IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHRYN SZELIGA, *et al.*

Plaintiffs,

v. **Case No. C-02-CV-21-001816**

LINDA H. LAMONE, *et al.*

Defendants.
_____/

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

Extreme partisan gerrymandering prevents free elections, rigs election outcomes, and violates basic civil liberties. Plaintiffs filed this lawsuit seeking relief from an extreme partisan gerrymander—the recently enacted congressional districts for Maryland's eight representatives to the United States House of Representatives (the "2021 Plan")—that violates their rights under the Maryland Declaration of Rights and Constitution. Through the 2021 Plan, Maryland's General Assembly has unlawfully guaranteed the election of Democratic candidates in seven congressional districts and given Democratic candidates an unnatural advantage in the eighth.

Defendants—state officials and the state agency charged with administering elections in Maryland—have filed a motion to dismiss Plaintiffs' claims. Although lengthy, Defendants' motion boils down to a simple theory: Plaintiffs have failed to state a claim because the Maryland Declaration of Rights and Constitution do not prohibit partisan gerrymandering in congressional elections. In other words, Defendants claim that extreme partisan gerrymanders designed to manipulate congressional elections are lawful. Defendants are wrong. Because the 2021 Plan violates Plaintiffs' rights under the Maryland Declaration of Rights and Constitution, the Court should deny Defendants' motion.

I. THE LEGAL STANDARD

When considering a motion to dismiss under Maryland Rule 2-322(b)(2), the Court must "assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them." *Pittway Corp. v. Collins*, 409 Md. 218, 239 (2009). The Court, moreover, "must view all well-pleaded facts and the inferences from those facts in a light most favorable to the plaintiff." *Id.* Dismissal "is proper only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff." *Id.* In other words, a trial court may grant a motion to dismiss only if the complaint fails "on its face, [to] disclose[] a legally sufficient cause of action." *Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 72 (1998).[1]

II. COMPLAINT ALLEGATIONS

A. Partisan Gerrymandering and Its Harms

Partisan gerrymandering occurs when electoral districts are manipulated to cause a desired election outcome based on political views, no matter the will and preference of voters. (Compl. ¶ 12.) It most often occurs through two basic techniques: cracking and packing. (*Id.* ¶ 13.) Cracking splits voters of one political party across multiple electoral districts, which greatly diminishes voting strength and those voters' ability to elect their preferred candidate in any district. (*Id.*)

[1] Defendants' motion is styled as a motion to dismiss or, in the alternative, for summary judgment. Defendants, however, do not contest any of the facts alleged in Plaintiffs' Complaint. Nor do they submit affidavit-quality evidence outside the pleadings upon which a motion for summary judgment could be granted. *See* Md. R. 2-501(a); *see also* Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary* § 2-501.04 (5th ed. 2020) ("Whenever the motion is based on facts not contained in the record or papers on file, it *must* be supported by affidavit."). The only "facts" outside the pleadings that Defendants appear to rely upon are selective portions of the legislative history of various constitutional provisions. But those "facts" do not convert a motion to dismiss into one for summary judgment and must be construed in a light most favorable to Plaintiffs. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557-58 (4th Cir. 2013). In short, Defendants' motion must be treated as a motion to dismiss, subject to the above standard.

Packing occurs when voters from the same political party are jammed into as few districts as possible, minimizing their voting strength elsewhere. (*Id.*)

Extreme partisan gerrymandering is incompatible with basic democratic principles. (*Id.* ¶ 15.) Most importantly, it threatens "the core principle of republican government" that "voters should choose their representatives, not the other way around." (*Id.* (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015).) At its most extreme—as it exists in Maryland—partisan gerrymandering amounts to election rigging. (Compl. ¶ 15.)

By discriminating against citizens based on their political views, moreover, partisan gerrymandering violates basic civil liberties. (*Id.* ¶ 16.) Diluting the weight of votes based on party affiliation violates citizens' rights to equal protection by preventing their equal participation in the election of legislators. (*Id.*) By subjecting citizens to disfavored treatment based on their voting history, party affiliation, and expression of political views, political gerrymandering also violates rights to free speech. (*Id.* ¶ 17.)

Finally, partisan gerrymandering leads to less competitive—and in many cases uncompetitive—electoral races. (*Id.* ¶ 18.) Without real challenges, politicians only have to serve the narrow interests of their ideological allies, need not be responsive to political minorities, and have no incentive to moderate their views to appeal to a diverse constituency. (*Id.*) This exacerbates political polarization, makes bipartisanship and pragmatic compromise nearly impossible, and drives voters away from an increasingly dysfunctional political system. (*Id.*)

B. The Congressional Redistricting Process in Maryland

Every ten years, states redraw their congressional districts following completion of the decennial United States census. (*Id.* ¶ 11; *see* also U.S. Const. art. I, § 2.) The United States

Constitution leaves to state legislatures the primary responsibility for the creation of their federal congressional districts. (Compl. ¶ 19; *see also* U.S. Const. art. I, §§ 2, 4.)

