IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

* * * * * * *

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Sarah W. Rice

_____

SARAH W. RICE (Bar No. 29113)
JENNIFER L. KATZ (Bar No. 28973)
ANDREA W. TRENTO (Bar No. 28816)
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
srice@oag.state.md.us
(410) 576-6847
(410) 576-6955 (facsimile)

July 13, 2018

Attorneys for Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORTIES

Page

Statutes

Rules

Miscellaneous

Although *Gill v. Whitford*, 138 S. Ct. 1916 (2018), did not resolve the justiciability of partisan gerrymandering claims or clarify the applicable legal standard, it provided instructive guidance on the substantial burden of production plaintiffs in partisan gerrymandering cases must satisfy to establish standing. The Supreme Court's disposition of the appeal in this case, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) ("*Benisek II*"), is also instructive, because it sets forth the reasons why plaintiffs have not satisfied the requirements for an injunction, including requirements that apply equally to "any injunctive relief, preliminary or permanent," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Finally, the Supreme Court's decision in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), supports this Court's legal conclusion that *Mt. Healthy* burden-shifting should not be applied to cases involving complex causal chains, like this one. Together, these three new precedents, combined with the arguments set forth in earlier briefing on defendants' cross-motion for summary judgment, call for granting summary judgment in favor of defendants.

I. PLAINTIFFS CANNOT SATISFY THE INJURY-IN-FACT REQUIREMENTS FOR ARTICLE III STANDING AS SET FORTH IN *GILL V. WHITFORD*.

In partisan gerrymandering cases, like all other cases, "a plaintiff may not invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy.'" *Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). That personal stake must be "distinct from a generally available grievance about government." *Gill*, 138 S. Ct. at 1923 (citation omitted). Although plaintiffs here have framed their claim as a challenge "specifically to the 'cracking' of Maryland's 6th

Congressional District," ECF 44 ¶ 1, and not a statewide claim, the regional specificity of their claim does not absolve them from the requirement to demonstrate individual standing. Like the plaintiffs in *Gill*, plaintiffs here have identified "vote dilution" as their injury. Accordingly, to establish Article III standing, the plaintiffs here, again like the plaintiffs in *Gill*, must "prove concrete and particularized injuries using evidence . . . that would tend to demonstrate a burden on their individual votes." *Gill*, 138 S. Ct. at 1934. Plaintiffs here have failed to produce evidence sufficient to establish that they suffered legally cognizable individual harm, and, having represented to this Court that they will not be seeking additional discovery, ECF 209 at 1, their claims must now be dismissed. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, the nonmoving party bears the burden of production under Rule 56 to designate specific facts showing that there is a genuine issue for trial") (citation omitted).

Because standing is an "indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at" the relevant stage of litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). On summary judgment, "the plaintiff can no longer rest on" the "'mere allegations'" in her complaint, "but must 'set forth' by affidavit or other evidence 'specific facts'" to demonstrate the standing elements. *Id.* (quoting Fed. R. Civ. P. 56(e)). Plaintiffs have never offered evidence that their inclusion in either the Sixth or Eighth District resulted in "vote dilution," but have stated to this Court that they "recognize full well that vote dilution, in some form,

is inevitable in every redistricting, and that it occurs for wide ranges of reasons, including geography and political calculi that have nothing to do with reprisals for prior electoral success." ECF 191 at 16-17. And plaintiffs have never made any attempt to explain how the evidence they have provided demonstrates any "burden on their individual votes," *Gill*, 138 S. Ct. at 1934, when what they have shown is nothing more than their preferred political party's diminished success in electing its candidate. That showing does not suffice to establish a redressable injury under the Supreme Court's redistricting precedents. *See League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 428 (2006) (plurality op.) ("The circumstance that a group does not win elections does not resolve the issue of vote dilution."); *Davis v. Bandemer*, 478 U.S. 109 (1986) ("[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult."); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77 (1980) ("[T]he right to equal participation in the electoral process does not protect any 'political group,' however defined, against electoral defeat.").

