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COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2022-SC-0522

DERRICK GRAHAM, et al.

PLAINTIFFS-APPELLANTS

v.

Appeal From
Franklin Circuit Court
Case No. 22-CI-00047

MICHAEL ADAMS, et al.

DEFENDANTS-APPELLEES

**BRIEF ON BEHALF OF *AMICUS CURIAE*
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AMICUS BRIEF

: 000001 of 000025

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE* 1

Joshua A. Douglas, *The Right to Vote Under State Constitutions*
67 Vand. L. Rev. 89 (2014) 1

Joshua A. Douglas, *State Judges and the Right to Vote*
77 Ohio St. L.J. 1 (2016)..... 1

Joshua A. Douglas, *Election Law and Litigation: The Judicial Regulation of Politics*
(Aspen 2014, second edition 2021) (with Edward B. Foley & Michael J. Pitts)..... 1

League of Women Voters v. Commonwealth ⁶
178 A.3d 737 (Pa. 2018)..... 1

Ky. Const. § 6..... 1

ARGUMENT 2

I. PARTISAN GERRYMANDERING CONTRAVENES THE KENTUCKY CONSTITUTION'S CORE STRUCTURAL PRINCIPLES 2

Ky. Const. § 6..... 2

A. A Constitution Premised on Popular Sovereignty Does Not Condone Partisan Gerrymandering 2

Ky. Const. § 145 3

Ky. Const. § 150 3

Ky. Const. § 147 3

Ky. Const. § 148 3

Ky. Const. § 149 3

Ky. Const. § 1 3

Ky. Const. § 2 3

Kentucky Milk Mktg. and Antimonopoly Com'n v. Kroger Co.
691 S.W.2d 893 (Ky. 1985)..... 3

Ky. Const. § 4 3

Ky. Const. § 5 3

Ky. Const. § 8 4

Ky. Const. § 6 4

Ky. Const. § 26 4

Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Colum. L. Rev. 859 (2021)..... 4

Joshua A. Douglas, *The Right to Vote Under State Constitutions* 67 Vand. L. Rev. 89 (2014)..... 4

B. The Constitution’s Drafters and Ratifiers, Who Were Gravely Concerned About Legislative Abuses of Power, Did Not Give Lawmakers Carte Blanche to Manipulate District Lines 4

1890-91 Debates, Vol. I..... 4, 5

Robert M. Ireland, *The Kentucky State Constitution* (2d ed. 2013)..... 5

Furste v. Gray
42 S.W.2d 889 (Ky. 1931)..... 5

II. UNDERSTOOD IN ITS HISTORICAL CONTEXT, KENTUCKY’S FREE AND EQUAL ELECTIONS CLAUSE IS AN ANTI-GERRYMANDERING PROVISION..... 6

Commonwealth v. Ky. Jockey Club
38 S.W.2d 987 (Ky. 1931)..... 6

A. The Principle of “Free Elections” Embodied in the English Bill of Rights of 1689 Prohibited Government Manipulation of Electoral Districts 6

English Bill of Rights Act of 1689 6, 7

Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala L. Rev. 221 (2021)..... 7

1890-91 Debates, Vol. I..... 8, 9

Commonwealth v. Ky. Jockey Club
38 S.W.2d 987 (Ky. 1931)..... 8

Ky. Const. § 33 9

B. As Imported to the United States, the “Free Elections” Principle Encompassed Freedom from Partisan Districting Abuses..... 9

Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala L. Rev. 221 (2021)..... 9

Ken Gormley and Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 Kentucky L.J. 1 (1991)..... 9, 10

League of Women Voters v. Commonwealth
178 A.3d 737 (Pa. 2018)..... 10

1792 Kentucky Constitution, art. XII, § 5 11

Patterson v. Barlow
60 Pa. 54 (1869)..... 11

III. KENTUCKY PRECEDENT BOLSTERS THE CONCLUSION THAT THE FREE AND EQUAL ELECTIONS CLAUSE BARS PARTISAN GERRYMANDERING..... 12

Gunaji v. Macias
31 P.3d 1008 (N.M. 2001) 12

Rogers v. Jacob
11 S.W. 513 (Ky. 1889)..... 12

City of Owensboro v. Hickman
14 S.W. 688 (Ky. 1890)..... 12

Perkins v. Lucas
246 S.W. 150 (Ky. 1922)..... 12

Queenan v. Russell
339 S.W.2d 475 (Ky. 1960)..... 12

Robertson v. Hopkins County
56 S.W.2d 700 (Ky. 1933)..... 12

Smith v. Kelly
58 S.W.2d 621 (Ky. 1933)..... 12

AMICUS BRIEF

RETRIEVED FROM DEMOCRACYDOCKET.COM

: 000004 of 000025

Hocker v. Pendleton
39 S.W. 250 (Ky. 1897)..... 12

Lakes v. Estridge
172 S.W.2d 454 (Ky. 1943)..... 12

Hillard v. Lakes
172 S.W.2d 456 (Ky. 1943)..... 12

Ferguson v. Rohde
449 S.W.2d 758 (Ky. 1970)..... 12

Early v. Rains
89 S.W. 289 (Ky. 1905)..... 12

Commonwealth v. Foley
798 S.W.2d 947 (Ky. 1990)..... 13

Asher v. Arnett
132 S.W.2d 772 (Ky. 1939)..... 13

Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 1370 (8th ed. 1903)..... 13

IV. PERSUASIVE AUTHORITY FROM OTHER STATES CORRECTLY RECOGNIZES THAT FREE ELECTIONS CLAUSES CONSTRAIN PARTISAN GERRYMANDERING 14

Patterson v. Barlow
60 Pa. 54 (1869)..... 14

League of Women Voters v. Commonwealth
178 A.3d 737 (Pa. 2018)..... 14

Yeoman v. Com., Health Pol’y Bd.
983 S.W.2d 459 (Ky. 1998)..... 14, 15

Szeliga v. Lamone
No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022)..... 15

Harper v. Hall
868 S.E.2d 499 (N.C. 2022)..... 15, 16

Harper v. Hall,
886 S.E.2d 393 (N.C. 2023)..... 16, 17

Rucho v. Common Cause
 139 S. Ct. 2484 (2019)..... 16, 18

Joshua A. Douglas, *The Right to Vote Under State Constitutions*
 67 Vand. L. Rev. 89 (2014) 17

People v. Hoffman
 5 N.E. 596 (Ill. 1886)..... 17

1890-91 Debates, Vol. I..... 17

Oviatt v. Behme
 147 N.E.2d 897 (Ind. 1958) 17

Ladd v. Holmes
 66 P. 714 (Or. 1901) 17

Matter of 2021 Redistricting Cases
 528 P.3d 40 (Alaska 2023)..... 18

Order, *Grisham v. Van Soelen*,
 No. S-1-SC-39481 (N.M. S. Ct. July 5, 2023)..... 18

CONCLUSION..... 18

Ky. Const. § 6 18

RETRIEVED FROM DEMOCRACYDOCKET.COM

AMICUS BRIEF

: 000006 of 000025

PURPOSE AND INTEREST OF AMICUS CURIAE

Professor Joshua A. Douglas is the Ashland, Inc.-Spears Distinguished Research Professor of Law at the University of Kentucky J. David Rosenberg College of Law. Professor Douglas writes and teaches in the areas of constitutional law, election law, voting rights, and civil procedure, and he has researched and written specifically about voting rights under state constitutions. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014); *State Judges and the Right to Vote*, 77 Ohio St. L.J. 1 (2016); *Election Law and Litigation: The Judicial Regulation of Politics* (Aspen 2014, second edition 2021) (with Edward B. Foley & Michael J. Pitts). The Pennsylvania Supreme Court relied upon his scholarship in its decision to invalidate a partisan gerrymander under the “Free and Equal Elections Clause” of its state constitution. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Professor Douglas has a professional interest in ensuring that state constitutional jurisprudence properly accounts for the history of Kentucky’s Free and Equal Elections Clause (Ky. Const. § 6) and for the Clause’s role in securing core structural protections against legislative manipulation of electoral processes.

Kentucky’s Constitution guarantees that “[a]ll elections shall be free and equal.” Ky. Const. § 6. This provision, venerated as a “sacred clause” at the 1890-91 constitutional convention, is a linchpin of Kentucky’s system of government. Each of the state’s four constitutions has included this core principle, and it is as foundational as the Constitution’s guarantee that absolute and arbitrary power does not exist in a republic. The Clause demands that electoral processes fairly and neutrally translate the popular will into representation and political power. When legislators stack the deck by manipulating district

lines, they deny Kentuckians the free and equal elections that their Constitutions have continually promised for over 230 years. This understanding of Kentucky's Free and Equal Elections Clause accords with the Kentucky Constitution's underlying structural principles, historical context, this Court's jurisprudence, and persuasive authority. This Court should therefore reverse the Circuit Court's ruling and hold that the Free and Equal Elections Clause prohibits extreme partisan gerrymandering.

ARGUMENT

I. **PARTISAN GERRYMANDERING CONTRAVENES THE KENTUCKY CONSTITUTION'S CORE STRUCTURAL PRINCIPLES.**

Under Kentucky Constitution § 6, "All elections shall be free and equal." This "Free and Equal Elections Clause" is a foundational principle of the state constitution. Consistent with the Kentucky Constitution's core commitments to popular self-rule and limited government, the Clause serves to check legislative schemes that manipulate district lines for partisan gain.

A. **A Constitution Premised on Popular Sovereignty Does Not Condone Partisan Gerrymandering.**

A cramped construction of the Free and Equal Elections Clause that leaves gerrymandering unredressed is at odds with the Kentucky Constitution's bedrock commitment to popular sovereignty and democratic self-government. The Free and Equal Elections Clause is no mere window dressing. Instead, it operates in conjunction with other provisions to ensure that the people remain firmly in control of a government that must respect their rights and pursue their interests. The Circuit Court's narrow reading of the Clause would render it to mere surplusage.

Read holistically, the Kentucky Constitution resolutely guarantees the right of Kentuckians to govern themselves and requires lawmakers, as elected agents, to act for the people. The Constitution expressly confers the right to vote, Ky. Const. § 145, safeguards it against “all undue influence thereon, from power, bribery, tumult or other improper practices,” *id.* § 150, and offers additional protections for voters, *see id.* § 147 (requirement of secret ballot); *id.* § 148 (requirement that employers give voters at least four hours off to vote); § 149 (privilege from arrest during voting). These multiple layers of voting protections confirm that Kentucky’s constitutional system ultimately depends on the people’s ability to translate their preferences into representation that fairly reflects their collective will.

The Kentucky Constitution’s Bill of Rights likewise serves in large part to proscribe abuses of power that threaten self-rule. After confirming that “all” individuals are “free and equal” and have “inherent and inalienable” rights to life, liberty, and property, among others, Ky. Const. § 1, the Kentucky Constitution uniquely declares that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” *Id.* § 2; *see Kentucky Milk Mktg. and Antimonopoly Com’n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (explaining that § 2 is “a curb on the legislature ... in the assertion or attempted exercise of political power” and that “[w]hatever is contrary to democratic ideals, customs, and maxims is arbitrary”). Instead, “[a]ll political power is inherent in the people,” and “free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property.” Ky. Const. § 4. The Constitution then proceeds to identify and enshrine a series of rights that are preconditions to democratic self-governance, including religious liberty, *id.* § 5;

freedom of speech and press, *id.* § 8; and, crucially, free elections, *id.* § 6. The Constitution explains that the powers delegated to the citizens' elected representatives are subordinate to the Bill of Rights and that all laws contrary thereto "shall be void." *Id.* § 26.

Collectively, these provisions reveal that a fundamental premise of Kentucky's constitutional system—indeed, its ultimate touchstone—is rule by the people. That principle offers the proper lens for understanding and applying the Free and Equal Elections Clause. Construing the Clause to promote popular self-rule by checking extreme partisan gerrymandering and the representational inequalities and distortions that come with it is far more faithful to the Kentucky Constitution's democratic structure and values than the Circuit Court's alternative interpretation. *Cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Colum. L. Rev. 859 (2021) (noting that the animating force of state constitutions is a "democracy principle" that prioritizes popular sovereignty). A proper construction of Kentucky's Constitution must give force to the broad protections for voters that it contains. *Cf.* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 129 (2014) ("[S]tate constitutions go well beyond the U.S. Constitution in granting voting rights. Judicial interpretation should follow suit.").

B. The Constitution's Drafters and Ratifiers, Who Were Gravely Concerned About Legislative Abuses of Power, Did Not Give Lawmakers Carte Blanche to Manipulate District Lines.

The Kentucky Constitution's commitment to popular self-rule goes hand in hand with its rejection of unchecked legislative power. Those who drafted and ratified the 1891 Constitution debated the meaning of its terms amid high-profile episodes of governmental corruption and capture. One convention delegate, connecting the concerns of public

corruption to the “sacred clause” guaranteeing free and equal elections, stressed that the people had demanded “[p]urity and economy in every branch of the government.” 1890-91 Debates, Vol. I at 452 (Oct. 7, 1890).

Accordingly, the drafters of Kentucky’s Constitution took great care to cabin legislative authority. *See* Robert M. Ireland, *The Kentucky State Constitution*, 15 (2d ed. 2013) (“A major thrust of the convention of 1890 ... concerned the drafting of provisions that limited the legislature.”). The Constitution is premised on the notion that those who are elected to do the people’s business must remain their faithful agents. This foundational principle explains why, in addition to adopting a detailed Bill of Rights and multiple protections for suffrage, the Constitution’s drafters placed a litany of substantive and procedural limitations on the legislature, such as capping the length of legislative sessions, precluding an array of local and special legislation, and more. *See id.* at 15-16 (summarizing the restrictions).

All of these provisions aim to keep the people in the driver’s seat. As this Court’s predecessor recognized, “under our theory of government,” the people “are sovereign and in them alone is vested the power to abridge or restrict that sovereignty.” *Furste v. Gray*, 42 S.W.2d 889, 890 (Ky. 1931). An interpretation of the Kentucky Constitution that hands lawmakers unfettered power to manipulate electoral districts for partisan advantage is directly contrary to the document’s central preoccupation with the dangers of legislative overreach and its commitment to keeping government dependent on the people. Instead, through the Free and Equal Elections Clause, the Kentucky Constitution provides a vital safeguard against this particularly pernicious form of legislative mischief.

II. UNDERSTOOD IN ITS HISTORICAL CONTEXT, KENTUCKY'S FREE AND EQUAL ELECTIONS CLAUSE IS AN ANTI-GERRYMANDERING PROVISION.

Reading the Free and Equal Elections Clause to constrain extreme partisan gerrymandering accords not only with the Kentucky Constitution's overarching structure, but also with history. From the seventeenth century forward, Free Elections Clauses have stood as safeguards against anti-democratic mischief. Historical evidence shows that the earliest Kentucky Constitutions included the Clause to prohibit legislative abuses of the electoral process. *Cf. Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 992 (Ky. 1931) (explaining that "the meaning, purpose, and reach" of the Constitution's terms "must be deduced from the intention they express considered in the light of the history that pertains to the subject"). The Circuit Court agreed that Kentucky's Free and Equal Elections Clause limits some forms of partisan manipulation, such as "election day interferences with vote-placement and vote-counting processes," (R. 1887), but the Circuit Court too narrowly read the Clause to hold that it does not apply to partisan gerrymandering.

A. The Principle of "Free Elections" Embodied in the English Bill of Rights of 1689 Prohibited Government Manipulation of Electoral Districts.

Kentucky's Free and Equal Elections Clause traces its lineage back to Pennsylvania's state constitution and ultimately to the English Bill of Rights Act of 1689. About a century before Kentuckians first approved a Constitution in 1792 stating that all elections "shall be free and equal," Parliament declared that all elections "ought to be free." The Circuit Court acknowledged this lineage but missed the crucial point that the original English free elections provision encompassed government manipulation of electoral districts, incorrectly suggesting instead that it concerned only election-day interferences with voting. (R. 1883-85).

In the 1680s, King Charles II was eager to gain the upper hand over his Whig opposition and pack Parliament with Tory loyalists. He opted to revive a seldom-used royal power to revise or revoke municipal corporate charters for boroughs (towns and cities). Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 258-59, 267-77 (2021). Through this prerogative, the Crown altered municipal charters to limit or deny the franchise for large swaths of residents in some boroughs to suppress votes for opposition candidates, while in other boroughs the Crown unscrupulously extended the franchise to non-residents so as to dilute the opposition's voting power. *Id.* at 268-69.

Using the same prerogative, the Crown could also control how much parliamentary representation, if any, each borough would receive. The Crown invoked this power to deplete the opposition's ranks by removing or withholding boroughs' rights to return members to Parliament. *See id.* at 269. The Whig stronghold of London, for instance, had its charter revoked and could not send representatives to Parliament for five years in the 1680s. *See id.* at 273-74, 283. The Crown simultaneously sought to pack Parliament with allies by creating new boroughs, often small ones, that had the same representation as larger boroughs. *See id.* at 269-77. This practice further diluted the opposition's power. *See id.* King Charles's successor, James II, used the same maneuver to approve forty-four new boroughs in the lead-up to the first Parliamentary elections under his rule. *Id.* at 275.

Ultimately, the abuse of this prerogative contributed to James's downfall and to the Glorious Revolution and the English Bill of Rights—including its decree that elections “ought to be free.” *See id.* at 281-89. Despite the Circuit Court's suggestion otherwise, delegates to Kentucky's 1890-91 constitutional convention knew and understood this

history. Delegate Knott, whom the Circuit Court quoted as stating that the English provision addressed the stationing of soldiers at polling locations, (R. 1883-84), subsequently clarified his historical account and expressly connected the Crown's manipulation of electoral districts to the concept of "free and equal" elections:

Consequently, when it became necessary to pack the House of Commons in the interest of the Crown, the Sheriffs, taking advantage of the indefinite terms of the [royal writ to hold an election], selected such boroughs as they saw proper, and omitted others, producing as a natural consequence the grossest inequality of representation. They, moreover, interfered with the conduct of elections in a variety of other ways, depriving large numbers of the elective franchise who were entitled to it, and permitting others to exercise it who were not. **These wholesale abuses gave rise to a number of statutes providing that elections should be free—that electors should not be prevented from exercising the franchise—and equal—that it should not be left to the power of the Sheriff to determine what boroughs were entitled to representation, but there should be an equality among them in that respect. ...** During the reign of James II, these outrages became ... so flagitious and oppressive that they became among the leading causes of the Revolution.

1890-91 Debates, Vol. I at 729 (Oct. 21, 1890) (emphasis added).¹ Thus, the Framers of Kentucky's 1891 Constitution knew that the free elections principle encompassed much more than election-day interferences with voting.² They further recognized that the free

¹ Delegate Knott had proposed changing the Free and Equal Elections Clause to read: "No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to vote at any election authorized by law." 1890-91 Debates, Vol. I at 731. The Convention rejected his proposal, keeping the Clause's language as it reads today and therefore signifying an intent to reject a limitation of the Free and Equal Elections Clause to election-day interferences with voting. *Cf. Ky. Jockey Club*, 38 S.W.2d at 993 (finding the Convention's rejection of an amendment as "authoritative" of the Convention's intent).