Maryland has eight congressional districts. (*Id.* ¶ 20.) The General Assembly enacts these districts every ten years by ordinary statute. (*Id.*) The General Assembly's congressional districts are subject to gubernatorial veto, which the General Assembly can override. (*Id.*)

C. The 2011 Maryland Congressional Redistricting Plan

In 2011, following the 2010 decennial census, Maryland had to redraw the boundaries of its eight congressional districts. (*Id.* ¶ 23.) Then-Governor Martin O'Malley led the redistricting process. (*Id.*)

Governor O'Malley wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican. (*Id.* ¶ 24.) He hoped to do so by "flipping" either District 1 on the Eastern Shore or District 6 in Western Maryland from Republican to Democrat control. (*Id.*) Ultimately, "a decision was made to go for the Sixth." (*Id.* ¶ 25.) Governor O'Malley and other Democratic leaders rejected the idea of trying to flip District 1 because the resulting district would have to cross the Chesapeake Bay. (*Id.*)

Governor O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") to hold public hearings and recommend a redistricting plan. (*Id.* ¶ 26.) But at the same time, he also asked Congressman Steny Hoyer—a self-described "serial gerrymanderer"—to advise GRAC about congressional redistricting and devise a congressional map that a majority of the congressional delegation supported. (*Id.*)

While GRAC held public hearings across the State, the Democratic members of Maryland's congressional delegation, led by Representative Hoyer, went about redrawing the State's congressional map. (*Id.* ¶ 27.) They retained NCEC Services, Inc. ("NCEC"), a

Democratic consulting firm, and directed it to draw a map that maximized protection for incumbent Democrats and changed the congressional delegation to 7 Democrats and 1 Republican. (*Id.*)

NCEC used a proprietary metric, which factored in past voting history, to develop maps that met the twin goals it was assigned. (*Id.* ¶ 28.) The Democratic members of Maryland's congressional delegation proposed and forwarded one of NCEC's maps to Maryland's Democratic leadership, and NCEC shared data with and assisted Democratic staffers in finalizing a map for GRAC and Governor O'Malley. (*Id.* ¶ 29.)

GRAC released its proposed congressional redistricting plan on October 4, 2011. (*Id.* ¶ 30.) GRAC's plan met the twin goals of incumbent protection and flipping District 6. (*Id.*) It ensured that Democratic voters comprised the majority of voters in the six districts then held by Democrats. (*Id.*) It also radically altered the boundaries of District 6 by removing much of Frederick County—which had been in District 6 in its entirety since 1872—and replacing it with a large portion of Montgomery County. (*Id.*) This exchanged about 700,000 residents among districts and resulted in a 90,000-voter swing in favor of Democrats in District 6. (*Id.*)

On October 15, 2011, Governor O'Malley announced that he was submitting a map (the "2011 Plan") to the General Assembly that was substantially the same as GRAC's proposal. (*Id.* ¶ 31.) Talking points prepared for Maryland's then-Senate President stated that the map would give "Democrats a real opportunity to pick up a seventh seat in the delegation" and that "[i]n the face of Republican gains in redistricting in other states[,] we have a serious obligation to create this opportunity." (*Id.* ¶ 32.)

On October 17, 2011, the Senate President introduced the 2011 Plan as a bill at a special session and it was signed into law on October 20, 2011 with only minor adjustments. (*Id.* ¶ 33.) No Republican member of the General Assembly voted in favor of the 2011 Plan. (*Id.*)

The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections and succeeded in "flipping" District 6. (*Id.* ¶ 35.) Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. (*Id.*)

D. The 2021 Maryland Congressional Redistricting Plan

In July 2021, following the 2020 decennial census, Maryland's Senate President and Speaker of the House of Delegates formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). (*Id.* ¶ 37.) The LRAC was charged with redrawing Maryland's congressional and state legislative maps. (*Id.*)

The LRAC included four Democratic members of the General Assembly, including the Senate President and Speaker of the House, and two Republican members of the General Assembly. (*Id.* ¶ 38.) A former head of Maryland's Department of Legislative Services ("DLS"), who is not a member of the General Assembly, was appointed Chair of the LRAC. (*Id.*)

The LRAC held public hearings, purportedly to seek public input into the drawing of new congressional districts. (*Id.* ¶ 39.) One of the main themes that emerged from these hearings was that Maryland's citizens wanted congressional maps that were not gerrymandered. (*Id.*)

After the public hearings, DLS was directed to produce maps for the LRAC's consideration. (*Id.* ¶ 40.) Upon information and belief, DLS was instructed to use the maps from the 2011 Plan as a baseline, keep as many people as possible in their current districts, and factor certain public comments into the maps it produced. (*Id.* ¶¶ 40-41.) DLS, however, was not instructed to consider the request of Maryland's citizens to not produce politically gerrymandered congressional maps. (*Id.* ¶ 41.)

Upon information and belief, Democratic members of the LRAC and/or their staffers worked closely with DLS to produce a set of proposed congressional maps for the LRAC's consideration. (*Id.* ¶ 42.) Neither Republican member of the LRAC or their staffs had input into the maps DLS produced for the LRAC. (*Id.*)

On November 9, 2021, the LRAC issued four maps for public review and comment. (*Id.* ¶ 43.) Importantly, in a cover message releasing the maps, the LRAC's Chair stated: "These Congressional map concepts below reflect much of the specific testimony we've heard, ***and to the extent practicable, keep Marylanders in their existing districts***." (*Id.*) The "existing districts" were those from the 2011 Plan. (*Id.*)

On November 23, 2021, by a strict party-line vote, the LRAC chose a final map, the 2021 Plan, to submit to the General Assembly for approval. (*Id.* ¶ 44.) A map of the 2021 Plan is set forth in the Complaint (*id.* ¶ 45) and the same map is attached hereto as Exhibit A.

Under the 2021 Plan, Democrats now enjoy a vote share majority in all eight of Maryland's congressional districts—only one of which is even close. (*Id.* ¶ 46.) The 2021 Plan was designed to create this partisan voting advantage through: (1) unnatural and non-compact districts; (2) dividing multiple counties into multiple districts (Montgomery County is part of four separate districts and Anne Arundel County, Baltimore City, Baltimore County, and Howard County are part of three separate districts); and (3) ignoring natural boundaries. (*Id.*)

The 2021 Plan thus cracks Republican voters, including Plaintiffs, into eight Democratic-majority districts through tortured partisan map drawing. (*Id.* ¶ 47.) By way of example:

- The 2021 Plan, like the 2011 Plan, cracks the Republican voters of western Maryland. District 6 cuts Frederick County in half and forces the primarily rural and Republican voters of Garrett, Allegany, and Washington Counties into a district with the overwhelmingly Democratic voters of suburban Montgomery County. The district thus continues the 2011 Plan's pairing of voters in Western Maryland and Montgomery County for partisan political advantage.

