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Court of Appeals
Suzanne C. Johnson,
Clerk of Court
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IN THE MATTER OF 2022 LEGISLATIVE DISTRICTING OF THE STATE OF MARYLAND	*	IN THE COURT OF APPEALS
MARK N. FISHER NICHOLAUS R. KIPKE KATHRYN SZELIGA,	*	OF MARYLAND September Term, 2021
Petitioners.	*	Misc. No. 25

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

MOTION TO DISMISS PETITION

Petitioners are three registered voters and Members of the House of Delegates who assert that the legislative districting plan adopted by the General Assembly (the "2022 Plan") violates several provisions of the Maryland Constitution. Specifically, Petitioners assert that the 2022 Plan was the product of unlawful "political gerrymandering" that resulted in the creation of at least 13 specific districts that violate the requirements of Article III, § 4 of the Maryland Constitution, as well as Articles 7, 24 and 40 of the Maryland Declaration of Rights and Article I, § 7 of the Constitution. Pet. ¶ 69; *see id.* ¶¶ 23-87. All these claims are defective as a matter of law and should be dismissed by this Court.

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First, Petitioners fail to state a proper claim under Article III, § 4. The districts that they allege violate the "compactness" requirement of that provision,[1] in fact,

[1] Article III, § 4 requires that "Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due

score *higher* on the mathematical tests for measuring geographical compactness than the lowest-scoring district in the Petitioners' preferred plan—the plan developed by Governor Hogan's Maryland Citizens' Redistricting Commission and presented by the Governor to the General Assembly (the "Governor's Plan"). Meanwhile, the districts that Petitioners allege impermissibly cross political boundaries, *see* Pet. ¶¶ 28, 31, 32, 36, 41, 44, 45, 52, 58, 62, 67, in general do not, because "towns and localities," *e.g.*, Pet. ¶¶ 31, 41, 45, 67, do not constitute political subdivisions for purposes of Article III, § 4. And where districts do cross county boundaries, they do so out of necessity to equalize population between districts. These conclusions, which are based on facts referenced in the Petition or subject to judicial notice by this Court, are dispositive and require dismissal of Petitioner's claims under Article III, § 4.

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Second, Petitioners' remaining claims fail, because Article III, § 4 establishes the exclusive constitutional avenue for challenging legislative districts on the ground that they were drawn based on impermissible political considerations. The framers of that provision struck a careful balance in recognizing that some pursuit of political objectives in districting was permissible, so long as it took place within the guardrails of the "compact[ness]," "adjoining territory," and "due regard" for the

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regard shall be given to natural boundaries and the boundaries of political subdivisions." Md. Const. art. III, § 4.

"natural boundaries and the boundaries of political subdivisions" requirements set out in Article III, § 4. Allowing claims like Petitioners' to proceed under other provisions of the Constitution would upset this balance struck by the framers to moderate—but not eliminate—the degree to which political considerations may be used in creating State legislative districts.

Moreover, even if Petitioners could somehow overcome the Maryland Constitution's fundamental choice to regulate political gerrymandering in Article III, § 4 alone, each of these other claims should be dismissed for lack of any legal support.

Petitioners' claims under Article 7 of the Declaration of Rights are deficient, because that provision's guarantee that "Elections shall be free and frequent," Decl. of Rights art. 7, was never intended to encompass districting, as both the history of its enactment and the cases interpreting it make clear.

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The Constitution's intended meaning similarly precludes Petitioners' claims under Article I, § 7. The legislative history and case law interpreting this provision confirm that it was not conceived as a restriction, but instead directs the General Assembly to exercise its inherent authority to "pass Laws necessary for the preservation of the purity of Elections" as it deems appropriate, and thereby to regulate the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud. Article I, § 7

has never once been used, by any court, to strike down an Act of the General Assembly for undermining the "purity of elections."

Finally, Petitioners' claims under Articles 24 and 40 of the Declaration of Rights purport to assert equal protection and free speech claims that, as to parallel provisions of the United States Constitution, the Supreme Court has rejected in the redistricting context as non-justiciable political questions. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Because the Court of Appeals has generally treated the rights enshrined under Articles 24 and 40 as "coextensive" with their federal counterparts and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, and because nothing in the Petition suggests the existence of any "judicially manageable" "legal standards discernible in the Constitution" or applicable statutes for adjudicating such claims, *id.* at 2499-500, the Article 24 and Article 40 claims should be dismissed.

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STATEMENT OF FACTS

The Constitutional Districting Process

The Maryland Constitution prescribes a process and establishes parameters for the creation of State legislative districts. Article III, § 3 establishes that the State shall be divided into legislative districts for the election of one Senator and three Delegates from each district, and that districts may be subdivided into single-member or mixed single- and double-member districts for Delegates. Md. Const.

art. III, § 3. Article III, § 4 requires that State legislative districts "consist of adjoining territory, be compact in form, and of substantially equal population," and that "due regard . . . be given to natural boundaries and the boundaries of political subdivisions" in their creation. *Id*. art. III, § 4. The "compactness" requirement, in particular, was "intended to prevent political gerrymandering," *Matter of Legislative Districting of State* ("*1984 Legislative Districting*"), 299 Md. 658, 687 (1984), although the framers of that provision understood that it did not completely foreclose consideration of political objectives in the districting process. Article III, § 5, establishes the process for adopting a new legislative districting plan "following each decennial census of the United States." The Governor is required to hold "public hearings" and "prepare a plan" setting forth the boundaries of the districts, and present that plan to the leadership of the General Assembly "not later than" the first day of the legislative session in the second year following the census. Md. Const. art. III, § 5. The General Assembly may adopt its own plan, but unless this is done within 45 days after the opening of the regular session in that second year following the census, the Governor's plan becomes law. *Id.*

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Allegations in the Petition

Petitioners allege that the 2022 Plan is invalid under the Maryland Constitution because it is the product of unlawful political gerrymandering. Pet. ¶ 5. They allege that the 2022 Plan was produced by a "purportedly bipartisan"

Legislative Redistricting Advisory Commission ("LRAC") that, in fact, was "controlled by its Democratic members." *Id.* ¶ 16.[2] The LRAC-developed plan "moved swiftly through committee" and, on January 27, 2022, was passed by the General Assembly. *Id.* ¶ 18; *see* H.J. Res. 2/S.J. Res. 2.[3]

Petitioners allege that "non-constitutional political considerations were the primary criteria underlying the creation" of at least 13 districts, while the requirements of Article III, § 4 were "either ignored or subordinated to these non-constitutional considerations." *Id.* ¶ 23. Specifically, Petitioners contend that:

- Districts 7, 9, 12, 21 22, 23, 24, 25, 31, 33, 42 and 47—and, in many cases, their sub-divided Delegate Districts—violate the "compactness" requirement of Article III, § 4 because of their appearance (*e.g.*, "simple eye test," "shaped like a boomerang," or "defies easy explanation," *see* Pet. ¶¶ 25, 31, 39) or their scores on mathematical tests for measuring geographical compactness known as the "Reock" or "Polsby-Popper" tests. *See* Pet. ¶¶ 25-27 (District 12), 31 (District 21), 34-35 (District 31), 39-40 (District 33), 49-51 (District 7), 55-57 (District 42), 61 (District 9), 64-66 (Districts 22, 23, 24, 25, and 47).

- Districts 7, 9, 12, 21, 22, 23, 24, 25, 27, 31, 33, 42 and 47 violate the "due regard" for "political subdivisions" requirement by crossing county lines, *see* Pet. ¶¶ 28 (District 12), 32 (District 21), 44 (District 27), 52 (District 7), 58 (District 42), 62 (District 9), and/or dividing towns and localities, *see id.* Pet. ¶¶ 28 (District 12), 32 (District 21), 36

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[2] The Commission was Chaired by Karl S. Aro, and the rest of its members were President Ferguson, Speaker Jones, Senate President Pro Tempore Melony Griffith; House Majority Leader Eric G. Luedtke; Senate Minority Leader Bryan W. Simonaire; and House Minority Leader Jason C. Buckel. Pet. ¶ 15

[3] The Governor's Districting Plan was also introduced on January 12, 2022, as House Joint Resolution 1/Senate Joint Resolution 3.

(District 31), 41 (District 33), 45 (District 27), 52 (District 7), 58 (District 42), 62 (District 9), and 67 (Districts 22, 23, 24, 25 and 47).