Plaintiffs have never explained how any individual experienced "reprisals for prior electoral success" or how such a reprisal impacted the individual's vote. ECF 191 at 16-17. Plaintiffs have not demonstrated that *they themselves*—Mr. Benisek, Ms. Ropp, Ms. Strine, Ms. O'Connor, Mr. Eyler, Mr. Cueman, and Mr. DeWolfe—were singled out for inappropriate retaliatory treatment by the government. Plaintiffs have offered no evidence, and have not even claimed, that decisionmakers examined the voting history of any of these individuals. Nor is it possible for plaintiffs to offer such proof. That is, the statistical measures Democratic Performance Index ("DPI"), Partisan Voting Index

("PVI"), and any other metric built with voting history, cannot shed light on any individual's voting experience. Instead, they can be only as specific as the precinct level, because we maintain a secret ballot in this country. *See* Md. Code Ann., Elec. Law §§ 11-402(a), (d)(1); 9-203(4). Even if that were not the case, Mr. Benisek, the only plaintiff remaining from the claims originally filed in 2013, *see Benisek II*, 138 S. Ct. at 1944, could not have been individually identified by decisionmakers as a Republican, because he was an unaffiliated voter at the time redistricting data was prepared. ECF 186-1 at 36. Plaintiffs therefore have not shown that any government official examined their voting conduct. Consequently, they cannot claim to have suffered an injury-in-fact due to any First Amendment retaliation attributable to any government official.

As this Court recognized in its earlier disposition of the preliminary injunction motion, "if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." *Benisek v. Lamone*, 266 F. Supp. 3d 799, 811 (D. Md. 2017) ("*Benisek I*"), *aff'd*, 138 S. Ct. 1942 (2018). If a candidate's loss is "a consequence of voter choice, that is not an *injury*. It is *democracy*." *Id.* at 812. At summary judgment, plaintiffs have the burden of producing evidence that their individual vote was burdened in some manner independent of election results. They have not done so.

A. Plaintiffs Have Not Shown the Existence of Any Burden on Their Individual Vote.

1. Voting History Metrics Cannot Establish Individual Burden.

Plaintiffs' prior assertion that "[t]he DPI and PVI are proof enough of" a concrete injury, ECF 191 at 15, does not withstand scrutiny under *Gill*'s clarification that there must be evidence of added burden to an individual's vote. As explained previously, both the DPI and PVI are averages of past election results. ECF 186-7 (Hawkins Dep.) at 24:12-16; ECF 177-51 (Pls. Ex. WW). *Gill* precludes reliance on "average measure[s]" of "the effect that a gerrymander has on the fortunes of political parties" as a substitute for proof that "address[es] the effect that a gerrymander has on the votes of particular citizens." *Gill*, 138 S. Ct. at 1933. Indeed, similar metrics were available in the *Gill* record for all the districts in which the named plaintiffs resided, but the Supreme Court deemed those measures unacceptable as proof of individual injury-in-fact. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 849-50 (2016) (discussing the "district-by-district partisanship scores" and spreadsheets "comparing the partisan performance of the draft plan to the prior map"). Similarly, under *Gill*, the mere fact that a Democratic candidate prevailed in the 2012, 2014, and 2016 elections, *see* ECF 177-1 at 22, does not establish plaintiffs' injury-in-fact as individual voters, because it is merely evidence of "the fortunes of political parties." *Gill*, 138 S. Ct. at 1933. Election results were also available in the record in *Gill*. *Whitford*, 218 F. Supp. 3d at 899. Yet the *Gill* plaintiffs' claims were nevertheless remanded because they had not offered sufficient proof of individualized injury to establish standing.

Even more closely analogous to plaintiffs' attempted showing in this case is the evidence offered by plaintiffs in North Carolina's partisan gerrymandering case, which resulted in the Supreme Court's vacatur of a three-judge court's judgment in favor of plaintiffs. The three-judge court in *Common Cause v. Rucho* concluded that "the 2016

Plan diluted the votes of those Plaintiffs who supported non-Republican candidates and reside in the ten districts that the General Assembly drew to elect Republican candidates. That dilution constitutes a legally cognizable injury-in-fact." 279 F. Supp. 3d 587, 615 (2018); *see also* 279 F. Supp. 3d at 615 n.9 (stating that plaintiffs "have standing to assert district-by-district challenges to the Plan as a whole"). That is exactly the theory of injury-in-fact plaintiffs have alleged in this case. ECF 177-1 at 32. In their attempt to establish injury-in-fact, the *Rucho* plaintiffs used the same types of evidence that plaintiffs identify here, namely predictive statistics, electoral results, and comparative maps, and that evidence was available in the record on a district-by-district basis. Supplemental Br. of League of Women Voters of N.C. 5-13, *Rucho v. Common Cause*, No. 17-1295 (U.S. June 20, 2018).[1] Yet, even with the three-judge court's findings, and with briefing outlining the available district-by-district evidence, the Supreme Court nonetheless vacated and remanded the three-judge court's decision for reconsideration in light of *Gill*. *Rucho v. Common Cause*, No. 17-1295, 2018 WL 1335403, at *1 (U.S. June 25, 2018). Given the Court's direction to the three-judge court in *Rucho*, plaintiffs here cannot be correct in suggesting that "[t]he numbers" indicated by predictive statistical measures and electoral results "speak for themselves," ECF 177-1 at 22, when it comes to articulating injury-in-fact.