- The 2021 Plan cracks the Republican voters of the Eastern Shore and northeast Maryland, who used to be members of one congressional district. District 1 now includes the primarily Republican voters of Maryland's Eastern Shore and Cecil County. The district, however, no longer includes the primarily Republican voters of portions of Harford County, Baltimore County, and Carroll County. Instead, it now includes a primarily Democratic portion of Anne Arundel County that eliminates the previous Republican voting advantage in the district—the only district in Maryland where Republicans held such an advantage. Like District 6, District 1 now combines widely diverse regions of Maryland into one district for partisan political advantage.

(*Id.*)

The 2021 Plan continues the extreme partisan gerrymandering enacted through the 2011 Plan. (*Id.* ¶ 53.) The LRAC's maps were designed to "keep Marylanders in their existing districts" by using the 2011 Plan as a baseline. (*Id.*) After passage of the 2021 Plan, Senator Ferguson and Delegate Jones issued a joint statement emphasizing that the 2021 Plan "keep[s] a significant portion of Marylanders in their current districts, ensuring continuity of representation." (*Id.* ¶ 54(b).)

The 2021 Plan, moreover, is even worse than the 2011 Plan because it intentionally alters District 1 to eliminate the one remaining Republican congressional representative from Maryland. (*Id.* ¶ 55.) The 2021 Plan removes from District 1 Republican-leaning portions of Carroll County, northern Baltimore County, and Harford County and replaces them with a Democratic leaning portion of Anne Arundel County that stretches inland away from the Chesapeake Bay and shares no land border with the rest of the district. (*Id.* ¶¶ 57-58.) The 2021 Plan thus has done something even the architects of the 2011 Plan were not willing to do to achieve a Democratic monopoly of Maryland's congressional districts: jump the Chesapeake Bay. (*Id.* ¶ 58.)

Upon release of the 2021 Plan, the Princeton Gerrymandering Project gave the 2021 Plan a "F" grade—the worst possible grade—based on political favoritism, geographical compactness, and other factors. (*Id.* ¶ 47.)

E. Enactment of the 2021 Plan

On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. (*Id.* ¶ 49.) No Republican member of the General Assembly voted to approve the 2021 Plan. (*Id.*) On December 9, 2021, Governor Hogan vetoed the 2021 Plan. (*Id.* ¶ 50.) On December 9, 2021, the General Assembly, again on a strict party line vote, overrode Governor Hogan's veto, thus adopting the 2021 Plan into law.[2] (*Id.* ¶ 51.)

III. ARGUMENT

By any measure, the 2021 Plan is an extreme partisan gerrymander. Defendants do not—and at this stage of this case cannot—dispute this fact. Instead, Defendants argue that Maryland's Constitution and Declaration of Rights provide no relief from extreme partisan gerrymandering in connection with congressional districts. Defendants therefore contend that this Court cannot strike down congressional districts created through a process that undermines democracy and prevents fair and free elections, codifies political corruption, and discriminates against citizens on the basis of their political views. Defendants' cramped view of Maryland's Constitution and Declaration of Rights is wrong. Plaintiffs have stated claims upon which relief can be granted.

A. The Maryland Constitution's Prohibition of Political Gerrymandering Is Not Confined to Article III, § 4

Defendants first argue that Article III, § 4 is the only provision of the Maryland Constitution addressing gerrymandering and by its terms applies only to claims concerning "*State* legislative redistricting." (Defs.' Mem. at 10.) Because there is no similar provision relating to congressional redistricting, so the argument goes, claims challenging congressional districts

[2] The 2021 Plan is codified at Md. Code Ann., Election Law §§ 8-701 – 8-709.

cannot be brought under Maryland's Constitution or Declaration of Rights. (*Id.*) Defendants' argument fails for at least two reasons.

1. Other Provisions of the Declaration of Rights and Constitution Guarantee Rights that Extreme Partisan Gerrymanders Violate

First, extreme partisan gerrymandering violates rights guaranteed by several provisions of Maryland's Constitution and Declaration of Rights. As explained in § III.B, *infra*, extreme partisan gerrymandering violates the rights to free elections, equal protection, and free speech guaranteed by Articles 7, 24, and 40 of the Declaration of Rights, and the requirement in Article I, § 7 of the Constitution that the General Assembly enact laws for the purity of Maryland's elections. These constitutional provisions are different than Article III, § 4 and by their terms protect basic civil rights that Article III, § 4 does not. Thus, no matter what Article III, § 4 says about limitations on state legislative redistricting, and no matter whether it applies only to state redistricting,[3] it does not limit the protections against extreme partisan gerrymandering afforded under Articles 7, 24, and 40 of the Declaration of Rights or Article I, § 7.

The Court of Appeals has implicitly recognized as much in prior cases considering challenges to state redistricting plans. Despite the numerous constitutional challenges to claimed partisan gerrymandering raised in these prior cases, never has the Court of Appeals found that they could only be asserted under Article III, § 4. Instead, the Court of Appeals has addressed and ultimately rejected these claims on their merits, not because Article III, § 4 was the only provision under which such a claim could be brought. *See In re 2012 Legislative Redistricting of the State*, 436 Md. 121, 159-88 (2013) (rejecting federal and state equal protection challenges to a "political

[3] Defendants argue at length that Article III, § 4 allows for the consideration of political interests in the drawing of legislative districts and only applies to state legislative districts. Whatever the merits of these arguments, they are largely irrelevant to this case. Plaintiffs assert no claim under Article III, § 4.

discrimination" claim on the merits); *Legislative Redistricting Cases*, 331 Md. 574, 610-11 (1993) (rejecting on the merits an equal protection challenge to state redistricting plan based on claim of political gerrymandering); *In re Legislative Districting of State*, 299 Md. 658, 685 (1982) (rejecting on the merits an "invidious discrimination" claim under the federal constitution based on political gerrymandering). These cases make clear that the Court of Appeals has not construed Article III, § 4 as the sole constitutional provision applicable to claims of partisan gerrymandering in redistricting.