- District 27 "gives no regard for natural boundaries" because "it crosses the Patuxent River to combine Calvert, Charles, and Prince George's Counties." *Id.* ¶ 46.

Petitioners claim (usually "upon information and belief") that all of these alleged violations of Article III, § 4, were undertaken to accomplish a political objective. *See id.* ¶¶ 29, 33, 37, 42, 47, 53, 59, 63, 68.

In addition to violating the requirements of Article III, § 4, Petitioners contend that the "political[] gerrymander[ing]" reflected in these districts also violates the Maryland Constitution and Declaration of Rights in four other ways. First, they allege that the 2022 Plan violates the "free and frequent elections" clause of Article 7 of the Maryland Declaration of Rights, because "[a]ny district map created through political gerrymandering and with the intent to dilute votes on a partisan basis is not free." Pet. ¶ 74. Second, they allege that the Plan violates the requirement in Article I, § 7 of the Maryland Constitution that the General Assembly "pass laws necessary for the preservation of the purity of Elections," because, in Petitioners' view, the 2022 Plan "is not fair or evenhanded" and instead "legalizes political corruption." *Id.* ¶¶ 75-77. Third, they allege that the 2022 Plan violates their equal protection rights under Article 24 of the Declaration of Rights, by discriminating against them as Republican voters. *Id.* ¶¶ 78-81. Finally, they allege that the 2022 Plan violates their freedom of speech rights under Article 40 of the Declaration of Rights by

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diluting their votes and depriving them of their ability to elect a candidate who shares their views, as well as by retaliating against them on the basis of their political viewpoints. *Id.* ¶¶ 82-87.

The LRAC Process and the Development of the 2022 Plan

After its establishment in July 2021, the LRAC held 10 in-person hearings across the State as well as 3 virtual statewide hearings, hearing from over 150 witnesses and receiving over 530 pieces of testimony and 20 maps.[4] The LRAC-produced plan was introduced as House Joint Resolution 2/Senate Joint Resolution 2 on the first day of the regular session, January 12, 2022. Senate Joint Resolution 2 became the Enacted Plan on February 1, 2022.

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Mr. Aro, the LRAC's Chair and the former Executive Director of the non-partisan Department of Legislative Services ("DLS"), has 32 years of redistricting experience, including serving as an expert in legislative and judicial oversight for Maryland redistricting. Press Release, Office of the Speaker and Office of the Senate President, "Senate President, Speaker of the House Announce Legislative Redistricting Advisory Commission," July 8, 2021.[5] Mr. Aro testified during the

[4] Senate Proceeding No. 6, January 19, 2022, statement by Senate President Pro Tem; video available at *Floor Actions - Senate (maryland.gov)*, at 54:12.

[5] *See also* Bennett Leckrone, *Maryland Matters*, "Ferguson and Jones Announce Legislative Redistricting Commission, July 8, 2021, available at *Ferguson and Jones Announce Legislative Redistricting Commission - Maryland Matters.*

January 18, 2022 hearing before the Senate Reapportionment and Redistricting Committee that the approach of the LRAC was to start with the existing districts to the extent practicable.[6] At the same time, the LRAC members understood that consideration of existing districts as communities of interest, while important, was secondary to legal requirements imposed by the State and federal Constitutions and other federal law, including the Voting Rights Act. Indeed, the members were briefed about these criteria during their first public meeting.[7] For this reason, DLS consistently presented 2020 census data at public meetings to show population changes from the 2010 census per county and per legislative district to inform the LRAC members and the public about where population changes needed to be addressed to meet equal population requirements.[8]

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According to Maryland's updated census data, the ideal population for a Senatorial District was 131,391; for a two-member House District 87,594; and for a single-member House District 43,797. Based on these numbers, the greatest number of possible legislative district share per county was as follows:

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[6] *Legislative Districting Plan of 2022: Hearing on S.J. 0002 Before the S. Reapportionment & Redistricting Comm.*, 2022 Sess. (Jan. 18, 2022) (testimony of Karl S. Aro, Chair, LRAC) ("Aro Testimony"), at 28:08, available at: https:// mgaleg.maryland.gov/mgawebsite/Legislation/Details/sj0002.

[7] LRAC public hearing, August 31, 2021, available for viewing at *RAC Committee Session, 8/31/2021 #1 - YouTube*.

[8] *Id.*, Presentation by Michelle Davis, Department of Legislative Services, starting at 19:31.

County	**Possible Districts**
Montgomery	8.09
Prince George's	7.37
Baltimore	6.52
Baltimore City	4.49
Anne Arundel	4.46
Howard	2.53
Frederick	2.07
Harford	1.99
Carroll	1.31
Charles	1.27
Washington	1.15
St. Mary's	.87
Wicomico	.79
Cecil	.79
Calvert	.71
Allegany	.50
Worcester	.40
Queen Anne's	.38
Talbot	.29
Caroline	.25
Dorchester	.25
Garrett	.22
Somerset	.17
Kent	.15

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In the August 31, 2021 meeting of the LRAC, Mr. Aro described how the LRAC would take the standard approach in using the adjusted 2020 census data. That approach is to "work from the fringes into the center" to avoid having excess population with no district in which to be placed. LRAC Meeting of August

31, 2021 2:08 to 2:17.[9] He also noted that population changes (plus and minus), which are uneven across the State, have a cascading effect on neighboring counties. *Id.* Further, Maryland's unique geography and shape present challenges to the redistricting process. *See In re Legislative Districting*, 299 Md. 658, 677-680 (1984) (discussing the effect of irregular geography on the requirement of compactness).

The 2022 Plan accordingly reflects necessary changes due to areas of population growth, such as in Central and Southern Maryland, as well as for population loss, such as in Baltimore City, Western Maryland, and the Eastern Shore. In order to make these changes, as well as to normalize district populations from county-to-county given uneven county populations, the Enacted Plan has 15 county crossings.[10] Even after making the required population adjustments, the Enacted Plan maintains a majority of Marylanders in their prior districts and contains subdistricts to ensure that political subdivisions have a resident legislator.

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[9] This hearing is archived at https://www.youtube.com/watch?v=JniSgVghOqA.

[10] The Districts with county crossings are 1, 2, 5, 7, 9. 12, 21, 27, 29, 35, 36, 37, 38, 42, and 43. Petitioners object to the crossings in Districts 7, 9, 12, 21, 27 and 42.

ARGUMENT

I. STANDARD OF REVIEW

The 2022 Legislative Districting Plan is a statute enacted by the General Assembly. Md. Code Ann., State Gov't §§ 2-201, 2-202. Therefore, '"[t]he basic rule is that there is a presumption' that the statute is valid." *Whittington v. State*, 474 Md. 1, 19 (2021) (citation omitted). That is, '"enactments of the [General Assembly] are presumed to be constitutionally valid and [ ] this presumption prevails until it appears that the [statute] is invalid or obnoxious to the expressed terms of the Constitution or to the necessary implication afforded by, or flowing from, such expressed provisions.'" *In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 579 (2015) (citation omitted; brackets in original). For this reason, this Court has held that "all challengers to a legislative reapportionment plan[] carry the burden of demonstrating the law's invalidity." *In re 2012 Legislative Districting*, 436 Md. 121, 137 (2013) (citation omitted). The State need make no showing unless "a proper challenge under Article III, § 4 is made and is supported by 'compelling evidence.'" *Id.* Only then will the State have "the burden of producing sufficient evidence to show that the districts are contiguous and compact, and that due regard was given to natural and political subdivision boundaries." *Id.* at 137-38. The petition is subject to dismissal if its allegations, assumed to be true, do not state "a proper challenge under Article III, § 4," *id.* at 137, and fail to show that the 2002 Legislative Districting Plan "is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland," Md. Const. art. III, § 5.

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In addressing the motion to dismiss, the Court may consider matters of which it may take judicial notice. *See* Md. Rule 5-201; *Faya v. Almaraz*, 329 Md. 435, 444 (1993) ("[I]n order to place a complaint in context, we may take judicial notice of additional facts that are either matters of common knowledge or capable of certain verification."). Because Rule 5-201 "governs only judicial notice of *adjudicative facts*," Rule 5-201(a) (emphasis added), and "does not regulate judicial notice of so-called 'legislative facts' (facts pertaining to social policy and their ramifications) or of law," Committee Note, Rule 5-201 (parentheses in original), the Court may consider legislative facts in deciding this motion without regard to the restrictions of Rule 5-201(a).

