STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
SOUTHERN DISTRICT

Docket No. 226-2022-CV-00181

MILES BROWN,
ELIZABETH CROOKER,
CHRISTINE FAJARDO,
KENT HACKMANN,
BILL HAY,
PRESCOTT HERZOG,
PALANA HUNT-HAWKINS,
MATT MOOSHIAN,
THERESA NORELLI,
NATALIE QUEVEDO, and
JAMES WARD,

v.

DAVID M. SCANLAN,
in his official capacity as the New Hampshire Secretary of State

&

THE STATE OF NEW HAMPSHIRE

PLAINTIFFS' OBJECTION TO DEFENDANTS' JOINT MOTION TO DISMISS

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I. Introduction

Plaintiffs filed this suit challenging New Hampshire's recently enacted Senate and Executive Council redistricting plans (the "Challenged Plans") as violations of the New Hampshire Constitution's Free and Equal Elections Clause, equal protection provisions, and guarantees of free speech and assembly. Their motion for preliminary injunction demonstrates through extensive expert evidence that the Challenged Plans were intended to—and will—warp New Hampshire's legislative elections in a manner that dilutes the electoral strength of voters seeking to elect Democratic Party candidates. This systematic dilution of a community's voting power based on how they are expected to vote is "incompatible with democratic principles" and defies "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 824 (2015) (cleaned up).

In the face of these stridently undemocratic actions, Defendants contend that the New Hampshire Constitution—which "protects the people from governmental excesses and potential abuses" and may be "interpret[ed] . . . as more protective of individual rights than the parallel provisions of the United States Constitution," *State v. Ball*, 124 N.H. 226, 231 (1983)—*requires* that this Court do nothing. They suggest that Plaintiffs' claims raise nonjusticiable political questions, arguing that the General Court retains exclusive authority over redistricting and that there are no discoverable and manageable standards for judicial intervention in this case. Significantly, Defendants do not dispute that these maps *are* partisan gerrymanders; instead, they assert that there can *never* be judicial review in these cases. But that argument is not grounded in the law.

Nothing in the New Hampshire Constitution exempts partisan gerrymanders from judicial review. In passing laws, the General Court must comply with the requirements of the New

Hampshire Constitution; where it fails to do so and violates the constitutional rights of New Hampshire citizens, state courts can *and must* enjoin such violations and order remedies. By proposing a "partisan gerrymandering exception" to judicial review, it is *Defendants*, not Plaintiffs, who seek to radically disrupt the separation of powers. Such a departure would be not only out of step with state courts across the country that have heard partisan gerrymandering claims under analogous constitutional provisions, but also inconsistent with New Hampshire precedent.

Both the history and the text of the New Hampshire Constitution support the conclusion that partisan gerrymandering claims are justiciable. By warping election results to thwart the will of New Hampshire voters, the Challenged Plans stymie free and equal legislative elections. By treating Democratic and Republican voters differently without justification and denying political equality to half of the state's electorate, the Challenged Plans violate equal protection principles. And by retaliating against Democratic voters based on their electoral preferences and imposing undue burdens on their ability to organize and influence elections, the Challenged Plans violate constitutional guarantees of free speech and assembly. The New Hampshire Constitution thus provides the legal bases for Plaintiffs' suit. And the courts across the country that have successfully adjudicated partisan gerrymandering cases have supplied a blueprint for the standards and types of evidence that the judiciary can consider when evaluating these claims.

New Hampshire's judiciary should not shy away from hearing partisan gerrymandering claims. Indeed, in concluding that *federal* courts lack jurisdiction to redress partisan gerrymanders, the U.S. Supreme Court explained that active policing by *state* courts will ensure that "complaints about districting [do not] echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). If this Court accepts Defendants' arguments, then the state court protection on which the *Rucho* Court relied will be eliminated for Granite State voters—an outcome squarely at odds with

New Hampshire's system of checks and balances. The framers of the New Hampshire Constitution expressed particular concern that governmental entities would be unable to "resist [the] bewitching influence" of expanded power, writing in a letter to the people that "[w]herever power is lodged there is a constant propensity to enlarge its boundaries." *An Address of the Convention for Framing a New Constitution of Government for the State of New Hampshire, to the Inhabitants of Said State* 5 (1781). They created a tripartite system under which no one branch would be absolutely immune from regulation of its authority by the others. Yet that is exactly what Defendants seek here—carte blanche for the General Court to violate the New Hampshire Constitution in pursuit of political power, without the necessary safeguard of judicial review.

Plaintiffs have sufficiently alleged that the Challenged Plans constitute unlawful partisan gerrymanders under the New Hampshire Constitution. This Court should discharge its obligation to vindicate the fundamental rights of New Hampshire voters by hearing those claims.

II. Background

A. The General Court enacted new districting plans for the Senate and Executive Council that overwhelmingly favor the Republican Party.

Over the past few years, New Hampshire has had repeated opportunities to ensure that the state's decennial congressional and legislative redistricting is undertaken in a fair, nonbiased manner—but Republican Party officeholders have consistently rebuffed those opportunities. In 2019, the General Court passed House Bill 706, which would have created an independent redistricting commission in New Hampshire, but Governor Christopher Sununu vetoed the bill. Complaint for Declaratory & Injunctive Relief. ("Compl.") ¶¶ 35–36. The following year, the General Court passed similar legislation, House Bill 1665, and Governor Sununu vetoed it again. *Id.* ¶ 37. And in a last-ditch attempt to prevent Republicans from enacting partisan gerrymanders earlier this year, Democrats introduced legislation providing that, among other criteria,

redistricting plans "as a whole shall not have the intent or the effect of unduly favoring or disfavoring any political party, incumbent, or candidate for office." S.B. 255, 2022 Sess. (N.H.). The Republican-controlled Senate rejected consideration of this legislation on party lines, with every present Republican voting not to consider the bill. Compl. ¶ 46.

Against this backdrop, the General Court enacted the Challenged Plans, which intentionally and systematically subordinate nonpartisan, traditional redistricting criteria to the overarching goal of achieving political gain for Republicans. *Id.* ¶ 4. From the beginning, the Republican-controlled General Court that produced these plans made their partisan ambitions plain. During the New Hampshire Republican Party's first meeting after the new General Court was seated in January 2021, party chairman Stephen Stepanek proclaimed that, because "we [now] control redistricting," the party could "stand here today and guarantee you that we will send a conversative Republican to Washington, D.C. as a Congress person in 2022." *Id.* ¶ 41. That November, Republican Representative Robert J. Lynn was asked by one of his Democratic colleagues on the House Special Committee on Redistricting whether political data were used to draw Republicans' proposal for a new congressional plan; he responded, "[I]f your question is 'were political considerations something that were in the mix,' of course they were. . . . Was that something that was taken into account? Of course it was." *Id.* ¶ 43. Going even further, Representative Lynn stated two weeks later that "political affinity would seem to be *among the most important considerations*" in drawing district lines. *Id.* ¶ 44. After introducing the newly proposed Senate and Executive Council plans, the General Court ignored overwhelming public testimony that the plans were unfair partisan gerrymanders that disregarded neutral redistricting principles. *Id.* ¶¶ 45, 49–50.

Notwithstanding the fact that New Hampshire's electorate is closely divided in their support for Republican and Democratic candidates in statewide races, the Challenged Plans will

distort the results of the Granite State's legislative elections to benefit the Republican Party. *Id.* ¶¶ 5, 7–8. Under the new Senate plan, Republicans are poised to take veto-proof, *supermajority* control of the Senate (16 of 24 districts). *Id.* ¶ 7. This partisan gerrymander is so durable and extreme that Republicans could *lose* the statewide popular vote and still acquire a supermajority in the Senate. *Id.* Similarly, if the new Executive Council plan is used in upcoming elections, Republicans will have a significant advantage in four of five—that is, *80%*—of Executive Council districts, even though in recent years Republican candidates have received votes from just over half of the electorate in statewide races. *Id.* ¶ 8. By contrast, just to win a bare majority of districts under either plan, Democrats must amass well more than half of the statewide vote. *Id.* ¶ 10.

The General Court's partisan intent is clear from the way in which they drew the Challenged Plans: "packing" Democratic voters into a small number of districts (or, for the new Executive Council plan, just one district) and then "cracking" other Democratic voters among many more districts such that they have little or no ability to influence elections. *Id.* ¶ 4. For the Senate map, the General Court drew bizarrely shaped, noncompact districts, packing Democrats into just eight districts where they comprise an overwhelming majority of voters and carefully drawing the remaining 16 to ensure Republican control. *Id.* ¶¶ 7, 55–73. The packing and cracking in the Executive Council plan is even more apparent: The General Court drew Executive Council District 2 as a Democratic "vote-sink" covering half of the state, surgically grabbing Democratic strongholds while carefully excluding Republican-leaning municipalities in the same areas. *Id.* ¶ 9. As a result, a significant portion of the state's Democratic voters are packed into just one Executive Council district, while other Democratic voters are carefully dispersed across the remaining four districts such that they have little or no chance of electing their preferred candidates. *Id.* ¶¶ 9, 88–96.

B. Plaintiffs initiated this action and filed a preliminary injunction motion supported by unrebutted expert evidence.

Plaintiffs—New Hampshire voters who intend to support Democratic candidates in future legislative elections, Compl. ¶¶ 17–28—filed their complaint on May 6, 2022, the day the Challenged Plans were signed into law by Governor Sununu. *Id.* ¶¶ 51, 85. They allege that "[t]he Challenged Plans are partisan gerrymanders that defy the basic principles of representative government," *id.* ¶ 3, in violation of multiple provisions of the New Hampshire Constitution: the Free and Equal Elections Clause, *id.* ¶¶ 99–105 (citing N.H. Const. pt. I, art. 11); the equal protection provisions, *id.* ¶¶ 106–13 (citing N.H. Const. pt. I, arts. 1, 10, 12); and the guarantees of free speech and assembly, *id.* ¶¶ 114–20 (citing N.H. Const. pt. I, arts. 22, 32).

Three days after filing their complaint, Plaintiffs filed their motion for preliminary injunction, supported by expert analysis confirming that the Challenged Plans constitute intentional, effective, and durable partisan gerrymanders. Dr. Jowei Chen "produced a sample of 1,000 computer-simulated districting plans" adhering to traditional redistricting criteria, including those required by the New Hampshire Constitution. Mem. of Law in Supp. of Mot. For Prelim. Inj. 19. Comparing the partisan characteristics of those simulated plans to the enacted Senate plan, Dr. Chen concluded that "partisan goals predominated in the drawing of the Enacted Plan" and that, "[b]y subordinating traditional districting principles, the New Hampshire General Court's Enacted Plan was able to achieve an extreme partisan outcome." Aff. of Steven Dutton in Supp. of Pls.' Mot. for Prelim. Inj. ("Dutton Aff.") Ex. 13, ¶ 75. Dr. Chen undertook a similar analysis for the Executive Council plan and reached the same conclusions. *See id.* Ex. 13, ¶ 131.

