

No. _____

In The
Supreme Court of the United States

PATRICIA FLETCHER, *ET AL.*,

Appellants,

V.

LINDA LAMONE, *ET AL.*,

Appellees.

On Appeal from the
United States District Court
for the District of Maryland
Greenbelt Division

JURISDICTIONAL STATEMENT

THOMAS J. JOSEFIK

(Counsel of Record)

JASON TORCHINSKY

SHAWN SHEEHY

HOLTZMAN VOGEL JOSEFIK PLLC

45 NORTH HILL DRIVE, SUITE 100

WARRENTON, VA 20186

(540) 341-8808

Attorneys for the Appellants

QUESTION PRESENTED

The Census Clause requires “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” Does Maryland violate this constitutional mandate when Maryland uses 1,321 persons to obtain eight congressional seats, summarily deletes these persons from the census count, and with invidious intent, discriminatorily reassigns certain persons to arbitrary locations throughout the state resulting in the highest congressional district population deviations in the country?

PARTIES TO THE CASE

The parties to the proceeding are the Appellants—plaintiffs below—: Ms. Patricia Fletcher, Mr. Trevelyn Otts, Mr. Donald M. Glover, Ms. Janis Hagey, Ms. Winnie Mae Campbell, Mr. Michael Harris, Mr. Michael Thompson, Ms. Julia L. Williams, and Ms. Robina Spruill. The Appellees—defendants below—are Ms. Linda H. Lamone in her official capacity as the State Administrator of Elections for Maryland, and Mr. Robert L. Walker in his official capacity as Chairman of the State Board of Elections.

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OPINIONS BELOW

Plaintiffs appeal an adverse opinion and order rendered on December 23, 2011 and delivered from a three-judge district court for the United States District Court for the District of Maryland. The opinion is reported and available at *Fletcher v. Lamone*, No. 8:11-cv-03220-RWT, 2011 U.S. Dist. LEXIS 148004 (D. Md. Dec. 23, 2011). The opinion is also available in the appendix.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1343(a)(3) and (4) and § 1331 for causes of action arising from 42 U.S.C. §§ 1973 and 1973c. For Plaintiffs' claims seeking declaratory relief, the district court had jurisdiction under 28 §§ U.S.C. 2201 and 2202. The district court had jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 for Plaintiffs' claims under Article I, Section 2, Amendment XIV, Section 1 and Amendment XV of the United States Constitution. The district court had jurisdiction over Plaintiffs' claims to attorneys' fees under 42 U.S.C. §§ 1973L and 1988. A three-judge district court was properly convened under 28 U.S.C. § 2284(a). The opinion and order of the three-judge district court was entered on December 23, 2011. Appellants filed a timely notice of appeal on January 20, 2012.

This Court has jurisdiction under 28 U.S.C. § 1253. This section permits direct appeals to this Court from any order denying a permanent or interlocutory injunction in any civil action required by an Act of Congress to be heard and determined by a district court of three judges.

The three-judge district court was convened pursuant to 28 U.S.C. § 2284, which mandates a three-judge district court in cases concerning the constitutionality of the apportionment of congressional districts.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following provisions:

1. The Census Clause, Article I, Section 2 of the United States Constitution.
2. Amendment XIV, Section 1 of the United States Constitution.
3. Amendment XV of the United States Constitution.
4. 42 U.S.C. §§ 1973, 1973c, and 1983.
5. Md. Code. Ann. Elec. Law § 8-701(a)(1-2).

STATEMENT OF THE CASE

Maryland’s “No Representation Without Population Act” (the Act)—in the Maryland Attorney General’s own words—“exclude[s],” “delete[s]” and “remove[s]” 1,321 persons from the U.S. Census Bureau’s count. (Defs.’ Mot. Summ. J. 2,3,4; ECF 33-1). Maryland used these persons to obtain eight congressional districts.¹ (App. at 3).

¹ 1,321 persons used for apportionment purposes is a significant number. During the 2000 round of redistricting, Utah was approximately 856 persons short of receiving an additional congressional seat. *See Census 2010: The Last Seat in Congress*, The Pew Research Center, <http://www.pewsocialtrends.org/2011/01/11/census-2010-the->

These persons resided in Maryland prisons on census day but had previous residences outside of Maryland. (App. at 9). After using these persons to obtain eight congressional seats, Maryland chose to delete them and therefore these persons were not counted *anywhere*. This was not by accident as the Act's stated goal was to "not count them at all." (Decl. of Karl Aro, 6, ECF 33-5). Furthermore, the Act also takes other persons—located in Maryland's prison facilities on census day—and arbitrarily reassigns them to their previous known residence without *any* evidence that these persons return to that residence or even have an intent to do so. On this record, Maryland takes persons from where it knows they are and presumes to know where these persons will be. (Decl. of James Cannistra, 3, ECF 33-3). This was done not to ameliorate Maryland's perceived one person, one vote problem but to protect Democrat incumbents and endanger Republican incumbents. (App. at 38).

Plaintiffs challenge Maryland's congressional redistricting plan—developed as to the Act's requirements—under Article I, Section 2 of the United States Constitution and applicable case law. The U.S. Census Bureau counts persons in prison on census day at the location of their prison as their usual residence. (App. at 2). Plaintiffs specifically challenge Md. Code. Ann. Elec. Law § 8-701(a)(1-2) which mandates that persons in Maryland prisons on census day—whose previous residence is outside of Maryland—are deleted from the census count. *Id.*

[last-seat-in-congress/](#) (last visited March 17, 2012).

Maryland cannot first benefit from having these persons and then exclude, delete and remove them from the census count for its own parochial interests.

§ 8-701(a)(1)(i-ii). For those persons in prison on census day whose previous residence is within Maryland, those persons are counted at their previous residence, where such residence can be identified. *Id.* § 8-701(2). In its opinion, the lower court noted that while states are permitted to adjust census data for redistricting purposes, states violate Article I, Section 2 when they do so in a haphazard and conjectural manner, without evidence and without justification for the adjustment. (App. at 12).

The Maryland Department of Planning (MDP) began excluding and deleting incarcerated persons whose last known residence was outside of Maryland on February 4, 2011. (Decl. of James Cannistra, 1-2, ECF 33-3). In addition, MPD reassigned certain persons within the state of Maryland. (*Id.* at 3). Maryland claims these actions are supported by the U.S. Census director's 2010 blog post. (Defs.' Mot. Dismiss 17, ECF 14-1). When MDP completed this process, 16,988 incarcerated persons were reassigned to their previous residences. (Decl. of James Cannistra, 3, ECF 33-3). MDP limited their documentation to the person's previously known residence. MDP did not document whether any of these prisoners returned to their previous residence or were likely to do so. Instead, Maryland produced third-party studies that at best showed a varying percentage of persons returned to their previous *city* or *county*. (Defs.' Reply Mot. Summ. J. 3-4, ECF 48). Maryland further relies on studies that merely show where incarcerated persons were *convicted* not where they reside. (Defs.' Reply Mot. Summ. J. Ex. 31, ECF 48-6) Then, MDP took 1,321 persons whose previous residences were outside Maryland and

deleted them. (Decl. of James Cannistra, 2, ECF 33-3).

The Caliper Corporation then took most prisoners and removed them from the prison's census block and placed them in the census block of their previous residence. (Decl. of Karl Aro, 5, ECF 33-5). Prisoners whose previous residence was within Maryland but whose addresses were unusable remained at the prison's census block. (*Id.*). Prisoners whose previous residences were outside Maryland were "dropped" from the prison's census block and not placed in *any* census block. (*Id.*). This report was delivered to the Maryland Department of Legislative Services on May 4, 2011, for use in drafting Maryland's redistricting plan. (*Id.* at 1-2). These adjustments account for the 1.61% population deviation from the U.S. Census numbers.² (App. at 10).

Two months later, Governor O'Malley appointed five individuals to the Governor's Redistricting Advisory Committee (GRAC). (Compl. ¶¶ 25-26); (Defs.' Mot. Summ. J. 5, ECF 33-1). Then, for approximately two months, the GRAC held twelve public hearings. (Compl. ¶ 27). These meetings culminated in the release of the GRAC's proposed map on October 4, 2011. (Compl. ¶ 30). This proposed map was presented to Governor O'Malley on the same day. Eleven days later

² Maryland currently has the largest deviation percentage in the country. The state with the second most is West Virginia with 0.79%. See *2010 Congressional and State Legislative Redistricting Table*, The National Conference of State Legislatures, <http://www.ncsl.org/legislatures-elections/redist/2010-ncsl-redistricting-deviation-table.aspx> (last visited March 17, 2012).

Governor O'Malley introduced his proposed plan which was "substantially similar" to GRAC's plan. (Compl. ¶ 31; App. at 4).

An emergency legislative session was convened on October 17, 2011. Donna Edwards, an African American congresswoman from Maryland's Fourth Congressional District, issued a statement decrying the proposed plan's treatment of the African American community. (Compl. ¶ 33). Representative Edwards argued that Governor O'Malley's plan reduced the African American voting age population in her district by 2%. (Compl. ¶ 33).³ The following day, the Maryland House of Delegates passed Senate Bill 1 91-46. (Compl. ¶ 36). Two days later, the Maryland Senate passed Senate Bill 1 32-13. (Compl. ¶ 37). That very same day, October 20, 2011, Governor O'Malley signed the redistricting plan into law. (Compl. ¶ 39).

When Maryland deleted and reassigned these persons, none of the government agencies or contractors making the adjustments had *any* evidence that these persons would return to their previous residence, within or outside Maryland. When pressed to demonstrate how many prisoners return home, Maryland produced studies showing a varying degree of prisoners—perhaps 27.7% or 59% or 70%--returning to the same "urban communities." (Defs.' Reply Mot. Summ. J. 3-4, ECF 48). One study Maryland submitted to justify its policy, limited its analysis to the person's city or county of *conviction*, not residence. (Defs.' Reply Mot. Summ. J. 3, ECF

³ See also *State Roundup, October 13, 2011, Map Changes Coming?*, MarylandReporter.com <http://marylandreporter.com/2011/10/13/state-roundup-october-13-2011/> (last visited March 19, 2012).

48, 48-6). But nothing in the record demonstrates that persons return from prison to their last known *residence*.

Plaintiffs filed suit on November 10, 2011 in the U.S. District Court for the District of Maryland, challenging various provisions of the Act. (App. at 5). In part, Plaintiffs challenged the congressional redistricting plan's provisions concerning the excluding, deleting, and removing of residents who were used to apportion Maryland's eight congressional districts. (Compl. ¶¶ 74-75). Specifically, Plaintiffs challenged the plan on the ground that Maryland did not conduct a good-faith effort to draw districts of equal population because the resulting districts contain a maximum deviation of 1.61%. (Compl. ¶¶ 44-54, 75); (Defs.' Mot. Summ. J. 10, ECF 33-1). Plaintiffs further argued that Maryland did not conduct a good-faith effort in adjusting the U.S. Census Bureau's count because there was no evidence to support reassignment to previous known residence or outright deletion. (Pls.' Reply Mot. Prelim. Inj. 26, ECF 43).

One week after the district court ruled that a three-judge court was warranted, the three-judge court was convened on November 28, 2011. (ECF 18 and ECF 20). Trial on the merits was heard on December 20, 2011. (App. at 2). Three days later, the three-judge district court granted Defendants' Motion for Summary Judgment on all counts. (ECF 54). In its opinion, the district court did not dispute that Maryland lacked evidence to support reassigning persons to their pre-incarceration residence. (App. at 17). Instead the district court held that it must be true that *some* persons return to their pre-incarceration address. (*Id.*). The court

further held that “[s]ome correction is better than no correction....” (*Id.*).

Plaintiffs then timely filed a notice of appeal. (ECF 60).

SUMMARY OF THE ARGUMENT

Maryland’s adopted congressional redistricting plan violates Article I, Section 2 of the U.S. Constitution because it impermissibly deviates from the “one person, one vote” principle. The district court in this case made a fundamental error of law by failing to adhere to the appropriate framework for assessing deviations established in *Karcher v. Daggett*.

Upon the showing of deviations—which the Plaintiffs demonstrated and the district court acknowledged—the burden of proof should have been shifted to Maryland. The district court failed to engage in the appropriate burden shifting test. Had the lower court properly applied *Karcher*, Maryland would not have been able to sustain its burden of proof. In this case, Maryland invidiously chose to apply its reassignment policy to a specific demographic group that would benefit the partisan interests of the dominant political party. Maryland failed to present any concrete evidence supporting its reassignment policy and eliminated known persons from the census count. This was the desired result of Maryland’s “No Representation Without Population Act.” This statute as applied to congressional redistricting cannot meet the tests of precision laid out by this Court in *Kirkpatrick* and *Karcher*.

Maryland’s “adjustment” violates this Court’s decisions in *Kirkpatrick* and *Karcher*. This is because the unadjusted population numbers reveal significant population deviations from the population as determined by the U.S. Census Bureau and these deviations cannot be adequately justified. Additionally, the factors identified in *Larios v. Cox* that the Court concluded were evidence of improper motivation—namely, discrimination based on race, region, growth rates and political party affiliation—are all present here.

Plaintiffs ask this Court to reverse the judgment of the court below, enjoin the current composition of Maryland’s congressional district map, and remand for further proceedings consistent with this Court’s holding in *Kirkpatrick v. Priesler* and *Karcher v. Daggett*.⁴

MARYLAND’S DEVIATIONS AND ITS EFFECT ON THE POPULATION

As provided in The Act the total population figures of the congressional districts embodied in The Act result in districts with deviations as high as +6,754 persons (.94%) and as low as -4,832 persons

⁴ Plaintiffs do not assert that the *Karcher* test for population deviations applies to state legislative and local jurisdiction redistricting plans. Those plans are subject to different standards—namely the Fourteenth Amendment equal protection standards of *Baker v. Carr*, 369 U.S. 186 (1962) and *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004). Congressional redistricting plans are evaluated under the Census Clause of Article I, Section 2. Maryland appears to be the only state in the country currently attempting to use anything other than the actual federal census figures for determining total population of congressional districts.