2. Defendants Provide Insufficient Support for Their Sweeping Conclusion that Article III, § 4 Precludes Partisan Gerrymandering Claims from Being Brought Under Other Constitutional Provisions

Defendants' argument also fails because they provide no authority sufficient to support it. Defendants cite to no case or other direct legal authority supporting their sweeping conclusion that partisan gerrymandering claims can be brought only under Article III, § 4. Instead, they attempt to rely on a speculative analysis of legislative history and caselaw that does not support their argument.

The Defendants' legislative history argument goes as follows: (1) the 1967 constitutional convention proposed a draft Constitution that included restrictions on both state legislative and congressional redistricting; (2) the voters rejected this draft Constitution (although there is no evidence that the voters did so based on the redistricting provisions); (3) the General Assembly included what is now Article III, § 4, but not congressional redistricting limitations, in the 1969 amendments to the Constitution that were adopted; and (4) the choice to exclude congressional redistricting limitations in the 1969 amendments indicates a clear intent that no provision of the Constitution or Declaration of Rights applies to congressional redistricting—even those provisions that were adopted and enacted long before Article III, § 4. (Defs.' Mem. at 19-22.)

The leap Defendants make to get from step (3) to step (4) in their argument falls short. The only link between these steps that Defendants offer is what they call the historical "backdrop" of the 1969 amendments. That "backdrop," however, is limited to the following: in the early and mid-1960s, the Supreme Court began considering redistricting issues; in 1965, the Supreme Court dismissed an equal protection challenge to a partisan gerrymander, with a concurring justice stating that partisan gerrymandering cannot be challenged under the Fourteenth Amendment; and other states (although Defendants cite only one) enacted constitutional provisions addressing congressional redistricting. (*Id.* at 21-22.) From this skimpy historical "evidence," Defendants ask this Court to conclude that the framers of Article III, § 4 intended it to be the only provision in Maryland's Constitution and Declaration of Rights that could provide relief from political gerrymandering claims. Defendants, however, offer no legislative history from the actual enactment of Article III, § 4 in 1969 and no legislative history explaining why only state redistricting limitations were included in the 1969 amendments. The absence of this critical evidence renders Defendants' legislative history analysis speculative at best.

Even if Defendants' speculative legislative history *might* support their argument, moreover, it is not sufficient to justify granting their motion to dismiss. At this stage of the proceeding all doubts as to the meaning of legislative history must be resolved in Plaintiffs' favor. *Clatterbuck*, 708 F.3d at 557-58. And there is more than significant doubt as to the meaning of the legislative history Defendants have put forth.

The caselaw upon which Defendants rely provides no better support than their speculative legislative history. Defendants cite only one case, *Lamone v. Capozzi*, 396 Md. 53 (2006), in support of their claim that "[a]n 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." (Defs.' Mem. at 16.) In *Capozzi*, however, the Court of Appeals rejected an argument in support of an early voting statute based on Article 7 of the Declaration of Rights because specific provisions of the Constitution prohibited early voting. 396 Md. at 75-76. In other words, *Capozzi* rejected a statute that conflicted directly with the Maryland Constitution; it did not hold that constitutional claims could not be made because an issue was addressed elsewhere in the Maryland constitution.

B. Plaintiffs Have Stated Claims Upon Which Relief May Be Granted

Defendants next contend that Plaintiffs' specific claims fail as a matter of law. These arguments fail as well.

1. Plaintiffs Have Stated a Claim Under Article 7 of the Declaration of Rights

Count I of the Complaint alleges a claim under Article 7 of the Declaration of Rights, which 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."

As courts from other states applying similar provisions in their state constitutions recently have found, extreme partisan gerrymandering violates the rights guaranteed by "free elections" clauses like Article 7. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018); *see also Harper v. Hall*, 2022 N.C. LEXIS 71, at *6-*7 (N.C. Feb. 4, 2022). More specifically, a "free elections" clause like Article 7: (1) provides citizens with a right to an effective power to select the congressional representative of their choice; and (2) bars the General Assembly from creating congressional districts that ensure the election of candidates from one political party and/or diluting the votes of citizens on the basis of political affiliation and viewpoint. *See League*

of Women Voters, 178 A.3d at 814 (concluding that the "free and equal" elections clause in the Pennsylvania Constitution "should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so"). Simply put, a "free elections" clause like Article 7 prohibits the State from rigging elections in favor of one political party through extreme partisan gerrymandering because such elections, by definition, are not free or fair and interfere with citizens' right of suffrage. *See id.* at 821 ("An election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not 'free and equal.' In such circumstances … the General Assembly, has in fact 'interfere[d] to prevent the free exercise of the right of suffrage.'").

Plaintiffs' Complaint clearly alleges that the 2021 Plan eliminates Plaintiffs' effective power to select the congressional representative of their choice, creates congressional districts that ensure the election of candidates from the Democratic Party, and dilutes the votes of citizens based on political affiliation and viewpoint. (Compl. ¶¶ 46-48, 52-58, 62-63.) The Complaint therefore alleges a violation of Article 7.

a. The Court of Appeals' Prior Applications and Interpretations of Article 7 Make Clear that Article 7 Is Not Limited to State Legislative Elections

Defendants first claim that Article 7's text, context, and history establish that it applies only to state legislative elections, not congressional elections. (Defs.' Mem. at 24-27.) Defendants' proffered interpretation, however, is inconsistent with the Court of Appeals' prior application and interpretation of Article 7.