Dr. Wesley Pegden used the "enacted plan as a starting point and ma[de] a sequence of many small random changes to the district boundaries" to determine "whether the district lines were carefully drawn to optimize partisan consideration." *Id.* Ex. 16, at 2. He found that both the

Senate and Executive Council plans "have a greater partisan bias than 99.99% of the billions of districtings produced by [his] algorithm" and "are more optimized for partisanship than more than 99.9% of all possible Senate and Executive Council districtings" satisfying traditional and constitutionally required redistricting criteria. *Id.* Ex. 16, at 2–3.

Lastly, Dr. Dante Scala analyzed whether the Challenged Plans reflect communities of interest or could be justified on that basis. *See id.* Ex. 15, ¶¶ 7–9. He found instead "abundant evidence for the idea that partisan considerations displaced concerns about communities of interest in the drawing of the State Senate map, and that disparate communities were pieced together in an effort to achieve partisan gain." *Id.* Ex. 15, ¶ 43. He reached the same conclusion for the Executive Council plan. *Id.* Ex. 15, ¶ 69.

III. Legal Standard

"In reviewing a motion to dismiss, '[the] standard of review is whether the allegations in the [] pleadings are reasonably susceptible of a construction that would permit recovery.'" *McNamara v. Hersh*, 157 N.H. 72, 73 (2008) (quoting *K & B Rock Crushing v. Town of Auburn*, 153 N.H. 566, 568 (2006)). "This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law." *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010). Courts must "assume the truth of the facts as alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to the plaintiff." *Id.* (quoting *Perez v. Pike Indus., Inc.*, 153 N.H. 158, 159 (2005)).

IV. Argument

No party disputes that the General Court has the primary authority to conduct redistricting. But it must do so consistent with the requirements of the New Hampshire Constitution. To that end, the General Court must ensure free elections, in which all eligible Granite Staters have "an equal right to vote." N.H. Const. pt. I, art. 11. It must "treat[] groups of similarly situated citizens

in the same manner" or demonstrate why its failure to do so narrowly serves a compelling—or at least legitimate—state interest. *McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 711 (2001). And it cannot engage in viewpoint discrimination unless doing so narrowly serves a compelling state interest. *See State v. Lilley*, 171 N.H. 766, 781–82 (2019).

Notwithstanding these constitutional requirements, Defendants attempt to avoid judicial review of the Challenged Plans by invoking the political question doctrine and emphasizing the General Court's prerogative to undertake redistricting in the first instance. But as the New Hampshire Supreme Court recently explained when considering the limited scope of the doctrine, "that the constitution commits to the legislature [] exclusive authority . . . does not end the inquiry into justiciability." *Burt v. Speaker of House of Representatives*, 173 N.H. 522, 526 (2020) (second alteration in original) (quoting *Horton v. McLaughlin*, 149 N.H. 141, 145 (2003) (per curiam)). To the contrary, "[t]he court system [remains] available for adjudication of issues of constitutional or other fundamental rights." *Id.* (second alteration in original) (quoting *Horton*, 149 N.H. at 145). It is thus axiomatic that when the General Court passes laws that violate the New Hampshire Constitution, "[i]t is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it." *Monier v. Gallen*, 122 N.H. 474, 476 (1982) (per curiam). A court may not evade that duty "merely because [the] task is a difficult one." *Id.* As "the final arbiter of State constitutional disputes," the judiciary has the "constitutional duty . . . to review whether laws passed by the legislature are constitutional." *Baines v. N.H. Senate President*, 152 N.H. 124, 129 (2005) (quoting *In re Below*, 151 N.H. 135, 139 (2004) (per curiam)). "While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction" by the judiciary "to deliberately ignore a clear constitutional violation." *Id.* (quoting *Consumer Party of Pa. v.*

Commonwealth, 507 A.2d 323, 333 (Pa. 1986)); *cf. Norelli v. Sec'y of State*, No. 2022-0184, 2022 WL 1498345, at *7 (N.H. May 12, 2022) (per curiam) ("We reject the State's position that, despite the unconstitutionality of the current congressional districting statute, judicial non-intervention in this case is more important than protecting the voters' fundamental rights under the United States Constitution.").

Defendants also wield the inherently political nature of redistricting as a cudgel to beat back any attempt at judicial scrutiny. But "merely characterizing a case as political in nature will [not] render it immune from judicial scrutiny" under the political question doctrine. *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982); *see also Baker v. Carr*, 369 U.S. 186, 209 (1962) ("[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question."). Indeed, it has long been recognized that the fact that "districting inevitably has and is intended to have substantial political consequences," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), does not automatically insulate all redistricting decisions from judicial scrutiny. Instead, a case presents a nonjusticiable political question only under limited circumstances—when "there is a textually demonstrable constitutional commitment of the issue to a coordinate political department" or there are no "judicially discoverable and manageable standards for resolving it." *Hughes v. Speaker of N.H. House of Representatives*, 152 N.H 276, 283 (2005) (quoting *In re Jud. Conduct Comm.*, 145 N.H. 108, 111 (2000) (per curiam)). As the New Hampshire Supreme Court has explained, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the

[State] Constitution." *Burt*, 173 N.H. at 525 (second alteration in original) (quoting *Hughes*, 152 N.H. at 283).[1]

In sum, while New Hampshire courts may decline to review so-called political questions, such cases represent "a narrow exception" to the rule that, "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). This Court has the duty and responsibility to do so here. Contrary to Defendants' arguments, neither the text of the New Hampshire Constitution nor the caselaw interpreting it supports their theory of nonjusticiability in this case. Instead, the New Hampshire Constitution provides the legal basis for Plaintiffs' claims, and comprehensive rulings from courts across the country provide clear and manageable standards for adjudicating them.

A. The New Hampshire Constitution does not foreclose judicial review of legislatively enacted redistricting plans.

Primary among Defendants' arguments is that, because the General Court has the authority to undertake redistricting, state courts are powerless to adjudicate partisan gerrymandering claims. *See* Mem. of Law in Supp. of Defs.' Joint Mot. To Dismiss ("Mem.") 6–7 (citing N.H. Const. pt.

[1] The New Hampshire Supreme Court has also recognized other indicia of nonjusticiability: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baines*, 152 N.H. at 129 (quoting *Baker*, 369 U.S. at 217). Although Defendants focus their attention only on the first two of the so-called "*Baker* factors"—"a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it," *id.* (quoting *Baker*, 369 U.S. at 217)—none of these considerations supports a finding of nonjusticiability in this case.

II, arts. 26, 65). But this Court should not "infer the non-justiciability of partisan gerrymandering purely from the structural fact that the decennial apportionment of legislative districts is committed to a 'political' branch." *Harper v. Hall*, 868 S.E.2d 499, 534 (N.C. 2022), *cert. granted sub nom. Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022). In other words, "the mere fact that responsibility for reapportionment is committed to the [General Court] does not mean that [its] decisions in carrying out its responsibility are fully immunized from any judicial review." *Id.* Indeed, to accept such a "startling proposition" would be "inconsistent with this Court's obligation to enforce the provisions of the" New Hampshire Constitution. *Id.*[2]

Accordingly, while "the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention" as a general matter, judicial scrutiny *is* warranted where there is "a clear, direct, irrefutable constitutional violation." *City of Manchester v. Sec'y of State*, 163 N.H. 689, 697 (2012) (per curiam) (quoting *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 383 (W. Va. 2012)). Here, the history and text of the New Hampshire Constitution and the cases on which Defendants themselves rely confirm that Plaintiffs have raised clear, cognizable constitutional claims. This is not a case where redistricting has been committed exclusively to the legislative branch. Plaintiffs' claims are therefore justiciable.

[2] Defendants' surreply in support of their objection to Plaintiffs' preliminary injunction motion inaccurately characterizes *Harper* as an "outlier." Defs.' Surreply in Supp. of Defs.' Obj. to Pls.' Mot. for Prelim. Inj. 7–8. To the contrary, both the holding and reasoning of *Harper* are consistent with state courts across the country that have considered partisan gerrymandering claims under their state constitutions. *See infra* at 14–22. And while the U.S. Supreme Court has granted certiorari in *Harper*, the narrow question before it is whether the federal Elections Clause bars claims related to *federal congressional* maps. *See* Petition for Writ of Certiorari at i, *Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (U.S. Mar. 17, 2022). Because Plaintiffs here challenge only *state legislative* maps, Defendants do not and could not make that argument.

1. The New Hampshire Constitution's history demonstrates an intent to prohibit partisan gerrymandering.

The history of the New Hampshire Constitution, and its Free and Equal Elections Clause in particular, demonstrates an intent to foreclose partisan gerrymandering—and thus place such claims within the ambit of the state's judiciary.

The Free and Equal Elections Clause was enacted on June 2, 1784, when the current constitution took effect and replaced the state's constitution of 1776. *See, e.g.*, Lawrence Friedman, *The New Hampshire State Constitution* 58 (2d ed. 2015); Susan E. Marshall, *The New Hampshire State Constitution: A Reference Guide* 12, 55 (2004). Since then, the clause has always required that "elections . . . be free" and that inhabitants have "an equal right" to elect or vote. Like the free elections clauses in North Carolina and other states, New Hampshire's Free and Equal Elections Clause reflects the English Bill of Rights of 1689—a product of the Glorious Revolution. *See Harper*, 868 S.E.2d at 540. As the North Carolina Supreme Court explained when describing the history of its own constitution's analogous free elections clause, the English Bill of Rights

> provided "election of members of parliament ought to be free." This provision of the 1689 English Bill of Rights was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain "electoral advantage," leading to calls for a "free and lawful parliament" by the participants of the Glorious Revolution. Avoiding the manipulation of districts that diluted votes for electoral gain was, accordingly, a key principle of the reforms following the Glorious Revolution.