(-.67%), for a maximum deviation range of 1.61% from the population as determined by the U.S. Census Bureau. The deviations from the U.S. Census by congressional district are not disputed. They are as follows:⁵

District	Deviation	% Deviation
1	956	.13%
2	1753	.24%
3	-1600	-.22%
4	-1629	-.23%
5	-1222	-.17%
6	6754	.94%
7	-4832	-.67%
8	-180	.02%

In 2010, Maryland adopted the “No Representation Without Population Act” which required an “adjustment” of population from the U.S. Census for the purposes of redistricting. Md. Code. Ann. Elec. Law § 8-701(a)(1-2) (2011). The statute provides that prison inmates should be assigned to their last known address within Maryland. *Id.* § 8-701(a)(2). For those inmates whose last known addresses are outside of Maryland, the state simply excludes, deletes and removes them from the count. *Id.* § 8-701(a)(1)(i-ii).

A comparison of the U.S. Census Bureau figures to the state’s total population figures demonstrates that 1,321 persons were eliminated in the state numbers. (Pls.’ Mot. Prelim. Inj. Attach. A,

⁵ The chart contains the deviation totals from the census ideal for Maryland’s congressional districts. (Defs.’ Mot. Summ. J. 10, ECF 33-1).

2, ECF 13-3) (comparing 2010 Census total population with adjusted total population). 16,988 persons were reassigned within the state. (Decl. of James Cannistra, 3, ECF 33-3). A comparison of the U.S. Census figures to the state's adjusted numbers shows that 939 known African American persons are eliminated in the state's numbers. (Pls.' Mot. Prelim. Inj. Attach. A, 2-3, ECF 13-3). As compared to the total population numbers, the African American population was reduced five times more than white population. *See (Id. at 2-3)* (comparing percentage losses between adjusted African American population with total population and adjusted white population numbers with the total population).

ARGUMENT

A. The Lower Court Committed A Fundamental Error Of Law By Failing To Properly Apply The Burden Shifting Analysis Required By *Karcher v. Daggett*.

In *Wesberry v. Sanders*, the Supreme Court held that Article I, Section 2 requires that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” *Wesberry v. Saunders*, 376 U.S. 1, 7-8 (1964). Five years later, the Court permitted minor population deviations so long as the deviations were adequately justified. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). Fourteen years later, this Court, in *Karcher*, developed a test for when a state could permissibly deviate from the unadjusted census data and for what reasons. *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983).

In *Karcher*, this Court rejected the suggestion that it adopt a *de minimis* safe harbor for deviations in congressional redistricting cases. *Karcher*, 462 U.S. at 732 (“[A]ppellants argue that a maximum deviation of approximately 0.7% should be considered *de minimis*. If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?”). Further, this Court said:

[W]e have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art. I, § 2, as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures, but we have not questioned the population equality standard for congressional districts.

Id. at 732-33.

Because toleration of even a minor deviation is contrary to the goal of Article I, Section 2, *Kirkpatrick*, 394 U.S. at 531, the *Karcher* Court, therefore, developed a process to evaluate deviations. The Court noted that Article I, Section 2 establishes that states must make a good-faith effort to draw districts with equal or near equal population. *Karcher*, 462 U.S. at 730. If a plaintiff can demonstrate that the state’s deviation could have been reduced or eliminated, the burden of proof then shifts to the state. *Id.* at 730-31. *See also Anne*

Arundel County Republican Central Committee v. State Advisory Board of Election Laws, 781 F. Supp. 394, 396 (D. Md. 1991) (three-judge court). The second part of the test requires that the state prove that every significant deviation—no matter how small—was necessary to achieve a legitimate purpose. *Karcher*, 462 U.S. at 731; *Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. at 396. This proof must be made with precision. *Karcher*, 462 U.S. at 738; *Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. at 396. Mere conjecture is not sufficient proof for the justification. *Karcher*, 462 U.S. at 732 n.4.

The lower court initially erred by not properly applying the *Karcher* test because it erroneously used Maryland’s unconstitutionally adjusted census numbers as its basis for congressional districts and not the U.S. Census Bureau’s numbers. (App. at 10). The lower court also erred by failing to apply *Karcher* properly in two ways: First, the court below did not shift the burden of proof when Plaintiffs showed—and Maryland knew—that a zero deviation congressional districting plan was possible. Second, the court did not examine whether Maryland met its burden to produce evidence that “each significant variance” between districts was both necessary to achieve “some legitimate goal” and the adjustment was made with particularity and the adjustment was not produced haphazardly or with conjecture. *Karcher*, 462 U.S. at 732. n 4.

Instead, the court failed to properly apply either prongs of *Karcher*, concluding that as long as “[M]aryland’s adjustments to census data were made in the systematic manner demanded by *Karcher*”

then no further burden applied to the state. (App. at 15).

This represents a fundamental misapplication of *Karcher*. This Court should, therefore, reverse the lower court's opinion, enjoin Maryland's map and remand to the lower court for further proceedings consistent with this Court's opinions in *Kirkpatrick* and *Karcher*.

i. Plaintiffs Made The Required Showing Of Deviations Between The Congressional Districts.

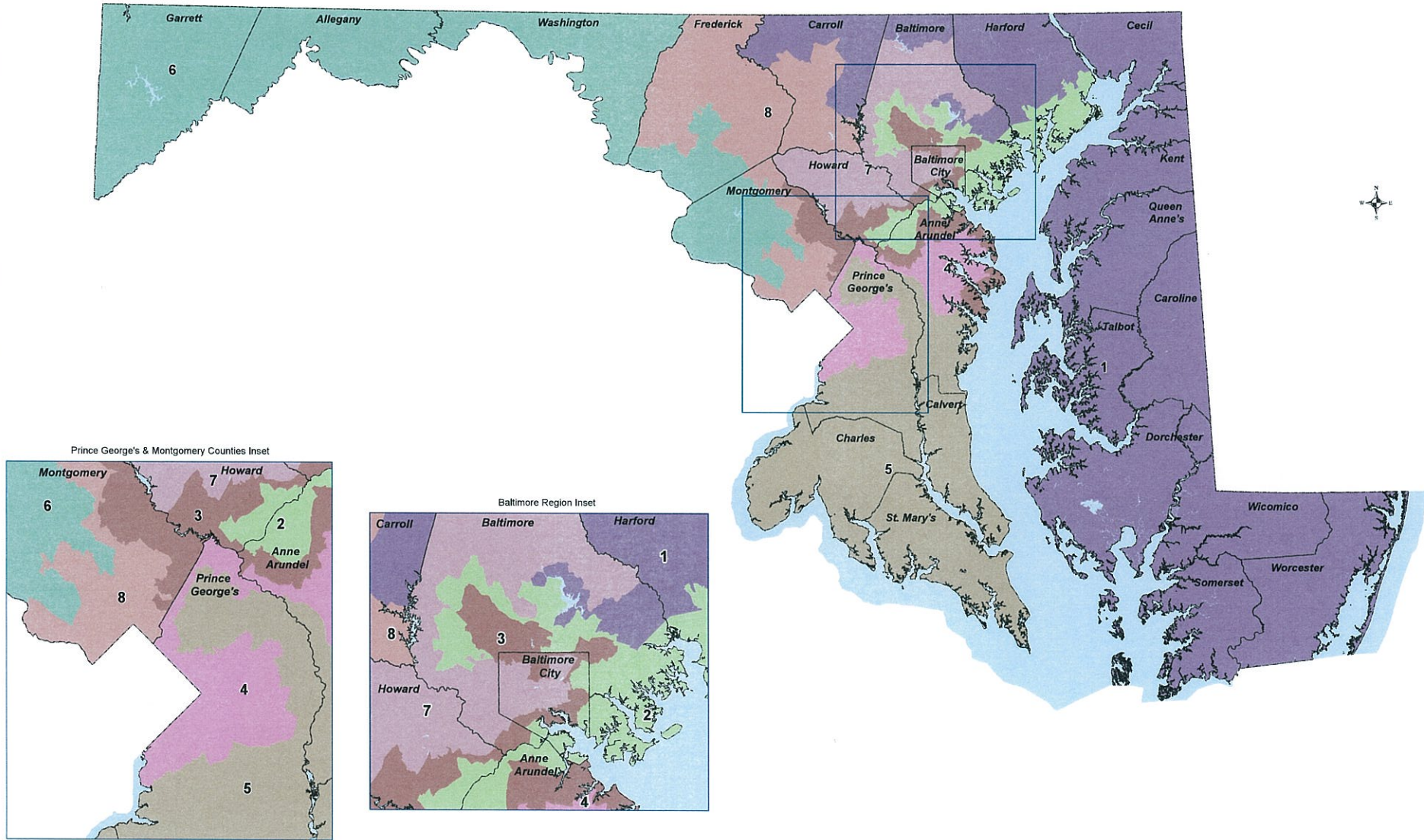
It is uncontested that the “No Representation Without Population Act” caused a 1.61% deviation from the ideal congressional district for a maximum deviation of 11,586 persons.⁶ This deviation is greater than the deviation ruled unconstitutional in *Karcher*. (0.69% deviation; difference of 3,674 persons).⁷ The question here is whether Maryland arrived at this deviation despite making a good-faith effort to draw districts of equal population. The initial burden is on the plaintiff to make the showing that the state did not make a good-faith effort to draw districts of equal population. *Karcher*, 462 U.S. at 730-31. When deviations are demonstrated, the burden is not strenuous. *Desena v. Maine*, 793 F. Supp. 2d 456, 459 (D. Me. 2011) (three-judge court) (“[E]ven ‘*de minimis*’ population variations’ offend

⁶ (Complaint ¶ 47); (Defs.’ Mot. Summ. J. 10, ECF 33-1). (App. at 10).

⁷ *Karcher v. Daggett*, 462 U.S. 725, 728 (1983). On the following page, we have attached a graphic comparing the congressional district map in *Karcher* with the district map here.

Maryland 2011 Congressional Districts

Senate Bill 1
October 20, 2011



the command of Article I, Section 2.”) (citing *Karcher*, 462 U.S. at 734). A state does not make a good-faith effort if it is demonstrated that a plan with smaller deviations was feasible. *Karcher*, at 738-40; *See also Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. at 395 (finding that a congressional redistricting plan lacked a good-faith effort because the adopted plan had a maximum deviation of ten people while another proposed plan had a maximum deviation of nine people); *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1291-92 (D. Kan. 2002) (three-judge court) (holding that the state’s adopted congressional redistricting plan contained a deviation of 33 persons that was avoidable because multiple plans before the court contained smaller deviations).

First, Plaintiffs introduced plans that did not contain *any* deviations and achieved Maryland’s goals. (Decl. of Antonio Campbell, 13, 27, ECF 43-15); (Defs.’ Reply Mot. Summ. J. Ex. 32, ECF 48-7). Furthermore, at trial, when the district court proposed a hypothetical where the court would require Maryland to draw a new redistricting map, Maryland admitted that it was feasible to draw a map containing smaller deviations within 48 hours. (Tr. at 95-96, 99). Because it was possible for Maryland to draw a congressional district map with fewer deviations, the deviations of the adopted plan were avoidable. The adopted plan, therefore, was not the product of a good-faith effort.

Furthermore, Maryland’s deviations are beyond what federal courts have permitted for

congressional redistricting.⁸ *See, e.g., Karcher*, 462 U.S. 725 (striking down a congressional district plan with an overall deviation range of 3,674 people or 0.69%); *White v. Weiser*, 412 U.S. 783 (1973) (striking down a state legislative redistricting plan with an average deviation of .745% and holding that a desire to draw districts that respected municipal lines was an insufficient justification here); *State ex rel. Stephan v. Graves*, 796 F. Supp. 468 (D. Kan.

⁸ In a handful of cases, courts have permitted minor deviations, but generally for the proposition that local jurisdictions be kept whole. *See, e.g., Turner v. State*, 784 F. Supp. 585 (E.D. Ark. 1991) (accepting a deviation of 0.78 percent because no submitted plan would sufficiently achieve the state's twin objectives with fewer deviations); *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (approving of a congressional district plan with a deviation of .00017% over another proposed plan with deviations of .00297%); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Calif. 1994) (finding a plan with a maximum deviation of .49% approved by the California Supreme Court in *Wilson v. Eu*, 823P.2d 545 (Cal. 1990) because the state's justifications were sufficient, namely attempting to form compact districts, to use census tracts rather than census blocks and to comply with the Voting Rights Act); *Stone v. Hechler*, 782 F. Supp. 1116 (N.D. W.Va. 1992) (upholding a congressional plan with an overall range of .09 % because the adopted plan best achieved the state's legitimate interest of keeping prior congressional district lines intact, and maintain compactness); *Anne Arundel County Republican Central Committee v. State Advisory Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (upholding a congressional redistricting plan containing a maximum deviation of 10 people and holding that the deviations were justified because the goal of the adopted plan was to maintain three centrally located regions; create a minority voting district; and protect senior incumbents).

1992) (striking down a congressional plan with a deviation range of .94% and holding that a desire to draw districts that kept counties whole within congressional districts was an insufficient justification here); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (striking down a congressional plan with an overall deviation range of 19 people because the court found that the state's justification of avoiding splitting precincts was a pretext because a different map with smaller deviations and no precinct splits was introduced and the adopted plan in some respects only benefited one party); *Desena*, 793 F. Supp. 2d 456 (ruling as unconstitutional Maine's congressional redistricting plan with a maximum deviation of 0.65% or 8,669 persons because the state's justification—that Maine was not required to redraw a congressional district between the date the census was released and the next election—was not legitimate).

Appellants have therefore demonstrated—and it is uncontested—that Maryland's congressional district map contains deviations from the census. Appellants have further demonstrated that these deviations are the product of a lack of good-faith effort on the part of Maryland because another congressional redistricting map was produced that contained smaller deviations. Furthermore, Maryland's Attorney General admitted that a map with smaller deviations was feasible and could be quickly produced. Finally, Appellants have shown that the deviations contained in Maryland's map are beyond what this Court has already determined to be unconstitutional. The district court, therefore, erred when it did not shift the burden of proof from the Plaintiffs to Maryland.

ii. **The Lower Court Erred Because It Failed To Shift The Burden Of Proof—As Required By *Karcher*—To Maryland Forcing It To Justify Its Deviations.**

The second part of the *Karcher* test requires that Maryland adduce evidence demonstrating that “each significant variance” between districts was both necessary to achieve “some legitimate goal,” *Karcher*, 462 U.S. at 730-31, and the adjustment was made with particularity, *Id.* at 739, and not with conjecture. *Id.* at 732 n.4.

