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IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

NEIL PARROTT, RAY SERRANO, CAROL SWIGAR, DOUGLAS RAAUM, RONALD SHAPIRO, DEANNA MOBLEY, GLEN GLASS, ALLEN FURTH, JEFF WARNER, JIM NEALIS, DR. ANTONIO CAMPBELL, and SALLIE TAYLOR,	*	
Plaintiffs,	*	Case No. C-02-CV-21-001773
v.	*	
LINDA H. LAMONE, in her official capacity as State Administrator of the Maryland State Board of Elections and WILLIAM G. VOELP, Chair of the Maryland State Board of Elections, and STATE OF MARYLAND,	*	
Defendants.	*	

PLAINTIFFS' OPPOSITION TO THE MOTION BY DCCC TO INTERVENE AS A DEFENDANT

Plaintiffs Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor ("Plaintiffs") submit this memorandum of law in opposition to DCCC's motion, pursuant to Md. Rule 2-214, to intervene as a defendant.

BACKGROUND FACTS

The complaint in this action, filed December 21, 2021, alleges that Maryland's newly passed congressional district plan is a partisan gerrymander. The facts of this case

strongly suggest that the plan was drawn to ensure that all eight of Maryland's congressional districts will elect Democratic candidates.

The challenged plan was adopted without a single Republican vote, was vetoed by Governor Hogan, and was passed on a veto override by supermajorities of Democrats in both houses of the Maryland legislature, again without a single Republican vote. Complaint ("Cmp."), ¶¶ 33-37. The plan was rammed through in this way despite the fact that the legislature had before it a fair, simple, compact district plan devised by a bipartisan citizen's redistricting committee established by the governor. *Id*., ¶¶ 24-32. The plan that was passed instead contains all the hallmarks of a gerrymander. Districts are noncompact and fragment existing political subdivisions. *Id*., ¶¶ 45-50, 56-67. These bizarre district lines were drawn for identifiable, political reasons. *Id*., ¶¶ 51-55. And the elections that will be held in these districts are likely to deliver all (or all but one) of Maryland's congressional districts to the party that drew the map, effectively neutralizing the electoral clout of at least 35% of Maryland's voters. *Id*., ¶¶ 71-76.

Plaintiffs make two claims. The first is that Maryland's congressional map violates Article 7 of the Maryland Declaration of Rights, which affords Plaintiffs the right to "free and frequent" elections and the "right of suffrage." *Id*., ¶¶ 86-91, 99-103, citing Md. Dec. of R. Art. 7. The second is that Maryland's congressional districts violates the requirements of Article III, Section 4 of the Maryland Constitution, which require that legislative districts shall "be compact in form," and give "[d]ue regard … to natural boundaries and the boundaries of political subdivisions." *Id*., ¶¶ 92-98, 104-108, citing Md. Const. Art III, § 4. These are the only legal issues in this case.

The Democratic Congressional Campaign Committee (DCCC) now moves to intervene as a defendant both as of right and permissively. Md. Rule 2-214(a)(2); (b). It does not mention any individual intervenors, but moves on its own behalf as an out-of-state organization. It has attached no affidavits or exhibits to its motion. The only interest it claims is in "supporting the election of Democratic Party candidates to" Congress, which interest, it asserts, will be injured if congressional districts are "changed." DCCC's Motion to Intervene as Defendant ("Mot.") at 5.

As set forth below, this motion should be denied. DCCC is not entitled to intervene as of right because its asserted interest is not legally protectable and not a basis for standing required by intervention. A second, independent ground for denying intervention as of right is the fact that existing Defendants the Administrator of the State Board of Elections, the Chair of the State Board, and the State of Maryland—whose legislature has veto-proof Democratic majorities in both houses—more than adequately represent any interest DCCC has in defending this case.

Permissive intervention should be denied because DCCC has not stated a common issue of law and fact it shares with existing parties. In addition, the fact that current Defendants adequately represent its interests means that its intervention necessarily would unduly delay and prejudice the adjudication of the rights of existing parties.

LEGAL STANDARDS

To intervene as of right, a movant

> must claim an interest in the subject of the action such that the disposition of the action may impair or impede the applicant's ability to protect that interest. In addition, intervention is permitted only if that interest might not be adequately represented by existing parties. Both requirements must be

met for intervention under Rule 2-214(a)(2).

Duckworth v. Deane, 393 Md. 524, 539 (2006) (citations omitted).

The interest "required for intervention as of right" must be "direct, significant [and] legally protectable." *Hartford Ins. Co. v. Birdsong*, 69 Md. App. 615, 628 (1987) (citation and internal quotations omitted); *see Duckworth*, 393 Md. at 539-40 (interests that are "indirect, remote, and speculative" or "contingent on the happening of other events" are insufficient) (citations and internal quotations omitted). Indeed, the "applicant's interest must be such that the applicant has standing to be a party." *Id*. at 540 (citation omitted).

In determining whether a movant's interest is adequately represented by existing parties, "[1] if the interest of an existing party and the movant are identical, or [2] if an existing party is charged by law with representing a movant's interest, 'a compelling showing should be required to demonstrate why this representation is not adequate.'" *Envtl. Integrity Project v. Mirant Ash Mgmt*., LLC, 197 Md. App. 179, 191 (2010) (quoting *Maryland Radiological Soc. v. Health Services Cost Review Com*., 285 Md. 383, 390-91 (1979)). A movant makes a "compelling showing … only if he can show collusion, nonfeasance, or bad faith on the part of those existing parties with whom his interest coincides." *Maryland Radiological Soc.*, 285 Md. at 391 (citations omitted).

Permissive intervention may be granted when a movant's "claim or defense has a question of law or fact in common with the action." Md. Rule 2-214(b)(1). In exercising its discretion, the court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Md. Rule 2-214(b)(3).

"[T]he predecessor to current Md. Rule 2-214 [] was derived from Fed. R. Civ. P.

24." *Maryland-National Capital Park & Planning Comm'n v. Town of Wash. Grove*, 408 Md. 37, 64 (2009) (citation omitted). Accordingly, "[i]n the absence of Maryland authority, the similarity" of Maryland's rule "and Federal Rule 24 makes the decisions of the federal courts interpreting their rule of considerable precedential value in construing our rule." *Maryland Radiological Soc.*, 285 Md. at 388 n.5 (citation omitted).

ARGUMENT

I. DCCC Does Not State or Have a Legally Protectable Interest Justifying Intervention.

DCCC describes itself as "a political organization dedicated to supporting the election of Democratic Party candidates to [Congress.]" Mot. at 5. It says it wishes "to defend its interests in congressional districts in Maryland that will allow Democratic candidates to be competitive." *Id*. at 4. DCCC asserts that "[i]f Plaintiffs succeed and HB 1 is enjoined, Proposed Intervenor will suffer direct injury because the districts their members of Congress have run in previously, and will run in again in 2022, will be changed." *Id*. at 5.

DCCC sets forth no other interest. Its motion to intervene does not refer to any legal issue in this case. It attaches no affidavits or evidentiary exhibits to its motion. It identifies no Maryland voter or resident it claims to represent. DCCC is not based in Maryland. Instead, DCCC, as a national organization, seeks to intervene in a controversy over the meaning of specific provisions of the Maryland Constitution, on the ground that it wishes to see more Democrats elected to Congress.

The interest asserted by DCCC fails to justify intervention as of right. To begin with, an interest warranting intervention must seek to vindicate or defend a *legally*

protectable interest. *See Birdsong*, 69 Md. App. at 628 (a "'direct, significant legally protectable interest' [is] required for intervention as of right") (citation omitted); *Montgomery County v. Bradford*, 345 Md. 175, 194, 199 (1997) (upholding decision applying *Birdsong* and rejecting movant's claim to a "significant legally protectable interest"); *McHenry v. Comm'r*, 677 F.3d 214, 226 (4th Cir. 2012) (upholding denial of intervention where interest "was not 'direct, substantial, and legally protectable'") (citation omitted). DCCC itself tacitly concedes that such an interest is required, when it claims that it seeks to defend "legally protected interests." Mot. at 5.

Yet DCCC has failed to identify any such legally protected interest. No law entitles a political party or any of its candidates to electoral success. DCCC identifies no legal right that is at risk of being violated. All that DCCC claims is that it has an interest in, meaning that it would like to see, certain electoral outcomes. That preference on its own does not constitute "a direct, significant legally protectable interest" (*Birdsong*, 69 Md. App. at 628) sufficient to confer "standing to be a party" (*Duckworth*, 393 Md. at 540).

Plaintiffs, by contrast, allege that Maryland's congressional district plan threatens to violate their rights to "free and frequent" elections and "suffrage" under Article 7 of the Declaration of Rights, and to districts that are "compact in form" and give "[d]ue regard" to "the boundaries of political subdivisions" under Article III, Section 4 of the Constitution, all for the sake of partisan gain. The poor prospects of Republican candidates constitute *evidence* of the underlying partisan motivation for the plan, *but they are not the claim itself*. DCCC, however, expresses no interest in any law, but only in seeing its partisans win elections. The utter implausibility of describing this as a "legally protectable interest" is

highlighted by the fact that DCCC is not even seeking a level playing field. Due to Maryland's gerrymandered districts, Democrats are likely to win *more* congressional seats than their numbers warrant. What injury, sufficient to confer standing on DCCC, would result if that electoral windfall is *taken away*? How, for example, does one plead a cause of action based on such an "injury"? The fact is that no such cause of action exists, because no one has a legal right to an electoral windfall.

Nor can DCCC claim an interest *on behalf of its members* that would confer on it the standing necessary for intervention. The Court of Appeals "has not yet recognized such derivative standing." *Voters Organized for the Integrity of City Elections v. Balt. City Bd. of Elections*, 451 Md. 377, 396, 397 (2017) (concluding that an organization "does not have standing to seek a declaratory judgment concerning its interpretation" of election law "simply because its members are interested in that interpretation or even because its members may themselves be specially affected"). *Compare Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 258 (4th Cir. 2018) (discussing Article III doctrine of "associational standing," which allows organizations to sue on behalf their members).

DCCC cites a number of cases—though none from Maryland—for the proposition that "Courts have routinely concluded that … interference with a political party's electoral prospects constitutes a direct injury." Mot. at 6-7. The cases they cite do not support this conclusion, especially in the context of this case.

The order cited from *LULAC v. Pate*, No. CVCV061476 (Iowa Dist. Ct. June 24, 2021) (Mot. at 6) is attached to the Popper Affidavit accompanying this motion ("Popper Aff.") as Exhibit A. This 25-word order does not express any view about what "constitutes

a direct injury." Rather, it simply notes that "Plaintiffs have withdrawn their opposition to the pending Motion to Intervene," and thus grants the motion. This order should not be cited as support for any legal proposition.