Id. (citations omitted) (first quoting Bill of Rights 1689, 1 William & Mary Sess. 2 ch. 2 (Eng.); and then quoting J.R. Jones, *The Revolution of 1688 in England* 148 (1972)). Like New

Hampshire's Free and Equal Elections Clause, "North Carolina's free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia." *Id.*[3]

Notably, although the original 1784 iteration of the New Hampshire Constitution stated that "[a]ll elections *ought* to be free," N.H. Const. pt. I, art. 11 (amended 1976) (emphasis added); *see also* Marshall, *supra*, at 229, it was later amended to state that "[a]ll elections *are* to be free," N.H. Const. pt. I, art. 11 (emphasis added)—a command rather than an aspiration. This distinction is significant; North Carolina's free elections clause evolved in a similar manner, leading that state's highest court to reason that "[t]his change was intended to 'make it clear' that the free elections clause . . . 'are commands and not mere admonitions to proper conduct on the part of the government.'" *Harper*, 868 S.E.2d at 542 (quoting *N.C. State Bar v. DuMont*, 286 S.E.2d 89, 97 (N.C. 1982)). The same reasoning applies here, indicating that "though those in power during the early history of [New Hampshire] may have viewed the free elections clause as a mere 'admonition' to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement." *Id.*

The origins and history of the Free and Equal Elections Clause demonstrate the intent of the framers of the New Hampshire Constitution to prohibit partisan gerrymandering. Rather than

[3] "New Hampshire shares its early history with Massachusetts" and "modeled much of [its] constitution on one adopted by Massachusetts four years earlier." *State v. Mack*, 173 N.H. 793, 802 (2020) (quoting *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 186 (1993)); *see also* Marshall, *supra*, at 1, 55 ("The 1784 version of [Part I, Article 11] was based on the 1780 Massachusetts Constitution[.]"). The primary author of the Massachusetts Constitution—John Adams—in turn derived the commonwealth's Declaration of Rights from several sources, including the bills of rights in the Virginia and Pennsylvania Constitutions. *See* Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 Proc. of Am. Antiquarian Soc'y 317, 330–31 (1980); Marshall, *supra*, at 2. "All these American declarations owed a debt to great English state papers . . . and the Bill of Rights of 1689 suggests the substance and occasionally some of the wording of more than a half dozen of Adams's articles." Taylor, *supra*, at 331.

trust the General Court to self-regulate, they imposed constraints on the ability of legislators to engage in gerrymandering. Far from being unmoored from the text of the New Hampshire Constitution, Plaintiffs' partisan gerrymandering claims have an historical basis in that document and its constitutional requirement for free elections. And where the New Hampshire Constitution imposes such a mandatory obligation, the task of enforcing that obligation falls to the courts. *See Monier*, 122 N.H. at 476.

2. The New Hampshire Constitution's text mirrors that of states in which courts have found partisan gerrymandering claims justiciable.

In addition to this history, the text of the New Hampshire Constitution itself demonstrates the justiciability of Plaintiffs' claims.

At the outset, Defendants' contention that "the New Hampshire Supreme Court has never invalidated a redistricting plan duly enacted by the Legislature following the then most recent federal decennial census," Mem. 8, is of little moment. If the lack of precedent for a given claim were sufficient to bar it under the political question doctrine, then new legal theories would never emerge, and the law would be forever calcified. Indeed, if this factor were controlling, *Baker itself* would have had the opposite outcome: Prior to that case, a court had never struck down districts as malapportioned. *See* 369 U.S. at 266–67 (Frankfurter, J., dissenting).

Moreover, the New Hampshire Supreme Court has never held that partisan gerrymandering claims are beyond the reach of state courts. New Hampshire's judiciary is thus in the same position as other state courts in recent cases: considering as a matter of first impression whether their state constitutions give rise to partisan gerrymandering claims. *See, e.g.*, *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 811 (Pa. 2018) (adjudicating partisan gerrymandering claim where, "[w]hile it is true that our Court has not heretofore held that a redistricting plan violates the Free and Equal Elections Clause—for example, because it is the product of politically-motivated

gerrymandering—we have never precluded such a claim in our jurisprudence"); *Szeliga v. Lamone*, No. C-02-CV-21-001816, slip op. at 26, 28 (Md. Cir. Ct. Mar. 25, 2022) (noting that "[t]he purpose of the Free Elections Clause relative to partisanship . . . heretofore has not been the subject of judicial scrutiny" but nonetheless holding that plaintiffs had stated claim for partisan gerrymandering).[4] And while the New Hampshire Supreme Court has not had the opportunity to squarely consider the question, its precedent strongly indicates that such a claim may be brought. Previously, the Court acknowledged that "[u]se of multi-member districts is constitutionally permissible . . . *unless* the districts are designed to or would 'minimize or cancel out the voting strength of racial *or political* elements of the voting population.'" *Burling v. Chandler*, 148 N.H. 143, 150 (2002) (per curiam) (emphases added) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); *accord Op. of Justs.*, 111 N.H. 146, 150–51 (1971). Defendants ask this Court to take the drastic and unprecedented step of carving an entire universe of claims from the jurisdiction of the New Hampshire judiciary without any authoritative support.

Finally, although Defendants suggest that "Plaintiffs might have a more colorable argument that partisan-gerrymandering-based claims were justiciable under the State Constitution" if a specific partisan gerrymandering amendment were enacted, Mem. 12, it is no barrier to Plaintiffs' claims that the constitutional provisions on which they rely do not explicitly mention partisan gerrymandering. Several states have struck down partisan gerrymanders under the broad guarantees of their respective constitutions. *See, e.g.*, *Harper*, 868 S.E.2d at 510 (holding that redistricting plan violated free elections clause, equal protection clause, and free speech and assembly clauses of North Carolina Constitution); *League of Women Voters of Pa.*, 178 A.3d at

[4] A copy of the *Szeliga* decision is attached as Exhibit 1.

814 (holding that Pennsylvania's free elections clause bars vote dilution by partisan gerrymandering); *Szeliga*, slip op. at 93–94 (holding that redistricting plan violated free elections clause, equal protection provision, and free speech clause of Maryland Constitution); *see also League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, 2021-1210, 2022 WL 110261, at *30 (Ohio Jan. 12, 2022) (Brunner, J., concurring) (finding that gerrymandered legislative maps violated state's equal protection clause in addition to other provisions of Ohio Constitution). The New Hampshire Constitution contains parallel provisions that likewise have been given broad application in the context of voting. For example, the New Hampshire Supreme Court recently cited the Free and Equal Elections Clause when affirming the unconstitutionality of a law relating to voter-registration requirements, even though the clause says nothing explicitly about burdens on the right to vote. *See N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 374 (2021).

Ultimately, Plaintiffs' claims are grounded in several provisions of the New Hampshire Constitution, which, properly interpreted, prohibit the dilution of votes on the basis of partisan affiliation.

Free and equal elections. As discussed above, the New Hampshire Constitution's Free and Equal Elections Clause mandates that "[a]ll elections are to be free." N.H. Const. pt. I, art. 11. In finding partisan gerrymandering claims justiciable under substantially identical language, the North Carolina Supreme Court explained that "partisan gerrymandering . . . is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people." *Harper*, 868 S.E.2d at 542; *see also League of Women Voters of Ohio*, 2022 WL 110261, at *32 (Brunner, J., concurring) ("A law . . . that decreases the weight or dilutes the power of a group of citizens' votes relative to their ability to achieve representative influence in the legislature may

impermissibly burden th[e] right [to vote] when the outcomes relating to one class of voters are not proportional to the votes cast."). The Pennsylvania Supreme Court, considering the commonwealth's similarly expansive free elections clause, likewise concluded that the words "free" and "equal" were "indicative of the framers' intent that all aspects of the electoral process . . . be kept open and unrestricted to the voters of our Commonwealth" and guarantee "equal participation in the electoral process for the selection of [a voter's] representatives in government." *League of Women Voters of Pa.*, 178 A.3d at 804. Or, "[s]tated another way, the actual and plain language of [the clause] mandates that all voters have an equal opportunity to translate their votes into representation." *Id.* And a Maryland court, considering that state's free elections clause, recently concluded that, "as it was originally adopted in 1776, [the clause] was meant to secure a right of participation." *Szeliga*, slip op. at 25. The court stated that "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." *Id.* at 27 (quoting *The Debates of the Constitutional Convention of the State of Maryland, Assembled at the City of Annapolis, Wednesday, April 27, 1864* 1334 (1864)).

Here, Plaintiffs have alleged that the Challenged Plans "will artificially warp the outcome of elections . . . in favor of Republican candidates," leading to Republican majorities or even *super*majorities in the Senate and Executive Council even in elections where Republican candidates *lose* the statewide popular vote. Compl. ¶¶ 7–8. This durable entrenchment will ensure that the will of New Hampshire voters will *not* be reflected in these bodies. Accordingly, under

the expansive protection afforded by the Free and Equal Elections Clause, the Challenged Plans are unconstitutional.[5]

Equal protection. The equal protection guarantees of the New Hampshire Constitution also prohibit partisan gerrymandering. *See* N.H. Const. pt. I, arts. 1, 10, 12. As the North Carolina Supreme Court concluded in interpreting that state's "fundamental principle of equality," the right to equal protection includes a right to "substantially equal voting power." *Harper*, 868 S.E.2d at 544. That right "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views," and thus designing "districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority." *Id.* This interpretation "is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality." *Id.* Like the North Carolina Constitution, the New Hampshire Constitution safeguards both the right to equal protection *and* the fundamental right to vote. *See Akins v. Sec'y of State*, 154 N.H. 67, 71 (2006) (observing that "the right to vote is fundamental" and that "when governmental action impinges upon a fundamental right, such matters are entitled to review under strict judicial scrutiny"). The New Hampshire Constitution therefore guarantees Granite Staters the right to substantially equal voting power.

[5] Although a 4-3 decision of the Kansas Supreme Court recently concluded that partisan gerrymandering claims are nonjusticiable under Kansas law, the Kansas Constitution does *not* include a free elections clause—a significant distinction between that case and this one. *Cf. League of Women Voters of Pa.*, 178 A.3d at 802 n.63 (basing partisan gerrymandering decision on free elections clause only and declining to address free speech and equal protection arguments).

Justice Brunner's concurrence in a recent opinion of the Ohio Supreme Court concerning legislative districts similarly concluded that partisan gerrymandering violates the guarantee of equal protection. *See League of Women Voters of Ohio*, 2022 WL 110261, at *33–37 (Brunner, J., concurring); Ohio Const. art. I, § 2. Justice Brunner explained that an equal protection violation can be found where plaintiffs "demonstrate that those in charge of the redistricting acted with an intent to subordinate adherents of one political party and entrench a rival party in power and the plan will have the effect of diluting the votes of members of the disfavored party" in a way that cannot be justified on "legitimate legislative grounds." *League of Women Voters of Ohio*, 2022 WL 110261, at *33–34 (Brunner, J., concurring) (cleaned up). This interpretation of the state's equal protection clause "goes to the fundamental protection of ensuring that state government will continue to be instituted for Ohioans' benefit and equal protection . . . , especially when relating to access to voting and its equal import no matter where a person resides in the state." *Id.* at *33 (Brunner, J., concurring); *see also Szeliga*, slip. op. at 93 (holding that "application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the State presented under a 'compelling interest' standard").

