IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

KATHRYN SZELIGA, ET AL., *Plaintiff*,	*	
	*	No. C-02-CV-21-001816
v.	*	
LINDA H. LAMONE, ET AL., *Defendant*.	*	
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NEIL PARROTT, ET AL., *Plaintiffs*,	*	
	*	
v.	*	No. C-02-CV-21-001773
LINDA LAMONE, ET AL., *Defendants*.	*	
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DEFENDANTS' SUPPLEMENTAL FILING IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to the Court's directive at the hearing on February 16, 2022 (the "Hearing"), Defendants respectfully submit this supplemental filing in support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, addressing the topics identified at the Hearing for which supplemental briefing was requested.

I. THE SESSION LAWS FROM 1788 AND 1843 IDENTIFIED BY THE COURT ADD FURTHER SUPPORT TO THE ANALYSIS IN DEFENDANTS' MOTION TO DISMISS.

At the hearing, the Court provided the parties with two statutes; 1788 Md. Laws ch. X, § 3 ("Chapter X"), in *Maryland State Archives*, Vol. 204, at 317-20; and 1843 Md. Laws ch. 16, § 5 ("Chapter 16"), in *Maryland State Archives*, Vol. 595, at 12-13. The Court requested supplemental briefing regarding whether the statutes had lapsed on their own terms and otherwise regarding their significance to the case. As set forth more fully below, these statutes support Defendants' showing that the provisions of the Maryland Constitution invoked by the Plaintiffs do not guarantee rights or impose duties with regard to congressional redistricting.

The first statute, from 1788, established the districts and procedures for the election of the first Representatives to the United States Congress from Maryland following the ratification of the United States Constitution by the ninth State. *See* 1788 Md. Laws ch. X, preamble. Among other things, Section 2 of Chapter X established the boundaries for Maryland's six congressional districts; sections 6 and 7 specified the number of Presidential Electors and Representatives, respectively, for which each voter would be entitled to vote; section 12 laid out the procedures for selecting Representatives or Electors in the event of a tie; section 13 established the procedures for filling vacancies in the State's congressional delegation; and section 14 provided that after the elections specifically prescribed in the Act took place, the next election would occur on the first Monday in October of 1790, and on the same day of every second year thereafter. *Id.*

Section 3 was the portion of the statute highlighted in the excerpt provided by the Court. It prescribed that the election of representatives to Congress would be "made by the citizens of this state qualified to vote for members of the house of delegates, on the first Wednesday of January next [*i.e.*, 1789], at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, *prescribed by the constitution and laws of this state for the election of delegates to the house of delegates.*" *Id.* § 3 (emphasis added). The emphasized text specified that the election would occur "at the places" established in the Constitution and laws of the State for the election of delegates. Article 2 of the Constitution of 1776 provided that all persons entitled to vote, on election day, "shall . . . assemble in the counties in which they are respectively qualified to vote, at the court-house in the said counties, or at such other place as the legislature shall direct." Md. Const. of 1776 art. 2. The emphasized text of Chapter X does not suggest that the General Assembly intended to incorporate every provision specifically applicable to elections for the General Assembly. For example, Chapter X expressly provided that "The said elections shall be free, and *viva voce.*"[1] 1788 Md. Laws ch. X, § 9. Whatever the meaning of the term elections shall be "free and frequent" in what was then Article 5 of the Declaration of Rights of 1776 (now Article 7), the General Assembly would not have needed to expressly

[1] The Latin phrase "*viva voce*" (literally, "with the living voice") indicated that votes were to be cast orally as distinguished from voting by a written or printed ballot. *See* "Viva voce," Black's Law Dictionary Free Online Legal Dictionary 2nd ed., available at https://thelawdictionary.org/viva-voce/#:~:text=I.at.,evidence%20on%20affidavits%20or%20depositions.

state in Section 9 of Chapter X that the "election shall be free" if it believed it had already incorporated all of the Constitution's election-related provisions in Section 3 of Chapter X.[2]

Chapter X appears to have been repealed in 1792, when the General Assembly passed a similar law establishing congressional districts and the procedures for electing representatives to Congress and Presidential Electors. *See* 1792 Md. Laws ch. XVI, § (repealing chapter X of 1788). But *even if* Chapter X or any of its successors (such as Ch. XVI of 1792) were still in effect, and *even if* they could be interpreted to incorporate by reference provisions of the Constitution that otherwise applied only to the General Assembly, and *even if* those provisions could be interpreted to prohibit the pursuit of political objectives in the districting process (though not one of these is the case), then the General Assembly's passage of the 2021 Plan is nothing more than a statute that is in conflict with a prior enactment of the General Assembly.