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II. THE PETITIONERS FAIL TO STATE A PROPER CHALLENGE AND CANNOT SHOW THAT THE 2022 PLAN CONFLICTS WITH THE REQUIREMENTS OF ARTICLE III, § 4.

At the outset, Petitioners' claims under Article III, § 4 are deficient as a matter of law. Article III, § 4 requires "[e]ach legislative district" to "consist of adjoining territory, be compact in form, and [be] of substantially equal population," and be drawn with "due regard . . . given to natural boundaries and the boundaries of political subdivisions." Md. Const. art. III, § 4. Petitioners contend that the 13 districts they have identified in the Petition fail the "compact[ness]" and "boundaries of political subdivisions" requirements of this provision. But these claims do not withstand scrutiny.

A. The Challenged Districts Are "Compact" Because They Exceed the Mathematical Compactness Score of the Lowest-Scoring District on Petitioners' Preferred Map.

Petitioners challenge 12 legislative districts (and their corresponding sub-districts) for an alleged lack of compactness. However, they provide no standard for judging when a district's alleged lack of compactness violates the Constitution. During the debates on the failed constitution of 1967, Delegate Francis X. Gallagher, the chair of the committee that introduced the compactness criteria since embodied in the state constitution, recognized the difficulty of objectively measuring compactness. He said, "we know what something is when it is contiguous. I am not sure that anyone knows how one can effectively apply the requirement of compactness."[11]

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The problem identified by chairman Gallagher is reflected in the Petition. For the two compactness measures upon which petitioners rely, Reock and Polsby-Popper, the scores for the challenged districts vary widely.[12] Nevertheless, while Petitioners articulate no standard against which these scores should be judged, they identify an alternative plan that they have asked this Court to implement—the Governor's Plan. *See* Pet. § V(c). Comparing the Roeck and Polsby-Popper compactness scores for the challenged districts

[11] Proceedings and Debates of the 1967 Constitutional Convention, Volume 104, page 10854, Archives of Maryland.

[12] The Reock scores span a range of 0.36, and the Polsby-Popper scores span a range of 0.18.

with the minimum compactness scores for the Governor's Plan shows that the 2022 Plan is not meaningfully less "compact" than the Governor's Plan. For 20 of the 21 challenged districts and sub-districts, the Reock scores are higher than the minimum Reock score for districts in the Governor's Plan.[13] *See* Table 1.

TABLE 1

COUNT	CHALLENGED DISTRICT	REOCK SCORE[14]	GOVERNOR'S PLAN MINIMUM REOCK SCORE[15]	DIFFERENCE WITH GOVERNOR'S PLAN
1	12	.14	.17	-.03
2	12A	.25	.17	+.08
3	12B	.23	.17	+.06
4	21	.29	.17	+.12
5	31	.30	.17	+.13
6	33	.34	.17	+.17
7	33A	.39	.17	+.22
8	33C	.28	.17	+.11
9	27	.36	.17	+.19
10	7	.24	.17	+.07
11	7A	.36	.17	+.19
12	7B	.19	.17	+.02
13	42	.46	.17	+.29
14	42B	.23	.17	+.06
15	42C	.36	.17	+.19
16	9	.26	.17	+.09
17	22	.45	.17	+.28
18	23	.23	.17	+.06
19	24	.22	.17	+.05
20	25	.45	.17	+.28
21	47	.27	.17	+.10

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[13] For the one challenged district with a lower score, the Reock score is lower by a de-minimis -.03 (Senate District 12). *See* Table 1.

[14] The Petition does not provide a Reock score for District 27 or 31or House Districts 33A or 33C. These calculations were added.

[15] The minimum Reock score for the Governor's Plan was obtained from Nathan Persily, Power Point Presentation.

And for 18 of the 21 challenged districts and sub-districts, the Polsby-Popper scores are higher than the minimum Polsby-Popper score for districts in the Governor's plan.[16] *See* Table 2.

TABLE 2

COUNT	CHALLENGED DISTRICT	POLSBY-POPPER SCORE[17]	GOVERNOR'S PLAN MINIMUM POLSBY-POPPER SCORE[18]	DIFFERENCE WITH GOVERNOR'S PLAN
1	12	.11	.12	-.01
2	12A	.22	.06	+.16
3	12B	.16	.06	+.10
4	21	.13	.12	+.01
5	31	.26	.12	+.14
6	33	.14	.12	+.02
7	33A	.25	.12	+.13
8	33C	.29	.12	+.17
9	27	.29	.12	+.17
10	7	.19	.12	+.07
11	7A	.25	.06	+.19
12	7B	.20	.06	+.14
13	42	.18	.12	+.06
14	42B	.13	.06	+.07
15	42C	.18	.06	+.12
16	9	.23	.12	+.11
17	22	.12	.12	0.0
18	23	.13	.12	+.01
19	24	.08	.12	-.04
20	25	.18	.12	+.06
21	47	.13	.12	+.01

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[16] For one challenged district, the scores are identical. As further indicated in Table 2, for the two challenged districts with a lower score, the Polsby-Popper score is lower by the de-minimis margins of -0.01 (Senate District 12) and -0.04 (Senate District 24).

[17] The Petition does not provide a Polsby-Popper score for District 27 or 31or House Districts 33A or 33C. These calculations were added.

[18] The minimum Polsby-Popper score for the Governor's Plan was obtained from the Power Point presentation made by Nathan Persily as part of his legislative testimony.

B. The 2022 Plan Gives Due Regard to Natural Boundaries and Boundaries of Political Subdivisions.

Article III, § 4 of the Maryland Constitution provides that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions." The districts that Petitioners allege impermissibly cross political boundaries, *see* Pet. ¶¶ 28, 29, 31, 32, 36, 41, 44, 45, 46, 52, 58, 62, 67, in general do not, because "towns and localities," *e.g.*, Pet. ¶¶ 28, 31, 32, 36, 41, 45, 52, 58, 62, 67, do not constitute political subdivisions for purposes of Article III, § 4.[19]

In 1993, the Court of Appeals traced the requirement of due regard for political subdivisions to *Reynolds v. Sims*, 377 U.S. 533, 580-81 (1964), where the Supreme Court suggested that insuring "'some voice to political subdivisions, as political subdivisions'" could justify some deviations from population-based representation because "'[l]ocal government entities are frequently charged with various responsibilities incident to the operation of state government.'" *Legislative Redistricting Cases*, 331 Md. 574, 612 (1993) (quoting *Reynolds*). The Court has also described the primary intent of the "due regard" provision as "to preserve those fixed and known features which enable voters to maintain an orientation to their own territorial areas." *Matter of Legislative Districting*, 299 Md. 658, 681 (1984).

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[19] Petitioners object to the splitting of 50 "towns and localities"; only 3 of them, however, are municipalities. Those are Bel Air, Glenarden and Hyattsville.

The total number of crossings statewide does not matter, for purposes of complying with Article III, § 4, so long as the State is "'able to show that each of the individual incursions was necessary to achieve population equality or to avoid a violation of the Voting Rights Act.'" *Matter of 2012 Legislative Districting*, 436 Md. 121, 154 (2012) (quoting the Special Master). Once a crossing was shown to be necessary, the decision as to where to put it is "quintessentially a political one, which requires judicial deference to be given to the political branches." *Id*. at 158. In making that determination the State can consider such matters as preservation of communities of interest, promotion of regionalism, helping or injuring incumbents or political parties, or achieving other social or political objectives. *Id*. at 133.

Petitioners challenge districts for crossing county and municipal lines. However, they fail to recognize that such crossings are necessary to adhere to the one-person-one-vote standard for State legislative districts, which generally imposes a maximum total deviation of 10%. *2012 Legislative Districting*, 436 Md. at 156 (When "a political subdivision crossing will be necessary in order to achieve substantial equality in population," "the due regard requirement is subordinated to the Fourteenth Amendment requirement of substantially equal population across legislative districts."). The Enacted Plan falls within this range with a maximum deviation for any district of 3.99%. Although it is not in Petitioners' complaint, the Governor's Commission advisor, Dr. Nate Persily, acknowledged in his presentation to the legislature that the LRAC plan had the same number of county crossings as the Governor's Commission plan. As shown in the table below, both the Commission plan and the LRAC plan have 34 split counties for both

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chambers of the Maryland General Assembly. The Persily presentation did not compare the plans with respect to municipal crossings.