These interpretations are consistent with the New Hampshire Constitution's equal protection guarantee, "which ensure[s] that State law treats groups of similarly situated citizens in the same manner." *McGraw*, 145 N.H. at 711. Indeed, the "principle of equality pervades the entire constitution." *State v. Pennoyer*, 65 N.H. 113, 114 (1889); *see also Rosenblum v. Griffin*, 89 N.H. 314, 321 (1938) (referring to New Hampshire Constitution's "organic principle of equality"). "The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *McGraw*, 145 N.H. at 711 (quoting *LeClair v. LeClair*, 137 N.H. 213, 222 (1993)). There can be no dispute that all New Hampshire voters are similarly situated in

their exercise of the franchise. And by diluting the voting strength of half of the state's electorate, the Challenged Plans single out New Hampshire voters who support Democratic candidates and treat them differently in a manner that harms their voting strength, as Plaintiffs allege. *See, e.g.*, Compl. ¶ 10 ("Under [the Challenged Plans], Republicans can attain overwhelming control of the Senate and Executive Council even if they amass less than half of the statewide vote. Meanwhile, just to win a bare majority of districts under either plan, Democrats must amass well more than half of the statewide vote."). By "packing Democratic voters into a small number of districts (or, for the Executive Council Plan, just one district), and then cracking other Democratic voters among many more districts such that they have little or no ability to influence elections," *id.* ¶ 4, the Challenged Plans devalue Democratic votes in violation of the principle of political equality codified in the New Hampshire Constitution.

Free speech and assembly. The Challenged Plans also violate the New Hampshire Constitution's guarantees of free speech and assembly. *See* N.H. Const. pt. I, arts. 22, 32. The constitutional text emphasizes that "[f]ree speech" is "essential to the security of freedom in a state." *Id.* pt. I, art. 22. When a legislature diminishes the votes of a disfavored party, "it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny." *Harper*, 868 S.E.2d at 546; *see also Lilley*, 171 N.H. at 781–82 (strict scrutiny applies to content-based restrictions on speech); *Szeliga*, slip op. at 93 (holding that Maryland's free speech provision "requires a 'strict scrutiny' analysis" in partisan gerrymandering context). That is precisely what the Challenged Plans accomplish: By singling out Democratic votes for dilution, they favor Republican viewpoints over Democratic viewpoints in direct contravention of Part I, Article 22.

The Challenged Plans likewise violate Plaintiffs' right to free assembly, which guarantees "a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer." N.H. Const. pt. I, art. 32. Courts in other states have interpreted the right to free assembly as incorporating a freedom of association that includes the right to form political parties with likeminded citizens and participate freely in those organizations. *See, e.g.*, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *120 (N.C. Super. Ct. Sept. 3, 2019) (three-judge court) (citing *Feltman v. City of Wilson*, 767 S.E.2d 615, 620 (N.C. Ct. App. 2014)); *Shane v. Parish of Jefferson*, 209 So. 3d 726, 741 (La. 2015). As the *Harper* court explained, "[w]hen legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views," which in turn violates the freedom of association. 868 S.E.2d at 546.[6]

Partisan gerrymandering also has the effect of "debilitat[ing]" the disfavored party and "weaken[ing] its ability to carry out its core functions and purposes." *Common Cause*, 2019 WL 4569584, at *122 (alterations in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)). Here, the Challenged Plans harm the associational rights of voters who

[6] The parties in a recent Oregon case similarly agreed that partisan gerrymandering would "violate[] Article 1, sections 8 and 26 of the Oregon Constitution, which guarantee freedom of expression and assembly, respectively." *Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *7 (Or. Special Jud. Panel Nov. 24, 2021).

cast their ballots for Democrats by diluting their votes—and thus violate the New Hampshire Constitution's right to free assembly as well.[7]

Ultimately, these various constitutional bases for Plaintiffs' partisan gerrymandering claims belie Defendants' assertion that "nothing in the text of the Constitution empower courts to invalidate and redraw maps based on notions of political fairness." Mem. 10. These provisions of the New Hampshire Constitution, interpreted in light of both their expansive language and the conclusions of courts in other states with similar constitutional protections, provide the requisite "clear, direct, [and] irrefutable" legal foundation for this Court's adjudication of Plaintiffs' claims. *City of Manchester*, 163 N.H. at 697 (quoting *Tennant*, 730 S.E.2d at 383).

3. Neither the arguments nor caselaw on which Defendants rely supports their claims of nonjusticiability.

The justiciability of Plaintiffs' partisan gerrymandering claims is supported by both the history and text of the New Hampshire Constitution. None of Defendants' arguments or caselaw suggests otherwise.

[7] In *Rucho*, the U.S. Supreme Court rejected a partisan gerrymandering challenge brought under the First Amendment to the U.S. Constitution. *See* 139 S. Ct. at 2504–05. Setting aside the fact that neither that result nor its underlying reasoning is binding on this Court when it analyzes a claim under Part I, Article 22 of the New Hampshire Constitution, *see infra* note 12, the *Rucho* Court's concern that, "[u]nder that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights," 139 S. Ct. at 2504, is misplaced. Plaintiffs do not allege that *any* partisan consideration as part of the redistricting process is constitutionally suspect. *Cf. Gaffney*, 412 U.S. at 753 ("[D]istricting inevitably has and is intended to have substantial political consequences."). Instead, Plaintiffs allege that the systematic and egregious distortions of the democratic system as manifested by the Challenged Plans render them unconstitutional. *Cf. Adams v. DeWine*, Nos. 2021-1428, 2021-1449, 2022 WL 129092, at *9 (Ohio Jan. 14, 2022) (Ohio law "does not prohibit a plan from favoring or disfavoring a political party or its incumbents to the degree that inherently results from the application of neutral criteria, but it does bar plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate, neutral criteria").

First, Defendants argue that "New Hampshire Supreme Court precedent makes clear that the Legislature, not the Judiciary, has the *exclusive* authority to factor political considerations into its redistricting calculus." Mem. 2 (citing *Below v. Gardner*, 148 N.H. 1, 11 (2002) (per curiam)). But *Below* merely stated that "political considerations . . . have no place in a *court-ordered remedial plan*." 148 N.H. at 11 (emphasis added); *accord Norelli*, 2022 WL 1498345, at *9. The admonition that courts avoid wading into political waters when drawing remedial maps, *see Burling*, 148 N.H. at 144–45, is not a license to forego adjudication of *constitutional claims* premised on illicit partisan intent and effects. Indeed, the New Hampshire Supreme Court has indicated as much. *See id.* at 150 (observing that multimember districts are constitutionally suspect where they dilute the voting strength of racial or political groups).

Second, Defendants claim that "Plaintiffs have not alleged that the Legislature violated any of the mandatory reapportionment requirements set forth in the Constitution." Mem. 6. But the cases on which they themselves rely confirm that their conception of the New Hampshire Constitution's redistricting requirements is inappropriately circumscribed. Defendants suggest that only the enumerated criteria described in Part II, Articles 26 and 65 impose limitations on the General Court's redistricting authority—and thus provide the only bases for justiciable challenges to Senate and Executive Council maps. But the New Hampshire Supreme Court has recognized redistricting limitations in *other* constitutional provisions as well. For example, the Court derived "the equal right to vote" vindicated in *Below* not from Part II, Article 26, but rather "Part I, Article 11 of the New Hampshire Constitution," 148 N.H. at 2—the Free and Equal Elections Clause on which Plaintiffs rely here, *see* Compl. ¶¶ 99–105; *see also Burling*, 148 N.H. at 146 (citing Free and Equal Elections Clause for proposition that "[t]he New Hampshire Constitution guarantees that each citizen's vote will have equal weight"); Marshall, *supra*, at 56 (citing *Below* and *Burling*

and explaining that, "[i]n discussing the state constitutional foundation for the one person/one vote standard, the New Hampshire Supreme Court held that [Part I, Article 11] guarantees that each citizen's vote will have equal weight").

City of Manchester, on which Defendants place considerable weight, *see* Mem. 11, is indeed instructive—but not for the reason they suggest. There, after noting that "[j]udicial relief becomes appropriate only when a legislature fails to reapportion according to . . . constitutional requisites in a timely fashion after having had an adequate opportunity to do so," the New Hampshire Supreme Court concluded that "[n]othing in the New Hampshire Constitution requires a redistricting plan to consider 'communities of interest'" and thus that a claim premised on the failure to do so was not cognizable. *City of Manchester*, 163 N.H. at 697, 708 (second alteration in original) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). Significantly, the Court distinguished between claims that a redistricting plan "violates other state constitutional mandates to which we apply a standard of review akin to the well-established rational basis standard"—in other words, the sort of claim advanced by the *City of Manchester* plaintiffs—and equal protection claims, which "generally involve the alleged deprivation of fundamental rights" and are subject to "an elevated level of judicial scrutiny." *Id.* at 698 (quoting *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 685 (Ariz. 2009)). Here, Plaintiffs assert the *latter* claims—causes of action premised on violations of fundamental constitutional rights—and therefore their partisan gerrymandering claims are both cognizable and justiciable.[8]

[8] In a misguided effort to tie Plaintiffs' causes of action to the rejected claim in *City of Manchester*, Defendants note that one of Plaintiffs' experts, Dr. Scala, examined the Challenged Plans' effect on communities of interest. *See* Mem. 11 n.2. But Dr. Scala's analysis is simply meant to

In short, there are more things in heaven and earth—and the New Hampshire Constitution—than are dreamt of in Defendants' philosophy. Under New Hampshire Supreme Court precedent, constitutional challenges to redistricting plans can be premised on provisions other than those that explicitly enumerate redistricting criteria. Just as the broad text of the Fourteenth Amendment has served as the basis for federal one-person/one-vote and racial gerrymandering claims, so too do the expansive protections afforded by the New Hampshire Constitution—including the Free and Equal Elections Clause and equal protection provisions—provide cognizable bases for redistricting claims.

Third, as a final arrow in their justiciability quiver, Defendants cite a series of cases where the New Hampshire Supreme Court considered whether challenges to legislative *procedures* were nonjusticiable political questions. *See* Mem. 13; *see also, e.g.*, *Burt*, 173 N.H. at 526 ("[C]ourts generally consider that the legislature's *adherence to the rules or statutes prescribing procedure* is a matter entirely within legislative control and discretion, not subject to judicial review *unless* the legislative procedure is mandated by the constitution." (first emphasis added) (quoting *Hughes*, 152 N.H. at 284)). These cases are inapposite: Plaintiffs challenge the Senate and Executive Council plans themselves—the *substantive results* of the redistricting process—not the General Court's procedures that led to their enactment. And because those substantive challenges are premised on fundamental rights guaranteed by the New Hampshire Constitution—just like the

demonstrate the extent to which the Challenged Plans satisfy traditional redistricting principles, which "are important not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Plaintiffs do not claim that preservation of communities of interest is itself a constitutional imperative.

claims adjudicated in *Below*, *Burling*, and the other redistricting cases Defendants cite—they are justiciable.