Two canons of statutory interpretation are pertinent in this situation. First, "when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute." *Maryland-Nat'l Cap. Park & Plan. Comm'n v. Anderson*, 395 Md. 172, 194 (2006) (internal quotation marks and citation

[2] For that matter, nor would the General Assembly have specified that the "election shall be free" if it believed that Article 5 of the Declaration of Rights of 1776 applied to congressional elections. As Defendants argue in their motion to dismiss, it does not. *See* Defts.' Mem. 24-27.

omitted). Here, the more specific statute laying out the precise boundaries of the districts in the 2021 Plan would be seen as an "exception to the general statute" incorporating constitutional requirements that districts be, for example, "compact."[3] Second, "if two statutes contain an irreconcilable conflict, the statute whose relevant substantive provisions were enacted most recently may impliedly repeal any conflicting provision of the earlier statute." *State v. Ghajari*, 346 Md. 101, 115 (1997); *see* Md. Code Ann., Gen. Prov. § 1-207(b) ("If the amendments are irreconcilable and it is not possible to construe them together, the latest in date of final enactment shall prevail."). The 2021 Plan is considerably more recent than Chapter X of 1778. While "repeal by implication is not favored" and "is carried no farther than is required to gratify the legislative intent manifested in the later act," *id.*, that limitation clearly results in upholding the 2021 Plan against the prior General Assembly's earlier attempt to incorporate constitutional limitations on districting. In summary, Chapter X supports the conclusion that the Maryland Constitution imposes no restrictions on the pursuit of partisan objectives in redistricting outside of the requirements of Article III, § 4, which does not extend to congressional districting.

The same is true of Chapter 16 of 1843. Like Chapter X, Chapter 16 established the boundaries of congressional districts, *see* 1843 Md. Laws Ch. 16, § 1, this time after the

[3] Of course, the "compactness" requirement would not appear in the Constitution until 1970, nearly two hundred years after Chapter X was passed by the General Assembly. The thought exercise assumes that Chapter X remained in effect all this time, and that its purported incorporation by reference of the Constitution effectively incorporated all subsequent amendments and newly adopted Constitutions by the State.

newly calculated apportionment of representatives following the "sixth census" of the United States, *see id.* preamble. But because the State had not been divided into congressional districts at the time of its normally scheduled elections in October 1843, Chapter 16—which was passed in January of 1844—set a special election for February 14, 1844. *Id.* § 2. It called for the "judges of election" to hold the elections "according to the provisions of this act, and laws regulating elections in this state," and to "make returns of said election in the manner now required by law." *Id.* § 4. It instituted measures for filling vacancies, *id.* § 6, and repealed "all acts inconsistent with the provisions of this act," *id.* § 7. It also established that the "regular election of representatives to Congress" would occur on the first Wednesday of October, 1845, "and on the same day in every second year thereafter." *Id.* § 5. And like Chapter X, it specified that these future elections would occur "at the places in the city of Baltimore, and in the city of Annapolis, and in the several counties, and Howard District of this State, *as prescribed by the constitution and laws of this State, for the election of members to the house of delegates*." *Id.* (emphasis added). As with Chapter X, the emphasized text specifies that the election would occur "at the places" established in the Constitution and laws of the State for the election of delegates.[4]

Chapter 16 was repealed in part by Chapter 52 of the 1852 Session of the General Assembly, which fixed the date for future elections of representatives to Congress as the

[4] The directive in Article 2 of the Declaration of Rights of 1776 that voting take place "at the court-house" in the various counties "or at other place as the legislature shall direct" had not been amended as of 1843.

first Wednesday in November. *See* 1852 Md. Laws ch. 52, § 3 (repealing "so much of the fifth section of . . . [Chapter 16] as fixes the first Wednesday in October as the date for electing representatives to Congress"), in *Maryland State Archives*, Vol. 615, at 39-40. Moreover, since Chapter 16's passage in 1843 and partial repeal in 1852, both the Constitution and the Maryland Code have been amended to include precise details regarding where and when voters are to be given access to the ballot. *See, e.g.*, Md. Const. art. I, § 1 (providing that an eligible voter "shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State," except as provided by § 3 of Article I); *id.* art. I, § 3 (providing for absentee voting and early voting "at polling places in or outside [voters'] election districts or wards"); Md. Code Ann., Elec. Law §§ 10-101, 10-301.1 (LexisNexis 2017 & 2021 supp.) (establishing requirements for placement of election day polling places and early voting centers). Although the highlighted portion of Chapter 16 states something of a truism (*i.e.*, the voting shall take place where the law says it shall take place), it has now been subsumed by far more specific Constitutional provisions and statutes dictating both the manner of voting that will be permitted, and the conditions for selecting locations where voting may take place.