In light of the critical importance of fair and free elections, the Court of Appeals has found that Article 7 is "even more protective of rights of political participation than the provisions of the

federal Constitution." *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 150 (2003). The Court of Appeals has further explained:

> In accordance with [Article 7], in cases involving voting rights such as the case sub judice, ***we construe the relevant constitutional provisions in relation to their purpose of providing and encouraging the fair and free exercise of the elective franchise. The rationale for this policy, as made clear by Article 7 of the Declaration of Rights, is that the "[right to vote] is one of, if not, the most important and 'fundamental right[s] granted to Maryland citizens as members of a free society.'"*** In [*Maryland Green Party*], we concluded that Article 7 of the Maryland Declaration of Rights "has been held to be even more protective of rights of political participation than the provisions of the Federal Constitution." Most clearly, we have stated:
> "***The elective franchise is the highest right of the citizen, and the spirit of our institutions requires that every opportunity should be afforded for its fair and free exercise. However ambiguously or obscurely statutes or constitutions may be phrased, it would not be just to give them a construction in hostility to the principles on which free governments are founded.***"

State Bd. of Elections v. Snyder, 435 Md. 30, 61 (2013) (emphasis added) (internal citations omitted).

Consistent with these interpretive guidelines and the fundamental rights Article 7 protects, the Court of Appeals has applied Article 7 in ways which make clear that it applies to congressional elections. In *Maryland Green Party*, for example, the Green Party qualified as a political party and "sought to nominate David M. Gross as its candidate ***for the November 2000 election for the United States House of Representatives in Maryland's first congressional district***." 377 Md. at 136 (emphasis added). The Board of Elections, however, determined that the Green Party had failed to satisfy certain nominating petition requirements, including that it submit a second nominating petition reflecting signatures of 1% of the active voters in the first congressional district. *Id.* at 137. The Green Party sued, claiming that several of Maryland's ballot access requirements were unconstitutional, and the circuit court granted summary judgment in favor of

the Board of Elections. *Id.* at 137-39. The Court of Appeals reversed, finding that the ballot restrictions violated Article 7 (and other provisions of Maryland's Constitution). *Id.* at 139, 150, 152-53.

Critically for purposes of this case, the Court of Appeals therefore found that Article 7 applied to invalidate a law affecting ballot access ***for a congressional election***. If Defendants' interpretation of Article 7 was correct—that Article 7 only guarantees rights associated with state legislative elections—the Court of Appeals would not have found it applicable in a case like *Maryland Green Party*. Indeed, the Court of Appeals also has applied Article 7 to invalidate election laws in a case where a party sought status as a political party and access to the ballot ***for a presidential election***. *Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 708 (2007). The application of Article 7 in *Maryland Green Party* and *Nader for President 2004* makes clear that its guarantee of free elections applies beyond state legislative elections and includes congressional elections within its protections.[4]

The Court of Appeals' directive to interpret Article 7 broadly also defeats Plaintiffs' claim that Article 7 does not apply to extreme partisan gerrymandering in congressional elections. Because Article 7 should not be given "a construction in hostility to the principles on which free governments are founded," *Snyder*, 435 Md. at 61, it should prohibit a practice like extreme partisan gerrymandering, which the United States Supreme Court has recognized is "incompatible

[4] Defendants attempt to limit *Maryland Green Party* and *Nader for President 2004* by arguing that the election laws at issue in these cases applied equally to state and federal elections. (Defs.' Mem. at 24 n.10.) True enough. But the critical points are that the laws at issue in these cases applied to federal elections, both cases arose in the context of candidates seeking access to the ballot for federal elections, and the Court of Appeals struck down the election laws at issue in both cases under Article 7 (among other constitutional provisions). Thus, simply because the election laws at issue in these cases applied equally to state and federal elections does not mean that Article 7 applies only to state elections.

with democratic principles." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

b. Defendants' Argument that Article 7 Protects Voter Choice Supports Plaintiffs' Claim

Defendants next argue that Article 7 protects rights related to voter eligibility and choice, not election outcomes. (Defs.' Mem. at 27-30.) Plaintiffs, however, do not claim that Article 7 provides a right to guaranteed election outcomes. Instead, Plaintiffs claim that Article 7 guarantees them a meaningful choice in their election of congressional candidates. For example:

> Article 7, therefore, provides the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice, and bars the State from creating congressional districts that ensure the election of candidates from one political party and/or diluting the votes of citizens on the basis of political affiliation and viewpoint. Simply put, it prohibits the State from rigging elections in favor of one political party.

(Compl. ¶ 62.)

If Article 7 protects rights related to voter choice—as Defendants concede that it does—it must protect voters' rights to a meaningful choice in elections. *See Munsell v. Hennegan*, 182 Md. 15, 22 (1943) ("[E]lectors should have the fullest opportunity to vote for candidates of any political party, and while this right, in cases where the public furnishes the ballots, may be restricted by the dictates of common sense, and by considerations of convenience in the size of the ballots, and by considerations of excessive costs, such restrictions will not be upheld when they are destructive of freedom of choice by the voters."). And as Plaintiffs have clearly alleged, the 2021 Plan eliminates meaningful choices in Maryland's congressional elections by predetermining their outcome. (Compl. ¶¶ 46-48, 52-58, 62-63.)