Once population deviations are demonstrated, “the state must justify each variance, no matter how small.” *Kirkpatrick*, 394 U.S. at 530-31. The deviations cannot be the product of efforts that are haphazard, inconsistent or conjectural. *Karcher*, 462 U.S. at 732 n.4. For a state to succeed at this step, the state must prove with specificity that the deviations were necessary to achieve a legitimate state objective. *Karcher*, 462 U.S. at 740. A state cannot rely on general assertions that the adopted plan was necessary to achieve the stated objective. *Id.* at 741; *Turner v. State* 784 F. Supp. 585, 588 (E.D. Ark. 1991).

Courts have further ruled that a sliding scale must be utilized when determining the sufficiency of the justification. Thus the greater the deviation “the more compelling the justification must be.” *Desena*, 793 F. Supp. 2d at 461 (“[O]nly small deviations may be justified...”) (citing *Karcher*, 462 U.S. at 740-41). *See also Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. at 397 (“We note that the amount and degree of justification which the State

must establish is roughly equitable to the deviation itself.”). Stated another way, the state’s burden of proof is great where the deviations are large, the state’s legitimate interest is small and the plan is inconsistently applied in achieving those interests. *Cf. Stone v. Hechler*, 782 F. Supp. 1116, 1126 (N.D. W. Va. 1992). In utilizing the sliding scale, therefore, the following factors must be analyzed:

The showing required to justify population deviations is flexible, depending on (1) the size of the deviations, (2) the importance of the State's interests, (3) the consistency with which the plan as a whole reflects those interests, and (4) the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

Karcher, 462 U.S. at 741 (numbers added).

The Court in *Karcher* ruled that it was willing to defer to state legislative policies to justify small deviations, so long as those policies “are consistent with constitutional norms...” *Karcher*, 462 U.S. at 740. Immediately following this statement, the Court articulated the following as potential permissible justifications if consistently applied: “making districts compact; respecting municipal boundaries; preserving cores of prior districts; and avoiding contests between incumbent Representatives.” *Id.*

Deviations are not properly supported by a legitimate state objective when the redistricting plan at issue is tainted by arbitrariness or discrimination. Such plans cannot survive constitutional scrutiny. See *Karcher*, 462 U.S. at 740 (“As long as the criteria are nondiscriminatory...”); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004) (three-judge court) (citing *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (striking down a legislative plan for deviations under the Fourteenth Amendment based on impermissible discriminatory criteria). Finally, a court need not defer to a state’s congressional redistricting policy that is inconsistent with identified traditional redistricting criteria. Cf. *Karcher*, 462 U.S. at 740.

The district court failed to shift the burden to Maryland forcing it to adduce evidence that “each significant variance” between districts was both necessary to achieve “some legitimate goal” and the adjustment was made with particularity. *Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. at 396; see also, *Karcher*, 462 U.S. at 730-31; 739; 732 n.4.

a. There Is No Justification For Excluding, Deleting Or Removing Known Persons Entirely From The Census Count.

In the “No Representation Without Population Act”, Maryland systematically and unabashedly excludes, deletes and removes 1,321 persons for congressional redistricting purposes. (App. at 10); (Def.’ Mot. Summ. J. 2,3,4). The U.S. Census

Bureau determined that Maryland's Population was 5,773,552. (App. at 3). The Census used this number to apportion Maryland eight congressional seats. (*Id.*). Then, Maryland excluded, deleted, and removed 1,321 persons because they were not residents of Maryland prior to incarceration. (App. at 10). Maryland used this adjusted number—5,772,231—as the basis for its ideal congressional district population. (*Id.*).

This very deletion of persons who were tabulated for apportionment purposes but then deleted for congressional redistricting purposes was ruled unconstitutional in *Travis v. King*, 552 F. Supp. 554, 571 (D. Haw. 1982) (three-judge court). The district court there held: “We note additionally that the presence of this large military population certainly aided the state in achieving its two congressional seats. Equity alone argues that it therefore should be included in the base used to draw the congressional districts within the state.” *Id.*⁹

Like Hawaii in *Travis*, Maryland cavalierly used 1,321 prisoners to obtain eight congressional seats, and then excluded, deleted and removed them from the entire census.¹⁰ Maryland therefore committed the same unconstitutional error as was committed in Hawaii.

⁹ Affirming the district court's decision would overrule *Travis* and permit Hawaii to delete non-resident military personnel for its congressional redistricting.

¹⁰ Even if Maryland wanted to alert the prisoner's previous state of residence, those states could not add these prisoners to their census count for apportionment purposes. Once these persons—destined for deletion—are apportioned to Maryland, the damage cannot be undone. *See* 2 U.S.C. § 2a.

Furthermore, if Maryland is permitted to eliminate these 1,321 persons from its population counts for congressional redistricting purposes, there would be no limitation on the ability of states to eliminate other groups of persons from its count whose legal or permanent residence is outside of Maryland. According to the Census Bureau, Maryland has some 339,000 students enrolled in degree granting institutions. See (Pls.' Mot. Prelim. Inj. Attach. E, 2, ECF 13-7). Additionally, Maryland has approximately 29,160 active duty military personnel at installations within the state. (Pls.' Mot. Prelim. Inj. Attach. F, 2, ECF 13-8). Should adjustments or elimination of persons be permissible for prisoners, nothing would bar the state from adjusting or eliminating from its population counts students or military personnel.

This ability to eliminate persons from the census by local leaders in each of the fifty states would threaten the uniformity envisioned for congressional apportionment by the founding fathers. The district court on remand in *Kirkpatrick* articulated that permitting parochial interests to adjust the census would have dire consequences. This is why, the court explained, the drafters of our Constitution desired a uniform census and placed the responsibility of the census on the national government. *Priesler v. Secretary of State*, 279 F. Supp. 952, 998 (W.D. Mo. 1967). The district court stated:

The constitutional history of Art. I, § 2 would seem to make it apparent that the Founders included the decennial census in that section as a central

instrument specifically designed to control and adjust the constitutionally required future apportionments of the House of Representatives. It would seem historically incongruous not to require the use of the constitutional decennial census in the establishment of congressional districts within the States. *A rejection of the federal decennial census as the exclusive guideline for congressional districting would have grave and particular significance in future congressional reapportionment cases....*

The idea of apportionment of representatives among the States based on the federal census and *the notion that the districting within the States for election of federal representatives may be based on some sort of state census would seem to be basically inconsistent with the primary reason for the Founder's insistence that the constitutionally required decennial census be a federal census. **The self-interest of at least sectors of particular States to manipulate their own local census figures would obviously have a drastic impact on the composition of the House of Representatives.***

Preisler, 279 F. Supp. at 1002-03 (emphasis added).

The desire for federal control of the census was first enshrined in Article I, Section 2 and further enshrined by Congress in the Census Act. Maryland undermines this very scheme because it deletes persons used by the census to apportion Maryland eight congressional districts. Maryland then further undermines federal control because it then attempts to cloak its deviations by using its own adjusted population numbers as the basis for its redistricting plan. (App. at 10).

There is no justification for excluding, deleting and removing persons who were used to apportion districts. Here, if this Court permits Maryland to use adjusted census numbers as the base to evaluate its deviations, and if this Court permits Maryland to delete existing known persons from the census, this Court then opens the very Pandora's box our founding fathers feared. The very composition of the House of Representatives would then be subject to the parochial interests of the several states.

b. Maryland's Justifications For Reassignment Of Prisoners Both Within And Outside of Maryland Are Likewise Insufficient.

If the lower court had properly shifted the burden of proof to the state in the second part of the *Karcher* test, Maryland's asserted justification would be insufficient. This is because the justification violates *Karcher's* justifications and the traditional redistricting principles enunciated in *Larios*.

Maryland's plan violates all of the permissible justifications articulated in *Karcher*. First, Maryland's map was not compact and it contained

some of the least compact districts in the country. Dr. Gaddie demonstrated that Maryland's plan contained districts that were less compact than 95% of the districts in the country in the last twenty years. (Decl. of Ronald Keith Gaddie, 5, ECF 43-16). Dr. Gaddie also showed that the Fannie Lou Hamer map contained more compact districts than Maryland's map, and FLH's least compact district was still more compact than six of Maryland's districts. (*Id.* at 4-5).

Second, Maryland's plan was not drawn to avoid contests between incumbents, rather Maryland's plan reflects its desire to protect Democrat incumbents and endanger Republican incumbents. A justification is legitimate only if it is done in a consistent and neutral manner. *Karcher*, 462 U.S. at 740. See also *Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. at 397; *Larios*, 300 F. Supp. 2d at 1347-48. Here, Democrats receive safe districts while Republican districts are made competitive. (Tr. at 46). Judge Titus noted that it was "not a well-kept secret" that Maryland's plan was developed to disadvantage Republicans in Congressional District 6. (App. at 38). Furthermore, Maryland chose to reassign prisoners and not college students because a majority of the prisons are in Congressional District 6 (App. at 10), while the majority of colleges are in Baltimore or Prince George's County. (Decl. of Shawn Sheehy, 33, 37, ECF 49-4). Maryland chose the best plan to benefit Democrats and endanger Republicans. Maryland, therefore, cannot shelter its plan under the incumbent protection justification as articulated in *Karcher*. Indeed, any goal for incumbent protection is violated.

Third, Maryland did not preserve core districts. Instead, for example, Congressional District 6, from 2000 to 2010 was a predominantly rural mountain district. (App. at 38). It contained all of Allegany, Garrett, Washington, Carroll, and Frederick Counties as well as small portion of Howard County.¹¹ (*Id.*). Now the district contains the entirety of Allegany, Garrett and Washington counties, parts of Frederick and a substantial portion of Montgomery County.¹² (*Id.*) Maryland's redistricting scheme forced this from a rural district into a suburban district shattering any "commonality of community interests." (*Id.*). Judge Niemeyer, during oral argument, said that Maryland's breaking of communities of interest is "almost undisputable." (Tr. at 31). Both Judge Niemeyer and Judge Titus further noted that Baltimore's community interests had likewise been shattered and divided into several congressional districts. (Tr. at 41); (App. at 39).

Maryland cannot shield its plan behind any of *Karcher's* justifications because Maryland's plan, in fact, violates all of *Karcher's* justifications and thus the plan does not survive the analysis under the *Karcher* factors. First, the size of the deviation—1.61%—is great because it is double the next highest deviation in the country currently and beyond what

¹¹ *Maryland and The Federal Government: Congressional Election Districts, 1992-2000*, <http://www.msa.md.gov/msa/mdmanual/39fed/dist/html/1992.html> (last visited March 14, 2012).

¹² *Maryland and The Federal Government: Congressional Election Districts, 2012-2020*, <http://www.msa.md.gov/msa/mdmanual/39fed/dist/html/2012.html> (last visited March 14, 2012).

this Court has ever approved. Second, the importance of the state's interest is weak because its justification does not further any traditional redistricting principle. Maryland's plan, in fact, violates traditional redistricting principles. Third, Maryland's plan is inconsistently applied because Maryland did not try to correct all institutional population, but only those with population flows away from Republican areas of the state and into Democrat strongholds. Fourth, the Plaintiffs' proffered plans were able to accomplish Maryland's ostensible goals—excluding the constitutional issue presented here—with far fewer deviations. (Decl. of Antonio Campbell, 13, 27, ECF 43-15). Maryland, also admitted it could accomplish its goals with fewer deviations. (Tr. at 95-96, 99). Therefore, Maryland's plan is not sufficiently justified.

Furthermore, Maryland's plan could not even survive scrutiny under this Court's state legislative redistricting jurisprudence because Maryland did not follow traditional redistricting principles. Maryland's redistricting scheme violated the *Larios* factors.

The three-judge court in *Larios* posited factors to use in evaluating a state legislative redistricting plan's deviations under the Fourteenth Amendment. *Larios*, 300 F. Supp. 2d at 1349. Given the heightened scrutiny that congressional redistricting plans receive under Article I, Section 2 if a congressional district plan violates these factors, the deviations in a congressional district plan cannot survive constitutional scrutiny. *Compare Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (articulating that state legislative districts are evaluated under the Fourteenth Amendment's Equal Protect Clause),

with Wesberry, 376 U.S. at 7-8 (articulating the congressional test “as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.”). Thus, the Court in *Reynolds* rightly recognized that there is more constitutionally permissible flexibility when reviewing a state redistricting plan as opposed to a congressional redistricting plan. *Reynolds*, 376 U.S. at 578.

The three-judge court in *Larios* outlined the following factors that guided the court in ruling that the state legislative redistricting plan was unconstitutional. First, the *Larios* court held that the desire of various regional factions within the state to retain the same legislative influence despite a languishing population and to the detriment of high-growth regions cannot be a legitimate justification for deviations. *Larios*, 300 F. Supp. 2d at 1342. States cannot seek to protect certain geographic interests by allotting them more seats in the state legislature and thus more legislative influence than their population would otherwise allow. *Id.* at 1343 (citing *Reynolds*, 377 U.S. at 566).

Here, Maryland reassigned persons from its western rural areas mostly back into the urban corridor of the Baltimore / Washington metropolitan area. (Pls.’ Mot. Prelim. Inj. Attach. D, 2, ECF 13-6). This mirrors almost exactly the parts of the state experiencing the fastest growth and the areas of the state experiencing slow growth or a reduction in population. According to the U.S. Census, the City of Baltimore, for example, lost more than 30,000 people or 4.6% of its population between 2000 and 2010.¹³ Maryland’s plan added 5,703 persons back

¹³*State and County Quickfacts: Baltimore City, Maryland*, U.S. Census Bureau,

into Baltimore while removing 7,392 persons from Allegany and Washington Counties. (Pls.' Mot. Prelim. Inj. Attach. D, 1 ECF 13-6). These population reassignments, further exacerbated Maryland's one person, one vote problem because it took non-voting persons¹⁴ in a high-voting area and reassigned those non-voting persons into low-voting areas. (Pls.' Mot. Prelim. Inj. Attach. A, 2, ECF 13-3).