Otherwise, nothing in Chapter 16 purports to impose or incorporate constitutional obligations into the process for electing representatives that would not otherwise apply. And even if it did, it would be subject to the same conflicts analysis that results in the

conclusion that 2021 Plan repealed the less-specific and earlier-in-time mandates of Chapter 16. Like Chapter X, Chapter 16 supports defendants.

II. THE PASSAGE FROM THE 1864 CONSTITUTIONAL CONVENTION DEBATES IDENTIFIED BY THE COURT FURTHER SUPPORTS DEFENDANTS' ANALYSIS.

There was substantial debate at the 1864 Convention around whether to include the requirement of a loyalty oath given upon request by an election judge as a condition to access of the franchise. One particular proposal—as characterized by one of the proposal's opponents—would have required to be excluded from the franchise any person who refused to swear an oath that the person had not at any time been in armed hostility to the United States or given aid or comfort to those who had, and had never declared or desired for the triumph of enemies to the United States. I *Proceedings and Debates of the 1864 Constitutional Convention* 1332, in *Maryland State Archives*, Vol. 102 (statement of Del. Isaac D. Jones, of Somerset County). Speaking in opposition to the proposal, Delegate Fendall Marbury of Prince George's County stated:

> *The right of free election lies at the very foundation of republican government. It is the very essence of the Constitution.* To violate that right, and much more to transfer it to any other set of men, is a step leading immediately to the dissolution of all government. The people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government. *By constitutional provisions and legislative enactments, they have sought to provide against every conceivable effort that might be made to suppress the voice of the people. They have spurned the idea of excluding any one on account of his religious or political opinions.* Is it not unwise and impolitic to depart from this established policy of the State, by introducing words into our constitution which are calculated to revive and foster that spirit of crimination and recrimination already existing to an alarming extent between parties in this

> State? *The word loyal has come to be, of late, a word susceptible of such various construction, and has so often been prostituted by the minions of power, to accomplish partizan ends, that to incorporate it into the constitution would be nothing more nor less than creating an engine of oppression, to be used by whatever party might hold for a time the reins of power*.

Id. at 1334 (Statement of Del. Fendall Marbury of Prince George's County; emphasis added). The Court has asked for briefing as to the significance of this passage to the issues in this litigation. As with Chapter X and Chapter 16, this passage—when read in context—supports Defendants.

First, it is important to understand that the statement was made in opposition to a loyalty oath that would have *excluded* certain otherwise eligible classes of voters from the franchise. As stated in Defendants' Memorandum in Support of their Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defendants' Mem."), Article 7's "free and frequent" elections clause has historically focused on the eligibility of voters to participate in elections and enjoy all privileges attendant to being an eligible voter. *See* Defts.' Mem. 27-30. The context of Delegate Marbury's statement in opposition to the loyalty oath is consistent with this analysis: the loyalty oath would have effectively excluded certain classes of Maryland citizens, otherwise eligible to vote, from exercising the franchise. The alleged pursuit of political objectives in drawing district lines does not deny anyone access to the ballot box in the way that the loyalty oath at issue in at the 1864 Constitutional Convention did.

Second, the oath was ultimately adopted *notwithstanding* the objections by Delegates Jones, Marbury, and others. *See* Md. Const. of 1864 art. I, § 4 (providing that "the Judges of Election . . . shall . . . administer to any person offering to vote" an oath of loyalty to the United States). Delegate Marbury's eloquent articulation of the principles of "free election" being the "foundation of republican government," the General Assembly's historical aversion to "excluding anyone on account of his religious or political opinions," and the threat posed by the abuse of the concept of "loyal[ty]" by "minions of power, to accomplish parti[s]an ends," at least in this particular instance, essentially reflected the views of the dissent.[5] *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981) ("'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " (citation omitted)). In fact, when the "free and frequent elections" clause itself was brought up for debate at the Convention, it was the "frequency" term in the clause that received the most attention. *See, e.g.,* I *Proceedings and Debates of the 1864 Constitutional Convention* 762, in *Maryland State Archives*, Vol. 102 (statement of Del. George W. Sands, of Howard County) ("I am in favor of a purely representative government. The only reason why I oppose annual elections is because I know the evil effects of elections, held according to our present constitutional theory, 'free and