Two other cases cited by DCCC do not concern intervention but the original standing of plaintiffs in federal court (Mot. at 6). Naturally, these cases concern Article III standing under the Constitution. Precedent involving original parties in federal court has no bearing on the question of intervention in Maryland. Even assuming that such cases provide a useful analogy to the standing of intervenors under Maryland law, the facts are very different. In *Owen v. Mulligan*, 640 F.2d 1130, 1132 (9th Cir. 1981), the Postal Service admitted "that local officials inadvertently failed" to evenhandedly enforce postal regulations on political parties and candidates. Thus, there was a clear legal violation. The lower court ruling had "held that there was standing because the Postal Service actions caused the plaintiffs financial injury which concomitantly restrained their first amendment freedoms." *Id*. The court affirmed, noting that the plaintiffs had standing to "seek to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which 'arguably promote his electoral prospects.'" *Id*. at 1133 (citation omitted). In *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 585 (5th Cir. 2006), the issue concerned whether the Republican Party of Texas had acted properly and in time in declaring its candidate ineligible. Both the Texas Democratic Party (not, as here, the national party), and the particular Democratic candidate who was running against that Republican, in that election, had Article III standing to make that challenge. *Id*. at 586-88.

Three other cited decisions (Mot. at 7) concerned interventions in the exceptional

context of federal lawsuits challenging the COVID-related imposition of all-mail ballot elections. This unprecedented, unpredictable, once-in-a-lifetime public health emergency makes all comparisons with other election administration cases dubious. Significantly, the stated interests extended beyond electoral prospects to public health and other concerns. *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 U.S. Dist. Lexis 102013, at *7-8 (E.D. Cal. June 10, 2020) (three protectable interests were "(1) asserting the rights of their members to vote safely without risking their health; (2) advancing their overall electoral prospects; and (3) diverting their limited resources to educate their members on the election procedures"); *Republican Nat'l Comm. v. Newsom*, No. 2:20-cv-01055-MCE-CKD, slip op. at 5 (E.D. Cal. June 10, 2020), ECF No. 38 (identical decision issued by same judge in related case). In a similar vein, intervenors in the third case argued that abandoning all-mail ballots would "disrupt" the organization's "efforts to promote the franchise" as well as to "ensure the election of Democratic Party candidates," and would also disadvantage an individual intervenor who "plan[ned] to vote by mail." *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. Lexis 74095, at *6 (D. Nev. Apr. 28, 2020).

DCCC's institutional preference that Democratic candidates succeed everywhere is not the same kind of particular interest as those presented in the federal cases it cites, and it does not warrant intervention here under Maryland law.

II. Any Interest DCCC Does Have Is Adequately Represented by Existing Parties.

Even if DCCC had stated an interest sufficient to serve as a basis for intervention, a wholly independent basis for denying its motion is the fact that existing Defendants will adequately represent its interests.

"[I]f the interest of an existing party and an intervenor-applicant are identical, or if an existing party is charged by law with representing a movant's interest, 'a compelling showing should be required to demonstrate why this representation is not adequate.'" *Maryland Radiological Soc.*, 285 Md. at 390-91 (citation omitted). In this case, both of the foregoing conditions are true, so DCCC must make a compelling showing that existing Defendants will not adequately represent its interests. It has not even tried to do so.

First, DCCC's litigation position is identical to that of the named Defendants. This can be simply established by examining existing pleadings. Attached to DCCC's motion to intervene in this case is its proposed responsive pleading to the complaint, a 7-page "[Proposed] Intervenor-Defendant's Motion To Dismiss" (Proposed Mot.). DCCC's proposed motion to dismiss makes two arguments: that "Article III, Section 4 of the Maryland Constitution applies only to state legislative, not congressional, districts," and that "Article 7 of the Maryland Declaration of Rights only applies to state legislative, not congressional, districts." Proposed Mot. at 2, 4 (point headings).

Defendants Lamone and Voelp are also defendants in a second case filed in Anne Arundel Circuit Court, *Szeliga v. Lamone*, which asserts similar claims under Maryland's Constitution. The defendants in that case just filed a 46-page motion to dismiss or for summary judgment. This motion makes the same arguments as DCCC, but at greater length. *See* Popper Aff., Exhibit B at 17 (point heading asserting that "Article III, § 4 Does Not Apply to Congressional Redistricting"); *id*. at 24 (point heading asserting that "Article 7 of the Declaration of Rights Does Not Extend to Congressional Elections").

Plaintiffs here will no doubt see these same arguments when Defendants file their

responsive pleadings in this case, and Plaintiffs maintain, of course, that these arguments are incorrect. But the point here is that Defendants and DCCC share the same interest in defending Maryland's gerrymandered maps and are making identical arguments.

Second, existing parties in this case are "charged by law with representing [the] movant's interest." *Maryland Radiological Soc.*, 285 Md. at 391. Maryland law provides that the State Board, chaired by Defendant Voelp, "shall manage and supervise elections in the State and ensure compliance with the requirements of this article and any applicable federal law by all persons involved in the elections process." Md. Elec. Law § 2-102(a). It also provides that the State Administrator of Elections, Defendant Lamone, who is "appointed by the State Board, with the advice and consent of the Senate of Maryland," shall "perform all duties and exercise all powers that are assigned by law to the State Administrator or delegated by the State Board" and "be the chief State election official." Md. Elec. Law § 2-103(b)(1), (5), (8). Of course, Defendant State of Maryland has an interest in enforcing and defending its own election laws. *See* Mot. at 6 (admitting that "the existing Defendants are state officials who have an undeniable interest in defending the duly enacted laws of Maryland and conducting elections under those laws").

The fact that government agents are charged with defending citizens' interests provides especially strong grounds for concluding that proposed intervenors' interests are adequately represented. "[I]t is among the most elementary functions of a government to serve in a representative capacity on behalf of its people. In matters of public law litigation that may affect great numbers of citizens, it is the government's basic duty to represent the public interest." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013). This "representative

function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge." *Id.* When "a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government." *Id*. Further, as a practical matter,

> to permit private persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate the government's job. Faced with the prospect of a deluge of potential intervenors, the government could be compelled to modify its litigation strategy to suit the self-interested motivations of those who seek party status, or else suffer the consequences of a geometrically protracted, costly, and complicated litigation.

Id.

Because both conditions specified in *Maryland Radiological Soc.* are true—DCCC has the identical interest as existing Defendants, and existing Defendants are government agents charged with representing these interests—DCCC must make a compelling showing that existing Defendants will not adequately represent its interests. A "compelling showing" requires a showing of "collusion, nonfeasance, or bad faith." *Maryland Radiological Soc.*, 285 Md. at 391 (citations omitted). DCCC has not even attempted to make this showing. This dooms its application for intervention. *See id*. at 392 (finding that petitioners, who made "no effort to produce any evidence concerning the three factors just mentioned," must "tacitly agree that there has been neither collusion … nor any indication of nonfeasance or bad faith on the part of any of the present parties").

As a final point, it must be observed that, as a practical matter, even DCCC's purely partisan interests will be adequately represented by existing parties. Democrats in the Maryland legislature have veto-proof supermajorities in both houses of the state legislature. They utilized this partisan dominance to pass an utterly partisan district map into law. The

State of Maryland is a party, and the interests of that partisan supermajority will, no doubt, be represented in this lawsuit.

Because DCCC has not made the required showing under Maryland law, it must be presumed that its interests are adequately represented by existing parties, and its motion for intervention should be denied.

III. Permissive Intervention Is Not Warranted.

DCCC's alternative motion for permissive intervention should also be denied. It fails at the most basic level, because DCCC has not stated a "claim or defense" with "a question of law or fact in common with the action." Md. Rule 2-214(b)(1). As explained above, ensuring that Democrats maintain an electoral windfall, achieved through gerrymandering, that is greater than what their electoral support would ordinarily warrant is not a "claim or defense" recognized in law.

Further, in determining motions for permissive intervention, courts are bound to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Md. Rule 2-214(b)(3). The fact that DCCC is adequately represented by existing parties weighs against granting it permissive intervention, because DCCC's participation will not add anything to the Court's consideration of the issues, while it will add to the Court's and parties' burdens in discovery and litigation.

Permissive intervention was denied on this basis in *Stuart*. The court there affirmed the lower court's finding that intervenors "would necessarily complicate the discovery process and consume additional resources of the court and the parties," and "result in undue delay … without a corresponding benefit to existing litigants, the courts, or the process,"

given that "existing [d]efendants are zealously pursuing the same ultimate objectives." *Stuart*, 706 F.3d at 355 (internal quotations omitted). "The court denied permissive intervention for that reason, and we find no error in its ruling." *Id.*

CONCLUSION

For the foregoing reasons, proposed intervenor DCCC's motion to intervene as a defendant should be denied.

Dated: February 4, 2022

Respectfully Submitted,

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Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I certify that on February 4, 2022 the foregoing Plaintiffs' Opposition To The Motion By DCCC To Intervene As A Defendant was filed electronically via the Court's MDEC system.

/s/ Eric W. Lee
Eric W. Lee

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

NEIL PARROTT, RAY SERRANO, CAROL SWIGAR, DOUGLAS RAAUM, RONALD SHAPIRO, DEANNA MOBLEY, GLEN GLASS, ALLEN FURTH, JEFF WARNER, JIM NEALIS, DR. ANTONIO CAMPBELL, and SALLIE TAYLOR,	*	
Plaintiffs,	*	Case No. C-02-CV-21-001773
v.	*	
LINDA H. LAMONE, in her official capacity as State Administrator of the Maryland State Board of Elections and WILLIAM G. VOELP, Chair of the Maryland State Board of Elections, and STATE OF MARYLAND,	*	
Defendants.	*	

AFFIDAVIT OF ROBERT D. POPPER

Robert D. Popper, for his affidavit, deposes and says;

1. I am Robert D. Popper, an attorney at Judicial Watch, Inc., and counsel for the plaintiffs in this action. I submit this affidavit in support of Plaintiffs' Opposition To The Motion By DCCC To Intervene As A Defendant.

2. Attached hereto as Exhibit A is a true and correct copy of the order issued in *LULAC v. Pate*, No. CVCV061476 (Iowa Dist. Ct. June 24, 2021), which was obtained online on February 2, 2022. To the best of my knowledge it is the order referred to on page

6 of the DCCC's Motion to Intervene.

3. Attached hereto as Exhibit B is a true and correct copy of a brief filed by the defendants in *Szeliga v. Lamone*, Case No. C-02-CV-21-001816, on January 31, 2022.

I solemnly affirm under the penalties of perjury that the contents of this document are true to the best of my knowledge, information, and belief.

Dated: February 4, 2022

/s/ Robert D. Popper
Robert D. Popper

Exhibit A to Affidavit of Robert D. Popper

LULAC v. Pate, No. CVCV061476 (Iowa Dist. Ct. June 24, 2021) Order

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA Plaintiff(s) VS. PAUL PATE THOMAS MILLER Defendant(s)	05771 CVCV061476 ORDER Granting Motion to Intervene and Canceling Hearing

The Plaintiffs have withdrawn their opposition to the pending Motion to Intervene. Therefore, the Motion to Intervene is GRANTED. Hearing set for 6/25/2021 is canceled.