2. Plaintiffs Have Stated a Claim Under Article I, Section 7 of the Maryland Constitution

Count II of the Complaint states a claim under Article I, § 7 of the Maryland Constitution, which provides: "The General Assembly shall pass Laws necessary for the preservation of the purity of Elections." This provision requires the General Assembly to pass laws concerning elections that are fair and evenhanded, and that are designed to eliminate corruption. *See Socialist Workers Party v. Sec'y of State*, 317 N.W.2d 1, 11 (Mich. 1982) (explaining that Michigan's "purity of elections" clause "unmistakably requires … fairness and evenhandedness in the election laws of this state" and that the "touchstone" for its violation "is whether the election procedure created affords an unfair advantage to one party or its candidates over a rival party or its candidates").[5]

The 2021 Plan is not fair or evenhanded. Through intentional partisan manipulation, it cracks Republican voters across Maryland, including Plaintiffs, to ensure that Democrats have a vote share majority in all of Maryland's congressional districts. (Compl. ¶¶ 46-47, 52-58, 67.) Thus, the 2021 Plan intentionally dilutes the voting power of Plaintiffs and renders their votes nearly meaningless in congressional elections. (*Id.* ¶ 67.)

Instead of preventing corruption in Maryland's elections, moreover, the 2021 Plan codifies it. (*Id.* ¶ 68.) Through intentional partisan manipulation, the 2021 Plan ensures the election of Democratic representatives to Congress in all but one of Maryland's congressional districts. (*Id.* ¶¶ 46-47, 52-58, 68.) And as for that one district where Democratic success is not guaranteed (District 1), the 2021 Plan, again through intentional partisan manipulation, gives Democrats an estimated vote share majority. (*Id.* ¶¶ 46(a), 47(b), 57, 68.) Extreme partisan gerrymandering—

[5] As Defendants note, there is very limited case law interpreting and applying Article I, § 7; thus, Plaintiffs rely on another state's interpretation of a similar constitutional provision.

like the 2021 Plan—amounts to election rigging, the epitome of political corruption. *See Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting).

Defendants claim that Article I, § 7 does not prohibit extreme partisan gerrymandering because it "is a mandate to the General Assembly to act to protect election administration," and "not a limitation on the General Assembly's authority when it engages in such activities." (Def.'s Mem. at 30.) This argument, however, presents a curious and potentially dangerous interpretation of Article I, § 7: according to Defendants, it requires the General Assembly to pass laws to prevent election corruption, but does not prevent the General Assembly from enacting laws that corrupt Maryland's elections.

Defendants' argument overlooks a simple truth: a constitutional mandate to perform a certain duty carries with it a corresponding prohibition on acting inconsistent with that duty. *See Nader for President 2004*, 399 Md. at 696-97 (citing authority explaining that "[t]he constitutional authority to implement a constitutional provision . . . does not authorize the General Assembly by statute … to contradict or amend the Constitution" and "the constitutional authority to implement a constitutional provision, by rules, does not authorize a rule which is inconsistent with that provision"). Thus, a constitutional obligation to enact laws that prevent election corruption, like Article I, § 7, also prohibits the enactment of laws that corrupt elections. *See, e.g.*, *Wells v. Kent County Bd. of Election Comm'rs*, 168 N.W.2d 222, 227 (Mich. 1969) ("[T]he constitutional mandate to the legislature to enact laws to preserve the purity of elections has been interpreted by this Court to carry with it the corollary that any law enacted by the legislature which adversely affects the purity of elections is constitutionally infirm.").

The legislative history upon which Defendants rely also supports an interpretation of Article I, § 7 that makes it broadly applicable to laws that corrupt elections, like the 2021 Plan. As

Defendants note, the original version of this constitutional provision, found in the 1851 Constitution, did not reference the "purity of elections"—it specifically authorized the General Assembly to disenfranchise individuals convicted of certain crimes. (*See* Defs.' Mem. at 31.) The 1864 Constitution added the phrase "purity of elections," but it linked the phrase to voter registration and to disenfranchising certain categories of people. (*See id.* at 32-33.) The 1867 Constitution adopted the "purity of elections" language we have today by removing all references to voter registration and disenfranchisement. (*See id.* at 33-34.) And as Defendants recognize, the provision now operates to ensure "that those who are entitled to vote are able to do so, free of corruption and fraud." (*Id.* at 31.) Defendants claim this legislative history means that Article I, § 7 has always been linked to the mechanics of voting. (*See id.* at 35.) But the distinct changes over time of the "purity of elections" provision mean something. And the changes it underwent repeatedly expanded its meaning from a provision disenfranchising certain voters to one that now requires the General Assembly to ensure that elections are free from corruption. The history of Article I, § 7 thus counsels against Defendants' claim that it applies only to the "mechanics of elections (*id.* at 35), and supports Plaintiffs' broader reading of the provision.

3. Plaintiffs Have Stated a Claim Under Articles 24 and 40 of the Declaration of Rights

Finally, Defendants argue that Plaintiffs have failed to state claims for violations of Articles 24 and 40 of the Declaration of Rights, which protect Marylanders' rights to equal protection and freedom of speech.[6] Defendants' argument rests on the United States Supreme Court's decision

[6] Article 24 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." The Court of Appeals has held that Article 24 includes by implication the concept of equal protection. *Md. Green Party*, 377 Md. at 157. Article 40 provides, in relevant part, "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects."

in *Rucho*, which held that equal protection and freedom of speech challenges to partisan gerrymandering were not justiciable in the federal courts. 139 S. Ct. at 2506-07. For several reasons, however, *Rucho* should not guide the Court's application of Articles 24 and 40 of Maryland's Declaration of Rights.