[1] Available at https://www.supremecourt.gov/DocketPDF/17/17-1295/50714/20180620124033768_Rucho%20v.%20Common%20Cause%20No%2017-1295_Supplemental%20Brief_FINAL_FILE%20THIS.pdf

2. Plaintiffs Have Not Produced Evidence of Additional Factors That Establish A Burden on Their Individual Vote.

The result in *Rucho* should not be surprising, because longstanding Supreme Court precedent prevents plaintiffs from using their preferred candidate's lack of success to establish individual injury-in-fact. The right to "'have an equally effective voice' in the election of representatives" does not bestow on any individual "an independent constitutional claim to representation" based on one's status as a group member, even if that group is, as the plaintiffs contend, composed exclusively of Bartlett voters. *Bolden*, 446 U.S. at 78 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). The plaintiffs cannot avoid this conclusion by claiming to assert individual rights. Each plaintiff's individual vote for Congressman Bartlett had the weight of all other votes cast in Maryland in 2012, just as in 2002, because Maryland created equally populous districts. It is only when the plaintiffs' votes are aggregated with those of other Bartlett supporters or Republican voters that it becomes possible to assert that the *group*'s votes have lost "strength" or have been "diluted" in the current Sixth District compared to its predecessor.

But the plaintiffs offered none of the familiar evidence that usually accompanies claims of vote dilution, such as actual election results showing that Democrats and Republicans in the Sixth District are polarized in their voting habits. ECF 177-19 at 8-11. Instead, the record contains evidence of extensive crossover voting. *E.g.*, *Benisek I*, 266 F. Supp. 3d at 810 (finding Senator Cardin underperformed in the Sixth District while Governor Hogan over-performed as compared to statewide results). Similarly, nothing in the plaintiffs' showing considers the voting preferences of the 20.8% of registered voters

who were affiliated with neither political party. *Id.* at 809; ECF 186-41 at 48:5-6. The inability of the Republican candidate to attract enough unaffiliated voters to prevail in the Sixth District congressional races in 2012, 2014, and 2016 does not necessarily mean that the result would have been the same if the Republicans had fielded a different candidate or if the same Republican candidates had faced a less attractive candidate in the general election. In all three of the elections under the 2011 redistricting plan, the Democratic nominee was John Delaney, a well-financed, well-organized candidate, whose moderate views appealed to independent voters and even some Republicans. ECF 186-8 (Lichtman) at 37; ECF 186-2 (O'Malley Dep.) at 26:7-11, 29:11-16, 8311-20. His success could have occurred because Democrats, Republicans, and unaffiliated voters alike preferred his policy positions to those of his opponent, and plaintiffs have presented no proof or analysis to the contrary.

What the plaintiffs have presented here falls well short of the historic crossover and polarization analyses usually consulted in cases brought under Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Those analyses provide statistical evidence of electoral possibilities in certain geographic areas, including the residences of plaintiffs, which is, as *Gill* has recapitulated, a central requirement for any gerrymandering claim. It is only through establishing the local political conditions that any alleged burden can be evaluated. For example, if a Republican candidate is capable of succeeding in the Sixth District (as gubernatorial candidate Larry Hogan was), that ability to succeed bears directly on whether or not plaintiffs have suffered any individual burden to their vote different from the circumstance of any other individual who resides in a district

where the views of her neighbors render it difficult for her to elect her candidate of choice. Plaintiffs have simply not produced any analysis that would yield answers to these questions and therefore their claim may not proceed further.