State of Iowa Courts

Case Number	**Case Title**
CVCV061476	LEAGUE OF UNITED LATIN AMERICAN CITIZENS VS PAUL PATE ET AL
Type:	OTHER ORDER

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

Electronically signed on 2021-06-24 10:45:50

Exhibit B to Affidavit of Robert D. Popper

Szeliga v. Lamone, Case No. C-02-CV-21-001816, Defendants' Motion to Dismiss or, In The Alternative, For Summary Judgment

IN THE
CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

KATHRYN SZELIGA, et al.,	*	
Plaintiffs,	*	
v.	*	No. C-02-CV-21-001816
LINDA H. LAMONE, et al.,	*	
Defendants.	*	

* * * * * * * * * * * *

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Md. Rules 2-322(b) and 2-501(a), Defendants Linda H. Lamone, Maryland State Administrator of Elections; William G. Voelp, Chairman of the Maryland State Board of Elections, and the Maryland State Board of Elections ("Defendants"), respectfully file this Motion to Dismiss or, in the Alternative, for Summary Judgment (the "Motion"). As stated more fully in the accompanying Memorandum of Law in support of this Motion, which is incorporated herein by reference, Plaintiffs fail to state a claim upon which relief can be granted, and fail to plead a genuine dispute as to any material fact that would preclude entry of judgment as a matter of law for the Defendants, as to any of the claims they have pled in their Complaint. For all of these reasons, and for the reasons stated in the accompanying Memorandum of Law in support of this Motion, Plaintiffs'

claims should be dismissed or, in the alternative, summary judgment should be awarded to the Defendants.

BRIAN E. FROSH
Attorney General of Maryland

/s/ Andrea W. Trento

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January 31, 2022

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KATHRYN SZELIGA, ET AL., *Plaintiffs*,	*	
v.	*	No. C-02-CV-21-001816
LINDA H. LAMONE, ET AL., *Defendants*.	*	

* * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Plaintiffs are nine Maryland voters who ask this Court to declare Maryland's newly established Congressional Redistricting Plan (the "2021 Plan") to be an unlawful partisan gerrymander. Specifically, Plaintiffs assert that the 2021 Plan violates their rights under Articles 7, 24, and 40 of the Declaration of Rights and Article I, § 7 of the Constitution, by denying them "free and pure elections" and discriminating against them on the basis of their political views. Compl. ¶¶ 3, 15-18. Plaintiffs seek not only declaratory relief but an injunction against the administration of the fast-approaching 2022 elections under the new 2021 Plan "until such time as the Maryland General Assembly enacts a congressional districting plan that complies with the Maryland Constitution and Declaration of Rights." *Id.* § VI, ¶ (c).

But these constitutional provisions do not supply any lawful basis for Plaintiffs' claims. As an overarching matter, all of Plaintiffs' claims must fail, because the Maryland Constitution situates the General Assembly's duties relating to the districting process—

including the extent to which political objectives may be pursued in drawing district lines—in Article III, § 4 of the Constitution. Since that provision expressly applies only to State legislative districts, a claim alleging that the General Assembly improperly pursued political objectives in redrawing the *congressional* map is unavailable as a matter of Maryland law.

Even if Plaintiffs could somehow overcome the Maryland Constitution's fundamental choice to address only State legislative redistricting to the exclusion of congressional redistricting, each of Plaintiffs' claims should be dismissed for lack of any legal support. Plaintiffs' claims under Article 7 of the Declaration of Rights must fail, because that provision's guarantee that "Elections shall be free and frequent," Decl. of Rights art. 7, is expressly intended to preserve "the right of the People to participate in the Legislature," *id.*, meaning Maryland's State Legislature rather than Congress.[1] Even

[1] In the Maryland Constitution and Declaration of Rights, the words "legislature" and "legislative" refer to the General Assembly. When the Constitution intends to refer to Congress, it does so explicitly, by using the terms "Congress" or "congressional." *See, e.g.*, Md. Const. art. I, § 6 ("If any person shall give, or offer to give, directly or indirectly, any bribe . . . to induce any voter to refrain from casting his vote, or to prevent him in any way from voting, or to procure a vote for any candidate or person proposed, or voted for as the elector of President, and Vice President of the United States, or Representative in Congress . . . the person giving, or offering to give and the person receiving the same . . . at any election to be hereafter held in this State, shall, on conviction . . . be forever disqualified to hold any office of profit or trust, or to vote at any election thereafter."); Md. Const. art. III, § 10 ("No member of Congress, or person holding any civil, or military office under the United States, shall be eligible as a Senator, or Delegate[.]"); Md. Const. art. XVII, § 1 ("The purpose of this Article is to reduce the number of elections by providing that all State and county elections shall be held only in every fourth year, and at the time provided by law for holding congressional elections, and to bring the terms of appointive officers into harmony with the changes effected in the time of the beginning of the terms of elective officers.").

within the provision's intended scope, Article 7's protections were never intended to encompass districting, which the Constitution addresses exclusively in Article III, §§ 3-5.

The Constitution's intended meaning similarly precludes Plaintiffs' claims under Article I, § 7. The legislative history and case law interpreting this provision confirm that it was not conceived as a restriction, but instead directs the General Assembly to exercise its inherent authority to "pass Laws necessary for the preservation of the purity of Elections" as it deems appropriate, and thereby to regulate the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud. Article I, § 7 has never once been used, by any court, to strike down an Act of the General Assembly for undermining the "purity of elections."

Finally, plaintiff's claims under Articles 24 and 40 of the Declaration of Rights purport to assert equal protection and free speech claims that, as to parallel provisions of the United States Constitution, the Supreme Court has rejected in the redistricting context as non-justiciable political questions. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Because the Court of Appeals has generally treated the rights enshrined under Articles 24 and 40 as "coextensive" with their federal counterparts and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, and because nothing in the Plaintiffs' complaint suggests the existence of any "judicially manageable" "legal standards discernible in the Constitution" or applicable statutes for adjudicating such claims with regard to congressional districts, *id.* at 2499-2500, the Article 24 and Article 40 claims should be dismissed.

Partisan gerrymandering has been condemned as "incompatible with democratic principles," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015), but this does not mean that the Maryland Constitution provides a mechanism for redressing grievances concerning congressional redistricting. On the contrary, the text, history, and case law interpreting the Maryland Constitution and Declaration of Rights confirm that Maryland law does not authorize such a challenge. Nevertheless, a solution to the problem has been proposed: federal legislation pending in Congress establishing uniform standards for congressional districting would eliminate partisan advantages arising from differences in the various States' districting laws and practices. Until such legislation is passed, or the Maryland Constitution is amended to impose the obligations that Plaintiffs wrongly believe are already in place, Plaintiffs lack a remedy under existing law. Their claims should be dismissed or, in the alternative, summary judgment should be awarded to the Defendants.

STATEMENT OF FACTS

Constitutional and Statutory Scheme

Neither federal nor Maryland law places specific restrictions on how congressional districts must be created.

The United States Constitution requires Representatives to be "chosen every second Year by the People of the several States," U.S. Const. art. I, § 2, cl. 1, which Congress has prescribed to be the "Tuesday next after the 1st Monday in November, in every even-

numbered year," 2 U.S.C. § 7.[2] Congress has fixed the total number of Representatives at 435, and those seats are reapportioned among the States after each decennial census. *See* 2 U.S.C. §§ 2a(a)-(b). Otherwise, congressional seats are generally redistricted within States "in the manner provided by the law thereof." *Id.* § 2a(c). Although as recently as 1911 a federal apportionment statute, the Apportionment Act of 1911, Pub. L. No. 62-5, 37 Stat. 13, prescribed "requirements of contiguity [and] compactness" for congressional districts, those requirements "were not thereafter continued," *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion), and no such requirement "remains in place today," *Rucho*, 139 S. Ct. at 2493.

The Maryland Constitution prescribes a process and establishes parameters for the creation of State *legislative* districts, but it, too, is silent as to how congressional districts should be drawn. Thus, Article III, § 4 requires that State legislative districts "consist of adjoining territory, be compact in form, and of substantially equal population," and that "due regard . . . be given to natural boundaries and the boundaries of political subdivisions" in their creation. The "compactness" requirement, in particular, was "intended to prevent political gerrymandering," *Matter of Legislative Districting of State* (*"1984 Legislative Districting*"), 299 Md. 658, 687 (1984), although the framers of that provision understood that it did not completely foreclose consideration of political objectives in the districting

[2] While the U.S. Constitution provides that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof," Congress "may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *id.* art. I, § 4, cl. 1.

process. Nevertheless, the Maryland Constitution imposes no similar restrictions on congressional redistricting. For its part, the Maryland Code similarly requires only that incarcerated individuals be counted as residents of "their last known residence before incarceration" for the purpose of congressional redistricting, Md. Code Ann., Elec. Law. § 8-701(a)(1) (LexisNexis 2017 & 2020 Supp.), but does not otherwise impose limitations on how congressional districts may be drawn. As confirmed by the Department of Legislative Services ("DLS"), an agency of the Legislative Branch whose duties include legislative research, Md. Code, State Gov't §§ 2-1202, 2-1207(6) (LexisNexis 2014), the statutory requirement concerning prisoner reallocation is "[t]he only provision of State law that governs congressional redistricting." Dept. of Leg. Services, *Issue Papers 2022 Legislative Session* (Dec. 2021), available at http://dls.maryland.gov/pubs/prod/RecurRpt/Issue-Papers-2022-Legislative-Session.pdf (last visited Jan. 25, 2022).

Allegations in the Complaint

In July 2021 the General Assembly's leadership convened a Legislative Redistricting Advisory Commission ("LRAC") to prepare and submit congressional and State legislative maps for consideration by the General Assembly. Compl. ¶ 37. However, Plaintiffs contend that this process was a farce. *See id.* ¶¶ 37-44. Specifically, they allege that the Democratic majority on the LRAC worked directly with DLS to develop alternative maps and excluded their Republican counterparts from this process. *Id.* ¶ 42. Plaintiffs allege that DLS was specifically instructed by Democratic leadership to incorporate in their proposals only certain comments from public hearings held across the State, and to ignore

the "overwhelming" request of Maryland citizens to refrain from producing politically influenced maps. *Id.* ¶ 41. They further allege that DLS was also instructed to use "as a baseline" the existing congressional districts adopted in 2011 (the "2011 Plan")—which they allege to be the product of unlawful partisan objectives—and to "keep as many people as possible in their current districts." *Id.* ¶ 40; *see also id.* ¶¶ 23-34 (allegations regarding 2011 Plan).

On November 9, 2021, the LRAC issued four maps for public review and comment. Compl. ¶ 43. On November 23, 2021, the LRAC by party-line vote chose a final map to submit to the General Assembly for approval. *Id.* ¶ 44. On December 8, 2021, during a special session of the General Assembly convened by Governor Hogan, the General Assembly voted by party-line vote to approve the 2021 Plan. *Id.* ¶ 49. Then, on December 9, 2021, the General Assembly again voted by party-line vote to override Governor Hogan's veto of the 2021 Plan. *Id.* ¶ 51.