² Additional evidence from the debates reinforces the conclusion that the delegates understood the Clause as expansive. An exchange between Delegate McDermott, who sought to narrow the Free and Equal Elections Clause to prohibit "all undue influence [on

elections principle guaranteed more than just population equality among districts.³ Instead, they understood that it was also about manipulating boundaries and representation to weaken the opposition's power and give the upper hand to loyalists—concepts that mirror the ills of modern partisan gerrymandering.

B. As Imported to the United States, the “Free Elections” Principle Encompassed Freedom from Partisan Districting Abuses.

When the American founders established state governments, they looked to the English Bill of Rights for inspiration. The first eleven states to adopt constitutions (in 1776-1777), which included the highly influential Pennsylvania and Virginia constitutions, all had free elections provisions. *See* Ross, *supra*, at 289 n.475. As new states joined the Union, they continued to include these provisions through an ongoing process of constitutional borrowing. The framers of Kentucky's 1792 constitution borrowed the bill of rights “almost verbatim” from Pennsylvania's 1790 Constitution, including the provision declaring that “[a]ll elections shall be free and equal.” Ken Gormley and Rhonda

the privilege of free suffrage] from power, bribery, tumult, or other improper practices,” and Delegates Rodes and Burnham, who represented the views of the committee that proposed retaining the language that “[a]ll elections shall be free and equal,” shows that the broader reading won out. 1890-91 Debates, Vol. I at 946 (Oct. 29, 1890). Burnham described the meaning of the word “equal” as “a good deal broader” than McDermott's alternative language. *Id.* Rodes, agreeing with Burnham, explained that “equal” is “a broad word” that “meant a great deal,” including “freedom from intimidation” and “fairness.” *Id.* at 948; *see also id.* at 438 (“the word ‘equal’ which implies ‘equality,’ just and honorable dealing, should stand; and let no one strike it out.”). Following this exchange, the convention rejected McDermott's proposal. *Id.* at 948. It later adopted a separate amendment—now Section 150—that incorporated McDermott's language.

³ The Framers of the 1891 Constitution addressed the issue of population equality among districts in a constitutional provision separate from the Free and Equal Elections Clause. *See* Ky. Const. § 33.

G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 Kentucky L.J. 1, 4, 35 (1991).

The influence of Pennsylvania’s Free and Equal Elections Clause on Kentucky’s almost identically-worded Clause is especially important because Pennsylvania’s provision has a rich history that likely would have been familiar to the framers and ratifiers of Kentucky’s early constitutions. Pennsylvania enacted its first two Free Elections Clauses (in the state’s 1776 and 1790 constitutions) in response to laws that diluted the voting power of citizens based on geography, religion, and political beliefs. *See League of Women Voters of Pa.*, 178 A.3d 737, 804-09 (Pa. 2018). The 1776 Clause, which parroted the English phrasing that “all elections ought to be free,” reacted to the colonial assembly’s deliberate efforts to underrepresent the City of Philadelphia and western Pennsylvania in the colonial government, which caused much strife pre-statehood. *Id.*

In 1790, Pennsylvania adopted a new constitution in an effort to curb the partisan rancor and severe governmental dysfunction that beset the state in its early years. That constitution reflected a compromise: One faction benefitted from the bicameral legislature and chief executive it preferred, while the other faction was guaranteed—in part through a “free and equal” elections clause—“popular elections in which the people’s right to elect their representatives in government would be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs.” *Id.* at 808. Thus, as the Pennsylvania Supreme Court explained, Pennsylvania’s Free and Equal Elections Clause has long stood firmly against legislative schemes that manipulate the allocation of representation, including based on political beliefs. *Id.* at 808-

09. Kentuckians incorporated this principle into their own Constitution just two years later. *See* 1792 Kentucky Constitution, art. XII, § 5.

By the time of Kentucky's 1890-91 constitutional convention, the Pennsylvania Supreme Court had affirmatively construed that state's Free and Equal Elections Clause to bar legislative schemes to dilute the power of disfavored voters. In *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)—a case known to Kentucky's 1890-91 constitutional convention delegates, *see* 1890-91 Debates, Vol. I at 670 (Oct. 17, 1890)—the Court explained that the Clause required the legislature to “arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth.” *Id.* *Patterson* involved a voter registration requirement, not a districting plan, which makes it especially notable that the Court nevertheless identified the Clause as a safeguard against districting abuses.

This history confirms that Kentucky's Free and Equal Elections Clause stands as a bulwark against partisan gerrymandering. Just as Pennsylvanians understood their clause to embrace principles of fair representation, so, too, did the framers and ratifiers of Kentucky's Constitution. And just as the original Free Elections Clause repudiated a seventeenth century scheme to stymie Whigs and pack Parliament with Tory-loyalists, Kentucky's Clause bars the twenty-first century analog that the Circuit Court found the Defendants to have committed.

III. KENTUCKY PRECEDENT BOLSTERS THE CONCLUSION THAT THE FREE AND EQUAL ELECTIONS CLAUSE BARS PARTISAN GERRYMANDERING.

The Circuit Court's narrow reading of the Free and Equal Elections Clause also gives short shrift to this Court's rich free elections jurisprudence. Although this Court has never ruled on whether the Clause prohibits partisan gerrymandering, the Court has applied the Clause to a wide range of election-related laws and practices, resulting in perhaps the most well-developed free elections jurisprudence of any state with a similar provision. *See Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001) ("Kentucky has the most developed jurisprudence of any state on what the clause means in relation to ballot problems.").

Applying the Clause, this Court (and its predecessor, the Court of Appeals) has issued the following rulings, among others: It struck down voting practices that failed to accommodate illiterate voters. *Rogers v. Jacob*, 11 S.W. 513 (Ky. 1889). It invalidated restrictive voter registration-related requirements, *City of Owensboro v. Hickman*, 14 S.W. 688 (Ky. 1890); *Perkins v. Lucas*, 246 S.W. 150 (Ky. 1922), as well as restrictive absentee voting requirements, *Queenan v. Russell*, 339 S.W.2d 475 (Ky. 1960). It invalidated a law that effectively prevented some residents from voting in a local school election. *Robertson v. Hopkins County*, 56 S.W.2d 700 (Ky. 1933). It ordered local officials to provide more voting locations. *Smith v. Kelly*, 58 S.W.2d 621 (Ky. 1933). It threw out election results due to ballot shortages, *Hocker v. Pendleton*, 39 S.W. 250 (Ky. 1897), ballot printing errors, *Lakes v. Estridge*, 172 S.W.2d 454 (Ky. 1943); *Hillard v. Lakes*, 172 S.W.2d 456 (Ky. 1943); *Ferguson v. Rohde*, 449 S.W.2d 758 (Ky. 1970), and the failure to adequately provide for voter registration, *Early v. Rains*, 89 S.W. 289 (Ky. 1905). And it rejected the disenfranchisement penalty contained in a vague and overly broad bribery statute,

explaining that “the right of citizens to involve themselves in the election process” is “[a]mong the most fundamental of constitutional rights.” *Commonwealth v. Foley*, 798 S.W.2d 947, 950, 953 (Ky. 1990), *overruled in part on other grounds Martin v. Com.*, 96 S.W.3d 38 (2003). Notably, these rulings construed the Clause more broadly than just “election day interferences with vote-placement and vote-counting processes,” (R. 1887). This Court has never shied away from holding that election laws and practices violate the Free and Equal Elections Clause.

Synthesizing what by 1939 was already a wealth of free and equal elections decisions, this Court’s predecessor, the Court of Appeals, described the “broad rule” of free and equal elections—noting that it protects voters but not a candidate’s right to appear on the ballot—in terms that should also apply to egregious partisan gerrymandering. *Asher v. Arnett*, 132 S.W.2d 772 (Ky. 1939). The Court explained that the Clause contains an anti-vote dilution principle: “The guaranty, therefore, means that every qualified voter may freely exercise the right to cast his vote without restraint or coercion of any kind and that his vote, when cast, shall have the same influence as that of any other voter.” *Id.* at 776 (citation omitted). The Court further recognized that the Clause protects voters from both direct and *indirect* impediments to their ability to participate in the political process and from subversions of their constitutional rights. *Id.* And, incorporating a treatise that the 1891 Constitution’s framers also heavily relied upon, the Court noted that election laws must be “impartial” or else they are void. *Id.* (quoting Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 1370 (8th ed. 1903)). Kentucky’s Free and Equal Elections Clause thus stands as a constitutional barrier to vote dilution, direct and indirect impediments to

political participation, and biased, one-sided election laws. Consistent with these foundational principles, the Clause also prohibits partisan gerrymandering.

IV. PERSUASIVE AUTHORITY FROM OTHER STATES CORRECTLY RECOGNIZES THAT FREE ELECTIONS CLAUSES CONSTRAIN PARTISAN GERRYMANDERING.

The Circuit Court's failure to apply the Free and Equal Elections Clause to partisan manipulation of electoral districts is also at odds with precedent in other states with similar clauses. Courts in several states have recently invoked their Free Elections Clauses to reject both Democratic and Republican gerrymanders.

As previously described, the Pennsylvania Supreme Court has long recognized that its Free and Equal Elections Clause prohibits legislative manipulation of electoral districts. *See Patterson*, 60 Pa. at 75. In 2018, the Court applied this precedent and expressly held that its Clause bars partisan gerrymandering. In *League of Women Voters of Pa.*, the Court explained that the "plain and expansive sweep" of the Clause's words were "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." 178 A.3d at 804. According to the Court, the Free and Equal Elections Clause "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." *Id.* at 814. This Pennsylvania ruling is particularly significant given the shared text and history of the Pennsylvania and Kentucky clauses. As this Court has recognized, "decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the

Pennsylvania Constitution similar to that of the Kentucky Constitution, are very persuasive to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives.” *Yeoman v. Com., Health Pol’y Bd.*, 983 S.W.2d 459, 473 (Ky. 1998).

Pennsylvania is not alone. In 2022, a Maryland Circuit Court invalidated a congressional redistricting plan as an unlawful partisan gerrymander (favoring Democrats) under the state’s Free Elections Clause (which provides that elections shall be “free and frequent”), among other provisions. *See Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022). Examining the Clause’s history, as well as case law “broadly interpret[ing]” the Clause in other contexts, the court concluded that it “afford[s] a greater protection” to Maryland voters “than is provided under the Federal Constitution.” *Id.* at *14. According to the court, a “pivotal goal” of the Clause is “to protect the right of political participation in Congressional elections,” and the challenged redistricting plan violated this right by “suppress[ing] the voice of Republican voters.” *Id.* at *14, *46.

North Carolina presents a more complicated story, but the better reading of recent case law supports a broader construction of the Free and Equal Elections Clause. In February 2022, the North Carolina Supreme Court rejected congressional and state legislative district plans as unlawful partisan gerrymanders (favoring Republicans) under the state constitution’s Free Elections, Equal Protection, Free Speech, and Freedom of Assembly Clauses. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). As to the Free Elections Clause, which provides that “[a]ll elections shall be free,” the court provided a thorough historical analysis. The Court correctly traced the Clause’s lineage to the English Bill of

Rights and noted the “key principle” that it prohibits manipulating district lines to dilute votes for electoral gain. *Id.* at 373. The Court examined other states’ experiences with free elections clauses, including Pennsylvania’s. *Id.* 373-74. And, consistent with the state constitution’s core commitment to popular sovereignty, the Court emphasized that “elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government.” *Id.* at 376.

Unlike Kentucky, which has a rich history of a nonpartisan judiciary, judges are elected in partisan races in North Carolina. Earlier this year, shortly after the North Carolina Supreme Court’s composition changed based on the November 2022 election, the court took the unprecedented step of “rehearing” *Harper*, even though the prior decision was only a few months old and there had been no change in the underlying law or facts. It then reversed itself. *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023). Expressly mimicking the U.S. Supreme Court’s decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the North Carolina Supreme Court’s new majority held that partisan gerrymandering claims present nonjusticiable political questions. Addressing the Free Elections Clause, the new majority agreed that the English Bill of Rights influenced the Clause but nevertheless construed the Clause narrowly to apply only when a law “prevents a voter from voting according to one’s judgment” or “votes are not accurately counted.” *Id.* at 439. This conclusion is historically dubious, and the case’s highly unusual posture undermines its persuasive value. Significantly, the Court’s analysis is also distinguishable because Kentucky’s Free and Equal Elections Clause, unlike North Carolina’s, derives from Pennsylvania’s Clause, which, according to its adopters, bars legislative machinations that dilute the power of disfavored voters. Moreover, the North Carolina Supreme Court’s new

decision to follow the U.S. Supreme Court's federal constitutional jurisprudence ignores the significant textual differences between the U.S. and state constitutions. Essentially, the North Carolina ruling renders the state constitution's broader allocation of voter rights and protections superfluous. *See* Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. at 129.

Beyond these cases, several more state courts have, like Kentucky's, long interpreted their states' Free Elections Clauses to embrace anti-vote dilution principles. These rulings are contrary to the Circuit Court's conclusion that Kentucky's Clause is limited to election-day interferences with vote-placement and vote-counting processes. For instance, the Illinois Supreme Court explained in *People v. Hoffman* that the guarantee that "elections shall be free and equal" means, in part, that "the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot." 5 N.E. 596, 599 (Ill. 1886). Notably, delegates to the Kentucky 1890-91 convention expressly referenced the Illinois Supreme Court's *Hoffman* decision when discussing a Free and Equal Elections Clause for Kentucky. *See* 1890-91 Debates, Vol. I at 670-71 (Oct. 17, 1890). The high courts of Indiana and Oregon have conveyed similar understandings. *See Oviatt v. Behme*, 147 N.E.2d 897, 901 (Ind. 1958) ("The constitutional provision that 'all elections shall be free and equal' means that 'the vote of every elector is equal in its influence upon the result to the vote of every other elector.'"); *Ladd v. Holmes*, 66 P. 714, 718 (Or. 1901) ("Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege."). Thus, while these courts have not yet specifically applied their Free Elections Clauses to partisan gerrymandering, they have embraced the

underlying logic of such claims and are contrary to the Circuit Court's narrow interpretation of the Kentucky Constitution.⁴ Consistent with these rulings, this Court should hold that Kentucky's Free and Equal Elections Clause guarantees to Kentuckians of all partisan stripes the right to exert electoral influence on equal terms, free from the distortions of doctored electoral districts.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to reverse the Circuit Court's ruling and hold that Kentucky's Free and Equal Elections Clause (Ky. Const. § 6) prohibits partisan gerrymandering.

⁴ While not involving claims brought under free elections clauses, the highest courts of several other states have recently held that their state constitutions prohibit partisan gerrymandering. *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 57-58, 92 (Alaska 2023) (holding that partisan gerrymandering is unconstitutional under the Alaska Constitution's equal protection clause); Order, *3-4, *Grisham v. Van Soelen*, No. S-1-SC-39481, (N.M. S. Ct. July 5, 2023) (holding that partisan gerrymandering claims are justiciable under the New Mexico Constitution's equal protection clause). These cases reinforce the idea that state constitutions go beyond the U.S. Constitution in protecting voters against partisan gerrymandering. See *Rucho*, 139 S. Ct. at 2507 ("Our conclusion [that partisan gerrymandering claims are nonjusticiable under the U.S. Constitution] does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

Respectfully submitted,

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WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(2)(c) because, excluding the parts of the document exempted by RAP 15(E), it contains 5,247 words according to the count of Microsoft Word software.

s/ Jamie K. Neal

Jamie K. Neal



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 Supreme Court of Kentucky

Szeliga v. Lamone

Circuit Court of Maryland, Anne Arundel County

March 25, 2022, Decided

CASE NO.: C-02-CV-21-001816, CASE NO.: C-02-CV-21-001773

Reporter

2022 Md. Cir. Ct. LEXIS 9 *

KATHRYN SZELIGA, et al., Plaintiffs v. LINDA LAMONE, et al., Defendants; NEIL PARROTT, et al., Plaintiff's v. LINDA LAMONE, et al., Defendants

Judges: [*1] LYNNE A. BATTAGLIA, Senior Judge.

Opinion by: LYNNE A. BATTAGLIA

Opinion

MEMORANDUM OPINION AND ORDER

Introduction

Partisan gerrymandering refers to the drawing of districting lines to favor the political party in power, and "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho v. Common Cause*, U.S. , , 139 S. Ct. 2484, 2499 (2019).¹ *Rucho* is pivotal for the discussion of why this trial court and, potentially, the Court of Appeals² are grappling with the issue of the

¹ Gerrymandering based on race is not an issue in this case, so that statutes such as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified, as amended, at 52 U.S.C. § 10101, et seq.), and cases solely addressing this conundrum are not implicated directly.

² A direct appeal to the Court of Appeals is available pursuant to Section 12-203 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.), which provides:

constitutionality of the 2021 Congressional map, because the Supreme Court demurred in the case from addressing, on the basis of the "political question" doctrine, the lawfulness of partisan gerrymandering. *Id. at* , 2506-07. Chief Justice Roberts, the author of *Rucho*, suggested, however, that, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id. at* , 2507.

Background

Two consolidated cases in issue in the instant case are constitutional challenges to the Maryland Congressional Districting Plan enacted in 2021, hereinafter referred to as "the 2021 Plan." In their Complaint, the 1773 Plaintiffs³ allege violations of

(a) *In general.* — A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:

- (1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;
- (2) on the request of a party or sua sponte, the chief administrative [*2] judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and
- (3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.

(b) *Expedited appeal.* — The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a)(3) of this section as expeditiously as the circumstances require.

³ The named Plaintiffs in the consolidated action, Case No. C-02-CV-21-001773, are 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; hereinafter "the 1773 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

EXHIBIT: SZELIGA V LAMONE

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Section 4 of Article III of the Maryland Constitution, which provides:

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions[.]

MD. CONST, art. III, §.4, as well as Article 7 of the Maryland Declaration of Rights, which declares:

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 [*3] to have the right of suffrage.

MD. CONST. DECL. OF RTS. ART. 7. The 1816 Plaintiffs⁴ also allege violations of Article 7, but also add Article 24 of the Declaration of Rights, which provides:

That 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. CONST. DECL. OF RTS. ART. 24, as well as Article 40, which declares:

That the liberty of the press ought to be inviolably preserved; 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. CONST. DECL. OF RTS. ART. 40, and Section 7 of Article I of the Maryland Constitution, which provides:

⁴The named Plaintiffs in Case No. C-02-CV-21-001816 are Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell; hereinafter "the 1816 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.

MD. CONST, art. I, § 7.