"Had the legislature complied with its obligation to reapportion 'according to . . . constitutional requisites,'" judicial intervention would not be necessary here. *Below*, 148 N.H. at 5 (alteration in original) (quoting *Monier*, 122 N.H. at 476). But because it did not—and because the Challenged Plans constitute partisan gerrymanders in violation of the New Hampshire Constitution's guarantees of free elections, free speech, and equal protection—judicial remediation is required.

B. Partisan gerrymandering claims are governed by judicially manageable standards.

As explained above, the New Hampshire Constitution provides the legal bases for Plaintiffs' partisan gerrymandering claims. In turn, the thoughtful, comprehensive rulings of courts in other states provide an easily discernible toolkit this Court can use to adjudicate them. Five states in particular provide instructive precedent:

- In Pennsylvania, the commonwealth's supreme court invalidated a congressional map as an unlawful partisan gerrymander after considering "the degree to which neutral criteria"—for example, "compactness, contiguity, and integrity of political subdivisions"—"were subordinated to the pursuit of partisan political advantage." *League of Women Voters of Pa.*, 178 A.3d at 817.

- In North Carolina, the state's supreme court adopted the detailed factual findings of a three-judge trial court and struck down the state's new congressional and legislative maps because the legislature had "subordinated traditional neutral redistricting criteria in favor of

extreme partisan advantage by diluting the power of certain people's votes." *Harper*, 868 S.E.2d at 509–10.[9]

- In Ohio, the state's supreme court twice invalidated recently enacted congressional maps because "[t]he evidence overwhelmingly shows that the enacted plan favors the Republican Party and disfavors the Democratic Party to a degree far exceeding what is warranted by [constitutional] line-drawing requirements and Ohio's political geography." *Adams v. DeWine*, Nos. 2021-1428, 2021-1449, 2022 WL 129092, at *9 (Ohio Jan. 14, 2022) (invalidating initial congressional plan); *see also Neiman v. LaRose*, No. 2022-Ohio-2471, slip op. at 2 (Ohio July 19, 2022) (per curiam) (invalidating second congressional plan because it "unduly favors the Republican Party and disfavors the Democratic Party");[10] *League of Women Voters of Ohio*, 2022 WL 110261, at *1 (invalidating legislative plan in part because it violated constitutional provision requiring that plan "meet[] standards of partisan fairness and proportionality").

- In Oregon, a special five-judge court rejected a partisan gerrymandering challenge after concluding that the state's new congressional map "resulted from a robust deliberative process and careful application of neutral criteria" and "provides no significant partisan advantage to either political party." *Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *7 (Or. Special Jud. Panel Nov. 24, 2021).

[9] A three-judge state court similarly struck down North Carolina's congressional map in 2019, rejecting the argument that the political question doctrine foreclosed adjudication of the plaintiffs' partisan gerrymandering claims and considering "a detailed record of both the partisan intent and the intended partisan effects of the [] congressional districts." *Harper v. Lewis*, No. 19 CVS 012667, slip op. at 3–4, 12–14 (N.C. Super. Ct. Oct. 28, 2019) (three-judge court); *see also Common Cause*, 2019 WL 4569584, at *132 (striking down North Carolina legislative maps after considering degree to which plans maximized partisan advantage and subordinated neutral criteria).

[10] A copy of the *Neiman* decision is attached as Exhibit 2.

- In Maryland, a state trial court invalidated the legislatively enacted congressional map, finding that it was "an extreme gerrymander that subordinates constitutional criteria to political considerations." *Szeliga*, slip op. at 88.

In adjudicating their respective partisan gerrymandering claims, these state courts considered and weighed evidence and arguments that delineate the requisite "judicially discoverable and manageable standards for resolving" Plaintiffs' claims. *Hughes*, 152 N.H at 283 (quoting *Jud. Conduct Comm.*, 145 N.H. at 111). A sampling of such evidence is discussed below.

Direct evidence of partisan intent. Although direct evidence "that the state acted with an intent to subordinate adherents of one political party and entrench a rival party in power . . . is rarely provable by direct evidence and generally must be inferred from the totality of the circumstances," *see League of Women Voters of Ohio*, 2022 WL 110261, at *34 (Brunner, J., concurring) (cleaned up), it can nevertheless serve as compelling evidence in partisan gerrymandering cases, *see, e.g.*, *Common Cause*, 2019 WL 4569584, at *10–11; *Neiman*, slip op. at 14.

Expert testimony on a plan's partisan effects. Established political science metrics—including mean-median difference analysis, the efficiency gap, the lopsided-margins test, and partisan-symmetry analysis—can demonstrate the degree to which a map confers an electoral advantage on one political party over another. *See, e.g.*, *League of Women Voters of Pa.*, 178 A.3d at 820–21; *Harper*, 868 S.E.2d at 547–49; *Adams*, 2022 WL 129092 at *14; *Neiman*, slip op. at 14–15, 19–22; *Clarno*, 2021 WL 5632371, at *5–7.[11]

[11] Significantly, these political science techniques can be effectively employed without "identify[ing] an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper*, 868

Expert testimony on deviations from neutral redistricting criteria. Large sets of computer-simulated redistricting plans, optimized to perform well on traditional redistricting principles like compactness, contiguity, and subdivision splits, can demonstrate the extent to which adopted maps deviate from the norm and thus subordinate neutral criteria to impermissible ends. *See, e.g.*, *League of Women Voters of Pa.*, 178 A.3d at 818–19; *Harper*, 868 S.E.2d at 549; *Szeliga*, slip. op. at 89–90, 92–93; *Adams*, 2022 WL 129092 at *10–11; *Neiman*, slip op. at 21.

Evidence of packing and cracking. "[E]vidence showing that [a] plan contained districts . . . that were shaped not by neutral political geography but by an effort to 'pack' and 'crack' Democratic voters—resulting in more districts in which Republican candidates were strongly favored or at least competitive"—can prove that the plan was drawn to disfavor certain voters. *Neiman*, slip op. at 15–19 (quoting *Adams*, 2022 WL 129092 at *13).

Examination of district features. An expert or even lay examination of a plan can reveal whether districts respect regions and political subdivisions or, conversely, "sprawl through [the] landscape" or "contain 'isthmuses' and 'tentacles,'" *League of Women Voters of Pa.*, 178 A.3d at 819—which in turn might demonstrate the extent to which neutral criteria were subordinated to other considerations. *See, e.g.*, *Neiman*, slip op. at 15–19 (noting that invalidated plan contained "oddly shaped districts" and "dr[ew] a district line directly through [a] Democratic area, carving it into two districts—one of which . . . connects Cincinnati to mostly rural Warren County through a narrow strip of land").

S.E.2d at 547. There are, ultimately, "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from . . . political geography." *Id.*

Lay witness testimony. Individuals familiar with the redistricting process can provide testimony as to a legislature's motivations and any irregularities in the adoption of maps, *see, e.g.*, *League of Women Voters of Ohio*, 2022 WL 110261, at *24–25, while individuals with intimate knowledge of a state and its political geography can describe the extent to which districts unite—or divide—minority groups and communities of interest, *see, e.g.*, *Clarno*, 2021 WL 5632371, at *3.

These established sources of evidence and the cases from which they are derived demonstrate that courts can apply manageable standards and successfully adjudicate partisan gerrymandering claims. Indeed, these cases are hardly distinguishable from any other case involving complex facts and expert testimony. The analytical tools employed in Pennsylvania, North Carolina, Ohio, Oregon, and Maryland can help courts smoke out excessive partisan gerrymanders that "deprive[] citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

Rather than engage with this extensive caselaw, Defendants instead rely on the U.S. Supreme Court's *Rucho* decision, *see* Mem. 14–15—an unavailing gambit. Although the *Rucho* Court held that partisan gerrymandering claims are nonjusticiable in *federal* courts, it explicitly recognized that *state* courts can and should assume the mantle of policing impermissible partisan gerrymandering; indeed, its conclusion that federal courts are unable to adjudicate such claims did not "condemn complaints about districting to echo into a void" precisely because "[p]rovisions in state statutes and *state constitutions* can provide standards and guidance for *state courts* to apply." 139 S. Ct. at 2507 (emphases added); *see also Harper*, 868 S.E.2d at 533 ("*Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing

the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level."); *League of Women Voters of Ohio*, 2022 WL 110261, at *33 (Brunner, J., concurring) (citing *Rucho* for proposition that "state courts interpreting provisions of *state law* that provide for fair districts were held to be capable of providing that relief" and establishing framework to consider districting violations under Ohio's equal protection clause).

In assessing the justiciability of partisan gerrymandering claims under its state constitution, the North Carolina Supreme Court noted that "simply because the [U.S.] Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts." *Harper*, 868 S.E.2d at 533. What is true in North Carolina is true in New Hampshire. As much as Defendants might hope to effectuate a wholesale adoption of *Rucho*'s reasoning and conclusion, whether partisan gerrymandering claims are justiciable under *New Hampshire* law requires a state- and case-specific inquiry. That inquiry demonstrates that Plaintiffs' claims are readily and necessarily justiciable because they are grounded in the New Hampshire Constitution[12] and capable of adjudication based on the

[12] Indeed, one of those constitutional provisions—the Free and Equal Elections Clause—"has no analogue in the federal Constitution and is, accordingly, a provision that makes the state constitution 'more detailed and specific than the federal Constitution in the protection of the rights of its citizens.'" *Harper*, 868 S.E.2d at 540 (quoting *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 413 S.E.2d 276, 290 (N.C. 1992)). And even though the U.S. Constitution *does* include equal protection and free speech provisions, departure from federal standards is particularly appropriate where, as here, the conduct at issue concerns a fundamental right under the New Hampshire Constitution. *See Akins*, 154 N.H. at 71 ("[T]he right to vote is fundamental[.]"); *see also* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 93–94 (2014) ("Courts that lockstep their state constitutions with the more limited rights inferred within the U.S. Constitution derogate the fundamental and foundational right to vote."). For that reason, the fact that the *Rucho* Court rejected a partisan gerrymandering claim based on the First Amendment should not require the similar rejection of Plaintiffs' free speech claim here. New

quantitative and qualitative standards adopted in other states. Ultimately, Plaintiffs ask this Court to do what courts routinely do: accept expert testimony on various objective and subjective factors and make a determination as to whether the challenged action exceeded the bounds of lawful conduct. Plaintiffs do not ask this Court to blaze a new path in the wilderness; because courts are often called upon to determine whether districting schemes constitute impermissible partisan gerrymanders, judicially discoverable and manageable standards exist to resolve Plaintiffs' claims.