According to the complaint, the 2021 Plan not only preserves the existing 7-1 partisan breakdown in favor of Democrats among Maryland's eight congressional districts, but it makes the single district that has elected a Republican representative in recent elections more competitive for Democrats. Compl. ¶¶ 46a, 55. It does so, according to Plaintiffs, by removing portions of Harford County from Maryland's First Congressional District, which otherwise comprises all counties located on the Eastern Shore, and instead extending that district across the Chesapeake Bay into Anne Arundel County. Compl. ¶¶ 46a, 47b, 57. Plaintiffs also complain that the 2021 Plan preserves the Democratic advantage in the Sixth Congressional District, which they allege resulted from what they

see as the 2011 Plan's unlawful creation of a reliably Democratic district as opposed to a Republican one. *Id*. ¶¶ 46f, 47a; *but see Benisek v. Lamone*, 266 F. Supp. 3d 799, 804 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018) (noting that the 2011 Plan was "duly enacted by the General Assembly of Maryland" and then "survived a voter referendum by a wide margin"). Plaintiffs add that the 2021 Plan allegedly perpetuates the practice of creating oddly-shaped districts, engineered to create a Democratic political advantage, that do not conform to preexisting political subdivisions or natural boundaries. *See* generally Compl. ¶¶ 46a–47b.

Plaintiffs claim that the 2021 Plan violates the Maryland Constitution and Declaration of Rights in four ways. First, they allege that the 2021 Plan violates the "free and frequent elections" clause of Article 7 of the Maryland Declaration of Rights, because "any election poisoned by extreme political gerrymandering and the intentional dilution of votes on a partisan basis is not free." Compl. ¶ 64; *see id.* ¶¶ 59-64. Second, they allege that the Plan violates the requirement in Article I, § 7 of the Maryland Constitution that the General Assembly "pass laws necessary for the preservation of the purity of Elections," because, in Plaintiffs' view, the Plan "makes political corruption the law of the State." Compl. ¶ 68; *see id.* ¶¶ 65-69. Third, they allege that the 2021 Plan violates their equal protection rights under Article 24 of the Declaration of Rights, by discriminating against them as Republican voters. Compl. ¶¶ 70-76. Finally, they allege that the 2021 Plan violates their freedom of speech rights under Article 40 of the Declaration of Rights by diluting their votes and depriving them of their ability to elect a candidate who shares their views, as well as by retaliating against them on the basis of their political viewpoints.

Compl. ¶¶ 77-82. Plaintiffs seek declaratory relief as well as an injunction against using the districts created by the 2021 Plan in any future election in Maryland, and an order suspending candidate filing deadlines until such time as a plan that complies with constitutional requirements can be promulgated. Compl. § VI.

ARGUMENT

I. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim under Maryland Rule 2-322(b)(2), "a trial court is to assume the truth of factual allegations made in the complaint and draw all reasonable inferences from those allegations in favor of the plaintiff." *Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 169 (2021). A court may also consider matters of which it may take judicial notice in ruling on a motion to dismiss. *See* Md. Rule 5-201; *Faya v. Almaraz*, 329 Md. 435, 444 (1993) ("[I]n order to place a complaint in context, we may take judicial notice of additional facts that are either matters of common knowledge or capable of certain verification."). Since Rule 5-201 "governs only judicial notice of *adjudicative facts*," Rule 5-201(a) (emphasis added), and "does not regulate judicial notice of so-called 'legislative facts' (facts pertaining to social policy and their ramifications) or of law," Committee Note, Rule 5-201 (parentheses in original), the Court's consideration of the motion to dismiss may also take into account such legislative facts.[3] The '"grant of a motion to dismiss is proper if the complaint does not disclose, on

[3] The Court of Appeals has further defined "legislative facts" as those that '"do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion,'" as distinguished from "adjudicative facts,"

its face, a legally sufficient cause of action.'" *GAB Enterprises, Inc. v. Rocky Gorge Dev., LLC*, 221 Md. App. 171, 185 (2015) (quoting *Hrehorovich v. Harbor Hosp. Ctr.*, 93 Md. App. 772, 784 (1992)).

If the Court determines to consider and not exclude as a basis for disposition "matters outside the pleading" that are not legislative facts or otherwise judicially noticeable, then "the motion shall be treated as one for summary judgment[.]" Md. Rule 2-322(c). "A court may grant summary judgment in favor of the moving party 'if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.'" *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017) (quoting Md. Rule 2–501(f)).

II. NEITHER THE MARYLAND CONSTITUTION NOR THE MARYLAND DECLARATION OF RIGHTS IMPOSES RESTRICTIONS ON CONGRESSIONAL REDISTRICTING.

Initially, all of Plaintiffs' claims must fail because the restrictions imposed on the pursuit of political objectives in the districting process by the Maryland Constitution are limited to *State* legislative redistricting. *See* Md. Const art. III, § 4. Because the framers of the Maryland Constitution expressly chose to restrict gerrymandering as to the State legislative map, but imposed no similar restrictions on the congressional redistricting process, plaintiffs' efforts to impose such restrictions through other Constitutional provisions must be rejected.

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which tend to be '"about the parties and their activities, businesses and properties'" and '"usually answer the questions of who did what, where, when, how, why, with what motive or intent.'" *Dashiell v. Meeks*, 396 Md. 149, 175 (2006) (citation omitted).

A. The "Compactness" Requirement of Article III, § 4 Was Intended to Curtail—But Not Eliminate—the Pursuit of Political Objectives in the State Legislative Redistricting Process.

The Maryland Constitution provides that "[e]ach legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population," and that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions" in creating such districts. Md. Const. art. III, § 4.

The Court of Appeals has held that the "compact[ness]" requirement contained in this provision "is intended to prevent political gerrymandering," *1984 Legislative Districting*, 299 Md. at 687, even if it was not intended to foreclose all consideration of political objectives in drawing district lines. The "compactness" requirement first appeared as an amendment to Article III, § 4, that was passed by the General Assembly in 1969 and ratified by the voters in 1970 (the "1970 Amendment") as part of a series of amendments to Article III. *See* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970 (proposing the repeal of Md. Const., art. III, §§ 2, 4, 5, and 6, and replacement with new §§ 2 through 6). Prior to this amendment, Article III, § 4 required districts to be "as near as may be, of equal population" and "always consist of contiguous territory," and only applied to the "existing Legislative Districts of the City of Baltimore." *See* Md. Const. art. III, § 4 (1969).[4] In

[4] Prior to 1966, Baltimore City was the only jurisdiction in the State in which Delegates were elected to represent discreet legislative districts; Delegates representing other counties were elected by the voters of those counties at large. See Md. Const. art. III, § 5 (1965) ("The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively . . . ."); 1965 Md. Laws special session, chs. 2, 3 (requiring for the first time that counties allocated more than 8 delegates be divided into districts). Thus, there was no reason for the

relevant part, the 1970 Amendment recharacterized the "contiguous territory" requirement as an "adjoining territory" requirement, retained the "equal population" principle, and added the "compact[ness]" requirement that appears in substantially the same form in Article III, § 4 today. *See* 1969 Md. Laws ch. 785. Additional amendments in 1972 added the current requirement that "due regard . . . be given to natural boundaries and the boundaries of political subdivisions." *See* 1972 Md. Laws ch. 363, ratified Nov. 7, 1972 (proposing the repeal of Md. Const., art. III, §§ 2, 3, 4, and 5, and replacement with new §§ 2 through 5).

Still, as interpreted by Maryland's highest Court, the new compactness requirement was not an absolute prohibition against "[o]ddly shaped or irregularly sized districts." *1984 Legislative Districting*, 299 Md. at 687. The Court of Appeals has held that such characteristics "of themselves do not . . . ordinarily constitute evidence of gerrymandering and noncompactness." *Id.* (holding that "irregularity of shape or size of a district is not a litmus test proving violation of the compactness requirement"). This is so because "in determining whether there has been compliance with the mandatory compactness requirement, due consideration must be afforded . . . to the 'mix' of constitutional and other factors which make some degree of noncompactness unavoidable," such as "concentration of people, geographic features, convenience of access, means of communication, and the several competing constitutional restraints, including contiguity and due regard for natural

"contiguity" or "equal population" requirements of pre-1966 article III, § 4, to apply to any "legislative district" outside of Baltimore City.

and political boundaries, as well as the predominant constitutional requirement that districts be comprised of substantially equal population." *In re Legislative Districting of State*, 370 Md. 312, 361 (2002) ("*2002 Legislative Districting*").

The Court of Appeals has also recognized that the redistricting process "is in part a political one," and thus the General Assembly may consider "broad political and narrow partisan" objectives in promulgating a legislative districting map under Article III, § 4. *2002 Legislative Districting*, 370 Md. at 322. These permissible objectives may even include "to help or injure incumbents or political parties, or to achieve other social or political objectives," which "will not affect [the] validity" of the plan "so long as the plan does not contravene the constitutional criteria." *Id.* Thus, when the General Assembly amended Article III, § 4 to add a compactness requirement for State legislative districts, it "intended to prevent political gerrymandering," at least insofar as any such "political gerrymandering" gave rise to State legislative districts that did not conform to constitutional "compactness" requirements. *1984 Legislative Districting*, 299 Md. at 687. But as set forth more fully below, the framers of this provision understood that political objectives would continue to play a role in the districting process within the guardrails established by Article III, § 4.

B. "Partisan Gerrymandering" Challenges Based on Other Provisions of the Maryland Constitution Are Unavailable As a Matter of Law.

The foregoing makes clear that the "compactness" requirement of article III, § 4, was intended to curtail the excessive pursuit of political objectives in drawing State legislative districts. But it also makes clear that the framers' establishment of a prohibition

against such practices to a certain extent—*i.e.*, the extent to which such practices give rise to districts that are not "contiguous" or "compact," or for which "due regard" has not "been given to natural boundaries and the boundaries of political subdivisions" in their creation—means that some degree of political considerations are permissible in the districting context. For this reason, any claim that a legislative district constitutes an unlawful "partisan gerrymander" must establish that it violates the requirements of Article III, § 4, and not some other provision of the Constitution or Declaration of Rights that does not reflect the balance struck by the framers in prohibiting some, but not all, efforts to achieve political goals in redistricting.

The Court of Appeals has recognized that the Constitution "commits to the political branches, the Governor and the State Legislature, the task of formulating a legislative apportionment plan." *In re 2012 Legislative Districting ("2012 Legislative Districting")*, 436 Md. 121, 150 (2012). Because of this constitutional commitment, "political officials may legally pursue a wide variety of political aims in creating a legislative re-apportionment plan," including "the preservation of communities of interest, promotion of regionalism, and"—importantly—"helping or injuring incumbents or political parties." *Id.* (citing *2002 Legislative Districting*, 370 Md. at 321-22). As a result, "the political branches are accorded, by law, a great degree of discretion to pursue political considerations in formulating a redistricting plan." *2012 Legislative Districting*, 436 Md. at 150. At the same time, "the political branches . . . do not have the authority to contravene constitutional requirements," *id.*, and therein lies the balance struck by the framers: the pursuit of political objectives is permissible (as to the State legislative map), provided the

districts conform to the contiguity, compactness, and due regard requirements of Article III, § 4.