SPLIT COUNTIES, GOVERNOR'S COMMISSION PLAN AND LRAC PLAN

CHAMBER	COMMISSION PLAN	LRAC PLAN
SENATE	**14**	**15**
HOUSE	**20**	**19**
BOTH	**34**	**34**
Testimony of Nathan Persily, Consultant, Maryland Citizen's Redistricting Commission.		

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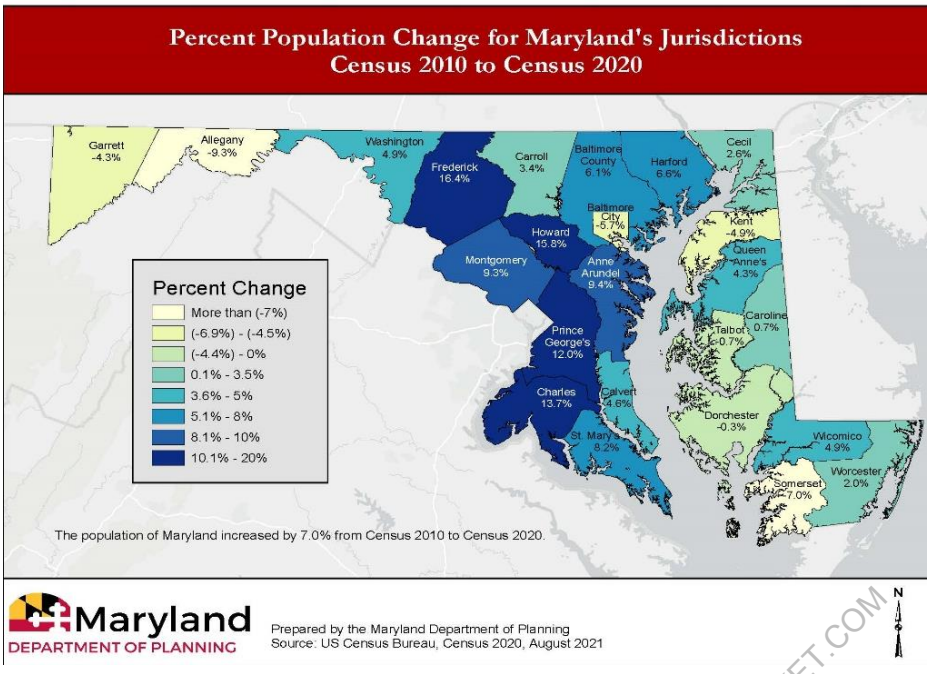
The Enacted Plan has 15 county crossings.[20] In addition, the Enacted Plan uses subdistricts to help ensure political subdivisions have a resident legislator. The population changes from the 2010 census to the 2020 census per county are illustrated in the map below.

[20] The Districts with county crossings are 1, 2, 5, 7, 9. 12, 21, 27, 29, 35, 36, 37, 38, 42, and 43. Petitioners object to the crossings in Districts 7, 9, 12, 21, 27 and 42.



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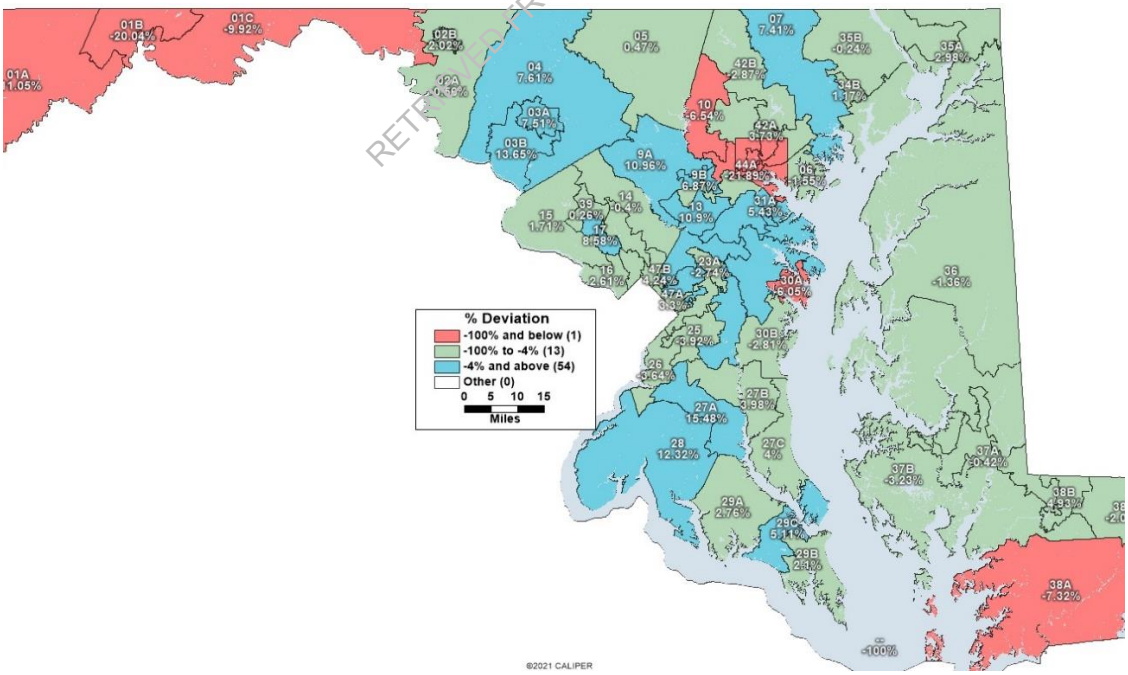
The impact of the population changes meant that many 2012 legislative districts needed adjustments to stay within the equal population requirements.



Viewing the Enacted Plan starting in Western Maryland shows how the shared districts were necessary to comply with constitutional strictures. As can be seen, both Districts 1 and 2 had to move further east due to population loss,[21] which additionally required District 2 to cross into Frederick County to add population. At the same time, Frederick County's population grew significantly from 2010, 16.4%. Both Frederick County Senate Districts in the 2012 plan had grown to exceed ideal district population size: District 3 exceeded ideal population by plus 12,554 persons and District 4 exceeded the ideal by plus 9,995 persons. To meet the equal population requirement, 15,757 persons were added from Frederick County to District 2 in the Enacted Plan. District 3 remains a Frederick County-only district and now, in the Enacted Plan, District 4 is only Frederick County. Moreover, all of Cumberland, a municipality, is in one single member district, District 1B, and another single member district is created to encompass all of Hagerstown, District 2A.

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Continuing to scan eastward on the map, the Enacted Plan moves a small part of Frederick County (3,531 persons) into District 5 because the municipality of Mount Airy was moved into District 5. Unique among municipalities in the State, Mount Airy itself is split between Frederick County and Carroll County. Thus, in the Enacted Plan nearly all of District 5 remains in Carroll County. The Enacted Plan makes additional changes in Carroll County to account for a 3.4% population growth there, which makes it possible for

[21] The population loss from 2010 to 2020 in 2012 District 1 resulted in a deviation from ideal district population amounting to minus 17,960 persons. The 2012 District 2A had a deviation of minus 493 persons per 2020 adjusted population.

Carroll County to have an additional single member district in the Enacted Plan, District 42C.

The Enacted Plan makes District 42 a shared district of Carroll County and Baltimore County as the result of necessary adjustments made because of population loss of 5.7% in Baltimore City (which as discussed below has one less Senate District in the Enacted Plan). In the Enacted Plan, the crossing of District 43 out of Baltimore City into Baltimore County contributed to the shift of District 42 population into Carroll County. The 2012 plan District 42A more or less becomes District 43B (with 42,217 persons) in the Enacted Plan. As a result, District 42 needed to add population. Because of the similarities in geography, natural boundaries, and the population growth of Carroll County, the Enacted Plan therefore adds 42,680 persons from Carroll County into District 42 so that Carroll County picks up the aforementioned single-member district along the Baltimore County border.

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As stated previously, Baltimore City lost population, requiring that the number of Senators and Delegates in Baltimore City decrease. As a result, in the Enacted Plan a new district crosses into a surrounding jurisdiction, which is District 43 that follows the York Road corridor and has subdistricts for very diverse communities. The Enacted Plan configures the subdistricts so that these communities have an equal opportunity to elect the candidates of their choice. A further result of Baltimore City population loss is that District 44 is now entirely in Baltimore County. Additionally, in the Enacted Plan a new Voting Rights single-member district is created in Baltimore County, District 11A, which is 52.59% Black voting age population ("VAP").