Defendants in both actions are Linda H. Lamone, the Maryland State Administrator of Elections; William G. Voelp, the Chairman of the Maryland State Board of Elections; and the Maryland State Board of Elections, which is identified as the administrative agency charged with "ensuring] compliance with the requirements of Maryland and federal election laws by all persons involved in the election process."⁵

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

On December 23, 2021, the 1816 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On January 20, 2022, the Democratic Congressional Campaign Committee ("DCCC") filed a Motion to Intervene in the matter, along with its proposed Answer to the Plaintiffs' Complaint. On February 2, 2022, the Defendants filed their Motion to Dismiss or, in the Alternative, for Summary Judgment.⁶ The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 3, 2022 and subsequently filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on February 11, 2022. In the meantime, the Defendants also filed their response to the DCCC's Motion to Intervene. The Court heard argument on the Defendants' Motion to Dismiss on February 16, 2022 and held the matter *sub curia*. Simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC's Motion to

⁵About *SBE, THE STATE BD. [*4] OF ELECTIONS*, <https://perma.cc/9GUT-X5KM> (last visited March 23, 2022).

⁶It should be noted that the Defendants have asserted that both Case No. C-02-CV-21-001816 and Case No. C-02-CV-21-001773 are non-justiciable "political questions." The Defendants, however, conceded that should the standards in Article III, Section 4 apply to Congressional redistricting, the matter is justiciable.

Intervene.

Several days later, on February 22, 2022, the Court issued a Consolidation Order, which consolidated Case No. C-02-CV-21-001816 with another similar case, Case No. C-02-CV-21001773, and identified Case No. C-02-CV-21-001816 [*5] as the "lead" case. On the same day, the Court denied three requests for special admission of out-of-state attorneys on behalf of the DCCC. On February 23, 2022, the Court ultimately issued its Order disposing of the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismissed Count II: Violation of Purity of Elections, with prejudice. The counts that remained included Counts I, III, and IV of the 1816 Complaint, which involved violations of Articles 7 (Free Elections), 24 (Equal Protection), and 40 (Freedom of Speech) of the Maryland Declaration of Rights, respectively. The 1816 Plaintiffs ask for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland's Declaration of Rights and *Section 7 of Article I of the Maryland Constitution*. Additionally, Plaintiffs seek to permanently enjoin the use of the 2021 Plan and ask for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map is prepared.

Case No. C-02-CV-21-001773

On December 21, 2021, the 1773 Plaintiffs filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland's Congressional Districts. [*6] On January 20, 2022, the DCCC filed a Motion to Intervene in the matter, along with its proposed Motion to Dismiss the Plaintiffs' Complaint. The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 4, 2022. Subsequently, on February 11, 2022, the Plaintiffs filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, in related Case No. C-02-CV-21-001816. On February 15,

2022, the DCCC filed its Reply in Support of its Motion to Intervene. Several days later, on February 19, 2022, the Defendants filed a Motion to Dismiss the Complaint. The Plaintiffs filed their Opposition to the Motion to Dismiss on February 20, 2022. On February 22, 2022, the Court issued a Consolidation Order (referenced above) and denied the DCCC's Motion to Intervene and the three requests for special admission of out-of-state attorneys on behalf of the DCCC. A hearing on the Defendants' Motion to Dismiss took place on February 23, 2022. Under this Court's February 23rd Order, which dismissed Count II of the 1816 Complaint, both counts in the 1773 Complaint remained.

The 1773 Plaintiffs ask for a declaration that the 2021 Plan is unlawful, [*7] as well as a permanent injunction against its use in Congressional elections. Additionally, the 1773 Plaintiffs ask the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission,⁷ be used for the 2022 Congressional elections.

The parties submitted proposed findings of fact prior to trial on March 11, 2022. Simultaneously, the 1816 and 1773 Plaintiffs submitted a Joint Motion in Limine as to exclude portions of testimony from Defendants' experts, Dr. Allan J. Lichtman and Mr. John T. Willis. During the first day of trial on March 15, 2022, the parties submitted Stipulations of Fact and the Court admitted the stipulations as Exhibit 1. The Court then placed, on the record, an agreement between

⁷The Maryland Citizens Redistricting Commission was established by Governor Lawrence J. Hogan, Jr., in January of 2021. Exec. Order No. 01.01.2021.02 (Jan. 12, 2021). The Commission, pursuant to the Order, was tasked with preparing plans for the state's Congressional districts and its state legislative districts, which would be submitted by the Governor to the General Assembly. *Id.* The Commission submitted its Final Report to the Governor in January 2022. *Final Report of the Maryland Citizens Redistricting Commission*, MD. CITIZENS REDISTRICTING COMM'N (Jan. 2022), <https://perma.cc/UUX5-6J72>.

the parties about relevant judicial admissions by the Defendants relative to the Defendants' Answer. On the last day of trial on March 18, 2022, the State submitted a stipulation that the 2021 Plan did, in fact, pair Congressmen [*8] Andy Harris and Congressmen Kweisi Mfume in the same district - the Seventh Congressional District.⁸

With respect to the Plaintiffs' Motion in Limine, which raised the issue of a *Daubert* challenge as well as alleged late disclosure by the Defendants' experts as to various opinions, the trial judge heard argument during trial and ruled that the allegations regarding late disclosure were denied. With respect to the *Daubert* motion regarding the States' expert witnesses, it was eventually withdrawn by the Plaintiffs on March 18, 2022.

In addition, the Defendants moved to strike three questions asked by the trial judge of Dr. Thomas L. Brunell, after cross examination and before re-direct and re-cross examination, and the responses thereto. After a hearing in open court on March 18, 2022, the judge denied the motion to strike the three questions of Dr. Brunell and his responses thereto.

The Motion to Dismiss

In evaluating the Constitutional claims posited in Case Nos. C-02-CV-21-001816 and C02-CV-21-001773, the trial court has been guided in its efforts by the words of Chief Judge Robert M. Bell, when he wrote in 2002, that courts "do not tread unreservedly into this 'political thicket'; [*9] rather, we proceed in the knowledge that judicial intervention . . . is wholly unavoidable." *In re Legislative Districting of State*, 370 Md. 312, 353 (2002). Chief Judge Bell recognized that when the political branches of government are exercising their duty to prepare a lawful redistricting plan, politics and political decisions will impact the process. *Id.* at 354; *id.* at 321 ("[I]n preparing the

redistricting lines . . . the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives[.]"). Yet, the consideration of political objectives "does not necessarily render the process, or the result of the process, unconstitutional; rather, that will be the result only when the product of the politics or the political considerations runs afoul of constitutional mandates." *Id.* (internal citations omitted).

In considering whether the various counts of the Complaints survived the Motion to Dismiss, the trial court applied the following standard of review⁹:

"Dismissal is proper only if the facts alleged fail to state a cause of action." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). Under *Maryland Rule 2-303(b)*, a complaint must state those facts "necessary to show the pleader's entitlement to relief." In considering [*10] a motion to dismiss for failure to state a cause of action pursuant to *Maryland Rule 2-322(b)(2)*, a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993); *Odyniec v. Schneider*, 322 Md. 520, 525 (1991). Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiffs complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999).

"[I]n considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." Mere conclusory charges that

⁹The trial court did not apply the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), commonly referred to as "the *Twombly-Iqbal* standard," which may be considered a more intense standard of review. The State disavowed that it was positing its application.

⁸See Stipulation No. 60, *infra* p. 57.

are not factual allegations may not be considered. Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, "[t]here is . . . a big difference between that which is necessary to prove the [commission] and that which is necessary merely to allege [its commission][.]"

Lloyd v. Gen. Motors Corp., 397 Md. 108, 121-22 (2007) (quoting Sharrow v. State Farm Mutual Ins. Co., 306 Md. 754, 768, 770 (1986)) (alterations in original).

There are no provisions in the Maryland Constitution explicitly addressing Congressional districting. The only statutes in Maryland that bear on Congressional redistricting include *Section 8-701 through 8-709* of the Election Law Article of the Maryland Code. *Section 8-701* states [*11] that Maryland's population count is to be used to create Congressional districts, that the State of Maryland shall be divided into eight Congressional districts, and that the description of Congressional districts include certain boundaries and geographic references.¹⁰ *Sections 8-702 through 8-709* identify

¹⁰ *Section 8-701* of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.) provides:

(c) *Boundaries and geographic references.* — (1) The descriptions of congressional districts in this subtitle include the references indicated.

(2) (i) The references to:

1. election districts and wards are to the geographical boundaries of the election districts and wards as they existed on April 1, 2020; and

2. precincts are to the geographical boundaries of the precincts as reviewed and certified by the local boards or their designees, before they were reported to the U.S. Bureau of the Census as part of the 2020 census redistricting data program and as those precinct lines are specifically indicated in the P.L. 94-171 data or shown on the P.L. 94-171 census block [*12] maps provided by the U.S. Bureau of the Census and as reviewed and corrected by the Maryland Department of Planning.

(ii) Where precincts are split between congressional districts, census tract and block numbers, as indicated in P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and referred to in this

the respective counties included within each of the eight Congressional districts according to the current Congressional map in effect.¹¹ None of the statutory provisions includes standards or criteria by which Congressional districting maps must be drawn.¹²

In ruling on the Defendants' Motion to Dismiss the Complaints, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the 1773 Complaint stated a

subtitle, are used to define the boundaries of congressional districts.

¹¹ Md. CODE ANN., ELEC. LAW §§ 8-701 through 8-709.

¹² During the hearing on the State's Motion to Dismiss, the Court asked the parties to provide supplemental briefings regarding the significance, or not, of two historical laws, which prescribed the application of the "constitution and laws of this state for the election of delegates to the house of delegates," to Congressional elections. The first law, enacted in 1788, in relevant part, provided:

And be it enacted, That the election of representatives for this state, to serve in the congress of the United States, shall 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, 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 [.]

1788 Laws of Maryland, Chapter X, Section III (Vol. 204, p. 318). The second law, enacted in 1843, provided:

Sec. 5. And be it enacted, That the regular election of representatives to Congress from this State, shall be made by the citizens of this State, qualified to vote for members to the House of delegates, and each citizen entitled as aforesaid, shall vote by ballot, on the first Wednesday in October, [*13] in the year eighteen hundred and forty-five, and on the same day in every second year thereafter, 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.

1843 Laws of Maryland, Chapter XVI, Section 5 (Vol. 595, p. 13).

The parties' responses, collectively, indicated that they ascribed little or no significance to the language, which suggested that the first Congressional elections in Maryland were conducted via the application of election rules prescribed, in part, in the State Constitution.

claim upon which relief can be granted. Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred. The standards of Article III, Section 4 are applicable to the evaluation of the 2021 Plan based upon the interpretation of the Section's language, purpose, and legislative intent.

With respect to the 1773 Complaint and the 1816 Complaint, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that can reasonably be drawn therefrom and determined [*14] that the strictures of Article III, Section 4 are, alternatively, applicable to the 2021 Plan because of the free elections clause, Md. Const. Decl. of Rts. art. 7, as well as with respect to the 1816 Complaint, the equal protection clause, Md. Const. Decl. of Rts. art. 24; each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan.¹³

¹³The trial court ultimately dismissed with prejudice Section 7 of Article I of the Maryland Constitution. Article I, Section 7 provides that, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." The 1816 Plaintiffs argued that this provision was violated because the General Assembly failed to pass laws concerning elections that are fair and even-handed, and that are designed to eliminate corruption. *1816 Compl.* If 66. The State took the position that Section 7 of Article I was not intended to restrain acts of the General Assembly, but rather, that the provision acted as "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." *1816 Mot. Dismiss* at 31.

The term "purity" in the Section is undefined and therefore, ambiguous. No case referring to the Section has defined what purity means. *Cnty. Council for Montgomery Cnty. v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975); *Anderson v. Baker*, 23 Md. 531 (1865) (concurring opinion); see also *Hanrahan v. Alterman*, 41 Md. App. 71 (1979); *Hennegan v. Gearner*, 186 Md. 551 (1946); *Smith v. Higinbotham*, 187 Md. 115 (1946); *Kenneweg v. Allegany Cnty. Comm'rs*, 102 Md. 119 (1905). When asked at oral argument to give the term a meaning applicable to elections, Counsel for the 1773 Plaintiffs could only say "purity means purity."

The phrase "purity" of elections was added to the Maryland Constitution of 1864, where the explicit language directed the General Assembly to preserve the "purity of elections." MD. Const.

With respect to the 1816 Complaint, alternatively, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the Complaint stated a cause of action under each of the equal protection clause, Md. Const. Decl. of Rts. art. 24, and the free speech clause, Md. Const. Decl. of Rts. art. 40, which subjects the 2021 Plan to strict scrutiny by this Court.

Alternatively, with respect to the 1773 and 1816 Complaints, this Court assumed the truth of all the well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that both Complaints stated a cause

of 1864, art. III, § 41 (directing the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters"). The provision focused on voter registration, with the purpose of excluding ineligible voters from the election process.

The language of what is now Article I, Section 7, has changed since its enactment in the Maryland Constitution of 1864. Article III, § 41 of the Constitution of 1864, in whole, 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, and to make effective the provisions of the Constitution disfranchising certain persons, or disqualifying them from holding office." Article III, § 41, was renumbered in the 1867 amendment, to Article III, Section 42, which provided, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." Md. Const. of 1867. art. III, § 42. Article III, § 42, was, again, renumbered and amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978, to Article I, § 7, which now provides, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." Md. Const. art. I, § 7.

Cases interpreting Article I, Section 7, have applied the Section to the registration of voters, *Anderson*, 23 Md. at 586 (concurring opinion), improper financial campaigns contributions, *Cnty. Council for Montgomery Cnty.*, 274 Md. at 60-65; see also *Higinbotham*, 187 Md. at 130 ("The Corrupt Practices Act is a remedial measure and should be liberally construed in the public interest to carry out its purpose of preserving the purity of elections.").

From its legislative history, the language of "purity of elections" referred to questions involving the *individual* candidate and the *individual* voter. The only assumption tendered by the 1816 Plaintiffs to support that partisan gerrymandering affected the "purity" of elections was that such gerrymandering was *ipso facto* corrupt. That assumption has not been borne out by review of over 200 cases addressing partisan gerrymandering, none of which characterized the practice as "corrupt."

of action under the entirety of the Maryland Constitution and Declaration of Rights to determine the lawfulness of the 2021 Plan.

The Provisions in the Maryland Constitution and Declaration of Rights

In reviewing whether political considerations [*15] have run afoul of constitutional mandates in the instant case, we must undertake the task of constitutional interpretation. "Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it." State Bd. of Elections v. Snyder ex rel Snyder, 435 Md. 30, 53 (2013) (citing Fish Mkt. Nominee Corp. V. G.A.A., Inc., 337 Md. 1, 8-9 (1994)). We first look to the natural and ordinary meaning of the provision's language. *Id.* If the provision is clear and unambiguous, the Court will not infer the meaning from sources outside the Constitution itself. *Id.* "[Occasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language," including "archival legislative history." Phillips v. State, 451 Md. 180, 196-97 (2017). Archival legislative history includes legislative journals, committee reports, fiscal notes, amendments accepted or rejected, the text and fate of similar measures presented in earlier sessions, testimony and comments offered to the committees that considered the bill, and debate on the floor of the two Houses (or the Convention). State v. Phillips, 457 Md. 481, 488 (2018).

The rules of statutory construction are well known. Yet, when applying the rules of statutory construction to the interpretation of constitutional provisions, [*16] the approach is more nuanced. That approach was described in Johns Hopkins Univ. v. Williams, 199 Md. 382 (1952):

[C]ourts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to

the people, and the history of the growth or evolution of the particular provision under consideration. In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.

Id. at 386-87.

To construe a constitution, "a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth." Snyder ex rel. Snyder, 435 Md. at 55 (quoting Bernstein v. State, 422 Md. 36, 56 (2011)). Similarly, we do not read the constitution as a series of independent parts; rather, constitutional provisions are construed as part of the constitution as a whole. *Id.* Further, if a constitutional provision has been amended, the amendments "bear on the proper construction of the provision as it currently exists," and in such a situation, "the intent of the amenders ... may become paramount." Norino Properties, LLC v. Balsamo, 253 Md. App. 226, (2021) (quoting Phillips, 457 Md. at 489). We keep in mind that the courts shall construe a constitutional provision [*17] in such a manner that accomplishes in our modern society the purpose for which the provisions were adopted by the drafter, and in doing so, the provisions "will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee." Bernstein v. State, 422 Md. 36, 57 (2011) (quoting Johns Hopkins Univ., 199 Md. at 386).

We recognize that "a legislative districting plan is entitled to a presumption of validity" but "that the presumption "may be overcome when compelling evidence demonstrates that the plan has subordinated mandatory constitutional requirements to substantial improper alternative considerations."" In re Legislative Districting of State, 370 Md. at 373 (quoting Legislative

Redistricting Cases, 331 Md. 574, 614 (1993).

Article III, Section 4 of the Maryland Constitution

Article III, Section 4 of the Maryland Constitution provides:

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

MD. CONST. art. III, § 4. The 1773 Plaintiffs assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term "legislative district" corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural [*18] boundaries of political subdivisions. The 1773 Plaintiffs allege the new Congressional districts under the 2021 Plan violate the requirements of Article III, Section 4, 1773 Compl. ¶¶ 93-97.¹⁴

Defendants claim that the text of Article III, Section 4, is limited to State legislative districting because the term "legislative districts" refers "unambiguously to State legislative districts" whenever it appears in other provisions of the Constitution, and that when Congress is referred to the "c" is capitalized. 1773 Defs.' Mot. Dismiss at 2. The Defendants argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted. 1816 Defs.' Mot. Dismiss at 19-22.

The term "legislative district" is the gravamen of

¹⁴The 1816 Plaintiffs do not assert a claim under Article III, Section 4, of the Maryland Constitution. 1816 Opp'n Mot. Dismiss at 10 n.3.

analysis. There is no definition of the term "legislative district" in the Maryland Constitution or Declaration of Rights. Absent a definition, in light of the differing ways the term could be applied, *i.e.*, as State legislative [*19] districts and/or Congressional districts, the language is ambiguous.¹⁵

The "compactness" requirement was added to then extant Article III, Section 4, by the General Assembly in 1969 and ratified by the voters in 1970 (the "1970 Amendment"), as part of a series of amendments to the entirety of 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). Its framers recognized that "compactness requirement in state constitutions is intended to prevent political gerrymandering." Matter of Legislative Districting of State ("1984 Legislative Districting"), 299 Md. 658, 687 (1984). Prior to this amendment, Article III, Section 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." Md. Const. art. III, § 4 (1969).¹⁶

¹⁵The State has posited the importance of the exclusion of the word "Congress" in Article III, Section 4 to specifically include reference to Congressional districts. Neither the word Congress nor State, General Assembly, Senate, or House of Delegates appears in Article III, Section 4, unlike other Constitutional provisions or importantly, in Section 4 itself. *See, e.g.*, Md. Const. art. I, § 6 (using the term "Congress"); art. III, § 10 (using the term "Congress"); art. IV, § 5 (using the term "Congress"); art. XI-A, § 1 (using the term "congressional election"); art. XVII, § 1 (using the term "congressional elections"); art. III, § 3 (using the terms "State," "Senate" and "House of Delegates"); art. III, § 5 (using the terms "State," "General Assembly," "Senate," and "House of Delegates"); art. III, § 6 (using the terms "General Assembly" and "delegate"); art. III, § 13(b) (using the terms "Legislative" and "Delegate district"); and art. XIV, § 2 (using the terms "General Assembly," and "Legislative District of the City of Baltimore").