This interpretation of Article III, § 4 is supported by the proceedings of the 1967 Constitutional Convention, which would have imposed "compactness" and "contiguity" requirements (had the proposed Constitution not been rejected by the voters at referendum) similar to what was ultimately added to Article III, § 4 two years later. In presenting the portions of the draft Constitution dealing with legislative redistricting to the Convention, Delegate Francis X. Gallagher explained the basis for including requirements that legislative districts be compact, consist of adjoining territory, and follow natural and political subdivision boundaries where practical. As he put it, these requirements were "designed to eliminate *to some degree* the element of gerrymandering." I *Constitutional Convention of 1967: Debates* 1542 (PD882115, Mar. 9, 1988) (emphasis added), in *Maryland State Archives*, Vol. 104.[5] However, he also noted that the Committee "did not follow the example of New York, which had a specific Eleventh Commandment, which was, 'Thou Shalt Not Gerrymander,'" because "[w]e thought that was perhaps carrying do-good too far; that is, to eliminate the practice." *Id.* Critically, the Committee proposed—and the Convention ultimately adopted—a proposed constitution that imposed compactness, contiguity, and political and natural boundary restrictions on both State legislative and congressional districts, but did so with the understanding *and intent* that this

[5] The historical constitutional materials sourced from the *Maryland State Archives* and cited herein are available at the following website: https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/conventions.html.

would not "eliminate the practice" of pursuing political goals in the districting process. *See* Proposed Const. of 1967, § 3.04, *in Maryland State Archives*, Vol. 605, at 9. Though the proposed Constitution ultimately failed at referendum, the compactness, contiguity, and political and natural boundary restrictions survived as amendments to the existing Constitution that were ratified in 1970 and 1972, without any accompanying effort to "eliminate the practice" of practicing politics in the districting process.[6]

An interpretation of the Maryland Constitution that would allow "partisan gerrymandering" challenges to proceed under *other* constitutional provisions would upset the balance embodied by Article III, § 4. *Cf. Lamone v. Capozzi*, 396 Md. 53 (2006) (rejecting claim that Article 7 of the Declaration of Rights required upholding early voting statute because it made voting "more convenient and easier," where other provisions of the Constitution expressly foreclosed early voting). The text and history of Article III, § 4 make clear that the framers intended to situate the General Assembly's duties regarding the districting process in this provision, to the exclusion of other duties under the Constitution or Declaration of Rights that might be construed to upset the careful balance struck by the framers to restrict some, but not all, considerations of politics in the districting process. Thus, under the Maryland Constitution, a claim that a particular districting process was characterized by too much politics will not lie outside the boundaries of Article III, § 4.

[6] Moreover, the amendments imposed these restrictions *only* as to State legislative districts. *See infra* § II.C.

C. Because Article III, § 4 Does Not Apply to Congressional Redistricting, the Maryland Constitution Does Not Prohibit the Pursuit of Political Objectives in the Creation of Congressional Districts.

By expressly limiting the requirements of Article III, § 4 to State legislative districts, the framers of the 1969 amendments foreclosed challenges to congressional districts premised on the theory that partisan considerations unlawfully infected the districting process, whether under Article III, § 4 or any other provision of the Maryland Constitution or Declaration of Rights.

When the drafters of the amendments to Article III, § 4 spoke with specificity as to the kinds of legislative districts to which that section would apply, they meant to exclude all others. *See Schisler v. State*, 394 Md. 519, 594-95 (2006) (holding that "the creation of the power" to remove certain officers "in the Governor with no mention of the Legislature, acts under the maxim, '*expressio unius est exclusio alterius*,' to exclude the Legislature from sharing the removal power" as to those officers). Plainly, "[i]f the framers desired" to extend the requirements of article III, § 4 to congressional districts, "they knew how to do so." *Id.* Indeed, in certain unrelated instances the text of the Maryland Constitution *does* refer to Congress or congressional elections, and it does so expressly, to leave no room for misinterpretation. *See, e.g.*, Md. Const. art. I, § 6; art. III, § 10; art. IV, § 5; art. XI-A, § 1; art. XVII, § 1.

For this very reason, in *Olson v. O'Malley*, No. CIV. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012), the United States District Court for the District of Maryland rejected a challenge to Maryland's congressional map asserted under Article III, § 4. *Id.*

at *2-3. In reaching this conclusion, the court observed that "Article III governs the Legislative Department of Maryland," and references the federal government only once, in § 10, when it prohibits any "member of Congress, or person holding any . . . office under the United States," from being "eligible as a Senator, or Delegate." *Id.* at *2; *see generally* Md. Const. art. III. The court also observed that Article III, § 4 was "most often read together with §§ 2, 3, and 5, of Article III," which "strongly suggests that § 4—like §§ 2, 3, and 5—does not govern congressional redistricting." *Id.* at *3.[7] Indeed, §§ 2, 3, 4, and 5 were repealed, amended, and reenacted together in 1972 by the General Assembly. *See* 1972 Md. Laws ch. 363, ratified Nov. 7, 1972. Finally, the court noted that "the Court of Appeals of Maryland uses the term 'legislative district' to refer to state legislative districts and not congressional districts." *Olson*, 2012 WL 764421, at *3 (citing *2002 Legislative Districting*, 370 Md. at 225, and *1984 Legislative Districting*, 299 Md. at 673); *see also Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 552 (D. Md. 2002) (holding that "while th[]e requirements [of article III, § 4] apply to reapportionment of districts for the Maryland General Assembly, Maryland law does not require that those criteria be used in Congressional redistricting"), *aff'd sub nom. Duckworth v. State Admin. Bd. of Election L.*, 332 F.3d 769 (4th Cir. 2003).

[7] Section 2 sets forth the number of Senators and Delegates in the General Assembly. *See* Md. Const. art. III, § 2. Section 3 directs that Senators and Delegates are to be elected from legislative districts, and gives the number of Senators and Delegates to be elected from each district. *Id.* art. III, § 3. Section 5 prescribes the process for promulgating a "a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates," and requires the plan to "conform to Sections 2, 3 and 4 of this Article." *Id.* art. III, § 5.

The historical context confirms this interpretation of Article III, § 4. In 1964, the Supreme Court held Maryland's county-based system of legislative apportionment to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, a decision that necessitated reform of the Maryland Constitution. *See Maryland Comm. For Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964). But rather than correct the specific constitutional infirmity via the amendment process, a constitutional convention was convened so that a "complete revision of the Constitution of Maryland" could be undertaken. Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 Md. L. Rev. 528, 531 (1999). Notably, the Constitutional Convention Commission—which was established by Governor J. Millard Tawes in 1965 to "study the need for [a Constitutional] Convention and to prepare necessary recommendations," *Report of the Constitutional Convention Commission* ix (State of Md. 1967) ("*1967 Commission Report*")—proposed a draft Constitution for consideration that established a process for both "congressional districting and legislative districting and apportionment." *Id.* at 128 (proposed § 3.03 of the draft Constitution). But the draft would have imposed restrictions on how those districts should be drawn only as to the State's legislative districts. *See id.* at 127 (proposed § 3.03 of the draft Constitution establishing "compact[ness]" and "adjoining territory" requirements for the "districts for the election of members of the Senate . . . [and] the House of Delegates"). During debates at the 1967 Constitutional Convention, Delegate Gallagher explained that "Congress has from time to time decided for itself what the test will be for proper congressional redistricting," and thus the Commission "felt under all the circumstances that it was best

not to get into" the issue in the proposed Constitution. 12 *Constitutional Convention of 1967: Official Transcript of Proceedings* 6279-80 (noting that "the job of drawing the districts is that of the [State] legislature and will remain that of the legislature, but Congress does have the power, when it decides to preempt the field, to tell the legislatures of the States how they shall do the redistricting of the Congressional districts"), in *Maryland State Archives*, Vol. 104.

The Convention rejected this approach and instead produced a draft Constitution that addressed the use of political considerations in redistricting in *both* the State legislative and congressional context. The final section 3.04 imposed "compact[ness]," "adjoining territory," and "due regard" for political and geographical boundaries for State legislative districts, *see supra* § II.B, while section 3.07 of the draft Constitution imposed the same requirements on the congressional districting process, *see* Proposed Const. of 1967, § 3.07, *in Maryland State Archives*, Vol. 605, at 10. The draft Constitution further prescribed separate processes for conducting redistricting for each. *See id.* §§ 3.05 (providing for establishment of legislative redistricting plan), 3.08 (providing for establishment of "congressional redistricting plan"). Thus, when the drafters of the proposed constitution intended to impose restrictions on both the State legislative *and* congressional redistricting process, they knew well how to make their intent clear—even if, as to the 1967 Constitution, the voters ultimately rejected those efforts.

In addition, around this same time the Supreme Court had begun to address constitutional issues concerning redistricting in a variety of contexts, including population equality, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Maryland Comm. For Fair*

Representation, 377 U.S. at 674; and racial discrimination, *see, e.g.*, *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). But federal statutory requirements that congressional districts be "contiguous" and "compact" had lapsed by this time. *See Wood v. Broom*, 287 U.S. 1, 7 (1932) (observing that while 2 U.S.C § 3 had previously incorporated contiguity and compactness requirements for congressional districts, "[i]t was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under" legislation passed in 1929 and thereafter). And in 1966, the Supreme Court affirmed the dismissal of an equal protection challenge to a partisan gerrymander under the Fourteenth Amendment, with Justice Harlan's concurrence explaining that the Court's ruling stood for the "eminently correct principle[]" that "partisan gerrymandering" may not "be subject to federal constitutional attack under the Fourteenth Amendment." *WMCA, Inc. v. Lomenzo*, 382 U.S. 4, 5-6 (1965) (Harlan, J., concurring).[8]

Thus, by 1965 the Supreme Court had made clear that efforts to curb the pursuit of political objectives in drawing congressional districts had to be undertaken either at the congressional or the State level.[9] By then several States had, indeed, begun to do so by

[8] The Court would eventually abrogate *WMCA*'s ruling in *Davis v Bandemer*, 478 U.S. 109, 143 (1986), before coming back, full circle, to the conclusion that such claims are nonjusticiable in *Rucho*, 139 S. Ct. at 2508.

[9] *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 580-81 (1964) (holding that States were free to draw legislative districts on the basis of political boundaries or other considerations, including to "deter the possibilities of gerrymandering," so long as "the basic standard of equality of population among districts is maintained"); *Swann v. Adams*, 385 U.S. 440, 443-44 (1967) (noting that "variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the

incorporating compactness and contiguity requirements for *congressional* redistricting into their respective State constitutions. *See, e.g.*, Mo. Const. of 1945, art. III, § 45 (requiring congressional districts to be "composed of contiguous territory as compact and as nearly equal in population as may be"). Nevertheless, against this backdrop, and despite the inclusion in the proposed 1967 Constitution of such restrictions on both the State legislative *and* congressional redistricting processes (which the voters of Maryland rejected), the General Assembly expressly limited the sweep of Article III, § 4's new compactness and contiguity requirements to State legislative districts when it amended that provision in 1969.

As set forth above, the Constitution channels duties concerning the use of politics in drawing districts into Article III, § 4. It also excludes congressional districting from the requirements of that provision. As a result, the Maryland Constitution does not purport to restrain the pursuit of political objectives in the congressional districting process. All of Plaintiffs' claims should be dismissed.

III. EVEN IF PLAINTIFFS' CLAIMS WERE NOT FORECLOSED BY ARTICLE III, § 4, PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS TO ANY OF THEIR CLAIMS.