Continuing the tour of the State map under the Enacted Plan and viewing it from another "corner" by traveling north up the Shore and turning west, the need for shared districts is evident. None of the Eastern Shore counties from Cecil County down has enough population to have a Senate District of their own. Moreover, several Shore counties lost population since the 2010 census.[22] Thus, in the Enacted Plan, the districts extend farther north to add population. District 38 remains with 3 single member districts and, despite Somerset County's population loss, each county (Somerset, Wicomico and Worcester) has the ability to elect its own delegate in the Enacted Plan. Also, by moving north, District 37 adds needed population.[23] Moreover, single-member district 37A remains minority-majority, 54% Black VAP, and District 37B in the Enacted Plan has more population from Caroline County to help ensure that Caroline County can elect its own delegate. District 36 also needed to move north and add population taken from it due to population loss on the lower Shore, as well as to make up for its own 2012 plan district population loss of 1,792 persons.

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Similarly, District 35 extends north more into Cecil County, and continues to be a shared district with Harford County, with two subdistricts that help Cecil County have its own delegate. Harford County's population is short of population for 2 full Senate Districts. Harford County has its own Senate District 34 and in the Enacted Plan, Harford County

[22] Kent lost 4.9%; Talbot lost 0.79%; Dorchester lost 0.3%; and Somerset lost 7%. As a result, the 2012 plan Districts 36, 37, and 38 had a combined deviation of minus 6,737 persons.

[23] 2012 plan District 37 alone was minus 3,015 persons.

has 2 subdistricts in 35B. District 7 remains a shared Senate District between Harford County and Baltimore County; one of the subdistricts in the Enacted Plan is configured along the county lines, giving Harford its own single member district, District 7B. The Enacted Plan has the municipality of Bel Air encompassed within a single member district, District 34B, with the exception of 132 persons. In the Enacted Plan, District 34B has a population of 45,371 persons, which is a deviation of plus 3.59%.

Moving next to the Southern Maryland peninsula, only Charles County has sufficient population for its own Senate District, which remains District 28 in the Enacted Plan. Neither Calvert County nor St. Mary's County have sufficient population for their own Senate Districts. Additionally, Charles County's population grew by a significant 13.7% over the previous decade, resulting in a 2012 district deviation of plus 16,190 persons. Therefore, District 28 needed to shrink in population and reassign people elsewhere to accommodate the growth. As a result, the Enacted Plan adds more population from Charles County to neighboring District 27, which is one of the shared county districts, into single member District 27A. District 27 remains shared between Calvert, Charles and Prince George's County in the area where the three counties converge and continues to have 3 single member districts so each county can elect its own delegate. District 27B in the Enacted Plan adds northern Calvert County due to the addition of excess population into District 27A from Charles County. District 27B and 27C are more compact in the Enacted Plan. District 29 is shared between St. Mary's County and Calvert County.

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Petitioners note the District 27 parts of Charles and Prince George's counties. However, with a population of just 166,617 Charles had excess population that had to be

included with another county to form a Senate District and Prince George's County with a population of 967,201 likewise had excess population. On the other hand, Calvert's population of 92,783 is well short of a Senate District, so parts of the county had to be included with other counties. Petitioners further claim that some voters would have to drive to a bridge to reach part of the district, although it is not clear why they would have to do so to vote. Petitioners, however, do not claim that the district is non-contiguous.

Petitioners also fail to note that District 27 in the Enacted Plan is a voting rights district. It includes a Black incumbent who was appointed to the seat upon the death of a white Senator, Thomas V. Mike Miller, Jr., the long-time Senate president. The district has a minority VAP of 49.5% and a Black VAP of 37%. District 27B also has a black incumbent and the district is 48.4% minority VAP and 36.4% Black VAP.

Moving toward the center of the State, into Anne Arundel County, population growth there required adjustments. The population of Anne Arundel County grew by 9.4%, and can encompass 4 full Senate Districts, which Anne Arundel County has in the Enacted Plan. The population growth within the county required population moves within the Anne Arundel County-only districts. District 32 had significant growth, resulting in a 13.75% plus population deviation in the 2012 plan district, so that 18,050 persons had to be put into another district. The Enacted Plan moves excess population to neighboring District 33 from overpopulated District 32. Moreover, District 33 in the Enacted Plan has three district subdistricts representing the three contiguous, but very different areas in the district: Broadneck, Odenton, and middle/rural Anne Arundel. The Enacted Plan also adds population from District 21 to District 33. District 21 was in the 2012 plan, and continues

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to be in the Enacted Plan, a shared Prince George's County/Anne Arundel County District, as it has been since 2002. In the 2012 plan, District 21 had 29,000 Anne Arundel County residents but in the Enacted Plan, fewer Anne Arundel County residents, 15,663, are in District 21.

In Prince George's County, the Enacted Plan splits the municipality of Glenarden between District 22 and District 24; both are Prince George's County-only districts that are majority-minority. This situation illustrates the challenge for keeping a municipality in a single district within a densely populated area, particularly where—as is often the case—the municipality boundaries are quite jagged. Glenarden's population is more than 6,000 persons. District 22's population deviation in the Enacted Plan is plus 5,060 persons (3.85%) and District 24's deviation is plus 4,113 (3.13%). Thus, ensuring population equality precluded putting Glenarden in one district.

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Hyattsville, with population of more than 22,000, is split in the Enacted Plan between District 22, District 47A and District 47B. The municipal boundaries of Hyattsville are also extremely jagged. District 47A (a two-member district) has a deviation in the Enacted Plan of plus 3,449 persons (3.94%) and District 47B (single member) has a deviation of 1,676 (3.83%). Thus, it presents challenges similar to those faced in Glenarden. Moreover, an additional consideration is that District 47B is a Voting Rights Act district for Hispanic voters; in the Enacted Plan the VAP for Hispanics there is 67.7%, for Blacks 23.44% and for Whites 5.42%. District 47A is also majority-minority in the Enacted Plan (Hispanic 39.86%; Blacks 50.01%; White 8.51%).

Petitioners fail to note that all five Prince George's County districts to which they object in the Enacted Plan are voting rights districts. The districts have overwhelming minority VAP, no less than 80% (District 23). In addition, configuration of these districts has little impact on partisan advantage one way or the other, because of the overwhelming preponderance of Democratic voters residing in both districts. The minimum two-party Democratic registration is 89% (District 23). Had Democrats been seeking partisan advantage it would have benefited the party to unpack Prince George's County districts to expand the Democratic strength in other districts. Prince George's County is 91% Democratic in its two-party registration.

Now coming to the center of the State, there are two other shared districts, District 9 and District 12. District 9 in the 2012 plan was a shared district with Carroll County/Howard County but in the Enacted Plan, it is a shared district between Howard County and Montgomery County. Carroll County is no longer in District 9 in the Enacted Plan. Montgomery County has enough population for 8 full Senate Districts with some excess population. The LRAC received testimony noting the similarities between the District 9 part of Howard County and the northern part of Montgomery County. Shifting 16,004 persons into District 9 from Montgomery County in the Enacted Plan acknowledges that commonality while taking care of the excess population from Montgomery County. This configuration also allows the 2012 District 9 Carroll County population to support the addition of a delegate seat in Carroll County, District 42C in the Enacted Plan.

As for District 12, in the Enacted Plan it is a shared Howard County and Anne Arundel County Senate District, which includes a single member district for the Anne

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Arundel County portion of the district, maintaining due regard for political subdivision boundaries. In the 2012 plan, it was a shared 3-member district with Howard County and Baltimore County. In the Enacted Plan, District 12 no longer includes Baltimore County.

Petitioners do not acknowledge that District 12 is a voting rights district drawn to maintain the incumbency of Asian Senator, one of only two Asian American Senators in Maryland. The other is in District 16. District 12 in the Enacted Plan is almost identical in its racial demography to the 2012 plan District 12, with a 48% minority voting age population.