¹⁶Prior 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

The present complete version of Article III, Section 4 was enacted in 1972 and ratified by the voters on November 7, 1972. In enacting the present version in 1972, the General Assembly "is presumed to have full knowledge of prior and existing law on the subject of a statute it passes." *Id.*; see also Bowers v. State, 283 Md. 115, 127 (1978) ("[T]he Legislature is presumed to have had full knowledge and information as to prior and existing law on the subject of a statute it has enacted."); Harden v. Mass Transit Admin., 277 Md. 399, 406-07 (1976) ("The General Assembly is [*20] presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.").¹⁷ With respect to this

Baltimore City, respectively . . ."); 1965 Md. Laws special session, chs. 2, 3 (requiring the first time that counties allocated more than eight delegates be divided into districts). The "contiguity" or "equal population" requirements of the early Article III, § 4, did not apply to any "legislative district" outside of Baltimore City.

¹⁷The State agreed during oral argument on the Motion to Dismiss that cases of the Supreme Court in the 1960s regarding redistricting informed the adoption of the present version of Article III, Section 4:

THE COURT: In doing research on Article III, Section 4, of the Maryland Constitution, it has come to the Court's attention that one of the reasons for enacting this provision was the Legislature's knowledge—which we presume—of the Supreme Court's cases. That is my understanding, is it yours?

MR. TRENTO, ON BEHALF OF THE STATE: Yes, Your Honor, the Supreme Court's cases were in the front and center of the minds of the 1967 Constitutional Convention. In that Convention, the sweep of amendments to Article III, Sections 3 through 6, were expressly undertaken to address the Supreme Court jurisprudence from the 1960s.

Mot. Dismiss Hearing, 02/23/2022. In the 1967 Constitutional Convention, the Supreme Court cases referencing legislative redistricting were prominent. The delegates in the Proceedings and Debates of the 1967 Constitutional Convention referenced prior Supreme Court jurisprudence on numerous occasions: *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 3255; 104 MD. STATE ARCHIVES 2267, 10853. During the 1967 Constitutional Convention, Delegate John W. White, in response to a question regarding his intent regarding a provision stated:

DELEGATE WHITE: What I am trying to do is to have all of Maryland line up with the position of the Supreme Court of the United States, which has said that one person should have one

knowledge, it is clear that they were aware of

Baker v. Carr, 369 U.S. 186 (1962), involving state [*21] legislative districts,¹⁸ as well as Wesberry v. Sanders, 376 U.S. 1 (1964), a Congressional districting case.¹⁹

With reference to Supreme Court jurisprudence that is the context of the 1967 to 1972 Amendments to Article III, Section 4, one early case—Baker v. Carr—involved the apportionment of the Tennessee legislature. The federal district court dismissed the complaint in apparent reliance on the legal process theory of political justiciability, but the Supreme Court reversed. Baker v. Carr, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). Importantly, the Supreme Court's decision only dealt with procedural issues: jurisdiction, standing, and justiciability. Baker, 369 U.S. at 198-237. It held by a 6-2 vote that the court had jurisdiction, plaintiffs had standing, and the challenge to apportionment did not present a nonjusticiable "political question." *Id.* at 204, 206, 209.

The Supreme Court, thereafter, confronted the apportionment of Congressional districts in Wesberry v. Sanders in 1964 and held that Congressional apportionment cases were justiciable, noting that there is nothing providing "support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of

vote.

Proceedings and Debates of the 1967 Constitutional Convention, 104 MD. STATE ARCHIVES 7879, <https://perma.cc/JG3T-KV3J> (last visited March 23, 2022). During the Proceedings and Debates of the 1967 Constitutional Convention, the delegates proposed constitutional amendments regarding Congressional districting, however, the amendments failed subsequent enactment and were, ultimately, not included in the adopted 1970 and 1972 versions of Article III, Section 4.

¹⁸*Proceedings and Debates of the 1967 Constitutional Convention*, 104 Md. State Archives, Vol. 1, *Debates* 412, 499.

¹⁹*Proceedings and Debates of the 1967 Constitutional Convention*, 104 Md. State Archives 10863-64.

courts to protect [*22] the constitutional rights of individuals from legislative destruction." 376 U.S. at 6-7. The Court ultimately applied the "one-person, one-vote" rule to apportionment of Congressional districts, explaining that "the [Constitutional] command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in a Congressional election is to be worth as much as another's." Id. at 7-8. The Court believed that "a vote worth more in one district than in another would run . . . counter to our fundamental ideas of democratic government." Id. at 8. The opinion rested on the interpretation of the Elections Clause in Article I, Section 4 of the Constitution. Id. at 6-7.

On April 7, 1969, another Congressional districting case was decided. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), a decision involving Congressional districting in Missouri, the Supreme Court held that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." Kirkpatrick, 394 U.S. at 530-31.

The context, therefore, of the 1967 through 1972 amending process of Article III, Section 4, was the Supreme Court cases [*23] in which state legislative districts, but also Congressional districts, were decided.

The State posits, however, that the Legislature really intended on omitting Congressional districts in the later versions of Article III, Section 4 enacted in 1969 and 1972 because an earlier version from 1967 of Section 4 included a specific reference to Congressional districts, *see* PROPOSED CONST. OF 1967-68, §§ 3.05, 3.07, 3.08, 605 MD. STATE ARCHIVES 9-10, and another section that had a specific reference to the State, *see* PROPOSED CONST. OF 1967-68, § 3.04, 605 MD. STATE ARCHIVES 9. The failed passage of the earlier draft Constitution, which included these phrases,

however, does not have any bearing on the analysis of what the Legislature intended in adopting the 1970 or 1972 versions of Article III, Section 4, because "[f]ailed efforts to amend a proposed bill, however, are not conclusive proof usually of legislative will. . . . This is because there can be a myriad of reasons that could explain the Legislature's decision not to incorporate a proposed amendment." Antonio v. SSA Sec. Inc., 442 Md. 67, 87 (2015). Most importantly, "[i]f the framers desired" to exclude Congressional redistricting from Article III, Section 4, "they knew how to do so." Schisler v. State, 394 Md. 519, 594-95 (2006).²⁰

The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result, "legislative districts" includes Congressional districts. A claim, thus, has been stated under Article III, Section 4.

Nexus Between Articles 7 and 24 of the Declaration of Rights and Article III, Section 4 of the Constitution

The standards of Article III, Section 4 are also applicable on an alternate basis, to evaluate the constitutionality of the 2021 Plan because the Free Elections Clause, Article 7 of the Maryland

²⁰Interestingly, the early language in a bill introduced in 1972 included the words Senators and Delegates to alter Article III, Section 4:

Each legislative district shall consist of adjoining territory and shall [*24] be compact in form. The ratio of the number of Senators to population shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.

Amendments to Maryland Constitutions, 380 MD. STATE ARCHIVES, 489. The final adopted version contained no mention of, nor reference to, "Senator" or "Delegate."

Declaration of Rights, which has been alleged in the 1773 and 1816 Complaints, as well as the Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, as averred in the 1816 Complaint, each implicate the use of the Section 4 criteria. Assuming [*25] either clause is applicable,²¹ its application to the lawfulness of the 2021 Plan can only be made manifest by use of the standards in Article III, Section 4.

The methodology of drawing a nexus between a "standards" clause and its facilitating constitutional provision is exactly what Judge John C. Eldridge, writing on behalf of the Court, did in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), between the Free Elections Clause and Section 1 of Article I of the Constitution²² as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.²³

²¹The applicability of the Free Elections Clause and the Equal Protection Clause will be addressed separately, *infra*.

²²Article I, Section 1 of the Maryland Constitution, provides:

All elections shall be by ballot. 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 for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

²³Article I, Section 2 of the Maryland Constitution, provides:

Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the [*26] right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

Green Party involved the constitutional validity of various provisions of the Election Code which governed the method by which a party, other than a "principal political party," could nominate a candidate for a Congressional seat. *Id. at 140*. The Green Party, however, had been notified that the name of its candidate could not be placed on the ballot because the Board of Elections was unable to verify a number of signatures on the nominating petition and, as a result, the petition contained less than the number required to vote. *Id. at 137*. The Board posited a number of reasons for denying the adequacy of the number of signatures, [*27] but the seminal reason addressed in the opinion was that many of the petition signatures were those who appeared on an inactive voter registry, which did not qualify them to sign a petition as a "registered voter" pursuant to Section 1-101(gg) of the Election Code.

In addressing whether the Free Elections Clause was violated by the provision regarding an inactive voter registry, Judge Eldridge applied the standards in Article I, Section 2 of the Constitution, which, he explained, "contemplates a *single* registry for a particular area, containing the names of *all* qualified voters[.]" *Id. at 142*. (italics in original). Remarking that the statute created a class of "second class" citizens comprised of inactive voters, Judge Eldridge determined that Article 7 had been violated. *Id. at 150*. In so doing, his determination was premised on a line of cases in which adherence with the strictures of the Free Elections Clause was informed by standards set forth in Constitutional Clauses. *Id. at 144* (citing *Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477 (1997) (rejecting provision in an Ocean City Charter that failure to vote in two previous elections rendered a person unqualified to vote in municipal elections, based on Sections 1 and 4 of Article of the Constitution and *Article 7 of the Declaration of Rights*); *State Admin. Bd. of Election Laws v. Bd. of Supervisors of Bait. City*, 342 Md. 586 (1996) (holding that "having voted frequently in the past is not a qualification for voting," under Article I, Section 1 of the

Constitution and Article 7 of the Declaration of Rights); Jackson v. Norris, 173 Md. 579 (1937) (recognizing [*28] nexus between the Free Elections Clause and the mandate in Section 1 of Article 1 of the Constitution, that "elections shall be by ballot"). Judge Eldridge also utilized the standards in Section 1 of Article I to determine that a registry of inactive voters was "flatly inconsistent" with Article 24 of the Declaration of Rights, the Equal Protection Clause.²⁴*Id.* at 150.

It is clear, then, that our Free Elections Clause, as well as the Equal Protection Clause implicate the use of standards contained in the Constitution in order to determine a violation of each. So is the case in their application in the instant case, in which implementation of their provisions can be determined in reference to Article III, Section 4.²⁵

Article 7 of the Maryland Declaration of Rights

Article 7 of the Maryland Declaration of Rights, entitled "Elections to be free and frequent; right of suffrage," 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.

²⁴As discussed, *infra*, Judge Eldridge also utilized the Equal Protection Clause, Article 24, to evaluate whether the requirement that the Green Party, as a non-principle party, was constitutionally required to submit not only 10,000 signatures on a petition to be recognized as a political party and then provide a second petition to nominate its candidate.

²⁵The Supreme Court of Pennsylvania, in League of Women Voters of Pa. v. Commonwealth, 645 Pa. 1 (2018), utilized a framework similar to that implemented in Md. Green Party v. Md. Bd. of Elections, 377 Md. 127 (2003), when it looked to standards delineated in Article 2, Section 16 of its Constitution — defining criteria to be used in drawing state legislative districts — in order to measure Congressional District Plan, which had been enacted by its Legislature, complied with the Free Elections Clause contained in Pennsylvania's Declaration of Rights.

The 1816 Plaintiffs assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan "unlawfully seeks to predetermine outcomes in Maryland's congressional [*29] districts." They also allege that the 2021 Plan violates Article 7, because it is not based upon "well-established traditions in Maryland for forming congressional districts[,] including compactness, adjoining territory, and respect for natural and political boundaries. They specifically allege that the boundary of the First Congressional District, which they aver is the only district in which a Republican is the incumbent, was redrawn "to make even that district a likely Democratic seat." As a result, they allege that "the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice," have been deprived of their right to elections, which are "free." They contend that Article 7 "prohibits the State from rigging elections in favor of one political party[.]" and conclude that, "any election that is poisoned by political gerrymandering and the intentional dilution of votes on a partisan basis is not free."

The 1773 Plaintiffs assert that the 2021 Plan "subordinate[s]" the requirement, under Article 7 of the Declaration of Rights, that elections be "free and frequent" to "improper considerations," namely [*30] the manipulation of Congressional district boundaries so that they will be unable "to cast a meaningful and effective vote for the candidates they prefer." Additionally, these Plaintiffs allege that Congressional district boundaries that are not based on criteria, such as compactness and the minimization of crossing political boundaries, result in elections that are inherently not "free" and, therefore, violate Article 7.

The State, conversely, argued that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections. The State observes that the capitalization of "L" in "Legislature," is a

direct reference to the General Assembly. Additionally, the State asserts that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, "for which the State is powerless to control the frequency."

With respect to the use of a capital "L" in "Legislature," in the Free Elections Clause, as reflecting only a reference to the state legislature, the State's contention is belied by its own language. Article 7, as it was originally adopted in 1776, was meant to secure a right [*31] of participation:

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.

The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. The reference to "Legislature," then, refers to the only entity for which there was any accountability through suffrage.

The purpose of the Free Elections Clause relative to partisanship, as alleged in the complaints, heretofore has not been the subject of judicial scrutiny. During the Constitutional Convention of 1864, however, proposals to amend Article I of the Constitution, to create a registry of voters whereby voters would be required to pledge a loyalty oath as a prerequisite to voting were hotly debated and the effect of "partisan oppression" on free elections was explored. Proponents of the amendments sought to exclude supporters of the Confederacy, who, by the terms of the oath, [*32] would be disqualified from voting. *Proceedings and Debates of the 1864 Constitutional Convention*, Volume 1 at 1332. Those opposed to the loyalty oath argued that it would be counter to the purpose of "free elections." *Id.* at 1332. One delegate noted that the

loyalty oath presupposed that,

there are now in the State of Maryland enjoying the right of suffrage under the present constitution, ten distinct classes of persons who deserve to be disfranchised from hereafter exercising that right. They ... are to be under a government by others, in which they are to have no voice, in which they are not to be allowed to participate in any shape or form.

Id. In the same debate, another delegate, Mr. Fendall Marbury, decried the imposition of a loyalty oath as a means of oppression, in contravention to the right to participate in free elections:

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 [*33] 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. Thus, inhibiting the creation of an "engine of oppression" "to accomplish party ends" by "whatever party might hold for a time the reins of power" to "suppress the voice of the people" was a purpose of the Free Elections Clause.

Our jurisprudence in [*34] Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State. In Jackson v. Norris, 173 Md. 579 (1937), the Court of Appeals considered whether automated voting machines, which used ballots that restricted the choice of voters to candidates whose names were printed on the ballot, violated the Free Elections Clause. In resolving the applicability of the Free Elections Clause, the Court explained that legislative acts that were "a material impairment of an elector's right to vote[.]" were to be deemed unconstitutional. *Id.* at 585. The Court held that the ballots were violative of the Free Elections Clause, because they constrained the ability of voters to cast their vote for the candidate of their choice and, by extension infringed upon voters' right to participate in free elections. *Id.* at 603.

The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in Green Party, 377 Md. at 127, which concerned an attempt by the Green Party to get a candidate on the ballot for election to Congress, in the state's first congressional district, as discussed, *supra*. In that case, Article 7 was held to protect the right of all qualified voters within the state to sign nominating petitions [*35] in support of minor party candidates for office, regardless of whether they had been classified as "inactive voters." In this regard, the decision in Green Party recognized that the Free Elections Clause afforded a greater protection of the citizens of Maryland in a Congressional election context, than is provided under the Federal Constitution, in the First, Fifth, Ninth, and Fourteenth Amendments, which also had been alleged in the Complaint. Green Party, 317

Md. at 150.²⁶

Clearly, the 1773 and 1816 Complaints, with respect to Article 7 of the Declaration of Rights, the Free Elections Clause, have stated a cause of action and survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

Article 24 of the Maryland Declaration of Rights, Equal Protection

Article 24 of the Maryland Declaration of Rights, entitled "Due process," provides:

That 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.

Although Article 24 does not contain language of "equal protection," the Court of Appeals has long held that "equal protection" is embodied in it: "we deem it settled [*36] that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. Att'y Gen. of Md. v. Waldron, 289 Md. 683 (1981); Bd. of Supervisors of Elections of Prince George's Cnty. v. Goodsell, 284 Md. 279, 293 n.7 (1979) ("[W]e have regularly proceeded upon the assumption that the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights.").

²⁶In interpreting similar phraseology that "Elections shall be free and equal," the Supreme Court of Pennsylvania, in League of Women Voters of Pa., determined that the state's Free Elections Clause required that "each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives." 645 Pa. at 117. The Court concluded that, in order to comply with the strictures of the Free Elections Clause, Congressional district maps be drawn in order to "provide[] 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." *Id.*

The 1816 Plaintiffs assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote. Specifically, these Plaintiffs assert 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. These Plaintiffs add that the 2021 Plan unconstitutionally degrades Plaintiffs' influence on the political process and infringes on their fundamental right to have their votes count fully. The State, in response, asserts that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment in Rucho. The State posits, though, that the scope of equal protection in Maryland is the same as, that which is embodied [*37] in the federal constitution in the Fourteenth Amendment.

The essence of equal protection is that "all persons who are in like circumstances are treated the same under the laws." Hornbeck v. Somerset Cnty. Bd. of Educ., 295 Md. 597, 640 (1983). The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights. In this regard, we need only look at various cases of the Court of Appeals in which the Court was clear that Article 24 and the equal protection clause of the Fourteenth Amendment are "independent and capable of divergent application." Waldron, 289 Md. at 704; see also Md. Aggregates Ass'n, Inc. v. State, 337 Md. 658, 671 n.8 (1995) (explaining the relationship between applications of equal protection guarantees under the Fourteenth Amendment and Article 24 of the Declaration of Rights); Verzi v. Balt. Cnty., 333 Md. 411, 417 (1994) (stating that "'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'" (quoting Waldron, 289 Md. at 715));

Hornbeck, 295 Md. at 640 (stating that "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other.").

Notably, in In re 2012 Legislative Districting, 436 Md. 121 (2013), Chief Judge M. Bell, writing for the Court of Appeals, assumed that Article 24 could embody a greater right than is afforded under the Fourteenth Amendment when he said: "The potential violation of [*38] Article 24 of the Maryland Declaration of Rights is not discussed at length in this case because the petitioners do 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.

The State, however, during argument regarding the Motion to Dismiss, attempted to distinguish what the Court of Appeals said in Footnote 25 in the 2012 redistricting case, by urging that the pivotal quote was addressing only a racial gerrymandering issue, rather than partisan gerrymandering. It is notable, however, that in deriving the notion that Article 24 could embody a greater breadth of protection than is afforded by the Fourteenth Amendment, the Court of Appeals cited to Md. Aggregates Ass'n, supra, (quoting Murphy v. Edmonds, 325 Md. 342, 354-55 (1992)), neither of which involved any racial differentiation.