In the 2004 presidential election, Congressional District 6 has the second highest number of votes cast in the state.¹⁵ In the 2008 presidential election, Congressional District 6 had the third highest numbers of votes cast.¹⁶ Averaging the two years, 335,053 people voted to elect one member of Congress from this district. By contrast, Congressional District 7 in the 2000 map had the lowest number of votes cast in the 2004 presidential election, and the second lowest number of votes cast in the 2008 presidential election.¹⁷ This Congressional District under the 2000 map contained most of Baltimore City. Again, averaging

<http://quickfacts.census.gov/qfd/states/24/24510.html> (last visited March 14, 2012).

¹⁴ Maryland does not permit persons in prison or felons still serving their sentence to vote. Md. Code. Ann. Elec. Law § 3-102(b)(1).

¹⁵ *Data Files For the 2004 Presidential Election Results*, Maryland State Board of Elections, http://www.elections.state.md.us/elections/2004/election_data/index.html (last visited March 18, 2012).

¹⁶ *Data Files For the 2008 Presidential Election Results*, Maryland State Board of Elections, http://www.elections.state.md.us/elections/2008/election_data/index.html (last visited March 18, 2012).

¹⁷ *Id.*

the two elections, only 280,956 votes elected a member of congress here.

There was a significant disparity between these two districts with respect to the actual votes cast in the presidential elections, yet each district elected one member of Congress. Thus, a vote cast in Congressional District 7 had the weight of 1.29 times that of a vote cast in Congressional District 6. While it may be that one person, one vote applies to Congressional District 6, the “one vote” portion is 1.29 times greater than the “one vote” in Congressional District 7. The election results are illustrative of the situation regarding the universe of potential voters.

Furthermore, the proportion of potential voters to the population of any given district can only decrease by the assignment of persons who cannot vote. This results in an increase in the vote weight in the recipient district. Maryland's reassignment and elimination of some persons actually exacerbates rather than ameliorates the one person, one vote issues in Maryland when looking at actual votes cast or actual population.¹⁸

Second, the *Larios* court, like the Court in *Karcher*, held that for justifications to be legitimate, they must be applied in a consistent and neutral manner. *Larios*, 300 F. Supp. 2d at 1347. The plan at issue in *Larios* was blatantly partisan because it protected only Democratic incumbents and forced 53 incumbents, almost all Republicans, to campaign against each other. *Id.* The three-judge court ruled that this was impermissible under the Equal

¹⁸ See generally James Campbell, “*Cheap Seats: The Democratic Party's Advantage in U. S. House Elections*” (Ohio University Press, 1996).

Protection Clause. *Larios* 300 F. Supp. 2d at 1347-48. Here, Maryland's plan harms Republican incumbents solely by "lasso[ing]" the northwest portion of the state and dragging it into the suburbs of Montgomery County. (App. at 38); *Larios*, 300 F. Supp. 2d at 1342. Thus, the Maryland plan committed the same error committed in *Larios* by manipulating districts in a way that harmed only Republicans to the benefit of Democrats only.

Next, the *Larios* court held that adherence to traditional redistricting criteria as outlined in *Karcher*,¹⁹ may be used to justify deviations. *Larios*, 300 F. Supp. 2d at 1349-50. In *Larios*, there was no suggestion that the resulting deviations occurred because of a desire to maintain compactness, or contiguity. *Id.* at 1349-1350. There is no suggestion in the Maryland maps that the resulting deviations were the product of a desire to limit compactness or maintain contiguity. Nor was this done to protect cores of districts. *Larios*, 300 F. Supp. 2d. at 1350. The district court's opinion only notes that these deviations were caused because of the removal of prisoners and an otherwise general desire to improve the count. (App. at 9-10).

Finally, the changes here systematically addressed the fast growth/slow growth in the state to the increase of political power in areas with slow population growth and the decrease of political power for areas with fast population growth. *Larios*, 300 F. Supp. 2d at 1351. Congressional District 7 which includes Baltimore, for example, gained 4,315

¹⁹ Legitimate legislative policies include the making of districts compact; respecting municipal boundaries; preserving cores of prior districts; and avoiding contests between incumbents. *Karcher*, 462 U.S. at 740. *Supra* at 19.

persons in its district who cannot vote, despite Baltimore's population decreasing. (Pls.' Mot. Prelim. Inj. Attach. A, 2, ECF 13-3). Likewise, Congressional District 6 lost 7,225 persons. (*Id.*)²⁰ As explained above, this increases the power of urban and suburban votes at the expense of rural votes, despite urban population losses.

The lower court, therefore, erred in the application of the second part of the *Karcher* test by failing to shift the burden to Maryland to demonstrate that its population adjustments were sufficiently justified. Because Maryland's plan causes deviations that are beyond what past courts have tolerated, to sustain Maryland's plan, the justification must be great. Because Maryland's plan violates all of the traditional redistricting principles recognized in *Karcher*, Maryland's justification is insufficient. Furthermore, because the Plaintiffs introduced plans that accomplished the same goals, and did so with no deviations, Maryland's adopted plan cannot be sufficiently justified under the fourth *Karcher* factor. *Karcher*, 462 U.S. at 741. The lower court, therefore, neglected to sufficiently weigh Maryland's justifications. The district court merely reviewed the plan to ensure it was applied in a systematic manner. (App. at 15-16). *Karcher* requires much more and Maryland's plan does not satisfy.

²⁰ The lower court's opinion says the Seventh Congressional District gained 4,832 persons while the Sixth Congressional District lost 6,754 persons. (App. at 10).

c. **Even If This Court Accepts That Maryland's Plan Is Sufficiently Justified, Maryland's Adjustments Are Merely Pretextual And Mask A Partisan Agenda.**

Should this Court find Maryland's justification sufficient, this Court should instead find that this justification is a pretext under the three-judge court rule in *Vieth*.

During the previous round of redistricting, Pennsylvania crafted a congressional redistricting plan that had a deviation in population of 19 persons. *Vieth*, 195 F. Supp. 2d at 675. Plaintiffs there challenged the plan under Article I, Section 2. Plaintiffs there, similar to Plaintiffs here, produced a plan that contained zero deviations. *Id.* Pennsylvania justified its plan arguing that these deviations were necessary to achieve the goal of the fewest possible precinct splits. *Id.* at 677 n.4. The district court there rejected this justification, describing it as a pretext. *Id.* at 677. Pennsylvania's argument was pretextual because the plaintiffs there produced a map that had zero deviations and zero precinct splits, as opposed to Pennsylvania's plan which had six. *Id.* at 678. The court held that because it was possible to achieve the state's goal with fewer deviations, the state's justification was therefore insufficient as a general desire and a pretext. *Id.* at 678.

First, Plaintiffs introduced a plan that did not contain any deviations. (Decl. of Antonio Campbell, 13, 27, ECF 43-15). This plan

accomplished Maryland's ostensible goals. (*Id.*); see also (Defs.' Reply Mot. Summ. J. Ex. 32, ECF 48-7).

Second, because Maryland has chosen to prohibit incarcerated persons from voting, Md. Code. Ann. Elec. Law § 3-102(b)(1), these persons will negatively impact the perception of the one person, one vote rule, no matter where they are located. Thus, Maryland must be reassigning prisoners for some other purpose. It is curious that Maryland cared to correct the perceived distortion caused by counting prisoners at their prison, but showed a lack of concern for college students counted in dormitories or military personnel in barracks. A large number of colleges in Maryland and military bases are located in suburban areas and are likely Democrat districts. (Decl. of Shawn Sheehy, 33, 37, ECF 49-4).

Therefore, Maryland's proposed justification is a pretext. First, at least one congressional redistricting plan was introduced that contained smaller deviations and achieved the same ostensible goals. Second, the effects of this plan demonstrate that the plan will not ameliorate the perceived one person, one vote deficiency, it will only exacerbate it to the benefit of Democrats.

d. Even If This Court Finds That Maryland's Plan Is Justified And Is Not A Pretext, Maryland's Congressional Plan Still Fails *Karcher* Because It Is Conjectural As There Is No Evidence Prisoners Return To Their Previous Address.

The lower court committed a further error by relying on *Kirkpatrick* for the proposition that legislatures can adjust census numbers so long as the adjustments are done in a systematic and thoroughly documented manner. (App. at 12, 15). *Karcher* requires much more. *Karcher* requires that the deviations first be justified. *Karcher*, 462 U.S. at 730. After this justification, adjustments must be applied first in a systematic manner; then be thoroughly documented; and finally the adjustments cannot be conjectural. *Id.* at 732 n.4, 740.

In *Kirkpatrick*, Missouri attempted to adjust for future population shifts for congressional redistricting purposes. *Kirkpatrick*, 394 U.S. at 535. This is an admirable goal. The Court, in agreeing with the district court there and rejecting several other state arguments for permitting deviations, held that Missouri's legislature did not adopt a policy for projecting population shifts between censuses and therefore was not adequately documented or done in a systematic way. *Id.* This was because Missouri's plan did not use methods with a "high degree of accuracy." *Id.* In Missouri, therefore the Court faulted the plan because of a lack of evidence that population trend projections were sufficiently precise and accurate.

Here there is no evidence that prisoners return to the addresses where they were reassigned by Maryland. First, prior to trial, Maryland argued that the legislature relied on studies to justify its action for reassignment purposes. (Defs.' Reply Mot. Summ. J. 3, ECF 48) One of these studies merely identified where the prisoners were *convicted* not where they resided before incarceration. (Defs.' Reply Mot. Summ. J. 4, ECF 48, 48-6). Maryland produced little evidence with respect to where these persons may return upon release from prison. This evidence cannot satisfy the "high degree of accuracy" test articulated in *Kirkpatrick*. The redistricting map may have been more accurate in that some of those projections would become true (App. at 17), but more inaccurate in that some prisoners would not return where the state assumed they would. Either way, this is not sufficiently precise to uphold the plan.

Furthermore, Maryland admitted that its reassignment of prisoners back to particular census blocks rests on a series of assumptions for which they have no data to adequately justify. Prior to trial, Maryland did not dispute that more than 72% of prisoners do not immediately return to their previous residence upon release. *See* (Defs.' Reply Mot. Summ. J. 3-4, ECF 48). Further Maryland did not dispute that—concerning the City of Baltimore—more than 40% of prisoners don't return at all. *Id.* Finally, with respect to the 42% that stay with family on the first night of release, the State baldly assumes—without any proof—that this is within the "same home community." *Id.* at 4. The study Maryland describes as analyzing returns rates at

greater depth merely demonstrates that 59% of prisoners return “to the same *urban community*.” (*Id.*) (emphasis added). As noted in the Complaint—and uncontested at trial—the urban community Maryland refers to is Baltimore, which under Maryland’s plan is carved into three congressional districts with congressional district lines in some places only one census block wide. (Compl. ¶¶ 60-61, 63, Attach. E and H). Saying that persons return to the same urban community is not sufficiently precise for census projections. The U.S. Census Bureau knows where these prisoners are on census day; Maryland guesses where they will be.

Finally, Maryland’s own diction betrays its uncertainty as to where these prisoners return upon release. Maryland describes where these prisoners return as “urban jurisdictions” or “urban communities” or “home community.” (Defs.’ Reply Mot. Summ. J. 3-4, ECF 48). Not once does Maryland say these prisoners return to their “residence” or “usual place of abode,” the terms used by the census.

The lower court erred here by determining Maryland adequately justified its actions by simply showing that they conducted their adjustment in a systematic manner. The district court neglected to analyze whether the plan was implemented in a conjectural manner. The Act may have been implemented in a systematic manner, but it was also systematic in its lack of research, data or evidence as to where these persons would shift upon release from prison. The Court demanded more of the defendants in *Kirkpatrick*. This Court should demand the same of the Defendants here.

CONCLUSION

Maryland's adopted congressional map was not the product of a good-faith effort, as it was possible to draw districts with no deviations. Furthermore, Maryland did not sufficiently justify its plan. This is so because Maryland's plan violated all of *Karcher's* stated justifications and traditional redistricting principles. Additionally, the plan was pretextual and was supported merely by conjecture. Finally, Maryland should not be permitted to commandeer the census by using persons to receive its congressional districts, then delete those persons and then attempt to cloak its actions by using its adjusted numbers as its basis for congressional redistricting.

For these reasons, the Court should summarily reverse the decision of the lower court. In the alternative, this court should note probable jurisdiction.

Respectfully submitted,

*THOMAS J. JOSEFIAK

(Counsel of Record)

JASON TORCHINSKY

SHAWN SHEEHY

HOLTZMAN VOGEL JOSEFIAK PLLC

45 NORTH HILL DRIVE, SUITE 100

WARRENTON, VA 20186

(540) 341-8808

Attorneys for the Appellants

March 20, 2012

No. _____

In The
Supreme Court of the United States

PATRICIA FLETCHER, *ET AL.*,

Appellants,

V.

LINDA LAMONE, *ET AL.*,

Appellees.

On Appeal from the
United States District Court
for the District of Maryland
Greenbelt Division

APPENDIX

THOMAS J. JOSEFIK

(Counsel of Record)

JASON TORCHINSKY

SHAWN SHEEHY

HOLTZMAN VOGEL JOSEFIK PLLC

45 NORTH HILL DRIVE, SUITE 100

WARRENTON, VA 20186

(540) 341-8808

Attorneys for the Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATRICIA FLETCHER, et al.,

Plaintiffs,

v.

LINDA H. LAMONE, et al.,

Defendants.

Case No.: RWT-11cv3220

Jason Brett Torchinsky, Warrenton, Virginia, and
James Paul Mayes, Jamestown, North Carolina, for
plaintiffs.

Dan Friedman, Annapolis, Maryland, and Steven M.
Sullivan, Baltimore, Maryland, Assistant Attorneys
General, Office of the Attorney General for the State
of Maryland, for defendants.

Filed: December 23, 2011

Before Niemeyer, Circuit Judge, and Williams and
Titus, District Judges:

OPINION OF THE THREE-JUDGE COURT

Judge Niemeyer wrote the opinion, in which Judges Williams and Titus joined. Judges Williams and Titus wrote concurring opinions.