The representation of minority elected officials in a jurisdiction is one of "Senate Factors" detailed in a report that accompanied the 1982 renewal of the Voting Rights Act by the Senate Committee on the Judiciary and discussed in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as part of the "totality of the circumstances" test for the voting opportunities of minorities.[24] Senate Factor 7 mandates consideration of "the extent to which members of the minority group have been elected to public office in the jurisdiction."[25]

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Petitioners additionally object that Senate District 12 crosses the Anne Arundel County line. However, they fail to consider that at least one Senate district must cross the Anne Arundel County line to achieve population equality (within plus or minus 5%). With a population of 588,261 according to the 2020 U.S. Census, Anne Arundel County can

[24] *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (quoting S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07).

[25] *Gingles*, 478 U.S. at 36-37.

sustain only four districts, with a remainder made up of many tens of thousands of persons who must be included in at least one cross-county district.

Petitioners also claim that partisan politics motivated the construction of Senate District 12 under the Enacted Plan, and in so doing they ignore the voting rights rationale for this district. In addition, their specific analysis does not withstand scrutiny. Petitioners claim that the district was configured to assure the "continued election of a Democratic Senator from District 12." In fact, this section of the state is overwhelmingly Democratic and new District 12 has a Democratic two-party registration of 72%. The district was instead configured for voting rights purposes to closely recapitulate the district that elected an Asian American Senator. Similarly, given the large number of wasted Democratic votes in the district, it was not either configured to protect a generic House of Delegates incumbent.

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III. PETITIONERS FAIL TO STATE A PROPER CHALLENGE UNDER THE DECLARATION OF RIGHTS OR ARTICLE I, § 7 OF THE CONSTITUTION.

A. "Partisan Gerrymandering" Challenges Brought Outside the Framework of Article III, § 4 Are Unavailable As a Matter of Law.

Petitioners fail to state proper claims premised on unlawful partisan gerrymandering under Articles 7, 24 and 40 of the Declaration of Rights and Article I, § 7 of the Constitution, because such claims are unavailable outside the provisions of Article III, § 4.

The Maryland Constitution provides that "[e]ach legislative district shall consist of adjoining territory, be compact in form, and of substantially equal

population," and that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions" in creating such districts. Md. Const. art. III, § 4. This Court has held that the "compact[ness]" requirement contained in this provision "is intended to prevent political gerrymandering." *1984 Legislative Districting*, 299 Md. at 687. But this Court has also made clear that the restrictions in Article III, § 4 were not intended to foreclose all consideration of political objectives in drawing district lines. For example, this Court has explained that "[o]ddly shaped or irregularly sized districts" do not, by these characteristics alone, violate the "compactness" (or any other) requirement of Article III, § 4, *id.*, because "due consideration" must also be given "to the 'mix' of constitutional and other factors which make some degree of noncompactness unavoidable." *In re Legislative Districting of State*, 370 Md. 312, 361 (2002) ("*2002 Legislative Districting*").

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The Court has also recognized that the redistricting process "is in part a political one," and thus the General Assembly may consider "broad political and narrow partisan" objectives in promulgating a legislative districting map under Article III, § 4. *2002 Legislative Districting*, 370 Md. at 321; *see also In re 2012 Legislative Districting ("2012 Legislative Districting")*, 436 Md. 121, 150 (2012) (holding that because the Constitution "commits to the political branches, the Governor and the State Legislature, the task of formulating a legislative

apportionment plan," the "political branches are accorded, by law, a great degree of discretion to pursue political considerations in formulating a redistricting plan").

These permissible objectives may even include "to help or injure incumbents or political parties, or to achieve other social or political objectives," which "will not affect [the] validity" of the plan "so long as the plan does not contravene the constitutional criteria." *2002 Legislative Districting*, 370 Md. at 321-22; *see also 2012 Legislative Districting*, 436 Md. at 150 (holding that political officials may legally seek to "help[] or inju[e] incumbents or political parties" in the redistricting process). Thus, when the General Assembly amended Article III, § 4 in 1969 to add a compactness requirement for State legislative districts, *see* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970, it "intended to prevent political gerrymandering," but only insofar as any such "political gerrymandering" gave rise to State legislative districts that did not conform to constitutional "compactness" requirements. *1984 Legislative Districting*, 299 Md. at 687. For this reason, any claim that a legislative district constitutes an unlawful "partisan gerrymander" must establish that it violates the requirements of Article III, § 4, and not some other provision of the Constitution or Declaration of Rights that does not reflect the balance struck by the framers in prohibiting some, but not all, efforts to achieve political goals in redistricting.

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This interpretation of Article III, § 4 is supported by the history of its adoption and amendments. In 1964, the Supreme Court held Maryland's county-based system

of legislative apportionment to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, a decision that necessitated reform of the Maryland Constitution. *See Maryland Comm. For Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964). But rather than correct the specific constitutional infirmity via the amendment process, a constitutional convention was convened so that a "complete revision of the Constitution of Maryland" could be undertaken. Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 Md. L. Rev. 528, 531 (1999). At the time, Article III, § 4 required only that the "Legislative Districts of the City of Baltimore" be "as near as may be of equal population," but "always consist of contiguous territory." Md. Const. art. III, § 4 (1966).[26] The proposed Constitution produced by the 1967 Constitutional Convention would have added "compactness," "political boundary," and "natural boundary" requirements to the existing "contiguity" requirement, while removing the limitation to the legislative districts of Baltimore City. *See* Proposed

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[26] Prior to 1966 Baltimore City was the only jurisdiction in the State in which members of the General Assembly were elected to represent discrete legislative districts. *See* Md. Const. art. III, § 5 (1965) ("The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively . . . ."); *see* 1965 Md. Laws special session, chs. 2, 3 (requiring for the first time that counties allocated more than 8 delegates be divided into districts).

Const. of 1967, at § 3.04, *in Maryland State Archives*, Vol. 605, at 10.[27] In presenting a drafting committee's proposal to the Convention, Delegate Francis X. Gallagher explained that the "compactness" and "contiguity" requirements were "designed to eliminate *to some degree* the element of gerrymandering." I *Constitutional Convention of 1967: Debates* 1542 (PD882115, Mar. 9, 1988) (emphasis added), in *Maryland State Archives*, Vol. 104. However, he also noted that the committee "did not follow the example of New York, which had a specific Eleventh Commandment, which was, 'Thou Shalt Not Gerrymander,'" because "[w]e thought that was perhaps carrying do-good too far; that is, to eliminate the practice." *Id.* Thus, the committee proposed—and the Convention ultimately adopted—a proposed constitution that imposed compactness, contiguity, and political and natural boundary restrictions on districting, but did so with the understanding *and intent* that this would not "eliminate the practice" of pursuing political goals in the districting process. *See* Proposed Const. of 1967, § 3.04, *in Maryland State Archives*, Vol. 605, at 9. Though the proposed Constitution ultimately failed to win ratification, the compactness, contiguity (or "adjoining territory"), and political and natural boundary restrictions were instated as

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

amendments that were ratified in 1970 and 1972, without any accompanying effort to "eliminate the practice" of practicing politics in the districting process. Since these amendments "stemmed from the constitution proposed by the Constitutional Convention Commission and that proposed by the Constitutional Convention, the General Assembly must have been aware" of the choices made at the Convention to forego "eliminat[ing] the practice" pursuing political objectives in redistricting, when the General Assembly effectively made the same choices in 1970 and 1972. *State Admin. Bd. of Election L. v. Calvert*, 272 Md. 659, 684 (1974).

In sum, Article III, § 4 in its current form reflects a carefully considered resolution that charts a middle ground between prohibiting political considerations in districting and allowing their unfettered use. Accordingly, the Constitution channels duties concerning the use of politics in drawing districts into Article III, § 4, to the exclusion of other provisions of the Constitution that might be construed to upset the careful balance struck by the framers to restrict some, but not all, considerations of politics in the districting process. An interpretation of the Maryland Constitution that would allow "partisan gerrymandering" challenges to proceed under other provisions of the Constitution or Declaration of Rights would upset the balance embodied by Article III, § 4. *Cf. Lamone v. Capozzi*, 396 Md. 53 (2006) (rejecting claim that Article 7 of the Declaration of Rights required upholding

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early voting statute because it made voting "more convenient and easier," where other provisions of the Constitution expressly foreclosed early voting).

Thus, under the Maryland Constitution, a claim that a particular districting process was characterized by too much politics is unavailable outside the boundaries of Article III, § 4. Petitioners' claims under those provisions should be dismissed.

B. Article 7 of the Declaration of Rights Does Not Protect Rights Associated with Petitioners' Challenge to the 2022 Plan.