Obviously, it cannot be lost to anyone that Article 24 was assumed to be applicable in a redistricting context in the 2012 redistricting case. Id. Article 24, moreover, has also been applied in various election and voting right contexts prior to 2012. See Nader for President 2004 v. Md. State Bd. of Elections, 399 Md. 681, 686 (2007) (Presidential elections); DuBois v. City of College Park, 286 Md. 677 (1980) (election for City Council); Goodsell, 284 Md. at 281 (election for County Executive).

Moreover, in Green Party, which is of particular significance to the instant case, Judge John C. Eldridge, writing for the [*39] Court, addressed

whether a statutory scheme comported with equal protection under Article 24 and analyzed the issue using two distinct approaches, both of which are applicable in the instant case.

In 2000, the Maryland Green Party sought to place its candidate on the ballot for the U.S. House of Representatives seat in Maryland's first congressional district. *Green Party*, 377 Md. at 136. The Green Party needed initially to be recognized as a political party within the state, which, pursuant to Section 4-102 of the Election Code, required it to submit a petition to the State Board of Elections that included "the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the 1st day of the month in which the petition is submitted." *Id.* at 135-36. In August of 2000, the Green Party's petition was accepted, and it became "a statutorily-recognized 'political party[.]'" *Id.* at 135 n.3 (quoting Section 1-101(aa) of the Election Code).

In order to nominate a candidate, however, the Green Party was then required to submit a second petition to the Board of Elections, which, pursuant to Section 5-703(e) of the Election Code, was to be accompanied by signatures of "not less 1% of the total number of registered voters who are eligible to vote for [*40] the office for which the nomination by petition is sought[.]" *Id.* at 137 n.6. "On August 7, 2000, the [Green Party] submitted a timely nominating petition containing 4,214 signatures of voters purporting to be registered in Maryland's first congressional district," *id.* at 137, but the petition was rejected by the Board of Elections. Alleging that "it could verify only 3,081 valid signatures, fewer than the 3,411 required by Maryland's 1% nomination petition requirement," the Board reasoned that "many signatures were 'inactive' voters" and ineligible to sign nominating petitions. *Id.* The basis for the Board's rationale was that, under the provisions of Section 3-504 of Election Code, if a sample ballot, which "the local boards customarily mail out... to registered voters prior to an election[.]" were "returned by the postal service" and the voter then "fail[ed] to respond to

[a] confirmation notice," the voter's name would be placed on "the 'inactive voter' registration list." *Id.* at 147. Persons on the inactive voter list, pursuant to Sections 3-504(f)(4) of the Election Code, would "not be counted as part of the registry [of voters]," and under Section 3-504(f)(5), their signatures were not to "be counted ... for official administrative purposes [*41] as petition signature verification[.]" *Id.* at 150.

In addressing the constitutionality of Section 3-504 of the Election Code, which established an inactive voter registry, which essentially disenfranchised voters, Judge Eldridge applied the standards of Section 2 of Article I of the Constitution, which required:

Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

In applying the standards of Section 2, Judge Eldridge declared Section 3-504 of the [*42] Election Code unconstitutional, because that Section "create[d] a group of 'second-class citizens' comprised of persons who are 'inactive' voters and thus not eligible to sign petitions[.]" and was "flatly inconsistent with *Article 24 of the Declaration of Rights*. *Id.* at 150. In explaining how the inactive voter list failed to comport with the Constitutional

standards, Judge Eldridge explained that Section 2 of Article I, which instructs the General Assembly to create a uniform registry of voters,

contemplates a single registry for a particular area containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for inactive voters, and no authority to decree that an "inactive" voter is not a "registered voter" with the rights of a registered voter.

Id. at 143. A nexus between the Equal Protection Clause and a standards clause, therefore, was established.

Judge Eldridge, thereafter, explored another methodology to apply equal protection to evaluate Green Party's claim that the required submission of two petitions in order to nominate its candidate violated Article 24, because it treated principal political parties differently from minor political parties. [*43] *Id. at 159.* The Green Party had argued that "once a group has submitted the required 10,000 signatures to receive official recognition as a political party, ... no further showing of support should be necessary for the name of a minor political party's candidate to be on the ballot." *Id. at 153.* The Board of Elections countered that the second petition was necessary to ensure that a minor party had "a significant modicum of public support," in order to prevent "frivolous" candidates from appearing on ballots. *Id. at 153-54.*

In addressing the question, Judge Eldridge approached the issue through the strict scrutiny lens and required the State to present a compelling interest. In so doing, he determined that the requirement that the Green Party submit one petition to form a political party and then a second petition to nominate a candidate, "discriminates against minor political parties in violation of the equal protection component of Article 24[.]" *Id. at 156-57.* Having identified the two-petition

requirement as discriminatory, Judge Eldridge considered "the extent and nature of the impact on voters, examined in a realistic light," in order to determine the appropriate standard of review of the five-year registration requirement. [*44] *Id. at 163* (quoting *Goodsell, 284 Md. at 288*). He then determined that, "the double petitioning requirement set forth by the Maryland Election Code denies ballot access to a significant number of minor political party candidates. On that basis, the challenged statutory provisions' impact on voters is substantial." *Id.*

Clearly, the 1816 Complaint, with respect to the equal protection principles embodied within *Article 24 of the Declaration of Rights*, has stated a cause of action to survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

Article 40 of the Maryland Declaration of Rights

The 1816 Plaintiffs' cause of action under Article 40 of the Maryland Declaration of Rights survived the Motion to Dismiss. Article 40, which pertains to freedom of speech and freedom of the press, provides:

That the liberty of the press ought to be inviolably preserved; 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. CONST. DECL. OF RTS. ART. 40.

In their Complaint, the 1816 Plaintiffs allege that the 2021 Plan violates Article 40 by "burdening protected speech based on political viewpoint." Specifically, [*45] they allege, the 2021 Plan benefits certain preferred speakers (Democratic voters), while targeting certain disfavored voters (e.g., Republican voters, including Plaintiffs) because of disagreement on the part of the 2021 Plan's drafters with views Republicans express when they vote. *1816 Compl. at ¶ 79.* Plaintiffs

aver that the 2021 Plan subjects Republican voters, including them, to disfavored treatment by "cracking"²⁷ them into specific congressional districts to dilute Republican votes and ensure that they are not able to elect a candidate who shares their views. *1816 Compl.* at ¶ 80. Therefore, Plaintiffs contend that the 2021 Plan has the effect of suppressing their political views and expressions and retaliates against them based on their political speech. *Id.* at ¶ 81.

Defendants argued in their Motion to Dismiss that the Plaintiffs' claims under Article 40 purport to "parrot" free speech claims that are the same as those offered under the *First Amendment to the United States Constitution*, which the Supreme Court has rejected in the redistricting context. *See Rucho, 139 S. Ct. at 2506-07.* Defendants further assert that because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal [*46] counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed. *1816 Mot. Dismiss* at 3; *see generally 1816 Mot. Dismiss*, Section III.C.

Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter. Article 40 of Maryland's Declaration of Rights has been generally regarded as coextensive with the *First Amendment*, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation. *Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621 (2002)* ("Many provisions of the Maryland Constitution ... do have counterparts in the United States Constitution. We have often

²⁷A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others." *Rucho v. Common Cause, U.S. , 139 S. Ct. 2484, 2492 (2019).*

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."); *see also State v. Brookins, 380 Md. 345, 350 n. 2 (2004)* ("While [*47] Article 40 is often treated *in pari materia* with the *First Amendment*, and while the legal effect of the two provisions is substantially the same, that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart." (citing *Dua, 370 Md. at 621*)). The Court of Appeals has not shied away from "departing from the United States Supreme Court's analysis of the parallel federal right" when necessary "[to] ensure[] that the rights provided by Maryland law are fully protected." *Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 550 (2013).*

A violation of the free speech provision of Article 40 is implicated when there is interference with a citizen's right to vote, which is a fundamental right. *Hornbeck, 295 Md. at 641* (explaining that the right to vote is a fundamental right). We apply strict scrutiny when a legislative enactment infringes upon or interferes with personal rights or interests deemed to be "fundamental." *Id. at 641*. When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right. As a result, this Court, under Article 40, will apply [*48] strict scrutiny to the 2021 Plan.

Fundamental Principles Underlying the Maryland Constitution and the Declaration of Rights

The final basis upon which the Plaintiffs have stated a cause of action on which relief can be granted is through the lens of the entirety of our Constitution and Declaration of Rights, which provides a framework to determine the lawfulness of the 2021 Plan based upon their fundamental principles.²⁸ *Snyder ex rel. Snyder*, 435 Md. at 55 ("In construing a constitution, we have stated 'that a constitution is to be interpreted by the spirit which vivifies[.]'" (quoting *Bernstein*, 422 Md. at 56)).

Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature. 1816 Compl. ¶ 2 ("Indeed, the 2021 Plan defies the fundamental democratic principle that voters should choose their representatives, not the other way around."). They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland's Government and its Constitution were founded. [*49]

In response, Defendants posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland. 1816 Mot. Dismiss at 3. As a result, Defendants argue that Plaintiffs cannot seek relief under the

²⁸ *Whittington v. Polk*, 1 H. & J. 236, 241 (Md. Gen. 1802), in dictum, established in Maryland the idea of judicial review - that the courts are the primary interpreters and enforcers of the constitution. The General Court of Maryland explained that if an act of the Legislature is repugnant to the constitution, the courts have the power, and it is their duty, so to declare it. *Id.* The General Court realized that the "power of determining finally on the validity of the acts of the legislature cannot reside with the legislature . . . [because] they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other." *Id.* at 243.

Maryland Constitution or Declaration of Rights. *Id.* at 45. Instead, the State argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting. *Id.* Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. *Id.*

The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland. The courts understood this rule of construction early on, explaining that "[t]he Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument." *Anderson v. Baker*, 23 Md. 531, 612-13 (1865). Specifically, the court in *Anderson* explained that, "[t]he Declaration of Rights is an enumeration of abstract principles, (or designed to be so,) and the Constitution [*50] the practical application of those principles, modified by the exigencies of the time or circumstances of the country." *Id.* at 627; see also *Bandel v. Isaac*, 13 Md. 202, 202-03 (1859) ("In construing a constitution, the courts must consider the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it[.]"); and *Whittington v. Polk*, 1 H. & J. 236, 242 (1802) (stating that, "[t]he bill of rights and form of government compose the constitution of Maryland").

More recently, the Court of Appeals has confirmed this rule of construction. In *State v. Smith*, 305 Md. 489 (1986), the court reiterated that it "bear[s] in mind that the Declaration of Rights is not to be construed by itself, according to its literal meaning; it and the Constitution compose our form of government, and they must be interpreted as one instrument." *Id.* at 511 (explaining that the Declaration of Rights announces principles on which the form of government, established by the Constitution, is based).

While it is established that the Declaration of

Rights and Constitution, together, form the organic law of our State, *Whittington*, 1 H & J at 242, the analysis then requires a review of the text, nature, and history of both documents. The text of the Maryland Constitution recognizes that "all Government of right originates [*51] from the people ... and [is] instituted solely for the good of the whole; and [that citizens] have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient." *Md. Const. Decl. of Rts. art. 1*. Its purpose "is to declare general rules and principles and leave to the Legislature the duty of preserving or enforcing them, by appropriate legislation and penalties." *Bandel, 13 Md. at 203*. Moreover, it is well understood that the rights secured under the Maryland Declaration of Rights are regarded as very precious ones, to be safeguarded by the courts with all the power and authority at their command. *Bass v. State, 182 Md. 496, 502 (1943)*. The framers ensured that the Declaration of Rights would be regarded as precious by enacting subsequent constitutional provisions to safeguard those rights. In that vein, the foundational significance of the right of suffrage is memorialized in the first Article of the Constitution, which pertains to the "Elective Franchise," *Md. Const. art. 1*, and Article I of the Declaration of Rights, which locates the source of all "Government" in the people. *Md. Const. Decl. of Rts. art. 1*.

Popular sovereignty dictates that the "Government" of the people which "derives from them," is properly channeled when our democratic process functions to reflect the will of the [*52] people. Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people. *Md. Const. Decl. of Rts. arts. 1, 7*. Specifically, recognizing that the government is for the people and by the

people, Article I of the Constitution describes the process of electing persons to represent them in government, which is also embodied in the principles expressed through the Free Elections Clause in Article 7.

Under the principle of popular sovereignty, we bear in mind that the Constitution as a whole "is the fundamental, extraordinary act by which the people establish the procedure and mechanism of their government." *Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Att'y Gen., 246 Md. 417, 429 (1967)*; *Whittington*, 1 H & J at 242 ("This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.").

The second principle—avoiding extravagant or undue extension of power by the Legislature—was an important limitation [*53] on the Legislature, the only entity for which the Maryland citizens could vote in 1776. It is stated that "[t]he Declaration of Rights is a guide to the several departments of government, in questions of doubt as to the meaning of the Constitution, and "a guard against any extravagant or undue extension of power[.]" *Anderson, 23 Md. at 628*. The limitation on "extravagant or undue extension of power" is coextensive with the principle of popular sovereignty. For this purpose, "courts have [the] power and duty to determine [the] constitutionality of legislation." *Curran v. Price, 334 Md. 149, 159 (1994)*.

In Maryland, we have long understood that "[t]he elective franchise is the highest right of the citizen, and the spirit of our institution requires that every opportunity should be afforded to its fair and free exercise." *Kemp v. Owens, 76 Md. 235, 241 (1892)*. In *Kemp*, the Court of Appeals characterized the right to vote as "one of the primal rights of citizenship," *id.*, as it did in *Nader for President 2004*: "the right of suffrage" guaranteed by our Constitution "is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society." *399 Md. at*

686. To safeguard the Legislature from exerting extravagant or undue extension of power, each citizen of this State is afforded the opportunity [*54] to vote and hold the Legislature accountable. *Md. Const. Decl. of Rts. arts. 7, 24, 40*. Similarly, the judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in *Article III, Section 4 of the Maryland Constitution* and by the avoidance of extreme partisan gerrymandering.

Therefore, assuming the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom, the Plaintiffs have stated a cause of action under the fundamental principles of the Maryland Constitution and Declaration of Rights of popular sovereignty and avoiding extravagant and undue exercise of power by the Legislature.

Findings of Fact

*Stipulations and Judicial Admissions*²⁹

1. Plaintiffs are qualified, registered voters in Maryland.

2. Plaintiffs in *Szeliga v. Lamone* ("No. 1816") are:

a. Kathryn Szeliga is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Ms. Szeliga currently serves as a member of Maryland's House of Delegates and [*55] has been a member of the House of Delegates since 2011. She is a Republican elected official who represents Maryland citizens in Baltimore and Hartford Counties. She resides in

²⁹ Where stipulations and admissions have overlapped, the trial judge has avoided duplication by adopting the more comprehensive of the two.

District 7 of the 2021 Plan.

b. Christopher T. Adams is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Mr. Adams currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2015. Mr. Adams is a Republican elected official who represents Maryland citizens in Caroline, Dorchester, Talbot, and Wicomico Counties. He resides in District 1 of the 2021 Plan.

c. James Warner is a citizen of the United States and a resident of and registered voter in Maryland. Mr. Warner is a decorated combat veteran and former prisoner of war. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

d. Martin Lewis is a citizen of [*56] the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

e. Janet Moye Cornick is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 3 of the 2021 Plan.

f. Ricky Agyekum is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 4 of the 2021 Plan.

g. Maria Isabel Icaza is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in [*57] District 5 of the 2021 Plan.

h. Luanne Ruddell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She currently serves as Chair of the Garrett County Republican Central Committee and President of the Garrett County Republican Women's Club. Additionally, she serves on the Rules Committee for the Maryland Republican Party and is a member of the Maryland Republican Women and the National Republican Women's organizations. She resides in District 6 of the 2021 Plan.

i. Michelle Kordell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 8 of the 2021 Plan.

3. Plaintiffs in *Parrott v. Lamone* ("No. 1773") are:

a. Plaintiff Neil Parrott is a citizen of Maryland, is registered to vote as a Republican, and resides in the Sixth Congressional District of the new Plan. Mr. Parrott [*58] has registered to run for Congress in 2022 in that district. Mr. Parrott is currently a member of the Maryland House of Delegates.

b. Plaintiff Ray Serrano is a citizen of Maryland, is registered to vote as a Republican, and resides in the Third Congressional District of the new Plan.

c. Plaintiff Carol Swigar is a citizen of Maryland, is registered to vote as a Republican, and resides in

the First Congressional District of the new Plan.

d. Plaintiff Douglas Raaum is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

e. Plaintiff Ronald Shapiro is a citizen of Maryland, is registered to vote as a Republican, and resides in the Second Congressional District of the new Plan.

f. Plaintiff Deanna Mobley is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

g. Plaintiff Glen Glass is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

h. Plaintiff Allen Furth is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District [*59] of the new Plan.

i. Plaintiff Jeff Warner is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan. Mr. Warner intends to run for Congress in 2022 in that district.

j. Plaintiff Jim Nealis is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fifth Congressional District of the new Plan.

k. Plaintiff Dr. Antonio Campbell is a citizen of Maryland, is registered to vote as a Republican, and resides in the Seventh Congressional District of the new Plan.

l. Plaintiff Sallie Taylor is a citizen of Maryland, is registered to vote as a Republican, and resides in the Eight Congressional District of the new Plan.

4. Linda H. Lamone is the Maryland State Administrator of Elections.

5. William G. Voelp is the chairman of the Maryland State Board of Elections.

6. The Maryland State Board of Elections is charged with ensuring compliance with the Election Law Article of the Maryland Code and any applicable federal law by all persons involved in the election process. It is the State agency responsible for administering state and federal elections in the State Maryland.
7. Every 10 years, states redraw legislative [*60] and congressional district lines following completion of the decennial United States census. Redistricting is necessary to ensure that districts are equally populated and may also be required to comply with other applicable federal and state constitutions and voting laws.
8. The United States Constitution provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." *U.S. Const. art. I, § 2, cl. 1*. It also states that, "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The United States Constitution thus assigns to state legislatures primary responsibility for apportionment of their federal congressional districts, but this responsibility may be supplanted or confined by Congress at any time.
9. Maryland has eight congressional districts.
10. The General Assembly enacts maps for these districts by ordinary statute. While the General Assembly's congressional maps are subject to gubernatorial veto, the General Assembly can, [*61] as with any ordinary statute, override a veto.
11. In 2011, following the 2010 decennial census, Maryland's General Assembly undertook to redraw the lines of Maryland's eight congressional districts.
12. To carry out the redistricting process, then-Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") in July 2011 by Executive Order. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.
13. To carry out the redistricting process, Governor O'Malley appointed the GRAC to hold public hearings and recommended a redistricting plan. As part of a collaborative approach to developing a congressional map in 2011, Governor O'Malley asked Rep. Steny Hoyer to propose a consensus congressional map among Maryland's congressional delegation.
14. Democratic members of Maryland's congressional delegation, including Representative Hoyer, were involved in developing a consensus map to provide Governor O'Malley in order to assist with the process of developing a new congressional [*62] map for Maryland.
15. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City.
16. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. The GRAC also solicited public comment on the proposed congressional plan that it adopted.
17. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0.
18. GRAC adopted a proposed congressional redistricting plan and made public its proposed plan

on October 4, 2011. No Republican member of the GRAC voted for the congressional redistricting plan that was adopted.