3. Plaintiffs Have Not Established That Their Alternative Map Is a Neutral Alternative.

Plaintiffs' remaining evidence about the political composition of the Sixth District is similarly not probative of any identifiable burden on an individual's vote. Plaintiffs' expert, Dr. Michael McDonald, opined that the new Sixth District map "'has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district.'" ECF 177-1 at 21 (quoting ECF 177-19, Ex. Q). But that statement does not to establish standing because it is equally applicable to any voter reassigned from a district in which she supports the successful candidate to one in which she supports the unsuccessful candidate. As Dr. McDonald went on to explain, the "concrete impact" plaintiffs have alleged and sought to prove is merely that Republican voters have "been unable to elect a candidate of their choice." ECF 177-1 at 21-22 (quoting ECF 177-19, Ex. Q). But many other voters throughout Maryland are also unable to elect a candidate of their choice, and in some instances that inability newly arose after the adoption of the 2011 plan. Notable examples include Republicans moved out of the First District and Democrats moved into the First District. Plaintiffs have proposed no threshold, given no mathematical explanation, nor even proffered qualitative reasoning for why the type of dilutive injury they assert is anything other than a "generally available grievance

about government," *Gill*, 138 S. Ct. at 1923, one that occurs to many people in every redistricting undertaken by a state with two-party representation in Congress.

Gill recognized these difficulties in establishing the burden on an individual vote, and offered that the vote dilution "harm arises from the particular composition of the voter's own district, which causes his vote . . . to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931. Justice Kagan, in her concurrence, clarified that such a comparison district must be "neutrally drawn." *Id.* at 1936. The need to provide both such a neutral comparator and a standard for measuring deviation is especially acute in addressing partisan gerrymandering claims where, as here, the alleged injury-in-fact is vote dilution, because there is no actual numerical dilution in absolute terms as was present in *Baker v. Carr* and its progeny. Some extra factor is needed to establish that there has been an injury.

The need for a neutral comparator and some standard for deviating from that comparator distinguishes the level of proof necessary in a partisan gerrymandering claim from what is deemed sufficient to establish standing in racial gerrymandering cases. Modern gerrymandering cases articulate the injury-in-fact as "being 'personally . . . subjected to [a] racial classification,'" *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996) (principal opinion of O'Connor, J.)), and "being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*)). In those cases, the harm is not relational; rather, the placement of the district lines *is* the harm and the necessary proof consists of

evidence about that placement. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1267. There, the Court found sufficient plaintiff's evidence on standing when they "referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence," *id.*, which included the historic and specific electoral circumstances related to specific districts and comparisons with plans that would not have inflicted the same stigmatic harm on plaintiffs. Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law, Doc. 194 at 30-36, *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. Aug. 8, 2013) (No. 12-1081).

Plaintiffs here have not produced nearly the level of district-specific evidence produced by plaintiffs in *Alabama Legislative Black Caucus*. For example, the *Benisek* plaintiffs have produced no evidence and offered no explanation for the placement of any specific boundary of the Sixth District, or what consequence that had for any individual's right to vote. The incompleteness of plaintiffs' showing is clear from their presentation of a singular alternative Sixth District. Dr. McDonald, the expert who opined on the alternative district, could not testify that his aid did not use political history or voter registration data in drawing the alternative District. ECF 186-41 at 59:18-60:18. Instead, Dr. McDonald highlights the fact that the alternative District packs Montgomery County Democrats into the alternative Eighth District by assigning all the major urban areas in Montgomery County to the alternative Eighth District. ECF 186-19 at 27 (Figure 9). Dr. McDonald even admitted that, under his proposed alternative map "[t]he Democratic voters that were formerly within the Eighth District would have their ability to elect a candidate

of their choice diminished[.]" ECF 186-41 (Michael McDonald Dep.) at 62:21-63:2. And Dr. McDonald did not include any information about the alternative Eighth District, and thus did not explain splits in voting tabulation districts or census places. ECF 186-19 at 16-17; 186-41 at 61:10-13. Therefore, plaintiffs have failed to produce evidence sufficient to prove that their alternative district would conform to traditional redistricting principles even as well as the district it seeks to replace. Plaintiffs have provided no evidence that their alternative district is "neutrally drawn." *Id.* at 1936 (Kagan, J., concurring). Even if neutrality of the hypothetical district were not required to establish injury-in-fact, the generalized nature of the plaintiffs' grievance is made obvious by their admission that their proposed alternative district affects many other non-plaintiff individuals in a manner indistinguishable from the plaintiffs' alleged injury.

B. Plaintiffs Have Not Produced Evidence of Any Non-Dilution Injury.

Throughout this litigation, including the briefing on cross-motions for summary judgment, plaintiffs have eschewed any need to establish any injury-in-fact to their First Amendment rights, other than vote dilution. ECF 177-1 at 23; ECF 191 at 18-19. Indeed, this Court may proceed to resolve the cross-motions for summary judgment on the understanding that plaintiffs' asserted injury-in-fact is vote dilution, in light of plaintiffs' representation in the recently-filed joint status report that "[t]he motions are fully briefed and ripe for decision." ECF 209 at 1.