As set forth above, all of Plaintiffs' constitutional challenges to the 2021 Plan are foreclosed by Article III, § 4. But even if that were not the case, plaintiffs' claims under Article I, § 7 of the Constitution and Articles 7, 24, and 40 of the Declaration of Rights all fail as a matter of law.

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maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines").

A. Article 7 of the Declaration of Rights Does Not Protect Any Rights Associated with Plaintiffs' Challenge to the 2021 Plan.

Article 7 of the Declaration of Rights provides "That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." Md. Decl. of Rights art. 7. Plaintiffs contend that the 2021 Plan violates the "free and frequent" clause of this provision because it "was designed specifically for partisan purposes and with an intent to preserve and expand the political power of one party." *See* Compl ¶¶ 63a-e. Plaintiffs also allege that the 2021 Plan violates their "right of suffrage" because it amounts to the "cherry-pick[ing] [of] voters to ensure the election of congressional candidates from one political party." Compl. ¶ 64.

These claims fail for two reasons. First, the plain text, context, and history of Article 7 establish that it does not extend rights *solely* related to the exercise of the franchise in congressional elections, as Plaintiffs seek to deploy it here. Second, even if Article 7 could be construed to apply to plaintiffs' challenge, plaintiffs' have not pled a violation of Article 7 as a matter of law, because the rights they seek to enforce—the right not to be placed into districts for partisan purposes—are not of the sort that Article 7 has been held to protect.

1. The "Free and Frequent Elections" Clause in Article 7 of the Declaration of Rights Does Not Extend to Congressional Elections.

Plaintiffs' claim under Article 7 of the Declaration of Rights should be dismissed because that provision cannot be interpreted to extend to congressional elections, and therefore cannot serve as a basis for challenging a congressional districting plan.

Article 7 of the Declaration of Rights provides "That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." Md. Decl. of Rights art. 7. The Court of Appeals has not had occasion to determine whether Article 7 is applicable to congressional elections.[10] As a textual matter,

[10] It is true that the Court has held that "this provision is 'even more protective of rights of political participation than the provisions of the federal Constitution.'" Compl. ¶ 61 (quoting *Maryland Green Party v. Maryland Bd. of Elections*, 377 Md. 127, 150 (2003)). But the contexts in which it has adjudicated Article 7 claims presented challenges to statutes that applied equally to both State and federal elections in Maryland, *see, e.g.*, *Maryland Green Party*, 377 Md. at 140, 153 (adjudicating challenge to requirements that nominating petition signers must be "active" voters to be counted, and that non-principal party candidates must be nominated by a petition, that applied equally to State or federal contest nominations); *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30 (2013) (evaluating the right of 17-year-olds to vote in primary elections if they will have turned 18 by the time of the general election, as to State and federal contests equally); *Nader for President 2004 v. Maryland State Bd. Of Elections*, 399 Md. 681 (2007) (adjudicating challenge to statute requiring that nominating petition signers must sign petitions in their county of registration for their signatures to be counted, that applied equally to State or federal contest nominations); *Jackson v. Norris*, 173 Md. 579, 604 (1937) (concluding that that Article 7 guaranteed the right to cast a write-in vote in federal, state, and municipal elections of Baltimore City).

however, it is clear that the right to "free and frequent elections" and the "right of suffrage" articulated by this provision must be read with reference to State and not federal elections.

For one, the reference to the capitalized term "Legislature" in the opening clause of Article 7 can only refer to the *State* legislature. It is well settled that "[c]onstitutions are not to be interpreted according to the words used in particular clauses"; rather, "[t]he whole must be considered." *Roskelly v. Lamone*, 396 Md. 27, 49 (2006). Here, the numerous references to the "Legislature" in the Declaration of Rights and elsewhere in the Constitution make clear that it is the State legislature that is being referenced. *See, e.g.*, Md. Decl. of Rights art. 11 ("That Annapolis be the place of meeting of the Legislature . . . ."); Md. Const. art. II, § 7 ("The Legislature may provide by law . . . for the impeachment of the Governor and Lieutenant Governor."); Md. Const. art. III, § 1 ("The Legislature shall consist of two distinct branches: a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland."). By contrast, when the framers intended to refer to the United States Congress, or to both the State legislature and the United States Congress, they did so expressly. *See, e.g.*, Md. Const. art. I, § 6 (prohibiting persons who give or accept a bribe to influence the vote of any voter for "elector of President, and Vice President of the United States, or Representative in Congress or for any office of profit or trust, created by the Constitution or Laws of this State," from being qualified to hold office or vote at any election thereafter); Md. Const. art. III, § 10 ("No member of Congress . . . shall be eligible as a Senator, or Delegate; and if any persona shall after his election as Senator, or Delegate, be elected to Congress . . . , his acceptance thereof, shall vacate his seat.")

Second, the reference to "free and frequent elections," when read in historical context, can only be understood to refer to State legislative elections. Article 7 has its origins in the Constitution of 1776, where it appeared as Article 5 of the Declaration of Rights in substantially the same form.[11] That same Constitution provided that the delegates to what was then the Continental Congress would be elected "by a joint ballot of both houses of assembly," and not by the people at election.[12] Md. Const. of 1776, art. 27. Moreover, the reference to "frequent" elections provides further evidence that Article 7 was not intended to encompass congressional elections; by 1787, the United States Constitution had specified the frequency of congressional elections. *See* U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."). The exhortation that elections shall be "free and frequent" would not have meaning if it concerned elections for which the State is powerless to control the frequency.

Debates around the Constitution of 1851 lend further support. At the Convention of 1850, delegates debated what the appropriate "frequency" of State legislative elections should be. Delegate Francis P. Phelps argued that then-Article 5's reference to "frequent" elections was a "relative term[] . . . not intended to designate any precise length of time,"

[11] Article 5 of the Declaration of Rights of 1776 stated, in full: "That the right in the people to participate in the legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent, and every man having property in, a common interest with, and attachment to the community, ought to have a right of suffrage."

[12] Under the 1776 Constitution, the Governor was also elected "by the joint ballot of both houses." Md. Const. of 1776, art. 25.

since the Governor, Registers of Wills, and judges all served for different term lengths before standing for reelection. I *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution* 246-47 (William M'Neir 1851), in *Maryland State Archives*, Vol. 101. But Delegate George Wells responded that Delegate Phelps "had mis-read the old bill of rights, where it is said in reference to the legislature only 'that elections should be free and frequent.'" *Id.* at 254.

Accordingly, whatever the scope of the rights guaranteed by Article 7, they cannot be read to apply in the circumstances presented here, where only congressional elections are at issue.

2. Article 7 Protects Rights Related to Voter Eligibility and Voter Choice, Not Election Outcomes.

Even if Article 7 could be construed to apply in circumstances where only congressional elections are involved, its guarantee does not encompass rights that are implicated by Plaintiffs' challenge premised on the use of partisan considerations in drawing district lines. At bottom, plaintiffs' complaint is that the 2021 Plan makes it less likely that they will be able not simply to vote for but to *elect* their preferred congressional candidates. *See, e.g.*, Complaint ¶ 1 (faulting the 2021 Plan for "preventing Republican voters, through unconstitutional means, from *electing* their preferred representatives for Congress")(emphasis added). Article 7 has never been interpreted to guarantee the kind of outcome-based "rights" demanded by Plaintiffs in this case.

The Court of Appeals has held that Article 7 "embodies the same principles" represented in Article I, § 1 of the Constitution. *Snyder*, 435 Md. at 60; *see* Dan Friedman,

The Maryland State Constitution: A Reference Guide 50 (Praeger 2006) (noting that Article 7 of the Declaration of Rights "describes the policy that animates" Article I of the Constitution) ("*The Maryland State Constitution*"). Article I, § 1 provides, in relevant part, that "[a]ll elections shall be by ballot," and that "every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time of the closing of registration next preceding the election, shall be entitled to vote." Art. I, § 1. This provision was promulgated as part of the 1851 Constitution "as a 'democratizing reform' to preserve the secrecy and independence of voters from the State's aristocratic classes who dominated Maryland politics at the time." *Snyder*, 435 Md. at 60 (quoting Friedman, *The Maryland State Constitution*, at 50-51). Thus, as Article I, § 1 makes clear, the rights embodied by Article 7 relate to the right of citizens to participate in elections.

In this regard, it is noteworthy that the draft Constitution of 1967 eliminated the "free and frequent" and "right of suffrage" provisions from the Declaration of Rights altogether. *See 1967 Commission Report* at 71-72. Instead, the members of the Constitutional Convention Commission sought to whittle down the Declaration of Rights so that it "state[d] with all possible clarity and simplicity those essential rights which the people wish to hold free from governmental interference." *Id.* at 19. Accordingly, Article 7 (along with Articles 1, 4, and 6) was to be subsumed into a broad guarantee that "All political power originates in the people and all government is instituted for their liberty, security, benefit and protection." *Id.* at 99 (draft Commission Constitution of 1967, §1.01). However, a minority of the Commission members would have preferred language that "preserve[d] as much as possible of the traditional language and phrasing" that appeared

in the original Declaration of Rights of 1776. *Id.* The minority alternative, which all agreed presented differences "of style rather than of substance," *id.* at 100, would have restated Article 7 as follows: "The right of the People to participate in the Government is the best security of liberty and the foundation of all free Government." *Id.* at 99.[13] This history confirms the understanding of the framers of the draft 1967 convention that Article 7's guarantee of "free and frequent" elections conferred a right to participate in elections, not a right to obtain any particular outcome or to reside in a legislative district of any particular shape, size, or make-up.

The Court of Appeals' decisions interpreting Article 7 are consistent with this historical analysis. In *Snyder*, the Court held that 17-year-olds who will have turned 18 by the close of voter registration preceding the general election were entitled to vote in the antecedent primary election under the principles of Article I, § 1 of the Constitution and Article 7 of the Declaration of Rights. 435 Md. 30 at 60. In *Maryland Green Party* and *Nader for President 2004*, the Court considered the eligibility of certain voters' petition signatures to be counted in the face of statutes that required the exclusion of signatures by voters deemed "inactive" (though eligible), *see Maryland Green Party*, 377 Md. at 139-53, and by voters who signed a petition in a county other than that of their registration, *see*

[13] The minority version of section 1.01 contained several other statements that more closely tracked the language of Articles 1, 4 and 6 of the Declaration of Rights. *See 1967 Commission Report* at 99; *compare* Md. Decl. of Rights arts. 1, 4, 6. Ultimately, the Constitution that was approved by the Convention incorporated what had been the draft section 1.01 into the Constitution's preamble. *See* Proposed Const. of 1967 pmbl, *in Maryland State Archives*, Vol. 605, *supra*, at 1.

Nader for President 2004, 399 Md. at 683-84. And in *Jackson*, the Court declared void a contract for the procurement of voting machines for use in Baltimore City because the machines did not allow voters to cast a "write in" vote for an unlisted candidate; the Court reasoned that the Maryland Constitution guaranteed that right because it had been available "[b]efore and at the time of the adoption of the Constitution of 1867." 173 Md. at 594, 598.