[5] Moreover, it is difficult to credit such high-minded rhetoric when one of the arguments against imposing the loyalty oath was that those who refused to swear would be "put upon an equality with free negroes." I *Proceedings and Debates of the 1864 Constitutional Convention* 1332, in *Maryland State Archives*, Vol. 102 (statement of Del. Isaac D. Jones, of Somerset County)

frequent.'"); *id.* at 1161 (Statement of Del. Robert W. Todd, of Caroline County) ("I hope the amendment submitted by the gentleman from Frederick (Mr. Schley) will prevail, for two reasons, which I think very important. First, the saving of expense to the State. Second, the prevention of the frequent occurrence of elections, which I think are highly demoralizing."). But it is difficult to draw concrete conclusions from the espousal of abstract principles of government by the losing side in a 160-year old debate over a Constitution that has since been superseded, as applied to a current issue that was far beyond the realm of what the framers of the 1864 Constitution were considering.

For these reasons, the passage from the 1864 Constitutional Convention to which the Court has directed the parties supports the Defendants' interpretation of the constitutional history of Article 7.

III. THE COURT OF APPEALS' REDISTRICTING PRECEDENTS DO NOT IMPLY THAT A CAUSE OF ACTION PREMISED ON PARTISAN REDISTRICTING MAY LIE UNDER ARTICLE 24 OF THE DECLARATION OF RIGHTS.

Finally, the Court directed the parties to consider whether footnote 25 of *In re 2012 Legislative Districting*, 436 Md. 121, 159 (2012), implies that the Court may consider partisan redistricting claims brought under provisions other than Article III, § 4, including Article 24 of the Declaration of Rights. No such implication can be drawn from that case.

In *2012 Legislative Districting*, the Court considered a challenge to certain legislative districts premised on "impermissible racial and political discrimination" and brought under the Equal Protection Clause of the Fourteenth Amendment to the United

States as well as Article 24 of the Declaration of Rights. 436 Md. at 159. As to the alleged "partisan gerrymander," the Court affirmed the conclusion of the Special Master, noting that the Special Master had "properly" applied "the Supreme Court's political gerrymander cases" in resolving these claims. *Id.* at 182. In so holding, the Court noted that it did not need to discuss "the potential violation of Article 24 of the Maryland Declaration Rights" in its ruling because "the petitioners [did] not assert any greater right under Article 24 than is accorded under both the Federal right and the population equality provision of Article III, § 4 of the Maryland Constitution." *Id.* at 159 n.25. It then cited *Maryland Aggregates Association, Inc. v. State*, 337 Md. 658, 671 (1995), for the proposition that while "the federal and state guarantees of equal protection are obviously independent and capable of divergent application,' they are sufficiently similar that Supreme Court decisions applying the federal clause provide persuasive authority for this Court's application of Article 24."

This approach does not suggest or imply that the Court agreed that a cause of action under Article 24 could exist in a case premised on partisan redistricting, because the Court did not even need to reach that threshold question in disposing of the claim. In other words, since the petitioners had not claimed a "greater right" under Article 24 than they already had under the Fourteenth Amendment and Article III, § 4, the Court could ignore Article 24 altogether in analyzing the claim, and that is essentially what it did. In fact, despite acknowledging that in some cases Article 24 may be capable of divergent application from the Fourteenth Amendment, *see* 436 Md. at 159 n.25, and despite concluding that the

districting plan at issue did not violate the Fourteenth Amendment, *id.* at 182, the Court *did not* proceed to analyze the claim under the Article 24. Far from suggesting that the Court was leaving open the possibility that such a claim could exist, the Court's declination suggests the opposite.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Defendants' Memorandum in Support of their Motion to Dismiss or, in the Alternative, for Summary Judgment, the complaints in the above-captioned matters should be dismissed.

Respectfully submitted,

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February 18, 2022

CERTIFICATE OF SERVICE

I certify that on this 18th day of February, 2022 the foregoing was filed and served electronically by the MDEC system on all persons entitled to service.

/s/ Andrea W. Trento
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