Plaintiffs should not be permitted to change their tack now, at this late juncture in litigation that the Supreme Court has found to be plagued by "plaintiffs' unnecessary,

years-long delay. . . ." *Benisek II*, 138 S. Ct. at 1944. For example, plaintiffs might be tempted to alter their arguments to take advantage of Justice Kagan's *Gill* concurrence suggesting that an "associational harm" could potentially occur as the result of a partisan gerrymander, a harm that is "distinct from vote dilution." *Gill*, 138 S. Ct. at 1938 (Kagan J., concurring). That attempt would be unsuccessful because plaintiffs have failed to point to any burden on their *individual* expressive rights. Plaintiffs have produced no evidence of any non-dilution injuries to their associational rights, like those at issue in *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983). There the Court found an election law caused an injury when it made "[v]olunteers . . . more difficult to recruit and retain, media publicity and campaign contributions . . . more difficult to secure, and voters . . . less interested in the campaign." *Id.* The plaintiffs' evidence here falls far short of that showing.

Plaintiffs principally rely on two plaintiffs' testimony about what other residents of the Sixth District told them when they were canvassing, ECF 177-1 at 23-24. Such anecdotal, hearsay testimony cannot be admitted at trial and, therefore, may not be considered on a summary judgment motion. *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *see also Whittaker v. Morgan State Univ.*, 524 F. App'x 58, 60 (4th Cir. 2013) (unpublished) (material in the record cannot be used to support summary judgment if it "cannot be presented in a form that would be admissible in evidence") (quoting Fed. R. Civ. P. 56(c)(2)). The only direct testimony plaintiffs have identified on this subject is that of Ned Cueman, who stated only that he was "disoriented or felt disconnected" and that he had "no connection" with parts of the district that were outside his own county, ECF 177-1 at 24 (quoting ECF 177-55 at 36:14-

37:2). But those subjective feelings demonstrate no burden on objective expressive rights, especially when viewed in light of the most telling indicator of political engagement: Mr. Cueman continued to vote regularly after the redistricting. ECF 186-25 (Cueman) at 15:10-16. The objective evidence demonstrates that Republican engagement in the five counties included in their entirety within the former Sixth District has increased since formation of the newly competitive Sixth District. From 2010 to 2016, Republican voter registration increased in each year in Allegany, Carroll, Frederick, Garrett, and Washington Counties. ECF 186-50 at 2-6. In each of these counties, turnout among Republicans also increased in absolute terms between the presidential election year of 2008 and the presidential election year of 2012. ECF 186-51 at 2. And, although turnout was down across-the-board in the 2014 gubernatorial election compared to the 2010 election, Republican turnout in the Sixth District outpaced Democratic turnout. ECF 186-51 at 3. Consistent with the objective general election data showing Republican voter engagement, all of the plaintiffs voted regularly after the 2011 redistricting. ECF 186-20 (Strine) at 11:22-12:10; 186-43 (DeWolf) at 10:16-18; ECF 186-44 (O'Connor) at 13:15-17; ECF 186-25 (Cueman) at 15:10-16; ECF 186-24 (Eyler) at 11:6-12; ECF 186-45 (Ropp) at 18:12-18; ECF 186-36 (Benisek) at 12:15-17. It is true that these unimpeded efforts to vote failed to secure victory for plaintiffs' preferred candidates, but that lack of success reflected the voting preferences of their fellow citizens, not only as to the winning candidates but also as to the district map itself. That is, the 2011 redistricting plan won voters' approval in 10 of the 12 counties where registered Republicans outnumbered registered Democrats, *see* ECF 104, ¶ 39, including three counties located within the

present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties, ECF 186-50 at 4. Only Carroll and Garrett Counties voted to reject the map. ECF 104 at ¶ 39.

Common Cause v. Rucho once again supplies an interesting point of contrast and comparison. There the three-judge court made findings of fact with regard to multiple first-hand accounts establishing the types of associational injuries at issue in *Anderson v. Celebrezze*. 279 F. Supp. 3d at 615-16. Nevertheless, the Court instructed the three-judge court to reconsider the issue of standing in light of *Gill*. Therefore, in the wake of *Gill*, it is unclear whether, when vote dilution is the asserted injury, evidence of associational harm could serve as a substitute for the requisite demonstration that dilution has burdened an individual vote.