The first step in any "analysis of a constitutional challenge" in the elections context "is to determine, in a realistic light, the extent and nature of the burden imposed on voters by the challenged enactments." *Burruss v. Board of Cty. Commissioners of Frederick Cty.*, 427 Md. 231, 264 (2012). But the Court of Appeals' precedents confirm that the rights protected by Article 7 relate to the rights of eligible citizens to participate directly in the electoral process—rights that are not implicated by the boundaries of a legislative district in which a voter finds herself. In other words, plaintiffs' rights to "free and frequent elections" and to "suffrage" under Article 7 are not burdened by the 2021 Plan. *Suessman v. Lamone*, 383 Md. 697, 731-33 (2004) (construing Md. Const. art. 1, § 1 and Articles 7 and 24 of the Declaration of Rights and holding that a prohibition against unaffiliated voters voting in party primary elections did not implicate "fundamental right" to vote). Plaintiffs' claims under Article 7 should be rejected.

B. Article I, § 7 Is a Mandate to the General Assembly to Act to Protect Election Administration, Not a Limitation On the General Assembly's Authority When It Engages in Such Activities.

The Court should similarly dismiss Plaintiffs' claims under Article I, § 7, which directs the General Assembly to "pass Laws necessary for the preservation of the purity of

Elections." This provision and its interpretation have evolved since it first appeared in the Constitution of 1951. But to this day, Article I, § 7 has only ever been interpreted to constitute an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud. It has never been interpreted as a restraint on the General Assembly's authority to act, as the Plaintiffs would ask this Court to do in this case. Because Plaintiffs' claims—if accepted—would take article I, § 7 far afield from this framework, they should be rejected as a matter of law.

The original incarnation of this provision was found in Article III of the Constitution of 1851, and did not even refer to the preservation of the "purity" of elections. Instead, it provided that the General Assembly "shall have full power to exclude form the privilege of voting at elections, or of holding any civil or military office in this State, any person who may thereafter be convicted of perjury, bribery, or other felony, unless such person shall have been pardoned by the Executive." Md. Const. of 1851, art. III, § 33; *see* Friedman, *The Maryland State Constitution*, at 55. Thus, the provision authorized the General Assembly—in addition to exclusions already required by the Constitution[14]—to identify additional crimes that would make a citizen ineligible to participate in the franchise.

[14] Article 1, §§ 2 and 5 of the Constitution of 1851 specifically excluded persons who were convicted of providing a bribe or reward to any other person to induce a voting decision, or who were "convicted of larceny or other infamous crime" from being entitled to vote, respectively.

The 1864 Constitution introduced the language directing the General Assembly to preserve the "purity of elections," Md. Const. of 1864 art. III, § 41, and coupled that directive with the new requirement elsewhere in the Constitution to establish a uniform "registration of the names of voters in th[e] State," *id.* art. I, § 2 (requiring the General Assembly to "provide by law for a uniform registration of the names of voters in this State"). Thus, the new article III, § 41 of the Constitution of 1864 directed the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient." It also removed the 1851 Constitution's provision authorizing the General Assembly, to expand the list of crimes that would make a citizen ineligible to vote, in favor of a directive to "make effective the provisions of the Constitution disenfranchising certain persons or disqualifying them from holding office" found elsewhere in the Constitution. Md. Const. of 1864 art. III, § 41.[15] In this formulation, the framers linked "preservation of purity" to registering voters so that only those eligible were able to vote, and prohibiting those who were proscribed from voting from doing so. And the debates on the proposed constitution confirm this reading, as references to the voter registration requirement and exclusions from the franchise of ineligible individuals were frequently described as supporting the "purity" of the ballot. *See* I *The Debates of the Constitutional Convention of the State of Maryland, Assembled in*

[15] The 1864 Constitution expanded the categories of persons ineligible to vote to include persons who had been in "armed hostility to the United States" or given aid or comfort to anyone who had been so engaged, or served in the Confederate Army, or refused to swear an oath disclaiming having engaged in any such activities upon offering themselves to vote. *See* Md. Const. of 1864 art. I, § 4.

the City of Annapolis 813, 1381, 1745, 1754 (Richard P. Bayly 1864), in *Maryland State Archives*, Vol. 102. For example, Delegate Henry Stockbridge offered an amendment to the provision, which was accepted, that changed the clause "*or* by such other means" to "*and* by such other means," in order to underscore that the registration of voters was "the only mode of preserving the purity of elections." *Id.* at 813. Elsewhere, Delegate Stockbridge described the provision which became Article I, § 6 in the 1864 Constitution that "provide[d] a penalty against any bribe, present, reward or promise" as a "guaranty for the purity of elections." *Id.* at 1381. And both Delegate John Smith and William Daniel spoke of "contaminat[ing]" or "corrupt[ing]" the "purity of the ballot-box" by allowing voting by those who sympathized with or actively supported the Confederacy. *Id.* at 1745, 1754.

The 1867 Constitution simplified the "purity" clause, by removing any reference to the registration of voters, or to the charge to "make effective the provisions of the Constitution disenfranchising" certain persons.[16] Instead, the new provision read as it does

[16] Elsewhere, the Constitution of 1867 eliminated the Constitution of 1864's provisions prohibiting voting by members of the Confederacy or those who aided it. . Otherwise, the 1867 version retained the requirement that the State establish a registry of voters, as well as the prohibitions of voting by persons convicted of "larceny, or other infamous crime," and of bribery to induce a vote. *See* Md. Const. art. I, §§ 2, 3, 5 (1867). Eventually, these prohibitions were combined into a single provision, and the General Assembly was given authority to determine that persons convicted would be barred from the franchise. *See* 1972 Md. Laws ch. 378. The provision is currently found in Article I, § 4 of the Constitution.

today: "The General Assembly shall pass Laws necessary for the preservation of the purity of Elections." Md. Const., art. III, § 42 (1867) (now art. I, § 7, by amendment).[17]

The Court of Appeals has rarely been called on to interpret what is now article I, § 7. But when it has, it has made clear that article I, § 7 does not constitute either a restriction or an independent grant of authority, but rather "'a mandate to execute a power implicitly assumed to exist independently of the mandate.'" 61 Md. Op. Att'y Gen. 254, 256 (1976) (quoting *Hennegan v. Geartner*, 186 Md. 551, 555 (1945)). In other words, the General Assembly's authority to pass laws to "preserve the purity of elections" exists independently of this provision. *See Kenneweg v. Allegany Cty. Comm'rs*, 102 Md. 119 (1905) ("The power to legislate in regard to elections—primary or general—if unrestrained by the Constitution itself, is inherent in the General Assembly, and the provision just cited, instead of conferring the power, is a mandate to execute a power implicitly assumed to exist independently of the mandate."). Thus, article I, § 7 must be read as imposing an affirmative "*duty* upon the legislature to pass such laws," *Maryland Constitutional Law*, Alfred S. Niles (Hepbron & Haydon 1915), rather than a restriction on the General Assembly's authority when it does so act.

Consistent with this interpretation, the Court of Appeals has held that the General Assembly's "creat[ion of] boards of canvassers" while "giv[ing] them explicit directions how to collect and count votes, and carefully limit[ing] their authority to the performance

[17] In 1977, this provision was moved and renumbered by amendment to Article I, § 7 "as part of an overall 'clean up' of the State Constitution." Friedman, *The Maryland State Constitution*, at 55 & n.32 (citing 1977 Md. Laws ch. 681, ratified Nov. 7, 1978).

of that function," were examples of legislation fulfilling this duty. *Lamb v. Hammond*, 308 Md. 286, 303 (1987). Similarly, the Court has held that the promulgation of election-related anti-corruption statutes serve the purposes of article I, § 7, *see Smith v. Higinbothom*, 187 Md. 115, 128-34 (1946), and that the express directive to the General Assembly to pass such laws signified an exclusive grant that preempted local legislative efforts in this space, *see, e.g.*, *County Council for Montgomery Cty. v. Montgomery Ass'n, Inc.*, 274 Md. 52, 60-65 (1975) (holding that the "purity of elections" clause, among others, "demonstrate[s] that the General Assembly is obligated to enact . . . a comprehensive plan for the conduct of elections in Maryland," thereby preempting local legislative efforts to regulate campaign finance activities). Thus, the Court has interpreted article I, § 7, to require the General Assembly to prescribe the mechanics of elections, and to embody those mechanics with protections against corruption or fraud.

What the Court of Appeals has *never* done is what Plaintiffs would have this Court do: interpret article I, § 7 as a *restriction* on the General Assembly's authority, rather than a mandate to act, and find the 2021 Plan to be an unconstitutional exercise of authority that contravenes the Constitution's directive to the General Assembly to "preserve the purity of elections." Nothing in the legislative history of this provision or the case law interpreting it supports the interpretation advanced by Plaintiffs. Their claims under article I, § 7 should be dismissed.

C. Plaintiffs' Claims under Articles 24 and 40 Should Be Dismissed for the Same Reasons that the Supreme Court Has Rejected Similar Challenges Under Analogous Provisions of the Federal Constitution.

Finally, Plaintiffs' claims under Articles 24 and 40 of the Declaration of Rights should be dismissed, because they state claims that the Supreme Court's most recent precedent has rejected as nonjusticiable political questions under the analogous provisions of the United States Constitution. To the extent the Maryland Court of Appeals has addressed similar claims, whether under the federal Constitution or the Maryland Declaration of Rights, it has consistently followed Supreme Court guidance. *See Legislative Redistricting Cases*, 331 Md. 574, 610-11 (1993) (applying as dispositive of petitioners' partisan gerrymandering claims the analysis in *Davis v. Bandemer,* 478 U.S. at 109, and noting that "[i]n *Davis,* only six justices found the question of partisan political gerrymandering to represent a justiciable controversy"); *2012 Legislative Districting*, 436 Md. at 182 (holding that in considering and rejecting "the political gerrymander iteration" of petitioners' "one person, one vote" claim brought under both the federal Constitution and Article 24 of the Declaration of Rights, the Special Master "applied, and properly so, the Supreme Court's political gerrymander cases"); *see* Report of the Special Master, *In re Legislative Districting*, Misc. Nos. 1, 2, 3, 4, 5, 9 (Sept. 2012) (Wilner, J.) at 49-50 & n.20, available at https://www.courts.state.md.us/coappeals/highlightedcases (discussing the Supreme Court's uncertainty about the justiciability of partisan gerrymandering claims as reflected in *Davis*, 478 U.S. at 109, *Vieth*, 541 U.S. at 267, and *League of United Latin American*

Citizens v. Perry, 548 U.S. 399 (2006), and surmising "[t]he net effect seems to be that political gerrymandering remains, in theory, a justiciable issue, but no clear standards exist for adjudicating that issue, and, if history is a guide, no judicial relief on that ground is likely."). Given this Court of Appeals precedent, plaintiffs' challenge cannot survive the Supreme Court's categorical rejection of claims alleging the improper resort to political considerations in drawing district lines.