V. Conclusion

Defendants ask this Court to take a dramatic and unprecedented step: shut the courthouse doors to an entire category of legal claims and leave New Hampshire voters subject to the whims of the General Court. *See* Mem. 17. But "[i]t is the duty of the judiciary to protect constitutional rights and, in doing so, 'to support the fundamentals on which the Constitution itself rests.'" *Norelli*, 2022 WL 1498345, at *7 (quoting *Trs. of Phillips Exeter Acad. v. Exeter*, 90 N.H. 472, 487 (1940)). Like the *Baker* Court and the various state courts that have successfully adjudicated partisan gerrymandering claims, this Court should refuse to abdicate its proper role as the guarantor of fundamental constitutional rights. Defendants' motion to dismiss should therefore be denied.

Hampshire courts "have deviated from United States Supreme Court pronouncements," *Ball*, 124 N.H. at 233, and free speech claims under Part I, Article 22 of the New Hampshire Constitution are distinct from First Amendment claims, *see, e.g., Montenegro v. N.H. Div. of Motor Vehicles*, 166 N.H. 215, 225 (2014).

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Respectfully submitted,

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Certificate of Service

I hereby certify that on July 22, 2022, I served the foregoing through the Court's electronic filing system on all parties and counsel of record.

/s/ Steven J. Dutton
Steven J. Dutton

EXHIBIT 1

KATHRYN SZELIGA, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
Defendants	*	CASE NO.: C-02-CV-21-001816

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

NEIL PARROTT, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
Defendants	*	CASE NO.: C-02-CV-21-001773

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

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 Appeals[2] are

[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.

(continued . . .)

grappling with the issue of the 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 Plaintiffs[3] allege violations of 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[,]

(. . . continued)

[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:

> (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 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.

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 to have the right of suffrage.

MD. CONST. DECL. OF RTS. art. 7. The 1816 Plaintiffs[4] 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:

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

MD. CONST. art. I, § 7.

[4] The 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.

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 "ensur[ing] 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 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-

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

[6] It 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.

21001773, and identified Case No. C-02-CV-21-001816 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. 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, 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 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

[7] The 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.

that the 2021 Plan did, in fact, pair Congressmen 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'; 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

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

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 review[9]:

"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 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 plaintiff's 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 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][.]"

[9] The 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.

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 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 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]

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[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. 94171 census block 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 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 (continued . . .)

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 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

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(. . . continued)
"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, 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.

therefrom and determined 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]

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[13] The 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.* ¶ 66. The State took the position that Section 7 of Article 1 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. Geartner*, 186 Md. 551 (1946); *Smith v. Higinbothom*, 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. 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. 1, § 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 Higinbothom*, 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.

(continued . . .)

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 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 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.* "[O]ccasionally 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

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(. . . continued)
That assumption has not been borne out by review of over 200 cases addressing partisan gerrymandering, none of which characterized the practice as "corrupt."

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, 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 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 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.

[14] The 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.

The term "legislative district" is the gravamen of 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 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]

[15] The 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").

[16] Prior to 1966, Baltimore City was the only jurisdiction in the State in which Delegates were elected to represent discreet legislative districts; Delegates representing other counties were elected by the voters of those counties at large. *See* MD. CONST. art. III, § 5 (1965) ("The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively . . . ."); 1965 Md. Laws special session, chs. 2, 3 (requiring the first time that counties allocated more than eight delegates be divided (continued . . .)

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 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 knowledge, it is clear that they were aware of

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(. . . continued)
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.

[17] The 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 the 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 vote.

Proceedings and Debates of the 1967 Constitutional Convention, 104 MD. STATE ARCHIVES 7879,

(continued . . .)

Baker v. Carr, 369 U.S. 186 (1962), involving state 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 courts to protect 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

(. . . continued)
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.

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 that 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 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.

[20] Interestingly, 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 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."

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 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 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 Constitution[22] as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.[23]

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

[22] Article 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.

[23] Article 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 right of every person, thus registered, to vote at any election thereafter

(continued . . .)

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, 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*

(. . . continued)

> 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.

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 Balt. 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 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]

[24] As 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.

[25] The 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.

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.

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 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 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 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, 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 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 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 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*, 377 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.

[26] In 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.*

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 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.").

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 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 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 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 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 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 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. *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. *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, 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

[27] "A "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).

redistricting context. *See Rucho*, 139 S. Ct. at 2506–07. Defendants further assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal 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 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 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 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.

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

[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.

argue that Plaintiffs cannot seek relief under the 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 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 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. I, 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 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 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 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.

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

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 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 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 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 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 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 aRepublican, 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 aRepublican, 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 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 voteas 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 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, 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 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 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 1 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 infmmative. *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. 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. Tenn 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. Tenn 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 (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 Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-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 vict01y 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%);

[30] The 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.

2020 (19.6%). *See ElectionStatistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

30. Maryland Governor Larry Hogan signed an executive order on August 6, 2015, which created the Maryland Redistricting Refo1m 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 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 processes 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 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 heretoas Exhibit XI.

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 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 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 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 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 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. Congressmen 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 is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressmen 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 Congressmen 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 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. 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 analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness

[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.

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 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 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 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 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 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 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 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 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 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).

[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.

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 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 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 defined 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 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 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. Brunnell 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 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 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 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 I-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 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 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 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 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 Ruppersberger.

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, 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 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 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 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 rescramble and figure out how 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 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 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 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 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 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 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 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 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, 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 918 (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 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," 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, 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. 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 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 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 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-Poppper 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 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 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. 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; 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–[]81, 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 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 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 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 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 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.

3/25/2022
Date

LYNNE A. BATTAGLIA
Senior Judge

EXHIBIT 2

SLIP OPINION NO. 2022-OHIO-2471

NEIMAN ET AL. *v.* LAROSE, SECY., ET AL.

LEAGUE OF WOMEN VOTERS OF OHIO ET AL. *v.* LAROSE, SECY., ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Neiman v. LaRose,* Slip Opinion No. 2022-Ohio-2471.]

Redistricting—Original actions under Ohio Constitution, Article XIX, Section 3(A)—The March 2, 2022 congressional-district plan does not comply with Ohio Constitution, Article XIX, Section 1(C)(3)(a) and is invalid—Within 30 days, the General Assembly must pass a new congressional-district plan that complies in full with the Ohio Constitution.

(Nos. 2022-0298 and 2022-0303—Submitted June 14, 2022—Decided July 19, 2022.)

ORIGINAL ACTIONS filed pursuant to Ohio Constitution, Article XIX, Section 3(A).

Per Curiam.

I. INTRODUCTION

{¶ 1} On January 14, 2022, this court held that the congressional-district plan passed by the General Assembly and signed by the governor in November 2021 was invalid in its entirety. *Adams v. DeWine*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, ¶ 5, 102. We held that the plan unduly favored the Republican Party and disfavored the Democratic Party in violation of Article XIX, Section 1(C)(3)(a) of the Ohio Constitution and that it unduly split Hamilton, Cuyahoga, and Summit Counties in violation of Article XIX, Section 1(C)(3)(b). *Adams* at ¶ 5, 102. We ordered the General Assembly to adopt a new plan that complied with Article XIX and that "[was] not dictated by partisan considerations." *Adams* at ¶ 102.

{¶ 2} Under Article XIX, Section 3(B)(1), the General Assembly had 30 days in which to pass a new plan. The General Assembly failed to pass a plan within that time, so under Section 3(B)(2), respondent Ohio Redistricting Commission was required to adopt a new plan. The redistricting commission adopted a new plan on March 2, 2022. For purposes of this opinion, we call that plan the "March 2 plan."

{¶ 3} Two sets of petitioners have filed original actions challenging the March 2 plan.[1] We hold that the March 2 plan unduly favors the Republican Party and disfavors the Democratic Party in violation of Article XIX, Section 1(C)(3)(a). We order the General Assembly to pass a new congressional-district plan that complies with the Ohio Constitution, as required under Article XIX, Section 3(B)(1).

1. The petitioners in case No. 2022-0298 are 12 individual voters: Meryl Neiman, Regina C. Adams, Bria Bennett, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Carrie Kubicki, Dana Miller, Holly Oyster, Constance Rubin, Solveig Spjeldnes, and Everett Totty ("the *Neiman* petitioners"). The petitioners in case No. 2022-0303 are the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and eight individual voters: Bette Evanshine, Janice Patterson, Barbara Brothers, John Fitzpatrick, Janet Underwood, Stephanie White, Renee Ruchotzke, and Tiffany Rumbalski ("the *League* petitioners").

II. BACKGROUND

A. Article XIX's remediation process

{¶ 4} Article XIX, Section 3(B)(1) provides that if this court determines that any congressional-district plan is invalid, the General Assembly "shall pass" a congressional-district plan that complies with the Constitution. As we noted in *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 97, Section 3(B)(1) mandates both the timing and substance of any new plan. Section 3(B)(1) provides that the General Assembly must pass a plan "not later than the thirtieth day after the last day on which an appeal of the court order could have been filed or, if the order is not appealable, the thirtieth day after the day on which the order is issued." And the plan "shall remedy any legal defects in the previous plan identified by the court but shall include no changes to the previous plan other than those made in order to remedy those defects." *Id.*

{¶ 5} If the General Assembly does not timely pass a remedial plan, "the Ohio redistricting commission shall be reconstituted and reconvene and shall adopt a congressional district plan" in accordance with the Constitution. *Id.* at Section 3(B)(2). Again, the Constitution "mandates both the timing and substance of the commission's actions." *Adams* at ¶ 98. Section 3(B)(2) states, "The commission shall adopt that plan not later than the thirtieth day after the deadline described [in Section 3(B)(1)]," and such plan "shall remedy any legal defects in the previous plan identified by the court but shall include no other changes to the previous plan other than those made in order to remedy those defects."

B. The General Assembly did not pass a remedial plan

{¶ 6} We issued our decision in *Adams* on January 14, 2022. On February 2, Blake Springhetti, an employee of the House Republican caucus and a drawer of the plan that we invalidated in *Adams*, *id.* at ¶ 15-17, sent an email with the subject line "Proposed Plan Information" to respondent Speaker of the House Robert Cupp. The email included attachments with what appear to be maps of proposed

congressional districts. On February 5, the Senate scheduled committee hearings for congressional redistricting. Those committee hearings were canceled, and the General Assembly did not vote on or pass a new congressional-district plan by the February 13 deadline for passing a plan under Article XIX, Section 3(B)(1).