II. THE REASONING IN *BENISEK II* BARS PLAINTIFFS' CLAIMS FOR PERMANENT INJUNCTIVE AND DECLARATORY RELIEF.

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). This is as true for permanent injunctions as it is for preliminary injunctions. Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). To satisfy that test, a plaintiff must show that (1) "it has suffered an irreparable injury"; (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "the public

interest would not be disserved by a permanent injunction." *Id.* at 391. "Satisfying these four factors is a high bar, as it should be." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017).

In considering this Court's opinion denying plaintiffs' request for preliminary injunction, the Supreme Court, in a per curiam opinion, emphasized that "[a]s a matter of equitable discretion," success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek II*, 138 S. Ct. at 1943. "Rather, a court must also consider" the equitable factors at issue when injunctive relief is requested: (1) irreparable harm; (2) balance of the equities; and (3) that the requested injunctive relief is in the public interest. *Id.* at 1943-44. As the Supreme Court concluded, "Plaintiffs made no such showing below." *Id.* at 1944. Plaintiffs not only failed to make such a showing in relation to their request for preliminary relief; they have also failed to do so in support of their request for permanent injunctive relief.

A. Plaintiffs Have Demonstrated No Irreparable Harm Because the Sixth District Remains Competitive and Electoral Circumstances Have Changed.

As for the first factor, irreparable harm is "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *see also Raub v. Campbell*, 785 F.3d 876, 885-86 (4th Cir. 2015). Here, the harm asserted by plaintiffs is an ill-defined vote-dilution injury, which is not a concrete injury-in-fact under this Court's previous holding absent proof of actual impact on real election results. ECF 202 at 17-21. The Court has found that the record, and most particularly Congressman Delaney's near defeat

in 2014, "raises serious doubts about whether Plaintiffs' alleged injury is likely to recur." *Benisek I*, 266 F. Supp. 3d at 813. The potential for recurrence has grown ever more doubtful in light of Congressman Delaney's decision not to seek reelection and the Maryland Republican Party chair's pronouncement that the Sixth District "is a winnable race" for the Republican candidate in 2018.[2] Under these circumstances, the Court should exercise extreme caution in considering plaintiffs' request for permanent injunctive relief. "Injunctions by their nature attempt to anticipate the future, but the future sometimes declines stubbornly to be prophesied." *SAS Inst., Inc.*, 874 F.3d at 385.

The "serious doubts" the Court has expressed about plaintiffs' claim of injury, *Benisek I*, 266 F. Supp. 3d at 813, are warranted not only because "Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations," *id.*, but also in light of other electoral results in the Sixth District. For example, "Democrat Ben Cardin carried the Sixth District by just 50% of the vote, despite winning 56% of the vote statewide" and "in 2014, Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points." *Id.* at 810.

The 2018 general election will pit newcomer Democratic candidate David Trone against Republican candidate Amie Hoeber. Plaintiffs have put forward no evidence about their own preferences in that race, nor have they offered any evidence that those preferences will be frustrated. Such evidence is particularly important where several of the

[2] Josh Hicks, *Maryland Politics: Republican Outside Groups Take a Rare Interest in Deep-Blue Maryland*, Wash. Post, Jan. 12, 2018.

plaintiffs have expressed support for Democratic candidates in the past. ECF 186-24 (Charles Eyler Dep.) at 15-17; *see also* ECF 186-25 (Ned Cueman Dep.) at 17; ECF 186-20 (Strine Dep.) at 14. Even Ms. Hoeber, the Republican nominee, has described herself as "independent" and "not an automatic partisan."[3]

Because irreparable injury is an element of plaintiffs' claim for injunctive relief, plaintiffs bear the burden of production on this element. *See Ricci*, 557 U.S. at 586. They have failed to carry that burden with the evidence they have produced, and they have declined the Court's invitation to reopen discovery. *See* ECF 209 at 1. Therefore, summary judgment should be granted in defendants' favor.

B. Plaintiffs' "Unnecessary, Years-Long Delay" Precludes Any Remedy in Equity, Not Just Preliminary Injunction.

A permanent injunction may not issue unless a court concludes, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *eBay Inc.*, 547 U.S. at 391. "[R]easonable diligence" is a precondition "to call into action the powers of the court." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *McKnight v. Taylor*, 1 How. 161, 168 (1843). Before equitable relief may be granted, the court must answer "whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair." *Id.* Lack of diligence "exists where 'the plaintiff delayed inexcusably or unreasonably in filing suit.'" *White v. Daniel*, 909 F.2d 99, 102

[3] Jeff Barker, *Republican Amie Hoeber and Democrat David Trone to face off for Maryland's only open House seat*," Balt. Sun, June 26, 2018, available at http://www.baltimoresun.com/news/maryland/politics/bs-md-congress-20180626-story.html (last visited July 12, 2018).