NIEMEYER, Circuit Judge:

After the 2010 decennial census, Maryland enacted a new redistricting plan in October 2011 for its eight congressional districts. The plaintiffs, nine African-American residents of Maryland, commenced this action against election officials of Maryland (“Maryland” or “the State”), contending that the redistricting plan violates their rights under Article I, § 2, of the U.S. Constitution; the Fourteenth and Fifteenth Amendments of the U.S. Constitution; and § 2 of the Voting Rights Act of 1965 because the plan dilutes African-American voting strength within the State and intentionally discriminates against African-Americans. For the same reasons, plaintiffs also challenge Maryland’s “No Representation Without Population Act” (“the Act”), which purports to correct census data for the distortional effects of the Census Bureau’s practice of counting prison inmates as residents of their place of incarceration.

This three-judge court, convened pursuant to 28 U.S.C. § 2284(a), heard arguments on December 20, 2011, on the plaintiffs’ motion for preliminary injunction and Maryland’s motion to dismiss or for summary judgment, as well as on the merits of the

case. By agreement of the parties, the court received the testimony of all witnesses by affidavit.

For the reasons given herein, we deny Maryland's motion to dismiss based upon an inappropriate convening of the three-judge court, deny the plaintiffs' motion for an injunction -- preliminary or permanent -- and grant Maryland's motion for summary judgment, obviating its motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

I. Factual Context

The 2010 census determined Maryland's population to be 5,773,552. This number entitled the State to eight congressional seats, the same number it had after the 2000 census.

On July 4, 2011, Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee (the "GRAC")¹, and that committee held twelve public meetings across the state between July 23 and September 12, 2011. Over the course of these meetings, the GRAC received more than 350 comments from members of the public. Among these comments were several proposed redistricting plans

¹ The GRAC's five members were: Chairperson Jeanne Hitchcock, Maryland's Secretary of Appointments, State Senate President Thomas V. Mike Miller, State House Speaker Michael Busch, Prince George's County businessman Richard Stewart, and James King, a small business owner and former member of the House of Delegates.

from third-party groups, including one from the Fannie Lou Hamer Political Action Committee. The Fannie Lou Hamer plan differed from all the other third-party submissions in that it proposed the creation of three, rather than two, majority African-American districts.

The GRAC presented its proposed plan to the Governor on October 4, 2011. (Compl. Attach. B.) After posting the plan online and receiving additional comments from the public, the Governor announced that he would submit to the legislature a plan that was “substantially similar” to the GRAC proposal.

The Governor’s proposed redistricting map (Compl. Attach. C) was introduced as House Bill (H.B.) 1 and Senate Bill (S.B.) 1 in an emergency legislative session beginning October 17, 2011. H.B. 1 was assigned to the House Rules Committee but was never reported out of committee. The Senate Committee on Reapportionment and Redistricting, however, held a joint hearing on S.B. 1 with the House Rules Committee on the same day the bill was introduced. After the hearing, the Senate Committee approved the bill and sent it to the floor of the Senate. While the bill was being debated, State Senator E.J. Pipkin moved to amend the bill. Like the Fannie Lou Hamer plan, Senator Pipkin’s proposed amendment created three majority African-American districts. (Compl. Attach. C.) Specifically, the Pipkin map proposed the creation of a new Fifth District that would stretch from the southern portion of Charles County, through Prince George’s County, and into the western Baltimore suburbs. The Senate

rejected Pipkin's amendment and, after adopting minor technical amendments, passed the bill. The bill was then sent to the House of Delegates on October 18, 2011.

During the House debate, several substantive amendments to the bill were proposed and rejected. On October 19, after making some technical amendments, the House passed the bill. It then returned the bill to the Senate, which concurred in the House's technical amendments and enacted the bill on October 20, 2011. The Governor signed S.B. 1 into law later that day.

Like the redistricting plan passed after the 2000 census, the enacted State Plan creates two majority African-American congressional districts. The Seventh District, which includes large portions of Baltimore City and its surrounding suburbs, has an African-American voting age population ("VAP") of 53.75%, and a non-Hispanic white VAP of 35.75%. The Fourth District, which is centered in Prince George's County, has an African-American VAP of 53.72% and a non-Hispanic white VAP of 28.65%.

The plaintiffs in this case, who are African-American residents of Maryland, commenced this action on November 10, 2011, naming Linda H. Lamone in her official capacity as Maryland's Administrator of Elections and Robert L. Walker in his official capacity as Chairman of the State Board of Elections. In their complaint, the plaintiffs allege that the State Plan was deficient in several respects, claiming specifically (1) that the State Plan's creation of two, rather than three, majority African-

American districts intentionally discriminates against minorities, in violation of the Fourteenth and Fifteenth Amendments (Counts 1 and 2), and unlawfully dilutes African-American voting strength in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (Count 5); (2) that the State Plan is unconstitutionally malapportioned (Counts 3, 4, and 6); and (3) that the State Plan is a partisan gerrymander, in violation of the Fourteenth Amendment (Count 7). At the time the plaintiffs filed their complaint, they also filed a motion under 28 U.S.C. § 2284 to convene a three-judge court to adjudicate their claims, as well as a Motion for a Preliminary Injunction on Counts 3 and 6.

The State opposed convening a three-judge court. And after it was convened, the State filed a Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment, and a Request for Review of the Order Convening a Three-Judge Panel.

The parties thereafter filed responsive and reply briefs and, upon agreeing to present the testimony of witnesses by affidavit, the affidavits of numerous witnesses.

II. Three-Judge Court

At the outset, Maryland requests that we review the single-district judge's ruling that the plaintiffs' complaint is sufficiently substantial to justify convening a three-judge court under 28 U.S.C. § 2284. It argues that the ruling failed to

take into account the Fourth's Circuit's precedent in Duckworth v. State Administration Board of Election Laws, 332 F.3d 769 (4th Cir. 2003). In that case, the Fourth Circuit held that when a complaint fails to state a claim upon which relief can be granted, as required by Federal Rule of Civil Procedure 12(b)(6), "by definition [it is] insubstantial and so properly [is] subject to dismissal by the district court without convening a three-judge court." Id. at 772-73. The State's argument rests on an assumed distinction between a complaint that "does not state a substantial claim for . . . relief" and the Rule 12(b)(6) standard. For purposes of construing § 2284, we find no material distinction, and deny Maryland's motion.

The Rule 12(b)(6) standard is a threshold condition for proceeding with an action, testing the sufficiency of a complaint to state a claim for relief. See Brzonkala v. Va. Polytechnic & State Univ., 169 F.3d 820, 829 (4th Cir. 1999) (en banc). In applying the standard, we have required more than formulaic, conclusory allegations. See Duckworth, 332 F.3d at 774-75. Indeed, the Supreme Court has required that a complaint must have sufficient "heft" in alleging facts so as to state a "plausible" claim for relief. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Here, the single-judge court reviewed the complaint and concluded that the claims presented were sufficiently substantial to proceed with convening a three-judge court. Under the standard for convening a three-judge court, which is informed by the standard for granting Rule 12(b)(6) motions,

we agree. See Ashcroft v. Iqbal, 556 U.S. 662 (2009); Twombly, 550 U.S. at 555-56; Duckworth, 332 F.3d at 773-75; Simkins v. Gressette, 631 F.2d 287, 295 (4th Cir. 1980) (noting that convening a three-judge court is not required to address insubstantial claims). Accordingly, we deny the State’s motion to dismiss the three-judge court.

III. “No Representation Without Population Act” (Counts 3, 4, and 6)

The plaintiffs challenge as unconstitutional Maryland’s “No Representation Without Population Act” (“the Act”), 2010 Md. Laws, ch. 67, codified at Md. Code Ann., Art. 24 § 1-111, Election Law (“EL”) § 8-701. They contend that the adjustments made under the Act result in malapportionment, in violation of Article I, § 2, of the Constitution, and racial discrimination, in violation of the Fourteenth Amendment.

Maryland enacted the “No Representation Without Population Act” in 2010. According to the State, the Act is intended to “correct for the distortional effects of the Census Bureau’s practice of counting prisoners as residents of their place of incarceration.” (Defs.’ Mot. Summ. J. 1.) These distortional effects stem from the fact that while the majority of the state’s prisoners come from African-American areas, the state’s prisons are located primarily in the majority white First and Sixth Districts. As a result, residents of districts with prisons are systematically “overrepresented” compared to other districts. In other words,

residents of districts with prisons are able to elect the same number of representatives despite in reality having comparatively fewer voting-eligible members of their community.²

To rectify this perceived imbalance, the Act requires that for purposes of drawing local, state, and federal legislative districts, inmates of state or federal prisons located in Maryland must be counted as residents of their last known residence before incarceration. Prisoners who were not Maryland residents prior to incarceration are excluded from the population count, and prisoners whose last known address cannot be determined are counted as residents of the district where their facility is located.

The Maryland Department of Planning (the “MDP”) accomplished the necessary population count adjustments by performing a multistep analysis of the records for prisoners housed in the Maryland Division of Correction.³ As a result of the MDP’s

² The manner in which counting prisoners where they are incarcerated results in overrepresentation can be seen most clearly at the local level. For example, District 1 of the Somerset County Council was created as a majority-minority district in order to settle a Voting Rights Act lawsuit brought in the 1980s. However, because the largely minority population of Eastern Correctional Institute was counted in the district’s population for redistricting purposes, only a small number of African Americans who “reside” in the district were actually eligible to vote. As a result, an African-American was not elected to fill the seat until 2010.

³ Because the Federal Bureau of Prisons rejected Maryland’s Freedom of Information Act request for information on the

analysis, 1,321 inmates who reported a pre-incarceration address outside of Maryland were excluded from the redistricting database. Other prisoners were reassigned to their prior residences. The largest changes from these reassignments occurred in the Sixth District, which contains the majority of the prisons and lost 6,754 individuals, and the Seventh District, which includes Baltimore City and gained 4,832 individuals. In no case did the adjustments made by the MDP exceed 1% of a district's population. (Defs.' Mot. Summ. J. 10.)

After the 1,321 out-of-state prisoners were excluded, Maryland's adjusted population base for redistricting fell to 5,772,231. This figure resulted in a new ideal Congressional district size of 721,528.875 individuals. Because the new ideal district size was not a whole number, the State set the size of the Eighth District to 721,528 individuals and the size of the remaining districts to 721,529 individuals.

The plaintiffs first contend that Maryland's adjustments to the census data result in malapportionment, in contravention of the "One Person, One Vote" standard established in Reynolds v. Simms, 377 U.S. 533 (1964), under Article I, § 2, of the Constitution.

home addresses of individuals incarcerated in federal prisons within Maryland, the MDP counted approximately 1,500 individuals in federal custody as residents of the Federal Correctional Institute Cumberland and Camp Cumberland facilities.

Article I, § 2 provides that the members of the House of Representatives are to be chosen “by the People of the several States.” U.S. Const. art I, § 2. As interpreted by the Supreme Court, this provision mandates that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964). “[T]he ‘as nearly as practicable’ standard requires that the State make a good-faith effort to achieve precise mathematical equality.” Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969). “Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.” Id. States do not have unlimited discretion in performing the calculations required to meet the “One Person, One Vote” standard. In Kirkpatrick and again in Karcher v. Daggett, 462 U.S. 725 (1983), the Supreme Court concluded that because the census count represents the “best population data available,” it is the only basis for good-faith attempts to achieve population equality.” Karcher, 462 U.S. at 738 (internal citation omitted) (quoting Kirkpatrick, 394 U.S. at 528).

Relying on these statements in Karcher and Kirkpatrick, the plaintiffs contend that “for determining congressional districts the only [population] number that can be used is the number generated by the U.S. census.” (Pls.’ Mot. Supp. Mot. Prelim. Inj. 7.) Accordingly, they argue that Maryland’s decision to adjust the census number is unconstitutional.

We believe that the plaintiffs fail to read the Karcher and Kirkpatrick statements in their fuller context. Although Karcher and Kirkpatrick do require states to use census data as a starting point, they do not hold, as the plaintiffs maintain, that states may not modify this data to correct perceived flaws. A more complete reading of the opinion in Karcher makes this point clear. The Court there recognized that “the census may systematically undercount population, and the rate of undercounting may vary from place to place.” 462 U.S. at 738. It cautioned, however, that “[i]f a State does attempt to use a measure other than total population or to ‘correct’ the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner.” Id. at 732 n.4 (citing Kirkpatrick, 394 U.S. 534 – 35). Thus, the New Jersey redistricting plan at issue in Karcher was rejected not because the state used adjusted census data, but because the state failed to perform its adjustments systematically. See id. at 738 (“Attempts to explain population deviations on the basis of flaws in census data must be supported with a precision not achieved here” (emphasis added)). Taken together, these Karcher statements suggest that a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution.

Although the case law on this issue is sparse, the majority of the courts to consider the issue have similarly concluded that Karcher and Kirkpatrick do not bar the use of adjusted census data. For example, in City of Detroit v. Franklin, 4 F.3d 1367

(6th Cir. 1993), the Sixth Circuit considered a challenge to the Census Bureau's alleged undercounting of the primarily African-American residents of the City of Detroit. The court held that the plaintiffs lacked standing to pursue their claim against the Census Bureau because the allegedly harmful act -- the decision to use unadjusted census data in the redistricting process -- had been made by the Michigan legislature. In reaching this conclusion, the Sixth Circuit rejected the plaintiff's argument that the Michigan legislature was constitutionally compelled to use unadjusted census data:

The Court in Karcher did not hold that the states must use census figures to reapportion congressional representation. The Supreme Court merely reiterated a well-established rule of constitutional law: states are required to use the "best census data available" or "the best population data available" in their attempts to effect proportionate political representation. Nothing in the constitution or Karcher compels the states or Congress to use only the unadjusted census figures.

Id. at 1374 (quoting City of Detroit v. Franklin, 800 F. Supp. 539, 543 (E.D. Mich. 1992)); see also Senate of State of Cal. v. Mosbacher, 968 F.2d 974, 979 (9th Cir. 1992) (stating in dicta that "[i]f the State knows that the census data is unrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process"); Perez v. Texas, No. 11-CA-360-OLG-JES-XR, slip op. at 24 (W.D. Tex. Sept. 2, 2011) (holding that "the State could enact a constitutional amendment or statute

that modifies the count of prisoners as residents of whatever county they lived in prior to incarceration . . . [but] there is no federal requirement to do so”).