First, Maryland courts, not the Supreme Court, determine the meaning and scope of Article 24 and Article 40. It is true, as Defendants argue, that the Court of Appeals has stated Article 24 and Article 40 are coextensive with or *in pari materia* with the Fourteenth and First Amendments. (Defs.' Mem. at 41.) The Court of Appeals, however, also has stated:

> Many provisions of the Maryland Constitution, such as Article 24 of the Declaration of Rights and Article III, § 40, of the Maryland Constitution, do have counterparts in the United States Constitution. We have often commented that such state constitutional provisions are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or *generally* should be interpreted in the same manner as federal provisions. Nevertheless, we have also emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart. Furthermore, cases interpreting and applying a federal constitutional provision are only persuasive authority with respect to the similar Maryland provision.

Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621 (2002). In fact, the Court of Appeals has "consistently recognized that the federal Equal Protection Clause and Article 24 guarantee of equal protection of the laws are complementary but independent, and 'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'" *Md. Green Party*, 377 Md. at 158. Thus, when necessary, the Court of Appeals has "ensured that the rights provided by Maryland law are fully protected by departing from the United States Supreme Court's analysis of the parallel federal right." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013) (collecting cases).

This Court, therefore, is not bound to follow the Supreme Court's conclusion regarding the justiciability of equal protection and free speech challenges to partisan gerrymandering in federal courts. It can—and should—find that Maryland's guarantees of equal protection and freedom of speech prohibit the practice. This is particularly so in light of the important issues at stake in this case—including the effective disenfranchisement of an entire political party in Maryland's congressional elections—and the broad protections afforded by Articles 24 and 40. Indeed, just this month, the Supreme Court of North Carolina found—despite the holding of *Rucho*—that extreme partisan gerrymandering in that state's congressional districts violated the equal protection and free speech clauses of North Carolina's constitution (among other constitutional provisions). *Harper*, 2022 N.C. LEXIS 71, at *5-*9.[7]

Second, the Supreme Court in *Rucho* made clear that its decision did "not condone excessive partisan gerrymandering" or "condemn complaints about districting to echo into a void." 139 S. Ct. at 2507. Rather, the Court highlighted the important role that state courts have in protecting against extreme partisan gerrymandering. *Id.* As the Court stated, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.*[8] Thus, the Supreme Court both recognized the independent duty state courts have to interpret their

[7] Defendants cite *Legislative Redistricting Cases*, 331 Md. at 610-11, and *In re 2012 Legislative Districting of the State*, 436 Md. at 182, for the general proposition that the Court of Appeals has followed Supreme Court guidance regarding the justiciability of political gerrymandering claims. (Defs.' Mem. at 36.) Both those cases, however, either explicitly or implicitly recognized that political gerrymandering claims are justiciable. *Legislative Redistricting Cases*, 331 Md. at 610-11; *In re 2012 Legislative Districting of the State*, 436 Md. at 182. These cases do not stand for the proposition—as Defendants seem to suggest they do—that the Court of Appeals will reverse course now that the Supreme Court has done so. It is equally possible that the Court of Appeals will follow its own prior precedent and hold that political gerrymandering claims are justiciable.

[8] Although the Court was referencing specific provisions in state constitutions concerning political gerrymandering, 139 S. Ct. at 2507, the principle expressed applies more broadly.

own constitutions and invited state courts to apply state constitutional provisions to prevent extreme partisan gerrymandering. *See id.* The Court should accept that invitation and find that the guarantees of equal protection and freedom of speech in Maryland's Declaration of Rights extend beyond those the Supreme Court in *Rucho* assigned to the Fourteenth and First Amendment.

Third, the primary concern of the Court in *Rucho*, upon which Defendants heavily rely here, was that workable tests could not be created to govern equal protection and freedom of speech claims in cases involving extreme partisan gerrymanders. *See* 139 S. Ct. at 2502. But ten federal judges in the *Rucho* litigation (including two judges of the United States District Court for the District of Maryland, two judges from the United States District Court for the Middle District of North Carolina, two judges from the United States Court of Appeals for the Fourth Circuit, and four justices of the United States Supreme Court) were satisfied that workable tests do exist. *See Rucho*, 139 S. Ct. at 2516-19 (Kagan, J., dissenting); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 515, 517-20, 523-24 (D. Md. 2018), *vacated by Rucho*, 139 S. Ct. 2484 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861-68 (M.D.N.C. 2018), *vacated by Rucho*. 139 S. Ct. 2484 (2019). The wisdom and reasoning of these judges and justices should not be lost on this Court simply because a bare majority of the Supreme Court felt otherwise, especially because the Court is not bound by *Rucho*. *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").[9]

[9] It also seems likely that *Rucho*'s "decision of whether unmanageability warrants judicial abdication involved practical considerations that lie beyond the constitutional meaning of Article III." *The Supreme Court 2018 Term: Leading Case: Rucho v. Common Cause*, 133 Harv. L. Rev. 252, 259 (Nov. 2019). In other words, the Supreme Court likely based its decision on concerns about whether federal courts should hear gerrymandering cases, not whether they can. *See id.* at 261.

The tests used by the lower courts in *Rucho* and endorsed by the four dissenting justices generally had three parts: (1) intent; (2) effects; and (3) causation. 139 S. Ct. at 2516. (Kagan, J., dissenting); *see also Lamone*, 348 F. Supp. 3d at 515; *Common Cause*, 318 F. Supp. 3d at 861-68. As Justice Kagan explained in her dissent in *Rucho*, such tests are "utterly ordinary" because they are "the sort of thing courts work with every day." 139 S. Ct. at 2517. They are certainly tests that this Court and other courts of this State can discern, manage, and apply consistently to the facts of individual cases. Indeed, the Court of Appeals has, on at least one occasion, applied a test to an equal protection partisan gerrymandering claim in a challenge to state legislative districting. *Legislative Redistricting Cases*, 331 Md. at 610-11. Contrary to Defendants' claims, therefore, tests exist that courts can apply to political gerrymandering claims in connection with congressional districts. [10]

[10] In support of their non-justiciability argument, Defendants repeat the *Rucho* majority's claim that the judiciary need not be involved in partisan gerrymandering issues because there are other means by which partisan gerrymandering may be cured. (Defs.' Mem. 43-45.) Of course, one of the means that *Rucho* highlighted was state courts applying state constitutions. 139 S. Ct. at 2507. But even putting that aside, Defendants' claim that Congress can pass a federal law or Maryland can pass a constitutional amendment to fix partisan gerrymandering ignores reality. The people who benefit most from extreme partisan gerrymandering—politicians from gerrymandered districts—are the ones who must propose and/or pass such legislation. *See id.* at 2524 (Kagan, J., dissenting) ("The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.").