In 2019, the Supreme Court considered similar challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment attacking the congressional maps adopted by the States of North Carolina and Maryland. *See Rucho*, 139 S. Ct. at 2484. For years the Court had entertained such claims, but had failed to "find a justiciable standard" for resolving them. *Id.* at 2498; *see id.* at 2494 (noting that "[a]mong the political question cases" that are nonjusticiable and thus beyond the jurisdiction of the federal courts "are those that lack 'judicially discoverable and manageable standards for resolving [them].'" (quoting *Baker*, 369 U.S. at 217)). The Court's efforts to discover the elusive standard led only to frustration due to an insoluble problem: "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.'" *Rucho*, 139 S. Ct. at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)). To hold that legislators "cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* Accordingly, the "central problem" the Supreme Court has faced "is not determining whether a jurisdiction has engaged in partisan

gerrymandering," but rather "determining when political gerrymandering has gone too far." *Rucho*, 139 S. Ct. at 2497 (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)).

In *Rucho*, the Court finally resolved this question by concluding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506-07. The Court rejected "proportionality" as a workable standard—that is, that the legislature in drawing district lines should come "as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," *id.* at 2499 (quoting *Davis*, 478 U.S. at 130)—because it was evident that the Founders did not believe proportionality was required. The Court then rejected "fairness" as a workable standard, because it was not clear whether "fairness" should mean maximizing competitive contests, allocating "safe" districts to the parties in proportion to their respective levels of statewide support, or adherence to "traditional districting criteria" such as maintaining political subdivisions and keeping communities of interest together—all of which would "unavoidably have significant political effect[s]" of their own. *Id.* at 2499-2501. The Court went on to conclude that its one-person, one-vote and racial gerrymandering jurisprudence could not be imported into the partisan gerrymandering context, because the former "is relatively easy to administer as a matter of math" (in stark contrast to the inherent complexity of the partisan gerrymandering conundrum), *id.* at 2501, while the latter looks to whether *any* racial gerrymandering occurred and seeks to eliminate it entirely, whereas analogous eradication of partisanship from the districting process would be impossible due to both practical and constitutional

constraints, *id.* at 2502 ("A partisan gerrymandering claim cannot ask for the elimination of partisanship.").

In evaluating the claim specifically under the Equal Protection Clause, the Court concluded that the district court's three-prong test pursuant to which it had found a constitutional violation was unworkable. *See Rucho*, 139 S. Ct. at 2502-04. The first prong asked whether the map-drawer's "predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.'" *Id.* at 2502. But this first prong foundered, according to the Supreme Court, because "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'" *Id.* at 2502-03; *accord 2002 Legislative Districting*, 370 Md. at 322 (noting that redistricting is "in part . . . political" and acknowledging that the General Assembly may constitutionally consider "broad political and narrow partisan" objectives in promulgating a legislative districting map). Meanwhile, the second prong "required a showing that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." *Id.* at 2502. But this prong would require courts to "forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be)," when history has shown that picking electoral winners in future contests (to say nothing of the margins of victory) is

fraught with uncertainty. *Id.* at 2503. And finally, the third prong would have shifted the burden to defendants to show that any discriminatory effects were due to a "legitimate districting objective," but given that the first prong would have already required a finding that the intent to create a partisan advantage predominated, it was not clear to the Court why the question was even being asked. *Id.* at 2504.

The Court also rejected the tests devised by the lower courts for evaluating the plaintiffs' First Amendment claims. *See Rucho*, 139 S. Ct. at 2504-05. Here, too, the lower courts settled on three-part tests that demanded "[(i)] proof of intent to burden individuals based on their voting history or party affiliation; [ii] an actual burden on political speech or associational rights; and [iii] a causal link between the invidious intent and actual burden." *Id.* at 2504. But the Supreme Court observed that "there [we]re no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue." *Id.* And if any "intent" to burden individuals based on their voting history or party affiliation were sufficient to meet the first prong, then "any level of partisanship in districting would constitute an infringement of their First Amendment rights," in contravention of the Court's precedents. *Id.* The "actual burden" prong, too, was problematic, because the "slight anecdotal evidence" found to be sufficient by the lower courts raised questions about how significant the burden actually was. *See id.*

If applicable law regarding partisan gerrymandering claims is to be applied as the Court of Appeals has instructed in its past decisions, then the Supreme Court's decision in *Rucho* dictates the outcome in this case. Article 24 of the Declaration of Rights provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or

privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Decl. or Rights art. 24. Although there is no express "equal protection clause" set forth in this provision, the Court of Appeals has held that the due process or "Law of the Land" clause in this article "embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment." *Murphy v. Edmonds*, 325 Md. 342, 353 (1992); *see 2012 Legislative Districting*, 436 Md. at 159 n.25 (equating the standard for evaluating petitioners' "political discrimination" claim under Article 24 with "the Federal right"). Moreover, the Court has "long recognized that decisions of the Supreme Court interpreting the Equal Protection Clause of the federal Constitution are persuasive authority in cases involving the equal treatment provisions of Article 24." *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, 640 (1983).

The Court has taken a similar approach vis-à-vis the United States Constitution with regard to claims under Article 40 of the Declaration of Rights, which guarantees (in relevant part) "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." Md. Decl. of Rights art. 40. Although the Court of Appeals "has sometimes held out the possibility that Article 40 could be construed differently from the First Amendment in some circumstances, the Court has generally regarded the protections afforded by Article 40 as 'coextensive' with those under the First Amendment." *Clear Channel Outdoor, Inc. v. Director, Dep't of Fin. of Baltimore City*, 472 Md. 444, 457 (2021).

Nothing in the Complaint suggests that the Court should depart "from the general rule" that the Supreme Court's rejection of the First Amendment and Equal Protection Clause challenges to partisan gerrymandering in *Rucho* "appl[ies] equally to the same issues under" Articles 24 and Article 40. *Clear Channel Outdoor, Inc.*, 472 Md. at 457. Plaintiffs' Complaint is premised in part on the theory that the very Maryland congressional map considered by the Supreme Court in *Rucho* was itself an unlawful partisan gerrymander. *See* Compl. ¶¶ 52-56, 63d, 73. Moreover, their equal protection theory under Article 24 is virtually identical to a theory found to be nonjusticiable by the Supreme Court under the Equal Protection Clause. *Compare* Compl. ¶ 72 (alleging that "the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their congressional representatives"), *with Rucho*, 139 S. Ct. at 2502 (noting that first prong of district court's test for evaluating equal protection clause theory was determining whether the "legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power'"). The same is true of plaintiffs' freedom of speech and association theory under Article 40. *Compare* Compl. ¶¶ 79-81 (alleging that the 2021 Plan burdens speech by targeting certain voters "because of a disagreement with the views they express when they vote," suppressing their views by "cracking them into specific districts to dilute their vote," and retaliating against them on the basis of their prior speech and party affiliation), *with Rucho*, 139 S. Ct. at 2504 (describing the plaintiffs' theory under the First Amendment as "partisanship in districting should be regarded as simple

discrimination against supporters of the opposing party on the basis of political viewpoint").

This case presents the same concerns that led the *Rucho* Court to conclude that there existed no "limited and precise standard that is judicially discernable and manageable" to adjudicate First Amendment and Equal Protection Clause challenges to political gerrymandering. *Rucho*, 139 S. Ct. at 2502. Plaintiffs' Article 24 challenge asserts that *all eight* of Maryland's congressional districts in the 2021 Plan "unnaturally combine large Democratic population centers with traditional Republican voting areas to unconstitutionally dilute the Republican votes in those districts." Compl. ¶ 74. Meanwhile, their Article 40 challenge is premised on the theory that any use of voters' party affiliation or voting history to draw district lines is constitutionally infirm, *id.* ¶¶ 79-81—a premise contradicted not only by federal precedents but by the expressed intent of the framers of the Maryland Constitution, as well. As in *Rucho*, plaintiffs' theories are broad enough to condemn any resort to political considerations in what is essentially a political endeavor and would put courts in the uncertain position of speculating about a party's future political performance as they evaluate the "fairness" or propriety of challenged maps. Plaintiffs are unable to provide and have not ventured an answer to the question that has bedeviled the Supreme Court for decades and that ultimately proved to be the *Rucho* plaintiffs' undoing: "How much political motivation and effect is too much?" *Rucho*, 139 S. Ct. at 2505 (quoting *Vieth*, 541 U.S. at 296-97).

Rucho also makes clear that both the Federal government and the States are far from powerless to remedy the lack of judicially discernable and manageable standards that

foreclose claims under the First and Fourteenth Amendments and their Maryland Constitution analogs. *See Rucho*, 139 S. Ct. at 2506-08. The Elections Clause "assigns to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." *Id.* at 2495. Pursuant to this authority, Congress has introduced several bills in recent years to reinstate and expand upon curbs on partisan gerrymandering at the federal level that had been allowed to lapse nearly a century ago. *See, e.g.*, For the People Act of 2021, H.R. 1, 117th Cong., §§ 2401, 2403(b)(1) (2021) (requiring congressional redistricting to be undertaken by independent commissions whose makeup and procedures satisfy criteria set forth in the Act, and prohibiting the drawing of districts "with the intent or effect of unduly favoring or disfavoring any political party"); Redistricting Reform Act of 2021, S. 2670, 117th Cong. (2021) (containing provisions similar to §§ 2401and 2403 of H.R. 1); Congressional Redistricting Formula Act, H.R. 6250, 111th Cong., 2d Sess., § 2 (2010) (imposing requirements of compactness, contiguity, and respect for political subdivisions in redistricting, and prohibiting the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except where otherwise required by law); Fairness and Independence in Redistricting Act, H.R. 2642, 109th Cong., 1st Sess., § 4 (2005) (requiring congressional redistricting to be undertaken by independent commissions; imposing requirements of compactness, contiguity, and population equality; and prohibiting consideration of voting history, political party affiliation, or incumbent Representative's residence, in drawing of district boundaries).

Short of congressional action, States—including Maryland—are also well-equipped to impose constitutional prohibitions or restrictions on the practice of drawing congressional district boundaries on the basis of political considerations. Several states have amended their respective constitutions to prohibit drawing districts "with the intent to favor or disfavor a political party," Fla. Const. art. III, § 20(a), or to require "partisan fairness" such that "parties shall be able to translate their popular support into legislative representation with approximately equal efficiency" in the districting process, Mo. Const. art. III, § 3, or both kinds of requirements, *see, e.g.*, Ohio Const. art. XI, § 6(A)-(B). Others have established independent commissions to conduct the redistricting process, at both the state and federal level. *See Rucho*, 139 S. Ct. at 2507 (citing Constitutions of Colorado and Michigan).

As noted above, Maryland amended its Constitution in 1970 and 1972 to impose limits on the use of political considerations in drawing district lines at only the State legislative level. It did so after the voters of Maryland rejected a proposed Constitution that would have imposed such limits on *both* the State legislative and congressional districting process. Until such time as either Congress or the General Assembly acts, respectively, to impose federal restrictions or propose an amendment to the Maryland Constitution that restricts the practice as to congressional districts, Plaintiffs lack any remedy under the Maryland Constitution or Declaration of Rights. Their claims under Article 24 and Article 40, as with their claims under Article 7 and Article I, § 7, should be dismissed.

CONCLUSION

The motion to dismiss or, in the alternative, for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 31st day of January, 2022, the foregoing Motion to Dismiss or, in the Alternative, for Summary Judgment and accompanying Memorandum were filed and served electronically by the MDEC system on all persons entitled to service:

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