{¶ 7} House Speaker Cupp later said that because of the 90-day referendum period for new laws, he believed the legislature did not have enough time to enact a new plan before the May 3, 2022 primary election.[2] He pointed out that any plan adopted by the commission would instead become effective immediately and therefore allow Ohio to maintain the May 3 primary date regarding the election of members to Congress.

C. President of the Senate Huffman introduces a plan to the commission

{¶ 8} As a result of the General Assembly's failure to act, the responsibility for congressional redistricting transferred to the commission on February 14. On February 21, Springhetti sent an email with the subject line "Congressional Plan Information" to the office of Auditor of State Keith Faber, a commission member. The email again included attachments with what appear to be maps of proposed congressional districts.

{¶ 9} On February 22, the commission first met to discuss congressional redistricting. House Speaker Cupp said that he and the other commission cochair, Senator Vernon Sykes, had asked their staffs to begin working together to draft a proposed congressional-district plan. The commission also announced that it would schedule hearings so that members of the public could testify about proposed plans that they had submitted to the commission. The commission held those hearings on February 23 and 24. On February 22, Dr. Kosuke Imai, a statistics

2. A plan passed by the General Assembly would have become effective immediately if it were passed as emergency legislation with sufficient bipartisan support. *See* Ohio Constitution, Article II, Section 1d.

expert retained by the *League* petitioners, submitted his own plan to the commission.

{¶ 10} On February 25, respondent President of the Senate Matt Huffman sent letters to the other commission members advising them that Ray DiRossi, an employee of the Senate Republican caucus and a drawer of the plan that we invalidated in *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 15-18, was available to meet with the other commission members. House Speaker Cupp sent a similar letter inviting the other commission members to work with Springhetti. On Sunday, February 27, DiRossi and Springhetti met with the staffs of the commission's two Democratic Party members, Senator Sykes and House Minority Leader Allison Russo. Senator Sykes later described that meeting as a "one way communication" because, in his view, Democratic staffers shared their ideas at the meeting but the Republican map drawers were not as forthcoming. Senate President Huffman disagreed with Senator Sykes's characterization of the meeting.

{¶ 11} Regardless, Senator Sykes and House Minority Leader Russo both indicated that during the meeting, DiRossi and Springhetti did not share any proposed plans with the Democratic staffers. Another commission member, respondent Secretary of State Frank LaRose, acknowledged that he had first viewed a "working draft" of a new congressional-district plan on February 27—the same day as the Republican map drawers' meeting with the Democratic staffers. And on the same date, Secretary LaRose texted Auditor Faber a screen shot of a district plan that was very similar to the plan that the commission later adopted on March 2.

{¶ 12} When the commission met again on Tuesday, March 1, Senate President Huffman introduced a proposed congressional-district plan. House Minority Leader Russo said that because she had received a copy of the proposal

just a short time before the meeting, she had had only a few minutes to review it. House Minority Leader Russo had several questions about the proposal.

{¶ 13} First, she asked why the proposal combined Cincinnati with Warren County instead of keeping Cincinnati within a district entirely within Hamilton County. She also asked whether the proposal addressed this court's concern in *Adams* about carving out Hamilton County's Black population from surrounding neighborhoods. In response, Senate President Huffman said that pursuant to Article XIX, Section 3(B)(2), "we"—presumably referring to himself, House Speaker Cupp, and their map drawers—had tried to remedy the defects identified by this court in *Adams* and that the new plan comported with this court's decision. "After that," he said, "there are still policy preferences and choices that commission members make." He said that although House Minority Leader Russo may prefer that Cincinnati be contained within a district entirely within Hamilton County, "[w]e think this is a better version of the map."[3] He further said that racial data was not used when drawing the proposal.

{¶ 14} Second, House Minority Leader Russo asked why proposed Districts 5 and 9 in northwest Ohio were drawn the way they were and, more specifically, why Lucas County was not drawn into a more compact district with Lorain County. Among other things, Senate President Huffman said that District 9 remained unchanged from the original map "because the court did not comment" on that district and "the constitutional charge" was to remedy the defects that this court identified in its opinion in *Adams*.

{¶ 15} Third, House Minority Leader Russo asked why portions of Franklin County in proposed District 15 were combined with far-away counties rather than

3. As petitioners have pointed out in their briefs, in the proposed maps that Springhetti emailed to House Speaker Cupp on February 2 and to Auditor Faber on February 21, District 1 was wholly within Hamilton County. In Senate President Huffman's March 1 proposal, however, District 1 straddled two counties and combined Cincinnati with Warren County.

the neighboring counties of Delaware or Union Counties. Senate President Huffman responded that a "phenomenon" of drawing compact districts is that ultimately a district will be made up of the "left over" parts of other districts, which he referred to as a "Frankenstein district." Senate President Huffman suggested that proposed District 15 was one such district but that the plan had nevertheless remedied the defects identified by this court in *Adams*.

{¶ 16} Fourth, House Minority Leader Russo asked why proposed District 7 combined the western and southern suburban areas of Cuyahoga County with dissimilar counties to the south, which included Amish Country, rather than creating a more compact district by combining the Cuyahoga County areas with areas to the west or east of Cuyahoga County. Senate President Huffman responded that regarding northeast Ohio, the proposed plan had, for the most part, created very compact districts and that the Polsby-Popper scoring method had rated the proposal as just as compact or more compact than a plan that had been proposed by Senate Democrats.[4] For example, he noted that the proposed new District 13, which he described as a "[D]emocratic drawn district," would include all of Summit County, which was "what the court specifically provided." He acknowledged that proposed District 7 "is a little like [the] 15th where it's made up of parts," but he also noted that it included two whole counties and was drawn so that the plan complied with this court's directive in *Adams* not to split Cuyahoga County into more than two districts.

{¶ 17} After commission members discussed whether a bipartisan vote was required to adopt a new plan, the commission agreed to meet again the following day.

4. The Polsby-Popper score is a statistical method accepted by political scientists for measuring the compactness of a district.

D. The commission adopts the March 2 plan

{¶ 18} At the beginning of the March 2 meeting, Senator Sykes moved the commission to adopt a congressional-district plan proposed by the Senate Democrats that consisted of eight Republican and seven Democratic districts. After the commission voted five to two along party lines to reject the proposal, Senate President Huffman moved the commission to adopt his plan, which included two "slight changes" from the map that he had introduced the day before.

{¶ 19} House Minority Leader Russo proposed an amendment to Senate President Huffman's plan that she believed would make the plan comply with this court's decision in *Adams* and not unduly favor Republicans and disfavor Democrats. Her amendment included four proposals: (1) changing Districts 1 and 8 so that District 1, which included Cincinnati, would be wholly within Hamilton County and District 8 would include Warren County, (2) swapping territory in northwest Ohio in Districts 5 and 9 to make District 9 more compact and not a toss-up district, (3) modifying Districts 3, 4, and 15 in central Ohio to create a more compact District 15 that would have a partisan index "slightly above the toss-up range" (presumably more in favor of Democrats) and better link more "cohesive" communities, and (4) modifying Districts 7 and 11 in Cuyahoga County so that District 7 would become a Democratic-leaning toss-up district.

{¶ 20} Senate President Huffman opposed the proposed amendment and opined that the standards set forth in Article XIX, Sections 1(C)(3)(a) and 1(C)(3)(b) did not apply to the commission at that stage of the redistricting process. House Speaker Cupp said, among other things, that the proposed amendment would not solve any of the alleged problems with Senate President Huffman's proposal. For example, he noted that in Senate President Huffman's proposal, District 15 stretched from Columbus to western Ohio "because it was a remnant of other changes." But House Minority Leader Russo's proposed changes to District 15, House Speaker Cupp said, would make District 4 less compact. House Speaker

Cupp also said that Senate President Huffman's proposal complied with our decision in *Adams*, particularly because it no longer split Hamilton County twice.

{¶ 21} House Minority Leader Russo asked that the commission "take a day" to attempt to reach a bipartisan compromise and avoid further court intervention, but the commission voted five to two along party lines to reject her amendment. Without further discussion, the commission also voted five to two, again along party lines, to adopt Senate President Huffman's proposal as the new congressional-district plan.

E. Petitioners file motions to enforce this court's judgment and for leave to amend their complaints

{¶ 22} A few days after the commission adopted the March 2 plan, the petitioners in the *Adams* litigation filed motions to enforce this court's January 14, 2022 order, arguing that the March 2 plan violated Article XIX, Sections 1(C)(3)(a) and 1(C)(3)(b) of the Ohio Constitution. *See* Supreme Court case No. 2021-1428 (Mar. 4, 2022); Supreme Court case No. 2021-1449 (Mar. 7, 2022). In response, Senate President Huffman and House Speaker Cupp argued, among other things, that this court lacked jurisdiction to grant the requested relief. *See* Supreme Court case No. 2021-1428 (Mar. 8, 2022); Supreme Court case No. 2021-1449 (Mar. 10, 2022). The petitioners then filed motions for leave to amend their complaints to add the commission as a party and to add new claims. *See* Supreme Court case No. 2021-1428 (Mar. 11, 2022); Supreme Court case No. 2021-1449 (Mar. 11, 2022). On March 18, we denied the motions to enforce as procedurally improper, noting that we had not retained jurisdiction to review any remedial district plan and that the petitioners could not, through a motion to enforce, challenge the validity of the March 2 plan. We also denied the motions for leave because the petitioners had improperly sought to add new claims that arose after final judgment. *Adams v. DeWine*, 166 Ohio St.3d 1431, 2022-Ohio-871, 184 N.E.3d 111; *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 166 Ohio St.3d 1432, 2022-Ohio-871, 184 N.E.3d 112.

F. Petitioners file new complaints

{¶ 23} Less than a week after we denied the postjudgment motions in the *Adams* litigation, two new lawsuits were filed in this court challenging the March 2 plan. The first case, case No. 2022-0298, was filed by the *Neiman* petitioners. The second case, case No. 2022-0303, was filed by the *League* petitioners. In the complaints in both cases, the petitioners named four respondents: Secretary LaRose in his official capacity as secretary of state, House Speaker Cupp in his official capacity as House speaker, Senate President Huffman in his official capacity as Senate president, and the commission.