The plaintiffs’ contrary argument rests primarily on the decision in Travis v. King, 552 F. Supp. 554 (D. Haw. 1982), which, they argue, is the only case directly on point. In Travis, the Hawaii legislature had decided to exclude from its population measure the entire military population, without attempting individual assignment, but allowed “the presence of this large military population . . . [to] aid[] in achieving its two congressional seats.” Travis, 552 F. Supp. at 571. A three-judge court subsequently held that Hawaii’s actions violated the “One Person, One Vote” principle. But Travis was decided before the Supreme Court’s decision in Karcher, and the district court in Travis therefore did not have the benefit of Karcher’s elaboration on the requirements of Article I, § 2. Further, after the categorical exclusion of all military personnel in Travis, the congressional districts still varied by over 300, id. at 569, whereas the Maryland legislature in this case drew districts as equally as possible after adjusting the census figures.

The conclusion that States may adjust census data during the redistricting process is also consistent with the practices of the Census Bureau itself. According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones. The Bureau has explained that counting prisoners at their home addresses would require

“collecting information from each prisoner individually” and necessitate “an extensive coordination procedure” with correctional facilities. U.S. Census Bureau, *Tabulating Prisoners at Their “Permanent Home of Record” Address*, at 10 (2006). Such an effort would likely cost up to \$250 million. *Id.* And although the Census Bureau was not itself willing to undertake the steps required to count prisoners at their home addresses, it has supported efforts by States to do so. For the 2010 census, the Bureau released its population data for prisoners and other inhabitants of “group quarters” early to enable States to “leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale.” So, *How Do You Handle Prisons?*, Director’s Blog, U.S. Census Bureau (March 10, 2010), <http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html>.

The question remains whether Maryland’s adjustments to census data were made in the systematic manner demanded by Karcher. It seems clear to us that they were. As required by the regulations implementing the Act, see Md. Code. Regs. 34.05.01 (2011), the MDP undertook and documented a multistep process by which it attempted to identify the last known address of all individuals in Maryland’s prisons. The MDP and its redistricting contractor, Caliper Corporation, then used this information to make the relevant adjustments to the data it had received from the Census Bureau. (Defs.’ Mot. Summ. J. Ex.s 2, 3, 4.) This process is a far cry from the “haphazard,

inconsistent, or conjectural” alterations the Supreme Court rejected in Karcher.

The plaintiffs do not dispute that the MDP followed the prescribed process, but they raise two objections to the result. First, they argue that if Maryland wishes to correct for prisoner-related population distortions, it must also make similar adjustments to account for the distortionary effects of college students and members of the military. (Pls.’ Resp. Defs.’ Mot. Summ. J. 24.) Second, they contend that contrary to the MDP’s assumption, most prisoners do not return to their last known residence after release. (Pls.’ Resp. 26.)

Neither of these objections, however, is probative of whether the adjustments made were proper. To be sure, Maryland might come closer to its goal of producing accurate data if it assigned college students or active duty military personnel to their permanent home addresses for purposes of redistricting. But as with prisoners, Maryland is not constitutionally obligated to make such adjustments. Moreover, the State’s failure to improve its redistricting data even more by determining students’ and soldiers’ home addresses has little bearing on the merits of the plaintiffs’ Article 1, § 2 claim made with respect to prisoners.

We also observe that the plaintiffs’ argument on this point implies that college students, soldiers, and prisoners are all similarly situated groups. This assumption, however, is questionable at best. College students and members of the military are eligible to vote, while incarcerated persons are not.

In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners.

As to the plaintiffs' second argument that the adjustments are improper because most prisoners do not return to their last known addresses after release, it would certainly be true that at least some prisoners will return to their old communities even if the plaintiffs are correct. See Nancy G. La Vigne et al., Urban Institute, *A Portrait of Prisoner Reentry in Maryland* 39 (reporting that 59% of Maryland prisoners returned to Baltimore City after their release from prison). Because some correction is better than no correction, the State's adjusted data will likewise be more accurate than the information contained in the initial census reports, which does not take prisoners' community ties into account at all.

In sum, we conclude that the State did not violate Article I, § 2 by adjusting the raw census data as it did.

The plaintiffs also contend that the Act's exclusion of incarcerated non-Maryland residents from the population base constitutes intentional discrimination on the basis of race, in violation of the Fourteenth Amendment, because, of the 1,321 prisoners who were excluded, 71.08% are African American. (Compl. ¶¶ 49 – 53, 70.)

We find no support in the record for this contention. It is well-established that allegations of disparate impact alone are insufficient to state a claim under the Fourteenth Amendment. Washington v. Davis, 426 U.S. 229, 239 (1976). Instead, plaintiffs are required to prove purposeful discrimination. Id. Our review of the record reveals no evidence that intentional racial classifications were the moving force behind the passage of the Act. In fact, the evidence before us points to precisely the opposite conclusion. As the amicus brief of the Howard University School of Law Civil Rights Clinic and other civil rights organizations makes clear, the Act was the product of years of work by groups dedicated to advancing the interests of minorities.

IV. Section 2 of the Voting Rights Act (Count 5)

The plaintiffs contend, as alleged in Count 5 of their complaint, that the State Plan violates the Voting Rights Act of 1965 (the “VRA”), 42 U.S.C. § 1973, because it fails to create a third majority African-American congressional district. To support this contention, the plaintiffs recite the census data that show that 30.9% of the Maryland population is African-American, representing 28% of the VAP, and they offer four maps that they contend demonstrate how a third African-American district could be created while still respecting traditional districting principles. These maps are the Fannie Lou Hamer Plan (Compl. Attach. A), Senator Pipkin’s Plan (Compl. Attach. D), and two plans by Antonio Campbell (Pls.’ Resp. Ex. 14). In each of these maps, a third majority African-American congressional district is formed by connecting residents of the

Washington, D.C. suburbs with residents of the Baltimore suburbs.

Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.” 42 U.S.C. § 1973(a). “A violation of [§ 2(a)] is established if, based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* § 1973(b).

In 1982, Congress amended § 2 to make clear that plaintiffs need not prove intentional discrimination. See Thornburg v. Gingles, 478 U.S. 30, 35 (1986). Instead, a violation of § 2 may be demonstrated through discriminatory effect alone. *Id.* District line-drawing is therefore impermissible where its result, “interact[ing] with social and historical conditions, impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.” Voinovich v. Quilter, 507 U.S. 146, 153 (1993) (internal quotation marks omitted).

In the redistricting of a single member constituency, the most common means of manipulating the voting strength of a politically cohesive minority group are “cracking” and “packing.” “Cracking” occurs when redistricting

lines are drawn in order to “divid[e] the minority group among various districts so that it is a majority in none.” Voinovich, 507 U.S. at 153. “Packing” occurs when a redistricting plan results in an excessive concentration of minorities within a given district, thereby depriving the group of influence in surrounding districts. Id. at 153–54.

In Thornburg v. Gingles, the Supreme Court established three preconditions (the “Gingles preconditions”) that a plaintiff must satisfy in order prove a violation of § 2 of the VRA:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.

Second, the minority group must be able to show that it is politically cohesive.

Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.

Gingles, 478 U.S. at 50–51. Only after all of these three preconditions are met will a court evaluate the totality of the circumstances.

Although the failure to create a majority-minority voting district may be the basis of a § 2 violation, § 2 does not obligate States to create the maximum possible number of majority-minority districts. See Johnson v. De Grandy, 512 U.S. 997, 1016–17 (1994); Abrams v. Johnson, 521 U.S. 74, 90

(1997). Rather, to succeed on their claim, plaintiffs seeking the creation of an additional majority-minority district must first independently establish the existence of each of the Gingles preconditions for their proposed district. Our analysis will address the first and third.

The first Gingles precondition requires plaintiffs to demonstrate that a minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district.” Gingles, 478 U.S. at 50. The Supreme Court has explained that “[w]hile no precise rule has emerged governing § 2 compactness, the ‘inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.’” League of United Latin Am. Citizens (“LULAC”) v. Perry, 548 U.S. 399, 433 (2006) (quoting Abrams, 521 U.S. at 92) (internal quotation marks omitted).

As their primary proof of compactness, the plaintiffs offer two affidavits from Dr. Ronald Keith Gaddie, a political science professor from Oklahoma. (Pls.’ Resp. Ex. 16; Pls.’ Mot. Prelim. Inj. Surreply Ex. 4.) Dr. Gaddie evaluates the majority-minority districts drawn in the Fannie Lou Hamer and Pipkin plans and concludes that they are sufficiently compact to warrant the creation of a third majority African-American district. Dr. Gaddie’s analysis also indicates that the additional majority African-American districts in both plans are more compact than several of the districts in the enacted State Plan.

Dr. Gaddie's statistical analysis, however, blurs the meanings of the technical term "compactness." Within the Supreme Court's voting rights jurisprudence, the word "compactness" refers to two distinct concepts. "In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines." *LULAC*, 548 U.S. at 433 (2006). By contrast, the Gingles "compactness" inquiry focuses on the compactness of the minority population itself, not the shape of the proposed minority district. *Id.* Thus, the evidence of statistical compactness offered by Dr. Gaddie is of only limited relevance to our § 2 analysis.

Even focusing our review to the statistics, however, that evidence does not prove the plaintiffs' compactness conclusion. On page six of his report on demographic trends in Maryland, the plaintiffs' expert, Dr. Peter Morrison, provides a graph entitled "Concentration of Population by Race and Hispanic Origin in Maryland's Jurisdiction." (Pls.' Resp. Ex. 18.) The graph clearly shows that Maryland has two -- and only two -- distinct concentrations of African-Americans, one in the D.C. suburbs and another in the Baltimore area.

The plaintiffs attempt to shore up their § 2 claim by arguing that the areas combined by their proposed third majority-minority district constitute a single "community of interest." Among other things, they argue that the Baltimore/Washington area forms an integrated transportation corridor and that residents of Howard County -- which links Baltimore and Washington in their proposed plans --

are equally likely to work in Baltimore City and the Washington D.C. area.

This argument is deficient in two respects. Although the distances at issue here are not as dramatic as in some cases courts have considered -- the two Latino communities connected in LULAC were 300 miles apart, for instance -- the differences between the two areas are real. While Baltimore's economy has traditionally been based on industry, medical services, and its port, Washington's economic strength derives primarily from the federal government. The two cities may share an airport, but they have separate cultural institutions and root for rival sports teams. And most importantly for election issues, both areas are in different media markets and have different newspapers. In light of these differences, we believe the plaintiffs have not shown sufficiently that residents of their proposed additional majority-minority district form a single community of interest.

We also emphasize that for purposes of the § 2 analysis, a plaintiff must demonstrate that the minority population at issue is sufficiently compact. Bush v. Vera, 517 U.S. 952, 997 (1996) (Kennedy, J., concurring). The crucial weakness in the plaintiffs' evidence is that it concerns residents of their proposed congressional district in general, and not minority residents specifically. In the absence of this kind of specific evidence, we may not accept bare assertions that the area's African-American residents share the same characteristics, needs, and interests. See LULAC, 548 U.S. at 433 (“[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” (internal quotation marks omitted)) (Op. of Kennedy, J.).

Although the failure of plaintiffs to satisfy the first Gingles precondition is sufficient to dispose of the § 2 issue, we are also skeptical that the plaintiffs have satisfied the third Gingles precondition. Commonly referred to as “racially polarized voting,” this precondition requires plaintiffs to prove that “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” Gingles, 478 U.S. at 51. Courts often conduct their review of this precondition on the basis of expert testimony.

The experts for both sides have analyzed a number of federal, state, and local elections in Maryland over the past decade to evaluate trends in racial voting. The State’s expert, Dr. Bruce E. Cain, a resident of Maryland and a professor at the University of California, Berkeley, reports that African-American candidates can in fact win contested elections in predominately white areas. (Defs.’ Mot. Summ. J. Ex. 1 at 7-11.) Dr. Cain’s analysis found high levels of white support for minority candidates in several races, including the 2004 Democratic primary race for the Fourth Congressional District. Dr. Cain further notes that three statewide Democratic primary races in the past decade have paired white candidates against African-American candidates: the 2006 race for Attorney General, the 2006 race for U.S. Senate, and the 2008 race for President. In each of these cases,

the African-American candidate's share of the white vote differed significantly, suggesting that factors other than race influenced electoral decisions.

The results of the 2006 Democratic primary elections in Montgomery County are of particular interest, as they provide, what Dr. Cain terms, a natural social science experiment. In that election, African-American Attorney General candidate Stuart Simms received 25% of the white vote in Montgomery County against a white opponent. In the same election, African-American candidate for County Executive, Ike Leggett, who was also running against a well-funded white opponent, received 65% of the white vote in Montgomery County. Thus, the evidence at the local level also demonstrates a pattern of varying support for African-American candidates among the white electorate.

Dr. Gaddie offers a competing take on the electoral evidence. He contends that Barack Obama's primary victory over Hillary Clinton was atypical and should be attributed to resource and organization. More instructive, Dr. Gaddie insists, is the low share of the white vote received by then-Congressman Kweisi Mfume, an African-American, during his 2006 U.S. Senate campaign. Dr. Gaddie also points out that most African-Americans who hold state legislative offices have been elected from majority African-American districts.

To be sure, the evidence suggests that some instances of racial voting occur in Maryland. Even Dr. Cain concludes that Maryland experiences

“moderat” racial polarization. But proof of occasional racial block voting is insufficient to fulfill the third Gingles precondition, which requires the showing that the white majority must be able “usually to defeat the minority’s preferred candidate.” Gingles, 478 U.S. at 51; see also Rollins v. Fort Bend Indep. Sch. Dist., 89 F.3d 1205, 1213 (5th Cir. 1996) (concluding that although special circumstances “may explain a single minority candidate’s victory . . . [e]very victory cannot be explained away as a fortuitous event”).

On the record before us, we cannot conclude that the white electorate in Maryland is sufficiently racially polarized to satisfy the third Gingles precondition for a § 2 claim.

V. Equal Protection Violations (Counts 1 and 2)

The plaintiffs also contend that Maryland’s redistricting plan violates the Fourteenth and Fifteenth Amendment.⁴ They assert that the state has intentionally discriminated against minorities by splitting minority communities when drawing district lines. According to the plaintiffs, the “bizarre” shapes of some of Maryland’s congressional districts and the State’s decision to create two minority influence districts in the Second and Fifth

⁴ It is unclear whether the Fifteenth Amendment applies to vote dilution claims like the one being brought by the plaintiffs here. The Supreme Court has raised the issue, but has not yet issued a definitive holding. See Voinovich v. Quilter, 507 U.S. 146, 159 (1992). But we need not resolve this question in the present circumstances.