19. The GRAC plan altered the boundaries of district 6 by removing territory in, among other counties, Frederick County, and adding territory in Montgomery County.

20. On October 15, 2011, Governor [*63] O'Malley announced that he was submitting a plan that was substantially similar to the plan approved by the GRAC to the General Assembly.

21. One perceived consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from District 6.

22. On October 17, 2011, the Senate President introduced the Governor's proposal as Senate Bill I at a special session and it was signed into law on October 20, 2011 with only minor adjustments (the "2011 Plan"). No Republican member of the General Assembly voted in favor of the 2011 Plan.

23. The 2011 Plan was petitioned to referendum by Maryland voters at the general election of November 6, 2012, pursuant to Article XVI of the Maryland Constitution.

24. On September 6, 2012, the Circuit Court for Anne Arundel County rejected contentions that the ballot language for the referendum question was misleading or insufficiently informative. *See Parrott, et al. v. McDonough, et al.*, No. 02-C-12-172298 (Cir. Ct. for Anne Arundel Cnty.) (the "Referendum Litigation"). On September 7, 2012, the Court of Appeals denied a petition for certiorari by the plaintiffs in that case.

25. The 2011 Plan was approved by the voters in that referendum. [*64] The language of the question on the ballot for the referendum stated:

Question 5

Referendum Petition

(Ch. 1 of the 2011 Special Session)

Congressional Districting Plan

Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.

For the Referred Law

Against the Referred Law

26. On July 23, 2014, the Court of Special Appeals affirmed the ruling of the Circuit Court in the Referendum Litigation in an unpublished opinion. *See Parrott, et al. v. McDonough, et al.*, No. 1445, Sept. Term 2012 (Md. App. July 23, 2014). A true and accurate copy of the unpublished opinion in that case is attached hereto as Exhibit XII.³⁰ On October 22, 2014, the Court of Appeals denied a petition for certiorari by the appellants in that case. *See Parrott, et al. v. McDonough, et al.*, No. 382, Sept. Term 2014 (Md. Oct. 22, 2014).

27. Republican Roscoe G. Bartlett won election as United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 [*65] (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

28. Democrats Goodloe E. Byron (1970-1976) and Beverly Byron (1978-1990) won election United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over their respective Republican challenger: 1970 (3.3%); 1972 (29.4%); 1974 (41.6%); 1976 (41.6%); 1978 (79.4%); 1980 (39.8%); 1982 (48.8%); 1984 (30.2%); 1986 (44.4%); 1988 (50.7%); 1990 (30.7%). *See*

³⁰The identification of exhibits attached to this Court's Opinion has been changed from alphabetical identifications, which were previously labeled by the parties in these stipulations, to roman numeral identifications, so as to avoid any confusion between the exhibits admitted at trial and the exhibits attached to this Opinion.

Election Statistics: 1920 to Present, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://perma.cc/98LO-8VXK>.

29. The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections. Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. The margins of victory for the Democrat in District 6 (John Delaney from 2012-2016; David Trone in 2018-2020) have been: 2012 (20.9%); 2014 (1.5%); 2016 (15.9%); 2018 (21.0%); 2020 (19.6%). See *Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://perma.cc/98LO-8VXK>.

30. Maryland Governor Larry Hogan signed [*66] an executive order on August 6, 2015, which created the Maryland Redistricting Reform Commission. A true and accurate copy of the August 6, 2015 executive order is attached hereto as Exhibit I.

31. The Commission was comprised of seven members appointed by the (Republican) Governor, two members appointed by the (Republican) minority leaders in the Maryland Legislature, and two members appointed by the (Democratic) majority leaders in the Maryland Legislature. The Governor's appointees consisted of three Republicans, three Democrats, and one not affiliated with any party. The Legislature's appointments consisted of two Democrats and two Republicans.

32. After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting. The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting

Rights Act and other applicable federal laws. The Commission [*67] also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. A true and accurate copy of the Commission's Final Report is attached hereto as Exhibit X.

33. During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a process by which State legislative and congressional maps were created in the first instance by a purportedly independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor. These bills were House Bill 458 and Senate Bill 380 introduced in the 2016 regular session of the General Assembly, House Bill 385 and Senate Bill 252 introduced in the 2017 regular session, House Bill 356 and Senate Bill 307 in the 2018 regular session, House Bills 43 and 44 and Senate Bills 90 and 91 in the 2019 regular session, and [*68] House Bills 43 and 90 and Senate Bills 266 and 284 in the 2020 regular session. None of these bills was voted out of committee.

34. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data. The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party. Governor Hogan's Executive Order directed the MCRC to prepare maps that, among other things: respect natural boundaries and the geographic integrity and continuity of any municipal corporation, county, or other political subdivision to the extent practicable; and be

geographically compact and include nearby areas of population to the extent practicable. A true and accurate copy of the January 12, 2021 Executive Order is attached hereto as Exhibit XL

35. Over the course of the following months, the MCRC held over 30 public meetings with a total of more than 4,000 attendees from around the State. The Commission provided a public online application portal for citizens [*69] to prepare and submit maps, and it received a total of 86 maps for consideration.

36. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a congressional redistricting map to Governor Hogan.

37. On November 5, 2021, Governor Hogan accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on December 6, 2021.

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

39. The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members of Maryland's General Assembly. Two Republicans, Senator Bryan W. Simonaire and Delegate Jason C. Buckel, also, were appointed to the LRAC by Senator Ferguson and Delegate Jones. Karl S. Aro, who is not a member of Maryland's General Assembly, was appointed as Chair of the [*70] LRAC by Senator Ferguson and Delegate Jones. Mr. Aro previously served as Executive Director of the non-partisan Department of Legislative Services for 18 years until his retirement in 2015, and was appointed by the Court of Appeals to assist in preparing a

remedial redistricting plan that complied with state and federal law in 2002.

40. The LRAC held 16 public hearings across Maryland. At the hearings, the LRAC received testimony and comments from numerous citizens.

41. One of the themes that emerged from the public testimony and comments was that Maryland's citizens wanted congressional maps that were not gerrymandered. Other citizens indicated in these comments or public testimony that they did not want to be moved from their current districts. Still others advocated for the creation of majority-Democratic districts in every district of the State. And others requested that districts be drawn so as to eliminate the likelihood that a current incumbent might be reelected.

42. At the conclusion of the public hearings, the Department of Legislative Services ("DLS") was directed to produce maps for the LRAC's consideration.

43. On November 9, 2021, the LRAC issued four maps for public review [*71] and comment.

44. In a cover message releasing the maps, Chair Aro wrote: "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. Portions of these districts have remained intact for at least 30 years and reflect a commitment to following the Voting Rights Act, protecting existing communities of interest, and utilizing existing natural and political boundaries. It is our sincere intention to dramatically improve upon our current map while keeping many of the bonds that have been forged over 30 years or more of shared representation and coordination."

45. On November 23, 2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan"). Neither Republican member of the LRAC supported the 2021 Plan.

46. On November 23, 2021, by a strict party-line

vote, the LRAC chose a final map to submit to the General Assembly for approval, referred to as the 2021 Plan. Neither Republican member of the LRAC supported the 2021 Plan. Senator Simonaire uttered the statement during the LRAC hearing on November 23, 2021, "[o]nce again, I've seen politics overshadow [*72] the will of the people."

47. A true and accurate copy of the 2021 Plan is attached as Exhibit I.

48. On December 7, 2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan. Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. No Republican member voted against the amendment.

49. On December 8, 2021, the General Assembly enacted the 2021 Plan. One Democratic member voted against the 2021 Plan. No Republican member voted to approve the 2021 Plan.

50. On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. Not a single Republican member of the General Assembly voted to approve the 2021 Plan.

51. According to the Princeton Gerrymandering Project, Democrats now have an estimated vote-share advantage in every single Maryland congressional district.

52. On December 9, 2021, Governor Hogan vetoed the 2021 Plan.

53. On December 9, 2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. One Democratic member of the General Assembly voted against overriding Governor Hogan's veto, while no Republican member of [*73] the General Assembly voted in favor of override.

54. 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."

55. Under Maryland's 2021 adopted congressional plan, portions of Anne Arundel County are in Districts 1, 2, and 4, and that District 1 includes population residing on the Eastern Shore and in Anne Arundel County.

56. Under Maryland's 2021 adopted congressional plan, portions of Baltimore City are in Districts 2, 3, and 7.

57. Under Maryland's 2021 adopted congressional plan, portions of Baltimore County are in Districts 2, 3, and 7.

58. Under Maryland's 2021 adopted congressional plan, portions of Montgomery County are in Districts 3, 4, 6, and 8.

59. Under Maryland's 2021 adopted congressional plan, nine counties have population assigned to more than one congressional district.

60. Congressman Andy Harris, who currently represents the First Congressional District under the Enacted Plan and represented the First Congressional District under the 2011 Plan, was in the Seventh Congressional District, which [*74] is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressman Harris registered to vote at a residence in Cambridge, Maryland, in the First Congressional District, which is on the Eastern Shore at a residence or place where Congressman Harris has owned since 2009.

61. Exhibit II reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit II are a true and accurate representation of data derived from government sources.

62. Exhibit III reports the adjusted population of

Maryland's eight congressional districts following the 2020 census under the 2011 Plan and under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit III are a true and accurate representation of data derived from government sources.

63. Exhibit IV reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered [*75] eligible voters, as of October 17, 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit IV are a true and accurate representation of data derived from government sources.

64. Exhibit V reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit V are a true and accurate representation of data derived from government sources.

65. Exhibit VI reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2020. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VI are a true and accurate representation of data derived from government sources.

66. Exhibit VII reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, under the 2021 Plan. [*76] The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VII are a true and accurate representation of data derived from government sources.

67. Exhibit VIII depicts Maryland's eight congressional districts under the 2011 Plan. The parties stipulate that the matters of fact asserted, stated or depicted in Exhibit VIII are a true and

accurate representation of data derived from government sources.

Findings Derived by the Trial Judge from Testimony and Other Evidence Adduced at Trial

Mr. Sean Trende

68. Mr. Sean Trende testified and was qualified as an expert witness in political science, including elections, redistricting, including congressional redistricting, drawing redistricting maps, and analyzing redistricting.

69. Mr. Trende was asked to analyze the Congressional districts adopted by the Maryland Legislature in the recent rounds of redistricting and opine as to whether traditional redistricting criteria was [subordinated] for partisan considerations.³¹

70. Mr. Trende's opinions and conclusions were rendered to a reasonable degree of scientific certainty typical to his field.

71. In deriving his opinions, Mr. Trende conducted a three-part [*77] analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness of the maps with a comparison to other maps that had been drawn both in Maryland and across the country; he then examined the number of county splits, "the number of times the counties were split up by the maps" and finally, he then conducted a "qualitative assessment" to see how precincts were divided.

72. In the first part, Mr. Trende conducted a simulation analysis. In doing so, he "used the same techniques that were used in Ohio and in North Carolina" and "similar to that which has been used in Pennsylvania." The purpose of Mr. Trende's

³¹ The transcript stated, "whether traditional redistricting criteria was coordinated for partisan considerations," however, the trial judge recalls the correct verbiage was "whether traditional redistricting criteria was *subordinated* for partisan considerations." March 15, 2022, A.M. Tr. 45: 2-7.

analysis was to analyze "partisan bias of the Maryland 2021 congressional districts."

73. Mr. Trende's methodology relied on "shape files."

74. In analyzing the shape files, he used "widely used statistical programming software called R."

75. Mr. Trende also conducted an analysis of the county splits for Maryland utilizing the "R" software.

76. Based upon his analysis of the county splits, referring to Exhibit 2-A, Mr. Trende found that the 1972 Congressional map included 8 splits.

77. In 1982, there were 10 county splits in the [*78] Congressional map.

78. In 1992, there were 13 county splits in the Congressional map.

79. In 2002, there were 21 county splits in the Congressional map.

80. In 2012, there were 21 county splits in the Congressional map.

81. In the 2021 Plan, there are 17 county splits.

82. The 2021 Plan has a historically high number of county splits compared to other Congressional plans, except the 2011 Map.

83. Mr. Trende testified that "you really only need 7 county splits in a map with 8 districts."

84. With respect to "compactness" of the 2021 Plan, Mr. Trende used four of the "most common compactness metrics": the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score; the lower the score the less compact a Congressional plan is.

85. The four scores were presented to strengthen his presentation as well as to present a different "aspect" of compactness.

86. Exhibits 4-A, 4-B, 4-C, and 4-D reflect the

bases for Mr. Trende's compactness analyses, which included scores for all of Maryland's congressional districts dating back to 1788.

87. Exhibit 5 reflects the analysis of the four scores using a scale of 0 to 1, where "1 is a perfectly compact district, and 0 is a [*79] perfectly non-compact score."

88. There is no "magic number" that reflects whether a district is not compact. Comparisons to historical data supported Mr. Trende's conclusion that the 2021 Plan is "an outlier."

89. Based upon Mr. Trende's testimony, the Court finds that for "much of Maryland's history, including for a large portion of the *post-Baker v. Carr* history, Maryland had reasonably compact districts that showed a similar degree of compactness from cycle to cycle."

90. The Court also finds, based upon Mr. Trende's analysis that by Maryland's historic standards, the 2021 Congressional lines are "quite non-compact" regardless of which of the four metrics is used or analyzed.

91. Mr. Trende also analyzed the 2021 Plan with reference to every district in the United States going back to 1972, which is represented by Exhibits 6-A, 6-B, 6-C, and 6-D.

92. Mr. Trende testified that there are a limited number of maps for other states that have lower Reock scores than the 2021 Plan (*see* Exhibit 6-A).

93. Mr. Trende also testified with reference to Exhibit 6-B that there are only "six maps that have ever been drawn in the last 50 years with worse average Polsby-Popper scores than the current [*80] Maryland maps."

94. Mr. Trende further testified with reference to Exhibit 6-C that the 2021 Plan reflects one of the "worst Inverse Schwartzberg score[] in the last 50 years in the United States."

95. With reference to Exhibit 6-D, Mr. Trende

testified that it scored, under the Convex Hull analysis, "very poorly relative to anything that's been drawn in the United States in the last 50 years."

96. Mr. Trende testified relative to compactness in the 2002 and 2012 Congressional plans in comparison to the 2021 Plan and concluded that the 2021 Plan is not compact.

97. Mr. Trende testified that relative to Exhibits 7-A, 7-B, 7-C, and 7-D, that the first Congressional district under the 2021 Plan "lower[ed] the Republican vote share in the First" and "[left] the democratic districts or precincts on the bay." He concluded that the "Democrats have an increased chance of winning this district in a normal or good democratic year."

98. As to Exhibits 8-A, 8-B, 8-C, and 8-D, he concluded that "almost all of the Republican precincts were placed into District 3 or District 7," while "[a]lmost all of the democratic precincts were placed into District 1."

99. Mr. Trende then presented a simulation approach [*81] to redistricting utilizing "R" software. The simulation package was dependent on the work of Dr. Imai using an approach that samples maps drawn without respect to politics. In each of Mr. Trende's simulations he used 250,000 maps all suppressing politics and utilizing two minority/majority districts mandated by the Voting Rights Act; he discarded duplicative maps and arrived at between 30,000 to 90,000 maps to be sampled for each simulation.

100. He then fed various "political data" into the program to measure partisanship.

101. Mr. Trende's simulations relied upon the correlations between vote shares and Presidential data, because he testified that Presidential data is the most predictive in analyzing election outcomes. Mr. Trende further testified that he used other elections at the Presidential, senatorial, and gubernatorial levels to check his simulation results.

102. In the first set of 250,000 maps, Mr. Trende depended upon population parity or equality and contiguity as well as a "very, very light compactness parameter." Other traditional redistricting criteria was not considered.

103. The second set of 250,000 maps depended on a "modest compactness criteria," "drawing without any [*82] political information."

104. The third set of 250,000 maps added respect for county subdivisions.

105. The three analyses are represented in Exhibits 9-A, 9-B, and 9-C.

106. In every one of the maps from which Mr. Trende drew his opinions, there are at least "two majority/minority districts to comport with the Voting Rights Act."

107. With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that "it is exceedingly unlikely that if you were drawing by chance, you would end up with a map where President Joe Biden carried all eight districts."

108. With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was "an extremely improbable outcome if you really were drawing - just caring about traditional redistricting criteria and weren't subordinating those considerations for partisanship."

109. With respect to Exhibit [*83] 9-C, which reflects maps drawn with consideration of population equality, contiguity, compactness, and respect for county lines, Mr. Trende testified that "you almost never produce eight districts that Joe Biden carries." Specifically, Mr. Trende found that

of the 95,000 maps that survived the initial sort, 134 of them, or .14%, produced eight districts that President Biden won.

110. Mr. Trende then presented data dependent on box plots, which are reflected in Exhibits 10-A, 10-B, 10-C, 10-D, and 10-E. On the basis of his box plot analysis, Mr. Trende concluded that, "[p]olitics almost certainly played a role" in the 2021 Plan. He also concluded that, "there is a pattern that appears again and again and again, which is heavily democratic districts are made more Republican but still safely democratic. And that, in turn, allows otherwise Republican competitive districts to be drawn out of that Republican competitive range into an area where Democrats are almost guaranteed to have seven districts, have a great shot at winning that eighth District [that being, the First Congressional District]."

111. With respect to his final analysis, he utilized a "Gerrymandering Index," which is "a number [*84] that summarizes, on average, how far the deviations are from what . . . would [be] expect[ed] for a map drawn without respect to politics."

112. Mr. Trende relied Dr. Imai's work in his paper on the Sequential Monte Carlo methods.³²

113. Exhibits 11-A, 11-B, and 11-C illustrate Mr. Trende's conclusions with respect to the Gerrymandering Index. Lower scores are indicative of greater gerrymandering.

114. Mr. Trende concludes that the 2021 Plan is an outlier with respect to the Gerrymandering Index. In fact, he concludes with respect to Exhibit 11-A, which included considerations regarding contiguity and equal population, that "it's exceedingly unlikely" that a map would result that would have a larger Gerrymandering Index, because there were only 97 maps of the 31,316 maps that were

consulted that would have a larger gerrymandering index.

115. With respect to Exhibit 11-B in which compact districts are drawn, Mr. Trende concluded that there were only 102 maps with larger gerrymandering indexes than the 2021 Plan: "[i]t's exceedingly unlikely if you were really drawing without respect to partisanship, just trying to [*85] draw compact maps that are contiguous and equipopulous, its exceedingly unlikely you would get something like this."