IV. CONCLUSION

For the above reasons, the Court should deny Defendants' motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,

Dated: February 11, 2022

/s/ *Strider L. Dickson*

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CERTIFICATE OF SERVICE

I certify that on February 11, 2022 the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment was filed electronically and served on counsel of record via the Court's MDEC system.

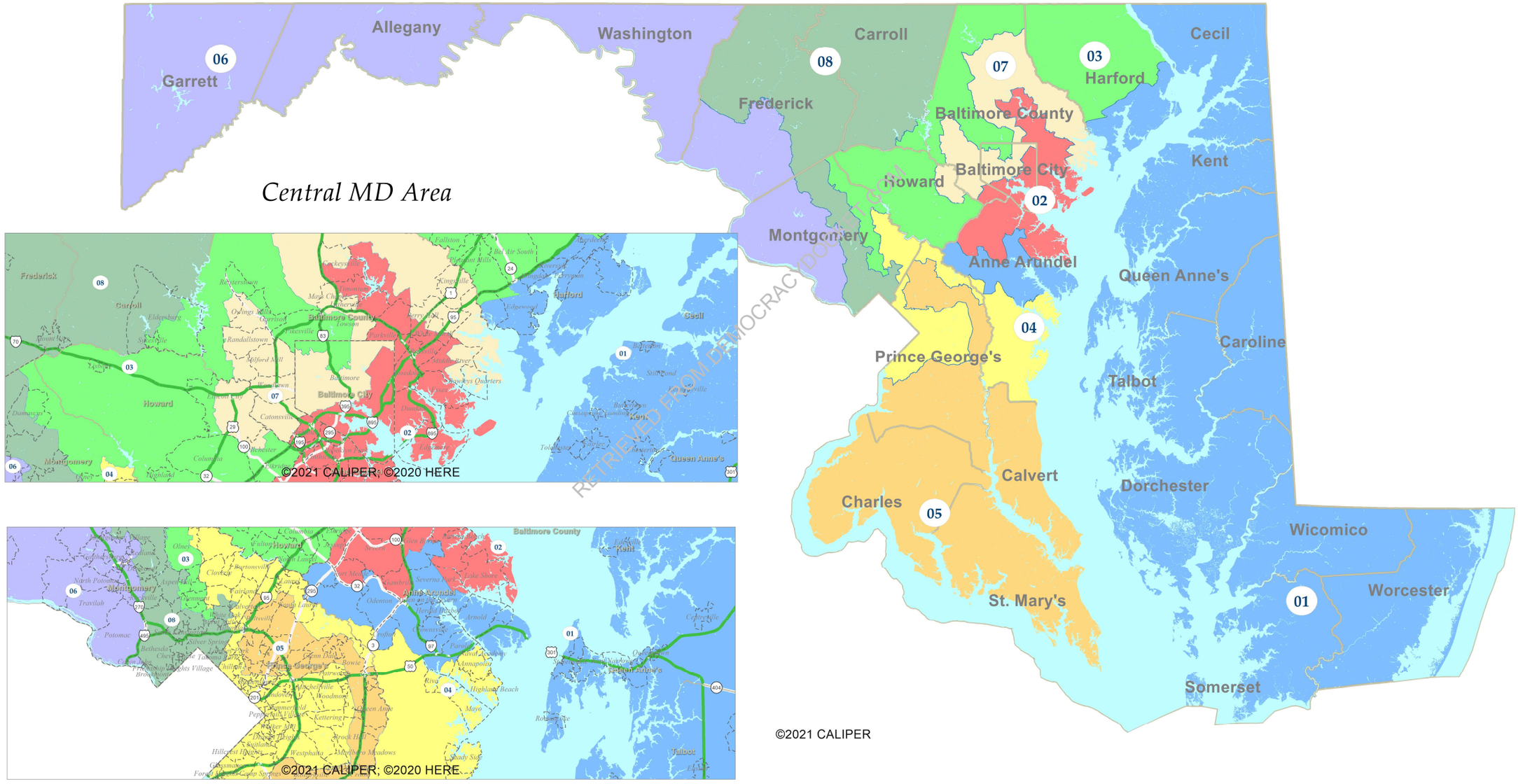
/s/ Strider L. Dickson
Strider L. Dickson

DEPARTMENT OF LEGISLATIVE SERVICES

MLD399C-C3V3

Final Recommended Congressional Map

MD General Assembly Legislative Redistricting Advisory Commission



E-FILED; Anne Arundel Circuit Court
Docket: 2/11/2022 5:49 PM; Submission: 2/11/2022 5:49 PM

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHRYN SZELIGA, *et al.*

Plaintiffs,

v. **Case No. C-02-CV-21-001816**

LINDA H. LAMONE, *et al.*

Defendants.
_____/

ORDER

Upon consideration of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, Plaintiffs' Opposition, and the argument of counsel, it is:

ORDERED that Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment is **DENIED**.

_____
LYNNE BATTAGLIA, Judge (Ret.)
Circuit Court for Anne Arundel County