(4th Cir. 1990) (quoting *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987)).

The plaintiffs here did not "show reasonable diligence" in requesting a preliminary injunction. *Benisek II*, 138 S. Ct. at 1944. The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second, the "newly presented claims" required, beginning in 2016 and at plaintiffs' own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, plaintiffs currently press their claim for permanent injunctive relief seven years, and three general and one primary election, after the 2011 map was adopted and nearly five years since the original complaint was filed. Because any deadline to "ensure the timely completion of a new districting scheme in advance of the 2018 election season" has "long since passed," *id.* at 1945, plaintiffs now are seeking permanent court intervention with only the 2020 election remaining in the redistricting cycle.

"[A] challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White*, 909 F.2d at 103. In *White*, the Fourth Circuit looked back at two of its cases where, in holding injunctive relief unavailable, the

Court had "found significant the nearness to the next census and resulting reapportionment." *White*, 909 F.2d at 103 (examining *Maryland Citizens for a Representative Gen. Assembly v. Governor*, 429 F.2d 606 (4th Cir. 1970), and *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980)). The significance of impending reapportionment is partly that "there is large potential for disruption in reapportioning with undue frequency." *Id.* at 104. Because the 2020 Census results likely will require significant population-based reapportionment, any injunctive relief here would require two successive reapportionments in two successive years. As *White* concluded, "two reapportionments within a short period of two years would greatly prejudice . . . citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens." 909 F.2d at 104.

Plaintiffs' "unnecessary, years-long delay," *Benisek II*, 138 S. Ct. at 1945, has also prejudiced the defendants within this litigation. The plaintiffs' "newly presented claims . . . required discovery into the motives of the officials who produced the 2011 map," *id.*, many of whom could not recall the events of nearly six years ago or the sources of data they considered. *See, e.g.*, ECF 186-13 (Miller) at 20-21, 115-17, 136-37; 186-46 (Busch) at 146:12-16; 186-5 (Hitchcock) at 123:16-20. And plaintiffs have sought to turn those fading memories to their advantage. ECF 177-1 at 5. Moreover, because plaintiffs' delay allowed a new gubernatorial administration to take office before they asserted their motive-based claims, neither the prior administration nor the incoming administration had notice of a need to institute a litigation hold to preserve records during the transition. As a result of the administration turnover, many State officials and employees involved in

redistricting left State service prior to plaintiffs' filing of their second amended complaint in March 2016, and long before anyone could perceive that documents other than the 2011 Plan might be relevant. These intervening events prejudiced the State's ability to defend this lawsuit, prejudice that has been exacerbated by plaintiffs' pursuit of frivolous spoliation claims and accusations of discovery misconduct. ECF 153-1.

"[E]quity ministers to the vigilant, not to those who sleep upon their rights." *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) (unpublished) (quoting *Texaco P.R., Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995). This is as true in cases alleging First Amendment injury as in others. *Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012), *aff'd*, 471 F. App'x 219 (4th Cir. 2012) (laches can serve as a defense to First Amendment claims). Where "delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for . . . relief until 2016," *Benisek II*, 138 S. Ct. 1944, resulting in the risk of substantial disruption of back-to-back reapportionments, the equities tip in favor of denying injunctive relief.

C. The Public Interest Would Be Harmed by Replacing a Voter-Approved Plan with a Court-Ordered Plan That Comes Too Late for Referendum Vote.

"'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Here that injury is acute because it would countermand a choice made directly by the people of

Maryland. Although some time remains before the 2020 elections, as discussed above, too-frequent redistricting undermines "the need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583. And in states like Maryland that allow voters to approve or reject redistricting plans, reapportionment too near the end of a decennial census period risks depriving the people of an opportunity to ensure that politicians do not "entrench themselves in power against the people's will." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring). The Maryland redistricting process cannot play itself out in full in the remaining time before decennial redistricting because a referendum could not appear on the ballot until the 2020 general election, the only election to occur under any new plan. Thus, any reapportionment ordered by this Court would replace a redistricting plan the people of Maryland have already overwhelmingly approved (majorities in 22 of Maryland's 24 counties, including a majority of voters in Allegany, Washington, and Frederick Counties, all of which were within the former Sixth District, ECF 186-8 at 31) with one that the people will have no effective opportunity to approve or reject directly.