Even if Petitioners' Article 7 claim were not foreclosed by the choice made by the drafters of Article III, § 4, it fails to state a claim upon which relief can be granted for separate and independent reasons, because the rights claimed by Petitioners in this case—the right not to be placed into districts for partisan purposes—are not of the sort that Article 7 has been held to protect, nor could they have been among those intended to be protected by the framers of Article 7.

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Article 7 of the Declaration of Rights provides "That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." Md. Decl. of Rights art. 7. Article 7 has its origins in the Constitution of 1776, where it appeared as Article 5 of the Declaration of Rights in

substantially the same form.[28] At the time of its promulgation, Maryland did not have legislative districts; under the original Constitution of 1776, Delegates represented and were elected by eligible voters residing within the counties at large. *See* Const. of 1776 art. 2.[29] Thus, the framers' directive that elections should be "free and frequent" could not have had any reference to what was then a non-existent legislative districting process.

Moreover, the guarantees of Article 7 have not been interpreted to encompass rights that are implicated by Petitioners' challenge. At bottom, Petitioners' complaint is that the 2022 Plan makes it less likely that they will be able to *elect* their preferred congressional candidates. *See, e.g.*, Pet. ¶ 72 (contending that Article 7 protects the "right to an equally effective power to select the legislative representatives of their choice"). Article 7 has never been interpreted to guarantee the kind of outcome-based "rights" demanded by Petitioners in this case.

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

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

[29] Senators were not directly elected under the Constitution of 1776. *See* Const. of 1776 arts. 14-15.

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

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In this regard, it is noteworthy that the draft Constitution of 1967 eliminated the "free and frequent" and "right of suffrage" provisions from the Declaration of Rights altogether. *See generally* Proposed Const. of 1967, *in Maryland State Archives*, Vol. 605. Prior to the Constitutional Convention, the members of the Constitutional Convention Commission sought to whittle down the Declaration of Rights so that it "state[d] with all possible clarity and simplicity those essential rights which the people wish to hold free from governmental interference." *See Report of the Constitutional Convention Commission* 19 (State of Md. 1967) ("*1967*

Commission Report"). Accordingly, Article 7 (along with Articles 1, 4, and 6) was to be subsumed into a broad guarantee that "All political power originates in the people and all government is instituted for their liberty, security, benefit and protection." *Id.* at 99 (draft Commission Constitution of 1967, §1.01). A minority of the Commission members would have preferred language that "preserve[d] as much as possible of the traditional language and phrasing" that appeared in the original Declaration of Rights of 1776, *id.*, but all agreed that the minority alternative presented differences "of style rather than of substance." *Id.* at 100.[30] Ultimately, the Constitution that was approved by the Convention incorporated what had been the draft section 1.01 into the Constitution's preamble. *See* Proposed Const. of 1967 preamble, *in Maryland State Archives*, Vol. 605, at 1. This history confirms the understanding that Article 7's guarantee of "free and frequent" elections conferred a right to participate in elections, not a right to obtain any particular outcome or to reside in a legislative district of any particular shape, size, or make-up.

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This Court's decisions interpreting Article 7 are consistent with this historical analysis. In *Snyder*, the Court held that 17-year-olds who will have turned 18 by the close of voter registration preceding the general election were entitled to vote in the

[30] The minority version of section 1.01 would have restated what was encompassed by Article 7 as follows: "The right of the People to participate in the Government is the best security of liberty and the foundation of all free Government." *1967 Commission Report* at 99.

antecedent primary election under the principles of Article I, § 1 of the Constitution and Article 7 of the Declaration of Rights. 435 Md. 30 at 60. In *Maryland Green Party* and *Nader for President 2004*, the Court considered the eligibility of certain voters' petition signatures to be counted in the face of statutes that required the exclusion of signatures by voters deemed "inactive" (though eligible), *see Maryland Green Party*, 377 Md. at 139-53, and by voters who signed a petition in a county other than that of their registration, *see Nader for President 2004*, 399 Md. at 683-84. And in *Jackson*, the Court declared void a contract for the procurement of voting machines for use in Baltimore City because the machines did not allow voters to cast a "write in" vote for an unlisted candidate; the Court reasoned that the Maryland Constitution guaranteed that right because it had been available "[b]efore and at the time of the adoption of the Constitution of 1867." 173 Md. at 594, 598.

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The first step in any "analysis of a constitutional challenge" in the elections context "is to determine, in a realistic light, the extent and nature of the burden imposed on voters by the challenged enactments." *Burruss v. Board of Cty. Comm'rs of Frederick Cty.*, 427 Md. 231, 264 (2012). But the Court of Appeals' precedents confirm that the rights protected by Article 7 relate to the rights of eligible citizens to participate directly in the electoral process—rights that are not implicated by the boundaries of a legislative district in which a voter finds herself. In other words, Petitioners' rights to "free and frequent elections" and to "suffrage" under

Article 7 are not burdened by the 2022 Plan. *Suessman v. Lamone*, 383 Md. 697, 731-33 (2004) (construing Md. Const. art. 1, § 1 and Articles 7 and 24 of the Declaration of Rights and holding that a prohibition against unaffiliated voters voting in party primary elections did not implicate "fundamental right" to vote). Petitioners' claims under Article 7 should be rejected.

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

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

The original incarnation of this provision was found in Article III of the Constitution of 1851, and did not even refer to the preservation of the "purity" of

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elections. Instead, it provided that the General Assembly "shall have full power to exclude form the privilege of voting at elections, or of holding any civil or military office in this State, any person who may thereafter be convicted of perjury, bribery, or other felony, unless such person shall have been pardoned by the Executive." Md. Const. of 1851, art. III, § 33; *see* Friedman, *The Maryland State Constitution*, at 55. Thus, the provision authorized the General Assembly—in addition to exclusions already required by the Constitution[31]—to identify additional crimes that would make a citizen ineligible to participate in the franchise.

The 1864 Constitution introduced the language directing the General Assembly to preserve the "purity of elections," Md. Const. of 1864 art. III, § 41, and coupled that directive with the new requirement elsewhere in the Constitution to establish a uniform "registration of the names of voters in th[e] State," *id.* art. I, § 2 (requiring the General Assembly to "provide by law for a uniform registration of the names of voters in this State"). Thus, the new article III, § 41 of the Constitution of 1864 directed the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient." It also removed the 1851 Constitution's provision authorizing the

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

General Assembly, to expand the list of crimes that would make a citizen ineligible to vote, in favor of a directive to "make effective the provisions of the Constitution disenfranchising certain persons or disqualifying them from holding office" found elsewhere in the Constitution. Md. Const. of 1864 art. III, § 41.[32] In this formulation, the framers linked "preservation of purity" to registering voters so that only those eligible were able to vote, and prohibiting those who were proscribed from voting from doing so. And the debates on the proposed constitution confirm this reading, as references to the voter registration requirement and exclusions from the franchise of ineligible individuals were frequently described as supporting the "purity" of the ballot. *See* I *The Debates of the Constitutional Convention of the State of Maryland, Assembled in the City of Annapolis* 813, 1381, 1745, 1754 (Richard P. Bayly 1864), in *Maryland State Archives*, Vol. 102. For example, Delegate Henry Stockbridge offered an amendment to the provision, which was accepted, that changed the clause "*or* by such other means" to "*and* by such other means," in order to underscore that the registration of voters was "the only mode of preserving the purity of elections." *Id.* at 813. Elsewhere, Delegate Stockbridge

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

described the provision which became Article I, § 6 in the 1864 Constitution that "provide[d] a penalty against any bribe, present, reward or promise" as a "guaranty for the purity of elections." *Id.* at 1381. And both Delegate John Smith and William Daniel spoke of "contaminat[ing]" or "corrupt[ing]" the "purity of the ballot-box" by allowing the franchise to those who sympathized with or actively supported the Confederacy. *Id.* at 1745, 1754.