District, are only explainable by discriminatory intent. The plaintiffs also maintain that the Pipkin map better serves many of the State's alleged redistricting goals. Specifically, they argue that Pipkin map splits fewer county lines and "census designated places," and that the Pipkin map concentrates Maryland's military installations in fewer districts.

As interpreted by the Supreme Court, the Equal Protection Clause prohibits states from using race as the sole or predominant factor in constructing district lines, unless doing so satisfies strict scrutiny. Easley v. Cromartie, 532 U.S. 234, 241 (2001); Bush v. Vera, 517 U.S. 952, 958–59 (1996) (plurality op. of O'Connor, J.). At the same time, however, the Court has held that the Equal Protection Clause does not preclude any consideration of race in the redistricting process. Indeed, the Court has acknowledged that "[r]edistricting legislatures will . . . almost always be aware of racial demographics." Miller v. Johnson, 515 U.S. 900, 916 (1995). The question presented here is whether the State has subordinated traditional, legitimate districting principles to racial considerations. Vera, 517 U.S. 959.

The plaintiffs have submitted several affidavits and reports discussing lamentable incidents of racism in Maryland. They also highlight various areas on the map where they claim the line-drawing has moved African-Americans in and out of districts in order to strengthen the Democratic Party's advantage. For example, Professor Todd Eberly, a political scientist working in Maryland,

suggests that African-American voters were used to balance out the effect of Republican-leaning white voters in the Baltimore suburbs. (Pls.' Resp. Ex. 16.)

But this evidence does not suggest, much less prove, that the political process in general or the redistricting process in particular is so infected with racial considerations that a desire to dilute African-American voting strength was the predominate factor in the creation of the State Plan.

As an initial matter, we note that the plaintiffs have not shown that the State moved African-American voters from one district to another because they were African-American and not simply because they were Democrats. Moving Democrats for partisan purposes does not establish a violation of the Fourteenth Amendment under Shaw v. Reno, 509 U.S. 630 (1993), "even if it so happens that the most loyal Democrats happen to be African-American Democrats and even if the State were conscious of that fact." Hunt v. Cromartie, 526 U.S. 541, 551 (1999). Distinguishing racial from political motivations is all the more important in a State like Maryland, where the vast majority of African-American voters are registered Democrats.

Moreover, the plaintiffs offer little evidence suggesting that African-Americans are especially disadvantaged by the State Plan. The State Plan makes two out of the eight congressional districts majority African-American districts. This ratio of minority/majority seats -- 25% -- is thus in proportion to African-Americans' share of the total voting-age population -- 28%. The State Plan also

creates two districts, the Second and the Fifth, with significant and growing minority populations. Assuming population trends remain consistent, both of these districts could conceivably elect minority candidates on the basis of majority/minority coalition voting. Thus, while the State Plan may not be maximizing African-American political power in Maryland, it does give the African-American community a strong electoral position, which will continue to strengthen according to current trends.

This result is unsurprising given that the redistricting map drew the support of many members of Maryland's African-American community. Indeed, even a brief review of the process leading to the State Plan's enactment reveals that Maryland's African-American political leadership played an integral part in its creation. Both GRAC Chair Jeanne Hitchcock and GRAC member Richard Stewart are African-American. While the GRAC was developing its initial proposal, Maryland's Legislative Black Caucus submitted two proposed redistricting plans, both of which contained only two majority African-American congressional districts. The Legislative Black Caucus also submitted a document outlining its goals for the redistricting process, which included:

Maintain[ing] the existing opportunity for Black voters to elect candidates of their choice in current District 7

Maintain[ing] the existing opportunity for Black voters to elect candidates of their choice in current District 4

Unify[ing] Prince George's County into Districts 4 and 5.

(Defs' Mot. Summ. J. Ex. 14.) Each of these requests was fulfilled in the enacted State Plan. Furthermore, during the legislative hearings on S.B. 1, the Redistricting Committee heard testimony from several prominent African-Americans who spoke in favor of the bill -- Prince George's County Executive Rushern Baker, Montgomery County Executive Ike Leggett, and Baltimore Mayor Stephanie Rawlings-Blake.

Of course, not every member of the African-American community supports the State Plan. The plaintiffs in this case clearly do not. But as counsel for the State suggested at oral argument, accepting the plaintiffs' argument that discriminatory motivations predominated in the redistricting process would require us to conclude that "the entire African-American leadership in the State of Maryland was hoodwinked." We cannot reach such a conclusion on this record.

Our finding that the plaintiffs have failed to carry their burden of proof should not be read as a complete endorsement of the State Plan. Admittedly, the shapes of several of the districts in the State Plan are unusually odd.⁵ Many obvious

⁵ Maryland's Third Congressional District merits special discussion. The District begins in Pikesville, a northwest suburb of Baltimore City; leaks eastward to capture the northeast suburbs of Baltimore City; then drops down into Baltimore City, taking a slice of the City on its way to

communities of interest are divided. For instance, Baltimore City, which could be placed in one congressional district given its current population, is instead split between three. Other districts combine citizens with widely divergent interests. That a farmer in Oakland should share a Representative with a federal contractor living in Potomac is, we think, a suspect proposition.

Yet the Supreme Court has made clear that “[t]he Constitution does not mandate regularity of district shape”; rather, for strict scrutiny to apply, “traditional districting criteria must be subordinated to race.” *Vera*, 517 U.S. 962. In its briefs and during oral argument, the State offered several plausible, nonracial reasons why the districts ended up looking as they do. For example, the decision to split majority African-American Prince George’s County between two districts was necessary because the county is more populous than the ideal district. Additionally, the basic shape of some districts has not changed substantially since the last redistricting, suggesting that incumbent protection and a desire to maintain constituent relationships

Montgomery County, a northwest suburb of Washington, D.C.; then veers eastward in a serpentine manner to include Annapolis, a city on the Chesapeake Bay. In form, the original Massachusetts Gerrymander looks tame by comparison, as this is more reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State. The Third District is rated at or near the bottom of all congressional districts in multiple measures of statistical compactness. See Redistricting the Nation, Top 10, <http://www.redistrictingthenation.com/top10.aspx>.

might be the main reasons they take their present forms.

And even if the plaintiffs are correct that the Pipkin map is more effective than the State Plan in vindicating some legitimate redistricting interests, that fact alone does not render the State Plan illegitimate. As the Supreme Court has explained, States may consider a wide variety of factors during the redistricting process. Easley, 532 U.S. at 242 (“[T]he legislature ‘must have discretion to exercise the political judgment necessary to balance competing interests,’ and courts must ‘exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race’” (quoting Miller, 515 U.S. at 915)). The State’s constitutionally permissible decision to prioritize certain interests over others, without more, does not establish that racial motivations predominated in the state’s decision making.

Accordingly, we conclude that the plaintiffs failed to carry their burden.

VI. Political or Partisan Gerrymandering (Count 7)

In the final count of their complaint, the plaintiffs allege that Maryland’s redistricting plan is an impermissible partisan gerrymander. Specifically, they argue 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.

Although this claim is perhaps the easiest to accept factually -- Maryland's Republican Party regularly receives 40% of the statewide vote but might well retain only 12.5% of the congressional seats -- it is also the plaintiffs' weakest claim legally, if they have standing to assert it at all. Since it first recognized the issue's justiciability in Davis v. Bandemer, 478 U.S. 109 (1986), the Supreme Court has struggled to define the parameters of a successful partisan gerrymandering claim. Recent cases have reaffirmed the conceptual viability of such claims, but have acknowledged that there appear to be "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.); see id. At 307–08 (Kennedy, J., concurring); see also LULAC, 548 U.S. 447 307–08 (Kennedy, J., concurring); see also LULAC, 548 U.S. 447 Supp. 2d 756, 761 (E.D. Tex. 2005), all of the lower courts to apply the Supreme Court's Vieth and LULAC decisions have rejected such claims. See, e.g., Perez, et al. v. Texas, No. 11-360, slip. op. at 21–22 (W.D. Tex. Sept. 2, 2011); see also Radogno v. Ill. Bd. of Elections, No. 11-4884, slip op. at 5–7 (N.D. Ill. Nov. 22, 2011) (reviewing seven proposed standards the Supreme Court has rejected).

The plaintiffs here likewise offer no reliable standard by which to adjudicate their gerrymandering claim. At best, they appear to argue for a sort of hybrid equal protection/political

gerrymandering cause of action, which would be judged under the standards applicable to discrimination challenges. The Supreme Court, however, has previously dismissed similar claims, emphasizing that although “[r]ace is an impermissible classification . . . [p]olitics is quite a different matter.” Vieth, 541 U.S. at 307 (op. of Kennedy, J.). Absent a clear standard to apply, we must reject the plaintiffs’ arguments on this count.

VII. Conclusion

Based on the foregoing findings and conclusions, we conclude that the plaintiffs have not satisfied their burden of proof with respect to any of the Counts alleged in their complaint. Accordingly, we will deny the State’s motion to dismiss the three-judge court; deny the plaintiffs’ motion for a preliminary injunction; and grant the State’s motion for summary judgment. A separate paper entering judgment for the State is filed herewith.

Paul V. Niemeyer
Alexander Williams, Jr.
Roger W. Titus

_____/s/_____

by Paul V. Niemeyer, for the
court

December 23, 2011

TITUS, District Judge

I concur in the excellent opinion for the Court by Judge Niemeyer, but write separately to express concerns about the current, unsatisfactory state of the law on claims of political gerrymandering.

Count 7 of the Complaint alleges that five of the congressional districts were politically gerrymandered in violation of the Fourteenth Amendment and are 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.” Compl. ¶ 78. Count 7 goes on to allege that “[n]o legitimate consistently applied state policy is supported or furthered by these plans’ needless division of these communities.” Id. ¶ 79.

In their papers and in oral argument before the Court, however, the Plaintiffs premised their claim of political gerrymandering on allegedly improper racial motivations in the drawing of the congressional district boundary lines, and eschewed the more general allegations in the Complaint of a partisan gerrymander. Since the Plaintiffs’ claims are tethered to a claim of racial animus in the drawing of congressional district boundaries, and because the Court has found that claim wanting, it is difficult for the Court to address the more basic question of whether Maryland has engaged in improper partisan gerrymandering in its recently adopted congressional districting plan.

Had the Plaintiffs pressed the issue, they would, of course, have run headlong into the confusing, at best, nature of the decisional law on this subject by the Supreme Court. At least four members of the Court in Vieth v. Jubelirer, 541 U.S. 267 (2004) would have eliminated entirely the justiciability of political gerrymandering claims. Vieth was only decided by the concurrence of Justice Kennedy in the result, but he would not join in abandoning justiciability of such claims. The inability of the Supreme Court to agree upon a standard for evaluating claims of partisan gerrymandering is chronicled in the plurality opinion of Justice Scalia in Vieth, and as yet, a discernable standard has not been developed and approved by the Supreme Court.

This is a tragic and unfortunate circumstance. Never before has the United States seen such deep political divisions as exist today, and while the courts are struggling in their efforts to find a standard, the fires of excessive partisanship are burning and our national government is encountering deadlock as never before. In his concurrence in Vieth, Justice Kennedy invited the formulation of standards, and for the sake of the country, one should be developed lest the extreme political divisions plaguing this country continue.

While a claim of political gerrymandering, untethered to a claim of racial discrimination, was not pursued by the Plaintiffs, it is clear that the plan adopted by the General Assembly of Maryland is, by any reasonable standard, a blatant political gerrymander. If the claim had been pressed by the

Plaintiffs and an acceptable standard existed for judging it, I would not have hesitated to strike down the Maryland plan. The question, however, is on the basis of what standard?

It is clear that partisan considerations in the development of reapportionment plans are something that will not go away and, standing alone, cannot serve as a basis for striking down a reapportionment plan. The question, as posed by Justice Kennedy, is whether, in a given case, “de facto incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification as unrelated to the aims of apportionment and thus is used in an impermissible fashion.” Id. at 312 (Kennedy, J., concurring). In determining whether the rights to fair and effective representation have been impacted by a reapportionment plan, Justice Kennedy noted that First Amendment concerns may be appropriate for consideration, especially “where an apportionment has the purpose and effect of burdening a group of voters’ representational rights.” Id. at 314.

I would suggest that the focus of the inquiry should steer away from whether partisan interests have been advanced or suppressed, and focus instead on communities and whether the voters in these communities have seen their right to fair and effective representation compromised by having their community of interests ignored. I realize, of course, that during the redistricting process partisan considerations and incumbency protection inevitably play a role, but the blatant actions taken here

demonstrate to me an impermissible political gerrymandering that “crossed the line.”

Two perfect examples are found in the plan before this Court: the sixth and third districts. First, it is not a well-kept secret that the plan for the sixth congressional district was developed for the purpose of disadvantaging an incumbent Republican legislator and, as previously noted, that is insufficient, standing alone, to strike down a gerrymander. However, when creating a legislative district for such a purpose, community interests simply cannot be completely disregarded as they were in the case of this district.

Prior to the reapportionment, the sixth district consisted of predominately mountain, rural, farming or low density suburban communities that had a broad commonality of interests. The new district dramatically differs from the old in that several hundred thousand residents of far more densely populated Montgomery County were added to the district, in the process fracturing Montgomery County into three separate congressional districts. The result is to create a district in which any commonality of community interests has been shattered.

Citizens of Garrett County are at a higher altitude, have a different climate, root for different sports teams, and read different newspapers than their counterparts in Montgomery County. As a result, the interests of two widely diverse regions of the state are paired, and both are compromised in their right to fair and effective representation.

Those who have an interest in farming, mining, tourism, paper production, and the hunting of bears, are paired with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like. Both of their interests thus have been compromised.

The shape of congressional district three is almost impossible to describe. It includes a snippet of Baltimore City, portions of Baltimore County, a small segment of Montgomery County, a large chunk of Anne Arundel County, and an isolated snippet that includes Annapolis that is detached from the rest of the district and can only be reached by water. To suggest that there is a community of interest between residents of Brookeville in Montgomery County, Owings Mills in Baltimore County, and Annapolis in Anne Arundel County is absurd. One reason for this Rorschach-like eyesore is the fact that the incumbent Congressman lives in Baltimore County, but still “wanted to continue to represent the capital city Annapolis.” Pls.‘ Resp. to Defs.‘ Mot. to Dismiss or for Summ. J., Ex. 16, Decl. of Prof. Eberly ¶ 34 (quoting Maryland State President Thomas V. Mike Miller, Jr.).