"'[T]he true principle of a republic is, that the people should choose whom they please to govern them.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015) (citation omitted). Direct voter participation through referendum serves "to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen . . . by the People of the several States.'" *Id.* To replace a plan that was endorsed by 64.1% of Marylanders who voted on the question, after opportunity for public debate, with a court-

ordered map with no opportunity for the people to directly approve may pose "serious First Amendment implications" of its own. *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J., plurality op.). Though plaintiffs have sought to denigrate the legitimacy of the referendum, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.*

Here, the public has voted overwhelmingly in favor of the 2011 redistricting plan. Replacing the plan without an effective opportunity for the public to approve or disapprove the plan is against the public interest.

III. *MT. HEALTHY* APPLIES ONLY WHERE THE CAUSAL CHAIN IS ONE ACTOR LONG.

During the pendency of the appeal in this case, the Supreme Court decided a case presenting the question of the proper standard for causation in a retaliatory arrest case. *Lozman*, 138 S. Ct. 1945. In holding that "*Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim" for Mr. Lozman's claim only, the Court emphasized the particular factual circumstances of Mr. Lozman's arrest and the nature of his claims. *Id.* at 1955. The Court pointed out that he alleged that "the City, through its legislators, formed a premeditated plan" of retaliation *and* "the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting." *Id.* The Court noted that Mr. Lozman had not sued the officer who had made the arrest, and further noted that he "likely could not have maintained a retaliation claim

against the arresting officer in these circumstances," namely, that "the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities." *Id.* The facts and allegations in *Lozman* stand in stark contrast to plaintiffs' claims in this case.

Lozman supports this Court's decision not "to import into the political gerrymandering context the [*Mt. Healthy*] burden-shifting framework." *Benisek I*, 266 F. Supp. 3d at 811 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). "[P]roving the link between the" non-defendant actor's "retaliatory animus and the plaintiff's injury" is "'more complex than'" it is "'in other retaliation cases.'" *Lozman*, 138 S. Ct. at 1953 (quoting *Hartman v. Moore*, 547 U.S. 250, 261 (2006)). Here, "the causal connection required . . . is not merely between the retaliatory animus of one person and that person's own injurious action," or even "between the retaliatory animus of one person and the action of another," as in *Hartman*. *Id.* at 262. Instead, the plaintiffs' claim presents the far more complex and "particularly attenuated causation," *Reichle v. Howards*, 566 U.S. 658, 667 (2012), between retaliatory *animus* attributed to multiple actors involved in the redistricting process, and the separate *actions* (plural) of the legislators who enacted the legislation and the more than 1.5 million voters who approved the legislation in the referendum, as well as, ultimately, the thousands of Sixth District voters who voted for congressional candidates. Moreover, the defendants sued here are not the actors alleged to have made the allegedly retaliatory decision. Those actors, most notably Governor O'Malley and the legislators, are entitled to absolute legislative immunity from suit for their legislative acts. *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292,

299, 300-01 (D. Md. 1992) (three-judge court) (holding that governor and legislators were entitled to absolute legislative immunity for their roles in redistricting). And, as *Lozman* reiterated, "*Hartman* relied in part on the fact that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by 'the presumption of regularity accorded to prosecutorial decisionmaking." *Lozman*, 138 S. Ct. at 1953 (quoting *Hartman*, 547 U.S. at 263). Here, the challenged redistricting legislation is subject to another "longstanding presumption": the general "presumption of validity" accorded a State's legislation, absent "invidious discrimination" based on "racial criteria" or "other immutable human attributes," which this case does not involve. *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807, 808 (1969) (applying presumption of validity in equal protection challenge to a State's absentee voting law involving alleged infringement of "fundamental right" to vote).

Lozman clarifies that *Mt. Healthy* is meant to apply only to retaliation cases where the asserted retaliation and injury are closely connected and stem from a single actor. Redistricting, with its multiple actors, does not present that scenario. Here, the approval of the 2011 plan by 1.5 million Marylanders even further attenuates the causal chain.

CONCLUSION

Defendants' cross-motion for summary judgment should be granted and judgment entered in favor of the defendants on all counts.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Sarah W. Rice
_____

SARAH W. RICE (Bar No. 29113)
JENNIFER L. KATZ (Bar No. 28973)
ANDREA W. TRENTO (Bar No. 28816)
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
srice@oag.state.md.us
(410) 576-6847
(410) 576-6955 (facsimile)

July 13, 2018

Attorneys for Defendants