The 1867 Constitution simplified the "purity" clause, by removing any reference to the registration of voters, or to the charge to "make effective the provisions of the Constitution disenfranchising" certain persons.[33] Instead, the new provision read as it does today: "The General Assembly shall pass Laws necessary for the preservation of the purity of Elections." Md. Const., art. III, § 42 (1867) (now art. I, § 7, by amendment).[34]

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

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

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

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Consistent with this interpretation, this Court has held that the General Assembly's "creat[ion of] boards of canvassers" while "giv[ing] them explicit directions how to collect and count votes, and carefully limit[ing] their authority to the performance of that function," were examples of legislation fulfilling this duty. *Lamb v. Hammond*, 308 Md. 286, 303 (1987). Similarly, this Court has held that the

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

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What this Court has *never* done is what Petitioners would have it do: interpret Article I, § 7 as a *restriction* on the General Assembly's authority, rather than a mandate to act, and find the 2022 Plan to be an unconstitutional exercise of authority that contravenes the Constitution's directive to the General Assembly to "preserve the purity of elections." Nothing in the legislative history of this provision or the case law interpreting it supports the interpretation advanced by Petitioners. Their claims under article I, § 7 should be dismissed.

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

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

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gerrymandering claims as reflected in *Davis*, 478 U.S. at 109, *Vieth*, 541 U.S. at 267, and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), and surmising "[t]he net effect seems to be that political gerrymandering remains, in theory, a justiciable issue, but no clear standards exist for adjudicating that issue, and, if history is a guide, no judicial relief on that ground is likely."). Given this Court's precedent, Petitioners' challenge cannot survive the Supreme Court's categorical rejection of claims alleging the improper resort to political considerations in drawing district lines.

In 2019, the Supreme Court considered similar challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment attacking the congressional maps adopted by the States of North Carolina and Maryland. *See Rucho*, 139 S. Ct. at 2484. For years the Court had entertained such claims, but had failed to "find a justiciable standard" for resolving them. *Id.* at 2498; *see id.* at 2494 (noting that "[a]mong the political question cases" that are nonjusticiable and thus beyond the jurisdiction of the federal courts "are those that lack 'judicially discoverable and manageable standards for resolving [them].'" (quoting *Baker*, 369 U.S. at 217)). The Court's efforts to discover the elusive standard led only to frustration due to an insoluble problem: "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political

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gerrymandering.'" *Rucho*, 139 S. Ct. at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)). To hold that legislators "cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* Accordingly, the "central problem" the Supreme Court has faced "is not determining whether a jurisdiction has engaged in partisan gerrymandering," but rather "determining when political gerrymandering has gone too far." *Rucho*, 139 S. Ct. at 2497 (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)).

In *Rucho*, the Court finally resolved this question by concluding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506-07. The Court rejected "proportionality" as a workable standard—that is, that the legislature in drawing district lines should come "as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," *id.* at 2499 (quoting *Davis*, 478 U.S. at 130)—because it was evident that the Founders did not believe proportionality was required. The Court then rejected "fairness" as a workable standard, because it was not clear whether "fairness" should mean maximizing competitive contests, allocating "safe" districts to the parties in proportion to their respective levels of statewide support, or adherence to "traditional districting criteria" such as maintaining political subdivisions and keeping communities of interest together—

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all of which would "unavoidably have significant political effect[s]" of their own. *Id.* at 2499-2501. The Court went on to conclude that its one-person, one-vote and racial gerrymandering jurisprudence could not be imported into the partisan gerrymandering context, because the former "is relatively easy to administer as a matter of math" (in stark contrast to the inherent complexity of the partisan gerrymandering conundrum), *id.* at 2501, while the latter looks to whether *any* racial gerrymandering occurred and seeks to eliminate it entirely, whereas analogous eradication of partisanship from the districting process would be impossible due to both practical and constitutional constraints, *id.* at 2502 ("A partisan gerrymandering claim cannot ask for the elimination of partisanship.").

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In evaluating the claim specifically under the Equal Protection Clause, the Court concluded that the district court's three-prong test pursuant to which it had found a constitutional violation was unworkable. *See Rucho*, 139 S. Ct. at 2502-04. The first prong asked whether the map-drawer's "predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.'" *Id.* at 2502. But this first prong foundered, according to the Supreme Court, because "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'" *Id.* at 2502-03; *accord 2002 Legislative Districting*, 370 Md. at 322 (noting that redistricting is "in part . . .

political" and acknowledging that the General Assembly may constitutionally consider "broad political and narrow partisan" objectives in promulgating a legislative districting map). Meanwhile, the second prong "required a showing that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." *Id.* at 2502. But this prong would require courts to "forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be)," when history has shown that picking electoral winners in future contests (to say nothing of the margins of victory) is fraught with uncertainty. *Id.* at 2503. And finally, the third prong would have shifted the burden to defendants to show that any discriminatory effects were due to a "legitimate districting objective," but given that the first prong would have already required a finding that the intent to create a partisan advantage predominated, it was not clear to the Court why the question was even being asked. *Id.* at 2504.

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The Court also rejected the tests devised by the lower courts for evaluating the Petitioners' First Amendment claims. *See Rucho*, 139 S. Ct. at 2504-05. Here, too, the lower courts settled on three-part tests that demanded "[(i)] proof of intent

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

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If applicable law regarding partisan gerrymandering claims is to be applied as this Court has in its past decisions, then the Supreme Court's decision in *Rucho* dictates the outcome in this case. Article 24 of the Declaration of Rights provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Decl. or Rights art. 24. Although there is no express "equal protection clause" set forth in this provision, this Court has held that the due process or "Law of the Land" clause in this article "embodies the concept of equal protection of the laws to

the same extent as the Equal Protection Clause of the Fourteenth Amendment." *Murphy v. Edmonds*, 325 Md. 342, 353 (1992); *see 2012 Legislative Districting*, 436 Md. at 159 n.25 (equating the standard for evaluating petitioners' "political discrimination" claim under Article 24 with "the Federal right"). Moreover, this Court has "long recognized that decisions of the Supreme Court interpreting the Equal Protection Clause of the federal Constitution are persuasive authority in cases involving the equal treatment provisions of Article 24." *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, 640 (1983).

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

Nothing in the Petition suggests that this Court should depart "from the general rule" that the Supreme Court's rejection of the First Amendment and Equal

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Protection Clause challenges to partisan gerrymandering in *Rucho* "appl[ies] equally to the same issues under" Articles 24 and Article 40. *Clear Channel Outdoor, Inc.*, 472 Md. at 457. The Petitioners' equal protection theory under Article 24 is virtually identical to a theory found to be nonjusticiable by the Supreme Court under the Equal Protection Clause. *Compare* Pet. ¶ 79 (alleging that "the 202[2] Plan intentionally discriminates against Republican voters 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 legislative representatives"), *with Rucho*, 139 S. Ct. at 2502 (noting that first prong of district court's test for evaluating equal protection clause theory was determining whether the "legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power'"). The same is true of Petitioners' freedom of speech and association theory under Article 40. *Compare* Pet. ¶ 83 (alleging that the 2022 Plan burdens speech by targeting certain voters "based on political viewpoint"), *with Rucho*, 139 S. Ct. at 2504 (describing the plaintiffs' theory under the First Amendment as "partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint").

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This Petition presents the same concerns that led the *Rucho* Court to conclude that there existed no "limited and precise standard that is judicially discernable and

manageable" to adjudicate First Amendment and Equal Protection Clause challenges to political gerrymandering. *Rucho,* 139 S. Ct. at 2502. Petitioners' Article 24 challenge asserts that the 2022 Plan "systemic[ally] dilute[s] . . . the weight of Republican voters" in at least 12 of Maryland's legislative districts "across the State—from Calvert County to the Pennsylvania border," Pet. ¶¶ 80, 69. Meanwhile, their Article 40 challenge is premised on the theory that any use of voters' party affiliation or voting history to draw district lines is constitutionally infirm, *id.* ¶¶ 83-86—a premise contradicted not only by federal precedents but by the expressed intent of the framers of the Maryland Constitution, as well. As in *Rucho,* Petitioners' theories are broad enough to condemn any resort to political considerations in what is essentially a political endeavor and would put courts in the uncertain position of speculating about a party's future political performance as they evaluate the "fairness" or propriety of challenged maps. Petitioners are unable to provide and have not ventured an answer to the question that has bedeviled the Supreme Court for decades and that ultimately proved to be the *Rucho* plaintiffs' undoing: "How much political motivation and effect is too much?" *Rucho,* 139 S. Ct. at 2505 (quoting *Vieth*, 541 U.S. at 296-97). Petitioners' claims under Articles 24 and 40 of the Declaration of Rights should be dismissed.

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CONCLUSION

The motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 15th day of February, 2022, the foregoing was filed and served electronically by the MDEC system on all persons entitled to service:

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