116. The final Gerrymandering Index Exhibit, 11-C, reflects compact plans that are contiguous and of equal population and respect county lines (with due consideration to the Voting Rights Act: two majority/minority districts).

117. On the basis of Exhibit 11-C, Mr. Trende concludes that the 2021 Plan is a "gross outlier," such that of the 95,000 maps under considerations, only one map had a Gerrymandering Index larger than the 2021 Plan.

118. Utilizing the Gerrymandering Index, Mr. Trende concluded that "it's just extraordinarily unlikely you would get a map that looks like the enacted plan."

119. Mr. Trende ultimately concluded that "the far more likely thing that we would accept in social science is given all this data is that partisan considerations predominated in the drawing of this map and that as was the case in Pennsylvania, North Carolina, and Ohio and other states where this type of analysis was conducted, traditional redistricting criteria were subordinated to these partisan considerations."

120. Mr. Trende also concluded that the 2021 Plan has a very high Gerrymandering [*86] Index and the same pattern of districts being drawn up in heavily Republican areas made more Democratic, as well as districts drawn down into the Democratic areas made more Republican, even when three majority/minority districts under the Voting Rights

³² Kosuke Imai & Cory McCartan, *Sequential Monte Carlo for Sampling Balanced and Compact Redistricting Plans*, HARV. UNIV. 6-17 (Aug. 10, 2021), available at: <https://perma.cc/Z2DT-A2RW>.

Act are conceded in the 2021 Plan.

121. Ultimately, Mr. Trende concludes that the 2021 Plan was drawn with partisanship as a predominant intent, to the exclusion of traditional redistricting criteria.

122. Mr. Trende had no opinion with respect to the Maryland Citizens Redistricting Commission ("MCRC") Plan.

123. Mr. Trende's simulations did not account for communities of interest and "double bunking of incumbents" into a single district.

124. Mr. Trende did not consider in his simulations the effect of Governor Hogan's victories in 2014 and 2018.

125. Mr. Trende did not account for unusually strong Congressional candidates running in an election using the 2021 Plan.

126. Mr. Trende used voting patterns rather than registration patterns in his analyses of the 2021 Plan.

127. Mr. Trende testified that the absolute minimum number of county splits in a map with eight congressional districts is seven splits.

128. Mr. Trende, when asked to define [*87] an "outlier," explained that it "means a map that would have a less than 5% chance of being drawn without respect to politics" and that with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier."

129. Mr. Trende testified within his expertise to a reasonable degree of scientific, professional certainty, that under any definition of extreme gerrymandering, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme."

130. Mr. Trende further opined that the 2021 Plan

reflects "the surgical carving out of Republican and Democratic precincts" and that "there are a lot of individual things that tell an extreme-gerrymandering story," and "when you put them all together, it's just really hard to deny it."

131. Mr. Trende further stated that the 2021 Plan was drawn "with an intent to hurt the Republican party's chances of letting anyone in Congress."

132. Mr. Trende testified that the 2021 Plan "dilutes and diminishes the ability of Republicans to elect [*88] candidates of choice."

133. Mr. Trende also testified that among the implications of an extreme partisan gerrymandering, that it "becomes harder for political parties to recruit candidates to run for office, because who wants to raise all that money and then be guaranteed to lose in your district."

134. Mr. Trende did not conduct an efficiency gap analysis in this case.

Dr. Thomas L. Brunell

135. Dr. Brunell testified and was qualified as an expert in political science, including partisan gerrymandering, identifying partisan gerrymandering, and redistricting.

136. Dr. Brunell was asked to examine two Congressional districting maps for the State of Maryland: the 2021 Plan and the MCRC Plan and compare them using metrics for partisan gerrymandering.

137. In his comparison, he looked at city and county splits and compared the outcomes to proportionality regarding the relationship between the statewide vote for each party and the total number of seats in Congress for each party. He also looked at compactness and calculated the efficiency gap regarding statewide elections during the last ten years for both the 2021 Plan and the MCRC Plan.

138. Dr. Brunell testified that the MCRC Map is

more compact [*89] on average than the eight districts for the 2021 Plan. He testified that the average compactness score using the Polsby-Popper index was lower for the 2021 Plan than the MCRC Plan. Dr. Brunell also concluded that in comparison to 29 states, the 2021 Plan had a Reock score that was higher than only two other states, Illinois and Idaho. He also concluded that only Illinois and Oregon had a lower Polsby-Popper score than Maryland with respect to the 2021 Plan.

139. Dr. Brunell utilized the actual number of voters in his analysis rather than voter registration.

140. Dr. Brunell testified that with respect to the 2016 Presidential election, similar to the 2012 Presidential election, the Democratic candidate received 64% of the statewide vote in Maryland and the Democrats carried seven of the eight Congressional districts in Maryland under the 2021 Plan. Using the 2020 Presidential data in evaluating the 2021 Plan, Democrats would carry all eight of the Congressional districts under the 2021 Plan. Using the 2012 Senate candidate data in evaluating the 2021 Plan, the Democrats would carry all eight Congressional districts. Using the 2016 Senate elections in evaluating the 2021 Plan, he testified [*90] that the Democrats would carry seven of the eight districts. Using the 2018 Senate elections data, the Democrats under the 2021 Plan would carry all eight districts. Using the 2014 and 2018 gubernatorial elections, he concluded that the Democrats would carry three of the eight seats in the Congressional elections under the 2021 Plan.

141. Dr. Brunell conducted an efficiency test to determine wasted votes, *i.e.*, those cast for the losing party and those cast for the winning party above the number of votes necessary to win.

142. In order to determine the efficiency gap, he added all the wasted votes for both parties in the same district to get a measure of who is wasting more votes at a higher rate.

143. A lower number of votes wasted reflects less likelihood of partisan gerrymandering.

144. Dr. Brunell testified that just considering the efficiency gap would not be enough to find that a map is gerrymandered. Dr. Brunell testified that one would need to look at "the totality of the circumstances, use different measures, different metrics, to see if they're telling you the same thing [or] different things."

145. Dr. Brunell testified that by using an efficiency gap measure, there was a bias [*91] in favor of the Republicans in the MCRC Plan, although that bias was not significant.

146. Dr. Brunell testified that there were many more county segments and county splits in the 2021 Plan than in the MCRC Plan.

147. Dr. Brunell testified that redrawing electoral districts "is a complex process with dozens of competing factors that need to be taken into account, . . . like compactness, contiguity, where incumbents live, national boundaries, municipal boundaries, county boundaries, and preserving the core confirmed districts."

148. Dr. Brunell only considered compactness of the districts in his analysis of the 2021 Plan.

149. Dr. Brunell did not take into consideration in his analysis the Voting Rights Act or incumbency bias. He testified he did assume population equality and contiguity having been met in the 2021 Plan.

Mr. John T. Willis

150. Mr. Willis testified and was qualified as an expert in Maryland political and election history and Maryland redistricting, including Congressional redistricting.

151. Mr. Willis was asked to evaluate the 2021 Plan and determine if it was consistent with redistricting in the course of Maryland history and to give his opinion as to its validity and whether [*92] it was based on reasonable factors.

152. Mr. Willis opined that Maryland's population over time has changed with an east-to-west

migration, "in significant numbers."

153. Mr. Willis referred to a series of Maryland maps reflecting population migration every 50 years from 1800 to 2000, admitted into evidence as Exhibit H.

154. Exhibit H had been prepared by Mr. Willis in anticipation of the 2001 redistricting process.

155. Exhibit H shows population migration to the west in Maryland and towards the suburbs of the District of Columbia.

156. Mr. Willis testified regarding Defendants' Exhibit I, admitted into evidence, which reflects concentrations of population during the Fall of 2010.

157. He testified almost 70% of the Maryland population is "in a central core, which is roughly 1-95 and the Beltway."

158. Mr. Willis also testified that geography impacts the redistricting process as well as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, and migration patterns.

159. With respect to Defendants' Exhibit J, Mr. Willis testified regarding the [*93] population changes from 2010 to 2020.

160. Mr. Willis further testified that each district in the 2021 Plan had to have a target population of 771,925.

161. Mr. Willis further testified that in Congressional redistricting the General Assembly starts with the map in existence to avoid disturbing existing governmental relationships.

162. Exhibit K includes all of the Congressional redistricting maps from 1789 to the present 2021 Plan, which includes a set of 17 maps. The last map—map 17—Mr. Willis testified that the district lines in the First District appeared to be based on

reasonable factors and are consistent with the historical district lines enacted in Maryland. As the basis for his opinion, Mr. Willis explained that there has always been a population deficit in the First District which requires the boundary to cross over the Chesapeake Bay or to cross north over the Susquehanna River in Harford County and that there have been more crossings over the Chesapeake Bay historically than into Harford County.

163. Mr. Willis further testified regarding regional and county-based population changes over the decades in Maryland since 1790, on a decade basis, reflected in Exhibit L. He testified [*94] that the district lines in the Second Congressional District appear to be based upon reasonable factors and are consistent with historical district lines enacted in Maryland and reflects migration patterns relative to Baltimore City.

164. Mr. Willis further testified about the district lines for the Third Congressional District, which he opined were based on reasonable factors and consistent with historical district lines enacted in Maryland.

165. With respect to the liens of the Fourth Congressional District, Mr. Willis testified that the district lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. He testified that the Fourth District is also what is known as a "Voting Rights Act District."

166. With respect to the district lines of the Fifth Congressional District, he opined that the lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. The district lines are also based on major employment centers and major public institutions.

167. With respect to the district lines of the Sixth Congressional District, following the Potomac River, Mr. Willis testified that [*95] the lines reflect commercial and family connections tying the area together since the State was founded. On

that basis, he testified that the lines of the Sixth District appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

168. Mr. Willis testified that the Seventh Congressional District is another "Voting Rights Act district."

169. Mr. Willis then testified about the Eighth Congressional District, the lines of which appear to be based on reasonable factors and consistent with historical district lines enacted in Maryland. Mr. Willis attributes the lines to traffic patterns along what is basically State Route 97.

170. He finally testified that the all the district lines as they are drawn in the 2021 Plan appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

171. Mr. Willis testified that for every election prior to 2002 in Congressional District 2, a Republican candidate won the Congressional seat. A Republican candidate also won every election in Congress in District 8 from 1992 to 2000, that being Congresswoman Constance Morella. Thereafter, from 2002 to 2010, no Republican [*96] candidate won a Congressional election in District 8. He then testified that in District 2, a Democratic candidate has won the Congressional election every single year since the 2002 map was drawn, *i.e.*, Congressman C.A. Dutch Ruppertsberger.

172. Mr. Willis further testified with respect to the First Congressional District that as a result of a Federal Court decision, District 1 included all of the Eastern Shore and Cecil County as well as St. Mary's County, Calvert County, and part of Anne Arundel County.

173. As a result of the redistricting plan from 2002 to 2010, District 1 was drawn a different way, which included all of the Eastern Shore counties and an area across the Bay Bridge into Anne Arundel County, as well as parts of Harford and

Baltimore County.

174. Mr. Willis characterized the Congressional map from 2002 to 2010 as "fraught with politics to favor some candidates over another."

175. He testified that since the Federal Court ordered the drawing of the Congressional districts in Maryland, the First Congressional District has crossed the Chesapeake Bay in southern Maryland, has crossed the Chesapeake Bay in northern Maryland, as well as crossed parts of Cecil, Harford, Baltimore, [*97] and Carroll County.

176. Mr. Willis testified that from the 1842 until the 2012 Congressional maps, Frederick County was linked in its entirety with the westernmost counties of Maryland, as well as in the Federal District Court redistricting map.

177. During the Court's questioning, Mr. Willis testified that the biggest "driver" in the redistricting process is populations shifts with gains in population in places like Prince George's County for example, and loss of population, for example, in Baltimore City.

178. He also testified about other factors affecting the redistricting process such as "transportation patterns," preservation of land, federal installations, state institutions, major employment centers, prior history, election history, as well as ballot questions that "show voter attitude." He further testified that incumbency protection might be a factor as well as political considerations.

Dr. Allan J. Lichtman

179. Dr. Allan J. Lichtman testified and was qualified as an expert in statistical historical methodology, American political history, American politics, voting rights, and partisan redistricting.

180. Dr. Lichtman testified that "politics inevitably comes into play" in the [*98] redistricting process and that the balance in democratic government is "between political values and other considerations"

to include "public policy, preserving the cores of existing districts, avoiding the pairing of incumbents, looking at communities of interest, shapes of the districts, and a balance between political considerations."

181. Dr. Lichtman testified that, "[w]hen you're involved with legislative bodies, it's inevitably a process of negotiation, log rolling, compromise."

182. Dr. Lichtman denied as unrealistic comparing the 2021 Plan with "ensembles of plans with zero - the politics totally taken out."

183. Dr. Lichtman's test of the 2021 Plan, according to his testimony, evaluates whether the 2021 Plan was "a partisan gerrymander based on the balance of party power in the state." His conclusions were that the likely partisan alignment of the 2021 Plan was "status quo, 7 likely Democratic wins, 1 likely Republican win"; that there could be Democratic districts in jeopardy in 2022 because "2022 is a midterm with a Democratic President." In doing his analysis, he looked at other states which were "actually mostly Republican states, where the lead party got 60% or more of [*99] the Presidential vote," which he termed are "unbalanced political states." According to Dr. Lichtman, he looked at "gerrymandering" in multiple ways, "all based on real-world considerations, not the formation of abstract models."

184. Using an "S-curve" representation in Exhibit N, he determined that a party with 60% of the vote-share would win all of the Congressional districts. He continued in his testimony to discuss how he determined that the Democratic advantage under the 2021 Plan was likely a 7-to-1 advantage based upon the Cook's Partisan Voter Index ("PVI"), referring to Exhibit R.

185. Dr. Lichtman posited through Exhibit T that traditionally there are many midterm losses by the party of the President.

186. Dr. Lichtman testified that the Democrats

could have drawn a stronger First Congressional District for themselves in the 2021 Map than they did to ensure a Republican defeat.

187. Dr. Lichtman testified pursuant to Exhibit U that the Democratic advantage in Maryland in federal elections is in the mid to upper 60% range so that the Democratic seat-share in a "fair" plan would exceed 80% of the seats.

188. With reference to Exhibit V, Dr. Lichtman presented a "trend line" from [*100] which he concluded that Maryland's enacted plan was not a partisan gerrymander because a 7-to-1 seat share was not commensurate with the Presidential vote for the Democratic party in 2020. He concluded that based on the trend line, "you would expect Maryland to be close to 100% of the [Congressional] seats."

189. Utilizing Exhibit W, he testified regarding "unbalanced states" in which the lead party secured more than 64.2% of the vote in the 2020 Presidential election. He included that the Democrats were performing below expectation in terms of its share of Congressional seats.

190. Dr. Lichtman testified that, in his opinion, "empirically, Maryland's Congressional seat allocation under the 2021 Plan is exactly what you would expect, assuming a 7-to-1 seat share."

191. He also testified that the Governor's plan, otherwise referred to as the MCRC Plan, is indicative of a gerrymander by "packing Democrats." He also concluded it was a gerrymander because it paired two or more incumbents of the opposition party, which he believed to be indicative of a gerrymander as reflected by Exhibit Z,

192. He testified that when you pair incumbents, "you are forcing them to rescrumble and figure out how [*101] to rearrange their next election."

193. He also testified that the MCRC Plan also "dismantled the core of the existing districts and disrupted incumbency advantage again and the

balance between representatives and the represented," referring to Exhibit AA.

194. Referring to Exhibit AB, he concluded that the MCRC Plan unduly packed Democrats, because in the MCRC Plan, there would be six Democratic districts over 70% and four Democratic districts close to or over 80%.

195. He testified further that the MCRC Plan is a "packed gerrymander." He testified that the Governor's Commission developing the plan was "extraordinarily under representative of Democrats" and that the Commission was appointed by a partisan elected official. He also testified that the Governor's instructions in developing the plan helps explain "why it turns out to be a Republican-packed gerrymander and a paired gerrymander"; "no attention was given to incumbency whatsoever." Instructions included considerations to include compactness and political subdivisions which he concludes "automatically" plays into, what he calls, partisan clustering. He also testified that the Governor's Secretary of Planning, Edward Johnson, sat [*102] in on deliberations while "there was no comparable Democratic representative sitting in."

196. Dr. Lichtman was critical of every one of Mr. Trende's simulation analyses because each one presumed "zero politics." Dr. Lichtman opined that "when state legislative body creates a plan, political considerations are one element to be balanced with a whole host of other elements and the process of negotiation, bartering, and trading that goes on in the legislative process and a demonstration that politics is not zero, is by not any stretch equivalent to a demonstration that the plan is a partisan gerrymander." He continued in his criticism of Mr. Trende's analysis that Mr. Trende did not provide "an absolute standard" and no comparative state-to-state standard. He testified in criticism of Mr. Trende's simulations not only based on "zero politics," but also because Mr. Trende's simulations did not consider "where to place historic landmarks, historic buildings, deciding how to deal

with parks or airports or large open spaces of water." He concluded that Mr. Trende's analysis was deficient because "you can't measure gerrymandering relative to zero politics, you can't measure gerrymandering [*103] without a standard, and you can't measure gerrymandering when comparing it to unrealistic simulated plans that don't consider much of the factors that routinely go into redistricting."

197. Dr. Lichtman attributed the problems of Republicans across the Congressional districts "not [to] the plan," but rather "the problem is that they are simply not getting enough votes, an absolutely critical distinction in assessing a gerrymander," based upon his review of Governor Hogan's two victories in 2014 and 2018 and the Republican vote-share in the 2014 Attorney General's race.

198. Dr. Lichtman concluded, in criticism of Mr. Trende's simulation analyses, that, "[a] supposed neutral plan based upon zero politics and supposedly neutral principles when applied in the real world into a place like Maryland, in fact, as demonstrated by this chart, produces extreme packing to the detriment of Democratic voters in the State of Maryland. Votes are extremely wasted for Democrats in at least half and maybe even more than half of the districts."

199. Dr. Lichtman, with respect to the 2021 Plan, does not dispute Mr. Trende's use of the four scores beginning with the Reock score, but opines that the scores [*104] of compactness reflect an improvement in compactness from the 2012 plan to the 2021 Plan. He then explains that the county splits decreased from the 2012 plan to the 2021 Plan, specifically, from 21 to 17 splits in the latter.

200. Dr. Lichtman further concluded, using the PVI, that the 2021 Plan "may not even be 7-1 in the real world." It may be "6-2, or even 5-3."

201. Dr. Lichtman later concludes that the very structure of the 2021 Plan "pretty much assures that Republicans are going to win two districts and that Democrats have wasted huge numbers of votes in

the other districts."

202. In criticizing Dr. Brunell's analysis, he concludes that the 2021 Plan is not a gerrymander "just like [the] 2002 and 2012 plans were not gerrymanders."