As has already been chronicled by Justice Scalia in his opinion in *Vieth*, numerous standards have been proposed, and rejected, by the Supreme Court. And, while congressional district three would probably be a prime candidate for the “I know it

when I see it” test,⁶ that test has already been rejected by the Supreme Court.

There are, however, fairly neutral and objective standards that could and should be considered for adoption by the Supreme Court. Had a claim of partisan gerrymandering been pursued in this case, untethered to a claim of racial discrimination, I believe that a finding of political gerrymandering could have been made applying a rational standard that could be utilized in future cases. In my judgment, the question of whether political considerations played a role is both irrelevant and naïve. Politics will always play a role in the establishment of congressional boundaries. The real question is whether those considerations “though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective” so as to interfere with the right of fair and effective representation. Vieth, 541 U.S. at 307 (Kennedy, J., concurring). In other words, did “politics” go too far?

In resolving that question, a number of benchmarks should be considered similar to those that are already contained in Maryland’s Constitution in Article III, Section 4, pertaining to reapportionment of the state legislature. Those criteria clearly were not applied in this case, and had they been, it would be difficult to conceive how the plan adopted by the General Assembly could have passed muster under the State’s own Constitution.

⁶ See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Potter, J., concurring).

Maryland's Constitution sets forth reasonable and objective standards for reapportionment of the General Assembly, including substantial equality of population, compactness, contiguity and giving due regard to natural boundaries and the boundaries of political subdivisions.

When voters go to the polls to elect a representative to the national legislature, their rights to fair and effective representation are compromised when they are jumbled together with persons with whom they have little, if any, community of interest. Had Maryland's own constitutional standards for reapportionment of the General Assembly been applied, we would likely not be in the unfortunate situation we are in today.

What I would propose for consideration in future cases is a burden-shifting process similar to that embraced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Where a partisan political gerrymander is alleged and the Plaintiff demonstrates that the districts chosen have been drawn with substantial disregard of political boundaries or natural boundaries, or are not compact, and the result has been the separation of identifiable communities, there should be a presumption that the right to fair and effective representation has been violated. The burden would then shift to the state to demonstrate a compelling governmental interest (other than incumbent protection or endangerment) that supports the boundaries chosen based on a legitimate public policy.

Had such a test been available to this Court and had the Plaintiffs pressed their claim of a partisan gerrymander separate and distinct from racial discrimination, I would have invalidated the redistricting plan without hesitation. Unfortunately that is not a choice available to this Court because we have neither a ship for the voyage nor a compass to guide us.

Williams, District Judge

Although I join the Court's comprehensive and well-reasoned opinion, I write separately to articulate my own views in reference to these sensitive and politically charged issues. This action—brought by nine African-American voters against a state plan favoring Democrats—fostered a unique and complex coalition of interests. It was this strange and oft-contradictory interplay of interests that ultimately toppled Plaintiffs' racial and partisan gerrymandering claims. Although my friend and respected colleague in his concurring opinion voiced concern at what he terms a "blatant political gerrymander," I emphasize that the Court, upon finding that the map withstood constitutional scrutiny, properly employed its judicial restraint in upholding the State Plan in its entirety.

I. "No Representation Without Population Act"
(Counts 3, 4, and 6)

As indicated by the majority, Plaintiffs' claim that the "No Representation Without Population Act" intentionally discriminates against African-

Americans in violation of the Fourteenth or Fifteenth Amendment can be summarily disposed with.⁷

From the outset, Plaintiffs struggled in making any sort of intentional discrimination claim since a significant portion of the legislative and community leaders advocating in favor of the State Plan were African-Americans. Several African-American politicians and community members testified in favor of the State Plan, including: Prince George's County Executive Rushern Baker, Montgomery County Executive Isiah Leggett, and Baltimore Mayor Stephanie Rawlings Blake. The Black Legislative Caucus proposed two redistricting plans, neither of which called for the three majority African-American districts proposed by Plaintiffs. Eight out of nine African-American senators and 31 of 34 African-American delegates voted for the State Plan. In fact, Defendants contended during the hearing that the very Chair of the legislative redistricting committee was African-American, as were a substantial portion of the individuals on that committee. It was represented at the hearing that even Representative Donna Edwards, initially a vocal dissident of the State Plan on racial grounds, has now voiced her support.

⁷ While Plaintiffs initially premised their intentional discrimination claims on both the Fourteenth and Fifteenth Amendments, they conceded at the hearing that their Fifteenth Amendment claim holds little weight under current jurisprudence. Post-Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Supreme Court has consistently focused on the Fourteenth Amendment as the proper vehicle for resolution of intentional discrimination claims.

As indicated by the majority, this Court refuses to entertain Plaintiffs' supposition that all of these individuals—leaders in the African-American community—were somehow bamboozled into promoting a state plan infected by invidious discrimination. Plaintiffs have produced no other evidence from which the Court could infer that traditional districting principals were subordinated to racial considerations.

Plaintiffs have shown no evidence, and in fact do not even allege in Count IV, that the “No Representation Without Population Act” has a discriminatory purpose. Nor would Plaintiffs succeed in such a claim; the legislative history of the Act reveals that it was heralded as a civil rights bill focused on eradicating “prison-based gerrymandering.” I found particularly impressive and persuasive Howard University School of Law’s amicus brief on the matter. The Howard Amicus provided a thorough account of the promulgation and purpose of the Act, emphasizing that the Act received the full support and advocacy of the NAACP of Maryland, the ACLU of Maryland, and the Legislative Black Caucus of Maryland. Given Plaintiffs’ failure to plead or prove a discriminatory purpose or invidious discrimination in the promulgation of the law, Plaintiffs’ claims fail to meet even the threshold showing required by *Washington v. Davis*, 426 U.S. 229, 239 (1976). Although I decline to reach the issue of discriminatory effect here, the Howard Amicus has persuasively demonstrated that the Act empowers all voters, including African-Americans, by counteracting dilution of votes and better aligning

districts with the interests of their voting constituents.

I find especially thorough the majority's analysis of Plaintiffs' Article I, Section 2 claim with regard to the "No Representation Without Population Act" and address it no further here.

II. Political or Partisan Gerrymandering (Count 7)

One of the most striking aspects of Plaintiffs' partisan gerrymander claim is its strange alliance between African-American voters and Republican officials. Plaintiffs allege that Maryland's redistricting plan diminishes Republican influence by reducing Republican-held congressional seats from two to one.

Although Plaintiffs never specify their political affiliation, the pleadings, briefs, and record contain all the trappings that would lead one to plausibly conclude that Plaintiffs are Democrats. Plaintiffs themselves proclaim, "African-Americans are the most reliable Democratic voting bloc . . ." (Doc. 16 at 22). Furthermore, Plaintiffs detail the State's purported plot to move politically cohesive African-American voters to the Sixth District—currently a Republican-controlled seat—to secure seats for White Democrats. This conjecture presumes that Plaintiffs, and the African-Americans on whose behalf they speak, are dependable Democrats. This atypical dynamic—where the plaintiffs argue a plan benefiting their party constitutes unconstitutional political

gerrymandering—differs from other partisan gerrymander claims. See, e.g., Vieth v. Jubiliner, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986).

Setting aside this fusion of unexpected bedfellows, I agree with the Court's opinion that Plaintiff's inability to articulate a justiciable standard for constitutionality defeats their political gerrymander claim. In fact, Plaintiffs' proposed standard—incorporating an intentional invidious racial component—mirrors previous standards already rejected by the Supreme Court. See Vieth, 541 U.S. at 286, 292–95 (rejecting both appellants' and Justice Stevens's proposed standards because racial and political gerrymandering are not analogous).

While the concurring opinion of my respected colleague Judge Titus characterizes the State Plan as a blatant political gerrymander, I take a different view. It is important to bear in mind that the Supreme Court has recognized that politics is an inherent part of any redistricting plan, and that partisan gerrymandering is unconstitutional only when it is so excessive as to violate the Fourteenth Amendment. Here, the evidence was too scarce to confidently assert that Maryland's redistricting plan constituted patently unconstitutional political gerrymandering.

Taking into account the enormous challenge of crafting an acceptable standard, it is unclear that the standard proposed in my colleague's concurrence would be acceptable to the Court. First, the

concurring opinion focus on the preservation of particular communities is not a requirement found in the Constitution, pertinent statutes, or applicable precedents.⁸ Nevertheless, the Court has rejected standards that “are not discernible in the Constitution” and have “no relation to Constitutional harms” See Vieth, 541 U.S. at 295. Second, the Vieth plurality rejected Justice Souter’s proposal requiring a five-step prima facie showing by the plaintiffs, which the state would then rebut with evidence of a legitimate governmental interest. According to the plurality, each of the findings required by the prima facie test was overly vague and immeasurable. See Vieth, 541 U.S. at 295–97. (“What is a lower court to do when, as will often be the case, the district adheres to some traditional criteria but not others?”). One of Justice Souter’s requirements for establishing a prima facie case was the state paid little or no heed to traditional districting principles, such as those advocated by the concurring opinion (i.e. disregard of political boundaries or natural boundaries, separation of identifiable communities). Moreover, this standard requires the state to demonstrate a government interest aside from incumbent protection. However, the Supreme Court has determined that incumbent protection is a legitimate consideration when creating redistricting plans.

Finally, it bears emphasis that this Court correctly declined Plaintiffs’ invitation to tinker with

⁸ Although communities of interest is one factor that a legislature may consider in redistricting, no provision of the Constitution or federal law requires states to preserve particular communities when redistricting.

the State Plan. Throughout this action, Plaintiffs' contentions have revealed a complex interplay of racial and partisan interests; interweaving, sometimes inextricably, fully justiciable issues with matters best left to the legislature. Upon determining that the perceived infirmities in the State Plan withstood constitutional scrutiny, my inquiry ended.

Certainly the district lines could have legitimately been drawn in a thousand different and perhaps more coherent ways that would have been more amenable to Plaintiffs, the community, or this Court. These redistricting decisions necessarily involve a sensitive and often complex array of value judgments. When entering this political thicket, one is confronted by the plethora of conflicting interests at play and quickly realizes that it is a zero sum game; the promotion of one legitimate interest inures to the detriment of others. Given the State Plan before this Court and the current state of the case law on political gerrymandering claims, I emphasize that this Court reached the proper outcome in upholding the State Plan in its entirety, rather than unfettering its judicial restraint by directing legislative revisions. In my view, the State Plan and its partisan line-drawing are the product of sensitive political choices and compromises best vested in the legislature's wise discretion.

For all of these reasons, I join in the opinion and judgment of the Court.

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

MS.PATRICIA FLETCHER,
Et al.,
Plaintiffs,

v.

LINDA LAMONE in her official
capacity as State Administrator of
Elections for the state of Maryland;
And ROBERT L. WALKER in his
official capacity as Chairman of the
State Board of Elections,
Defendants.

Civ. Action No.: RWT 11-3220

NOTICE OF APEAL

COME NOW the plaintiffs, Patricia Fletcher, et al., pursuant to 28 U.S.C. §§ 1253 and 2284 and U.S. Sup. Ct. Rule 18, and hereby file their Notice of Appeal from the portions of the Memorandum Opinion and Order with respect to Counts Three, Four and Six of the complaint entered by the three-judge District Court for the District of Maryland on December 23, 2011.

This the 20th day of January, 2012.

Respectfully submitted,

/s/ Jason Torchinsky_

Law Office of James P Mayes
James Paul Mayes (Bar No. 10414)
mayesfedlaw@aol.com
Law Office of James P Mayes

4721 Chesterfield Place
Jamestown, NC 27282
Tel: (202) 255-2031
Fax: (336)841-5275

Holtzman Vogel PLLC
Jason Torchinsky, pro hac vice
jtorschinsky@holtzmanlaw.net
HOLTZMAN VOGEL PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809
Counsel for Plaintiffs

I, Jason Torchinsky, do hereby certify that on January 20, 2012, I have mailed a true and correct copy of the above and foregoing Notice of Appeal to the following listed counsel and that I filed the original Notice of Appeal with the Clerk of this Court who electronically filed the foregoing Notice of Appeal using the ECF system which sent notification of such filing to the following:

Counsel for the Defendants:

Kathryn M Rowe

krowe@oag.state.md.us

State of Maryland Office of the Attorney General
Legislative Services Bldg 90 State Circle Room 104
Annapolis, MD 21401

Dan Friedman

dfriedman@oag.state.md.us

Maryland Office of the Attorney General Counsel to
the General Assembly 90 State Circle Room 104
Annapolis, MD 21401

Steven M Sullivan

ssullivan@oag.state.md.us

State of Maryland Office of the Attorney General 200
Saint Paul Pl Baltimore, MD 21202

Adam Dean Snyder

asnyder@oag.state.md.us

Office of the Attorney General Civil Division 200 St.
Paul Place 20th Floor Baltimore, MD 21202

Counsel for amici:

C. Paul Smith

cpaulsmith@verizon.net

Law Office of C Paul Smith 308 W Patrick St
Frederick, MD 21701

Deborah Jeon

jeon@aclu-md.org

American Civil Liberties Union of Maryland
Foundation 3600 Clipper Mill Rd Ste 350

Ajmel Quereshi
aaquereshi@law.howard.edu
Civil Rights Clinic Howard Univ School of Law 2900
Van Ness St NW Washington, DC 20008

Brenda Wright
bwright@demos.org
Demos 358 Chestnut Hill Ave Ste 303 Brighton,
MA 02135

Dale Ho
dho@naacpldf.org
NAACP Legal Defense and Educational Fund Inc 99
Hudson St Ste 1600 New York, NY 10013

Aleks Kajstura
akajstura@prisonpolicy.org
Prison Policy Initiative 69 Garfield Ave Floor One
Easthampton, MA 01027

Peter Wagner
pwagner@prisonpolicy.org
Prison Policy Initiative 69 Garfield Ave Floor One
Easthampton, MA 01027

Jason Torchinsky