203. Ultimately, Dr. Lichtman testified that "through multiple analyses -- affirmative analyses in [his] own report and scrutiny of the analyses of experts for the plaintiffs, it's clear that the Democrats did not operate to create a partisan gerrymander in their favor," and that "[t]he Governor's Commission plan is a partisan gerrymander that favors Republicans."

204. On cross-examination, Dr. Lichtman testified that non-compactness of Congressional districts [*105] could be, and it could not be, an indicator of partisan gerrymandering and concluded that "certainly nothing about compactness or municipal splits or county splits proves that a plan is not fair on a partisan basis, but they can be indicators."

205. On cross-examination, Dr. Lichtman acknowledged that for the past ten years, even when a midterm election occurred during the Democratic presidency of Barack Obama, the Maryland Delegation has been 7-1 Democratic/Republican, so that the Democrats did not lose any seats in any midterm elections, and prior to that, for a number of years, the outcome of Maryland's Congressional elections had been 6-2 Democratic/Republican, year after year.

206. Dr. Lichtman, during cross-examination, further stated that he had "checked the addresses of the incumbents to make sure there was not an unfair double bunking, which [Mr. Trende] meant the pairing of incumbents in the same districts" and indicated that he did not see any pairings in the 2021 Plan.

207. Dr. Lichtman, during cross-examination, concluded that if the General Assembly was "intent upon destroying a Republican district, they could

have done so and didn't," which he concludes was a deliberate [*106] decision by Democratic leaders, including the Senate President, Bill Ferguson." He further concluded that the General Assembly "created a district that Andy Harris is overwhelmingly likely to win in the crucial first election under the redistricting plan."

208. Finally, Dr. Lichtman stated that he had not seen evidence that the General Assembly bumped "Andy Harris into the Seventh District with Kweisi Mfume."

209. On cross-examination, Dr. Lichtman reiterated that Mr. Trende's simulations "do not account for all traditional redistricting ideas. A whole host of them - and we've gone over that numerous times - are left out," and that Mr. Trende's simulation resulted in an "extraordinarily high degree of packing, which wastes large numbers of Democratic votes to the detriment of Democrats in Maryland."

210. In response to questioning from the Court, based on his opinion to a reasonable degree of professional certainty as to whether the 2021 Plan comports with Article III, Section 4, of the Maryland Constitution, Dr. Lichtman testified that the 2021 Plan comported with Article III, Section 4 because the drafters "actually made the districts-substantially more compact than they had been in 2012 and equally compact as they had been in 2002." In providing that opinion [*107] relative to compactness, Dr. Lichtman testified that "instead of distorting compactness and violating Section 4, they made their district substantially more compact and in line with what compactness had been over long periods of time." Dr. Lichtman acknowledged that historical compactness is not necessarily the measure of Article III, Section 4 compactness and reiterated that there is no objective standard by which to judge any of the measures utilized by Mr. Trende. He reiterated that he was "not aware of any study which establishes, on an objective scientific basis, a line you can draw in one or more compactness measures, which would distinguish

between compact and noncompact."

211. In response to the question of whether in his opinion, to a reasonable degree of professional, scientific certainty that the standards of due regard shall be given to the natural boundaries and the boundaries of political subdivisions was met, he acknowledged that he had not done any of his own individual research. He opined, however, that "there has not been the presentation of proof by plaintiffs' experts that it doesn't comply." He reiterated "Plaintiffs did not prove that the 2021 Plan violates the Constitution."

212. Dr. Lichtman [*108] opined that Article 7 of the Declaration of Rights, dealing with free and frequent elections, Article 24 of the Declaration of Rights, entitled Due Process, as well Article 40, the free speech clause, would not apply to districting because "none of them mentioned districting or anything like that." He further opined that the free and frequent elections clause "clearly was designed for legislative elections" and that based upon his delineation of its history, that the free speech clause did not apply at all.

213. Dr. Lichtman further opined that he did not think that Article III, Section 4 or any of the provisions in the Maryland Constitution or Declaration of Rights applied to Congressional gerrymandering, nevertheless, even assuming were the standards to apply, partisan considerations would not predominate.

Application of the Law to the Findings of Fact

Applying the law to the findings of fact adduced during a trial with a "battle of the experts" initially requires a trial judge to transparently reflect what weight was given to a particular opinion or sets of opinions and why. Each expert in the instant case was qualified as an expert in particular areas. The qualification of each witness, however, was only the beginning of the analysis.

Whether the expert's testimony was reliable and

helpful to the [*109] trier of fact and law, the trial judge herein, informs the weight to be afforded to each of the opinions. Obviously, the newly adopted *Daubert* standard, under *Rochkind v. Stevenson*, 471 Md. 1 (2020), was a point of discussion with respect to the opinions of Mr. Willis and Dr. Lichtman, but that challenge was withdrawn in the end by the Plaintiffs, and the State did not mount a *Daubert* challenge at all. Beyond *Daubert*, then, the weight given to an expert's opinion depends on many factors including, as well as irrespective, of their qualifications, but based upon a consideration of all of the other evidence in the case, under *Maryland Rule 5-702*.

In the present case, the trial judge gave great weight to the testimony and evidence presented by and discussed by Sean Trende. His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated. He used multifaceted analyses in his studies of compactness and splits of counties and acknowledged the data that he did not consider, such as voter registration patterns, might have yielded additional data, although the reliance on such data had not been studied. He readily acknowledged that he was not yet a PhD, [*110] although that title was soon to come, and that he was being paid for his work by the Plaintiffs.

Importantly, although he testified that he was on the Republican side of a number of redistricting cases in which Republican plans had been challenged—*Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658 (N.C. Super. July 08, 2013); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681 (S.D. Ohio 2018), vacated sub nom. *Ohio A. Philip Randolph Inst. v. Obhof*, 802 F. App'x 185 (6th Cir. 2020); *Whitford v. Nichol*, 151 F. Supp. 3d 91.8 (W.D. Wis. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), vacated and remanded, 139 S. Ct. 2484 (2019); and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, N.E.3d , 2022-Ohio-789 (2022)—he apparently learned what would be

helpful to a court in evaluating a Congressional redistricting plan, because he clearly relied on methodologies that were persuasive in North Carolina, *Harper v. Hall*, 2022-NCSC-17, 868 S.E.2d 499 (2022), and *Pennsylvania, League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018).

The impeachment of Mr. Trende's presentation undertaken by Dr. Lichtman was unavailing, in large part, because of the bias that Dr. Lichtman portrayed against simulated maps utilizing "zero politics" and county splits that "happened" to be less in number than what had occurred in a map that had been the subject of criticism in 2012 at the Federal District Court level but not addressed in *Rucho* in 2019. Mr. Trende's presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.

Dr. Brunell's testimony and evidence in support was much less valuable and helpful to the trial judge, because to evaluate compactness, the [*111] efficiency gap, as presented, did not have the power that was portrayed in other cases. See e.g., *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) (finding that around 75% of historical efficiency gaps around the country were between -10% and 10%, and only around 4% had an efficiency gap greater than 20% in either direction, and therefore, noting that several of Ohio's prior elections had efficiency gaps indicative of a plan that was a "historical outlier," including an efficiency gap of -22.4% in its 2012 election and an efficiency gap of -20% in its 2018 election, compared to efficiency gaps in 2014 and 2016 that were -9% and -8.7%, respectively). Dr. Brunell's presentation was murky and lacking in sufficient detail. He made no attempt to establish the interaction of an efficiency gap analysis with other types of testing for compactness and certainly, no basis to believe that allocating Republicans two of eight Congressional seats is appropriate, let alone reliable or valid.

The opinions of Mr. Willis, while of interest, to gain a perspective as to what legislators considered in 2002, 2012, and possibly may have considered in 2021 to draw the various Congressional boundaries, such as natural boundary lines, "quarters of transportation," [*112] the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, major employment centers, preservation of land, political considerations, and migration patterns, may in fact be "reasonable," but not, in any way, helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan. As Chief Judge Robert M. Bell from the Maryland Court of Appeals, in 2002 in *In re Legislative Districting of State*, eloquently stated in opinion regarding the influence of such criteria on Constitutional redistricting standards:

Instead, however, the Legislature chose to mandate only that legislative districts consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. That was a fundamental and deliberate political decision that, upon ratification by the People, became part of the organic law of the State. Along with the applicable federal requirements, adherence to those standards is the essential prerequisite of any redistricting plan.

That is not to say that, [*113] in preparing the redistricting plans, the political branches, the Governor and General Assembly, may consider only the stated constitutional factors. On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives. Thus, so long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or

political parties, or to achieve other social or political objectives, will not affect its validity. On the other hand, notwithstanding that there is necessary flexibility in how the constitutional criteria are applied - the districts need not be exactly equal in population or perfectly compact and they are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity - those non-constitutional criteria cannot override the constitutional ones.

370 Md. at 321-22.

Finally, this trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. [*114] Dr. Lichtman's presentation was dismissive of empirical studies presented by Mr. Trende because of their "zero politics" and disavowed their use because of their lack of absolute standards or comparative standards to guide what an outlier is. Juxtaposed against Mr. Trende's use of reliable valid measures that have been accepted in other state courts, such as simulations in North Carolina and Pennsylvania, Dr. Lichtman's own data urged the "realities" of Maryland politics, as he used a "predictive" model to address alleged Democratic concerns about losing not only one, but two or three seats in the midterm election in 2022, because of having a Democratic President in power; in fact the realities of Maryland politics, in the last ten years, under Republican as well as Democratic Presidents, as well as a Republican Governor, have been that the Congressional delegation has stayed essentially the same—7 Democrats to 1 Republican.

Dr. Lichtman's denial of the fact that the 2021 Plan, as enacted, actually "pitted" Congressman Andy Harris against Congressman Kweisi Mfume in the Seventh Congressional District when the 2021 Plan did so, reflects a lack of thoughtfulness and deliberativeness that [*115] a trial judge would expect of experts. The fact that only a short period of time was afforded for the development of Dr. Lichtman's report does not excuse that it would have taken a review of the 2021 Plan as enacted in December of 2021, rather than in February of 2022,

to know that Congressman Harris had to move to Cambridge to reside in the First Congressional District to avoid being "paired" in the 2021 Plan with a Democratic Congressional incumbent in the Seventh Congressional District.

Finally, although a cold record does not always reflect the nuances of a witness's demeanor, it is apparent from the words Dr. Lichtman used that he was dismissive of the use of a normative or legal framework to evaluate the "structure," as he called it, of redistricting. He began his discussion by referring to legal "machinations" in referring to his testimony discussing a challenge by the plaintiffs in Vieth v. Jubelirer, 541 U.S. 267, 124 S. Ct. 1769 (2004) against the redistricting plan of Pennsylvania for Congress, and ended with what amounted to a refrain of an "apologist" of the work of politicians.

There is no question that map-making is an extremely difficult task, but like most of the complexities of the modern world, justifications of map-making [*116] must be evaluated by the application of principles—here, the organic law of our State, its Constitution and Declaration of Rights.

Analysis and Conclusion

Application of the legal tenets that survived the Motion to Dismiss, as articulated heretofore, to the Joint Stipulations, Judicial Admissions and the stipulation orally presented by the State at the end of the trial, with consideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an "outlier," an extreme gerrymander that subordinates constitutional criteria to political considerations. In concluding that the 2021 Congressional Plan is unconstitutional under Article III, Section 4, either on its face or through a nexus to the Free Elections Clause, MD. CONST. DECL. OF RTS. art. 7, the trial judge recognized that the 2021 Plan embodies population

equality as well as contiguity, as Dr. Brunell acknowledged. The substantial deviation from "compactness" as well as the failure to give "due regard" to "the boundaries of political subdivisions" as required by Article III, Section 4, are the bases for the constitutional failings of the 2021 Plan, which has been challenged in its entirety.

In evaluating [*117] the criteria of compactness required under Article III, Section 4, it is axiomatic that it and contiguity, but particularly compactness, "are intended to prevent political gerrymandering." 1984 Legislative Districting, 299 Md. at 675 (citing Schrage v. State Bd. of Elections, 88 Ill.2d 87 (1981); Preisler v. Doherty, 365 Mo. 460 (1955); Schneider v. Rockefeller, 31 N.Y.2d 420 (1972); Opinion to the Governor, 101 R.I. 203 (1966)). With respect to compactness, while it is true that our cases do not "insist that the most geometrically compact district be drawn," In re Legislative Districting of State, 370 Md. at 361, we recognized that compactness must be evaluated by a court in light of all of the constitutional requirements to determine if all of them "have been fairly considered and applied in view of all relevant considerations." Id. at 416.

The task of evaluating whether "compactness" and other constitutional requirements have been fairly considered by the Legislature is informed by the various analyses performed by Mr. Trende. Initially, by application of each of the four "most common compactness metrics," *i.e.*, the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 Plan are "quite non-compact" compared to prior Maryland Congressional maps and to other Congressional maps in other states based upon a comparison of the scores achieved with reference to the four metrics. It is notable that the 2021 Plan reflects [*118] compact scores that range from a "limited" number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to "very

poorly relative to anything drawn in the last fifty years in the United States."

The simulations conducted by Mr. Trende, of the type already accepted in North Carolina and Pennsylvania, when infused with the same constitutional criteria as embodied in Article III, Section 4 and allowing for two Voter Rights districts, result in only .14% or 134 maps of the 95,000 reflected produce a victory for President Biden in all eight Congressional districts in Maryland, based upon predictive Presidential votes, as acknowledged by the experts. Importantly, Exhibit 11-C, the Gerrymandering Index exhibit, which embodies all of the constitutional mandates and two Voting Rights districts, reflects that the 2021 Congressional Plan is a "gross outlier", as Mr. Trende opined, "such that of the 95,000 maps under consideration, only one map had a Gerrymandering Index larger than the 2021 Plan. It is extraordinarily unlikely that a map that looks like the 2021 Plan could be produced without extreme partisan [*119] gerrymandering." As a result, the notion that the 2021 Plan is compact is empirically extraordinarily unlikely, a conclusion that utilizes comparative metrics and data throughout the various states. The notion that a plan must pass an absolute standard, as Dr. Lichtman suggested, is without merit, for the test is whether the constitutional conditions, especially compactness, are met.

With respect to county splits, it is clear that the number of crossings over county lines are 17 in the 2021 Plan, which is a historically "high number" of splits since 1972, only less than the 21 splits in 2002 and 2012. The importance of the due regard to political subdivisions language is a reflection of the importance of counties in Maryland, as recognized in Md. Comm. for Fair Representation v. Tawes, 229 Md. 406 (1962):

The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model

of the English shire . . . Indeed, Kent County had been established by Claiborne before the landing of the Marylanders . . . We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. [*120] They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. . . . While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

Id. at 411-12. In dissent in *Legislative Redistricting Cases*, 331 Md. 574 (1993), Judge Eldridge reiterated the pivotal governing function of counties:

Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, "[t]he counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union."

The Maryland Constitution itself recognizes the critical importance of counties in the very structure of our government. See, e.g., *Art. I, § 5*; *Art. III, §§ 45, 54*; *Art. IV, §§ 14, 19, 20, 21, 25, 26, 40, 41, 41B, 44, 45*; *Art. V, §§ 7, 11, 12*; *Art. VII, § 1*; *Art. XI*; *Art. XI-A*; *Art. XI-B*; *Art. XI-C*; *Art. XI-D*; *Art. XI-F*; *Art. XIV, § 2*; [*121] *Art. XV, § 2*; *Art. XVI, §§ 3, 4, 5*; *Art. XVII, §§ 1, 2, 3, 5, 6*. After the State as a whole, the counties are the basic governing units in our political system. Maryland government is organized on a county-by-county basis. Numerous services and responsibilities are now, and historically have been, organized at the county level.

The boundaries of political subdivisions are a significant concern in legislative redistricting for another reason: in Maryland, as in other States, many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties. See *Reynolds v. Sims*, 377 U.S. 533, 580-081, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506, 538 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions").

Id. at 620-21.

Due regard for political subdivision lines is a mandatory consideration in evaluating compliance with constitutional redistricting, as Chief Judge Bell noted in the 2002 Legislative districting case, *In re Legislative Districting of State*, 370 Md. at 356, such that fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed. To say that the 2021 Plan is four splits better than the 2002 and 2012 [*122] Plans (which have never been examined in a State court, let alone sanctioned), and so must be lawful, is a fictitious narrative, because it is inherently invalid; in 2002, Chief Judge Bell, writing on behalf of the Court, rejected similar justifications offered by the experts on behalf of the Defendants in this case. "There is simply an excessive number of political subdivision crossings in this redistricting plan. . . ." The State has failed to meet its burden to rebut the proof adduced that the constitutional mandate that due regard to political subdivision lines was violated in the 2021 Plan.

To the extent that Dr. Lichtman and Mr. Willis discussed and prioritized a myriad of considerations that Dr. Lichtman called "political" and Mr. Willis called "reasonable factors," would require that this Court accept their implicit bias that constitutional mandates can be subordinated to politics and/or "reasonable factors." Again, Chief Judge Bell, more

eloquently and precedentially than this judge could, addressed the same justifications offered by the State, then and now, when in 2002, he said,

[b]ut neither discretion nor political considerations and judgments may be utilized in violation [*123] of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution "trumps" political considerations. Politics or non-constitutional considerations never "trump" constitutional requirements.

Id. at 370.

Mr. Trende's analysis of the 2021 Plan with respect to its extreme nature and its status as an "outlier" reflects the realities of the 2021 Plan: an "outlier means a map that would have a less than five percent chance ... of being drawn without respect to politics" and with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier," therefore, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be [*124] drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme." This trial judge agrees; the 2021 Plan is an outlier and a product of extreme partisan gerrymandering.

With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.

With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at

trial, proved that the 2021 Plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria," *Findings of Fact, supra*, ¶ 121, accomplished by the party in power, to suppress the voice of Republican voters. The right for all votes of political participation in Congressional elections, as protected by Article 7, was violated by the 2021 Plan in its own right and as a nexus to the standards of *Article III, Section 4*.

Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan. The application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the [*125] State presented under a "compelling interest" standard. It is clear from Mr. Trende's testimony that Republican voters and candidates are substantially adversely impacted by the 2021 Plan. The State has not provided a "compelling state interest" to rationalize the adverse effect.

Alternatively, the same rationale holds true for the violation of *Article 40 of the Maryland Declaration of Rights*, the Free Speech Article, which requires a "strict scrutiny" analysis because a fundamental right is implicated, a citizen's right to vote. In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.

Finally, with respect to the evaluation of the 2021 Plan through the lens of the Constitution and Declaration of Rights, it is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those [*126] governing reside. The 2021 Congressional Plan is unconstitutional,

and subverts that will of those governed.

As a result, this Court will enter declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional. A separate declaratory judgment will be entered as of today's date.

/s/ Lynne A. Battaglia

LYNNE A. BATTAGLIA

Senior Judge

3/25/2022

Date

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