{¶ 24} The *Neiman* petitioners requested a highly expedited scheduling order so that this court could resolve their claims before the May 3 primary election. Although the *League* petitioners also sought an expedited scheduling order, they did not seek relief for the 2022 election. Secretary LaRose, Senate President Huffman, and House Speaker Cupp opposed petitioners' requests to expedite the cases. Among other arguments, Senate President Huffman and House Speaker Cupp argued that they needed time to engage in meaningful discovery pertaining to petitioners' experts. On March 29, we issued a scheduling order that expedited these matters but set briefing and evidence deadlines past the May 3 primary date. 166 Ohio St.3d 1452, 2022-Ohio-1016, 184 N.E.3d 138. We also consolidated the two cases. *Id.*

{¶ 25} The parties submitted evidence by April 25 and completed briefing on June 1. As evidence, the parties filed five new expert reports relating to the March 2 plan and a voluminous number of documents—many in response to petitioners' discovery requests. Although House Speaker Cupp and Senate President Huffman retained an expert to review the documents produced by one of petitioners' experts, they did not depose any of petitioners' experts.

{¶ 26} On May 3, Ohio held a primary election that included voting for candidates in congressional districts drawn under the March 2 plan.

III. ANALYSIS

A. The burden and standard of proof

{¶ 27} In *Adams*, we held that the first congressional-district plan was presumptively constitutional because it was passed as legislation by the General Assembly. *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 26. Although the March 2 plan was adopted by the commission, it is also entitled to a presumption of constitutionality. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, ¶ 76 (holding that a General Assembly–district plan adopted by the commission was presumptively constitutional). Accordingly, as in *Adams*, petitioners have the burden of proving that the March 2 plan violates the Constitution. *See Adams* at ¶ 26. In *Adams*, we assumed that petitioners' challenge was subject to the highest standard of proof: proof beyond a reasonable doubt. *Id*. at ¶ 29. We do not defer to the commission on questions of law. *See id*. at ¶ 28.

B. The commission had to remedy the original congressional-district plan's defects

{¶ 28} Article XIX, Section 1(C)(3) of the Ohio Constitution states that if *the General Assembly* passes a congressional-district plan by a simple majority in each house, it "shall not pass a plan that unduly favors or disfavors a political party or its incumbents," Section 1(C)(3)(a), and "shall not unduly split governmental units," Section 1(C)(3)(b). Senate President Huffman, House Speaker Cupp, Senator Rob McColley, and Representative Jeff LaRe assert that Section 1(C)(3) refers to a plan passed by the General Assembly, not to a plan adopted by the commission.[5] They argue that Section 1(C)(3) does not apply to remedial plans

5. Senator McColley and Representative LaRe were not named as parties in the original complaints. They filed a motion for leave to file an amended notice of their substitution, notifying the court that they had been appointed to the commission to replace Senate President Huffman and House Speaker Cupp, who are no longer members of the commission. To the extent the commission is a party,

adopted by the commission and that Article XIX permits all commission-adopted plans to unduly favor a political party and unduly split governmental units. We reject this argument.

{¶ 29} The commission's constitutional duty is to adopt a congressional-district plan to replace the original, invalidated plan. That duty arises under Article XIX, Section 3(B)(2), which requires the replacement plan to "remedy any legal defects in the previous plan identified by the court." The legal defects in the original congressional-district plan were the commission's failure to comply with Section 1(C)(3)(a) and Section 1(C)(3)(b). *See Adams* at ¶ 41-71, 84-93. The commission was required to fix those problems.

{¶ 30} Contrary to the arguments of Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe, this court's order that the commission correct the General Assembly's noncompliance with Section 1(C)(3)(a) and Section 1(C)(3)(b) does not effectively rewrite Section 1(C)(3). The commission's constitutional duty arises under Section 3(B)(2), not Section 1(C)(3). According to Article XIX, Section 3(B)(2), the commission may not ignore the legal defects in the original congressional-district plan that this court identified. Indeed, the commission has a constitutional duty to *remedy* the defects in the previous plan.

{¶ 31} Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe argue that requiring the commission to remedy the General Assembly's noncompliance with Section 1(C)(3) would incentivize "the minority party" to vote against a plan. They contend that the language of Article XIX was intended to establish a "safety valve of sorts" by allowing the commission

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Senator McColley and Representative LaRe asked to be substituted for their predecessors on the commission. The court granted Senator McColley and Representative LaRe's motion. 166 Ohio St.3d 1523, 2022-Ohio-1887, 188 N.E.3d 179. Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe filed a joint merit brief in this matter.

to adopt a remedial plan without being constrained by the anti-gerrymandering provisions that had applied to the General Assembly. But under that interpretation, if the majority-party members of the General Assembly and the commission want to avoid the anti-gerrymandering requirements of Article XIX, Section 1(C)(3), they can simply refuse to comply with those requirements when adopting both an original plan and a remedial plan. In other words, the majority party in the General Assembly could simply ignore the anti-gerrymandering requirements when adopting an original plan, knowing that if this court rejects that plan and if the duty to adopt a legislative-districting plan is transferred to the commission, then the commission would be free to adopt a plan that likewise disregards the anti-gerrymandering requirements that were overwhelmingly approved by Ohio voters. The result would be the absence of any incentive to comply with Article XIX, Section 1(C)(3) of the Ohio Constitution. No constitutional language suggests that the voters who approved Article XIX intended to allow the prohibitions against partisan favoritism and unduly splitting governmental units to be avoided so easily.

C. Article XIX, Section 1(C)(3)(a)

{¶ 32} In *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 40, we explained that Section 1(C)(3)(a)'s requirement that a plan not unduly favor or disfavor a political party or its incumbents "does not prohibit a plan from favoring or disfavoring a political party or its incumbents to the degree that inherently results from the application of neutral criteria, but it does bar plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate, neutral criteria." We held that the evidence overwhelmingly showed that the original congressional-district plan violated that standard. *Id*. at ¶ 41, 69, 71. As discussed below, similar evidence presented in these cases shows that the March 2 plan also unduly favors the Republican Party and unduly disfavors the Democratic Party in violation of Article XIX, Section 1(C)(3)(a) of the Ohio Constitution.

1. Misunderstanding the applicable standard

{¶ 33} To start, it is notable that Senate President Huffman and House Speaker Cupp do not believe that the commission is required to refrain from unduly favoring one political party over the other. At the March 2 meeting, Senate President Huffman explained at length his belief that the commission is not constrained by the standard set forth in Article XIX, Section 1(C)(3)(a) of the Ohio Constitution. This fact alone shows that he, as the main proponent of the March 2 plan, was not operating with the goal of proposing a plan that did not unduly favor the Republican Party. Moreover, the drafters of the March 2 plan—DiRossi and Springhetti—ensured that any changes in partisan favoritism from the original, invalidated plan to the March 2 plan would be minimal when they wrongly viewed Article XIX, Section 3(B)(2)'s requirement to remedy the defects to be unnecessary or even unwarranted—despite our invalidation of the original plan "in its entirety," *id*. at ¶ 5, due to its systemic bias and our statement that the plan "defies correction on a simple district-by-district basis," *id*. at ¶ 96.

2. Expected performance

{¶ 34} In *Adams*, we began by examining how the two major political parties were expected to perform under the original plan. *Id*. at ¶ 42. We relied on the expert evidence that had been submitted showing that Republicans were likely to win 80 percent of the seats (i.e., 12 out of 15) under that plan, despite receiving only about 53 percent of the vote in recent statewide elections. *Id*. at ¶ 47-50. We concluded that the original plan was a statistical outlier, exhibiting significant bias in favor of the Republican Party. *Id*.

{¶ 35} The parties have now submitted evidence showing that the March 2 plan is only slightly less favorable to the Republican Party (or more favorable to the Democratic Party) than the original plan. The March 2 plan has five Democratic-leaning districts and ten Republican-leaning districts. But three of the five Democratic-leaning districts have Democratic vote shares very close to 50

percent (52.15, 51.04, and 50.23 percent). Dr. Christopher Warshaw, an associate professor of political science at George Washington University who has written about elections and partisan gerrymandering, calculates—with a variety of methods and data sets—that Democrats will likely still win only three seats under the March 2 plan in an average election. Dr. Jonathan Rodden, a professor of political science at Stanford University with expertise in the analysis of fine-grained geospatial data sets, including election results, predicts that it is most likely that Democrats will win four seats—only a one-seat improvement from the original plan. Senate President Huffman and House Speaker Cupp do not dispute these projections.

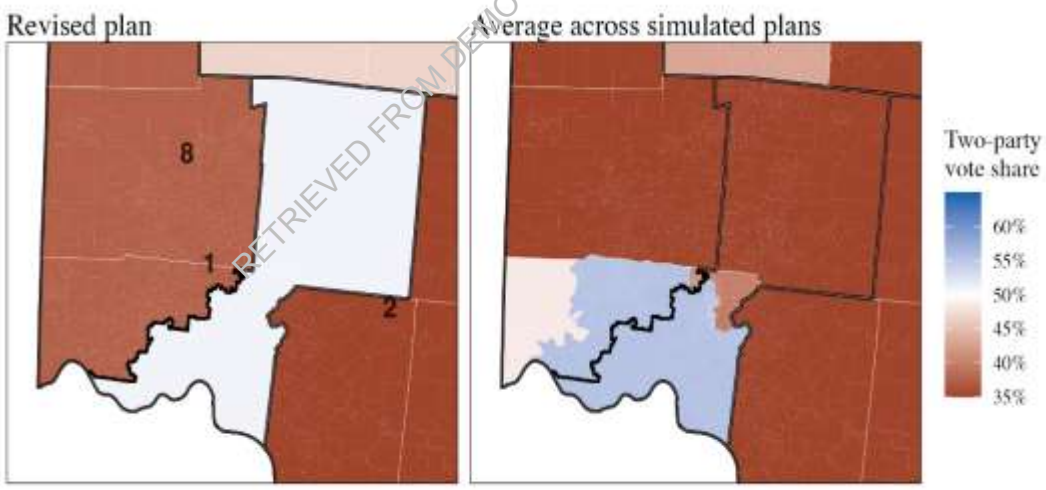
{¶ 36} The March 2 plan creates just three seats with Democratic vote shares over 52 percent (and one of those is at 52.15 percent). By contrast, all the Republican-leaning seats comfortably favor Republican candidates. The most competitive Republican-leaning district has a 53.32 percent Republican vote share. Thus, the best-case projected outcome for Democratic candidates under the March 2 plan is that they will win four—roughly 27 percent—of the seats. Considering that Democratic candidates have received about 47 percent of the vote in recent statewide elections, this probable outcome represents only a modest improvement over the invalidated plan. Indeed, according to Dr. Imai, any plan in which Democratic candidates are likely to win fewer than six seats is considered a statistical outlier.

3. Comparisons focusing on urban counties

{¶ 37} In *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, we also were persuaded by evidence showing that the original plan maximized the number of Republican-leaning districts by "cracking" and "packing" Democratic voters in several urban counties. *Id.* at ¶ 53-54, 58, 61. We noted substantial evidence showing that the original plan contained districts in Ohio's three largest metropolitan areas that were shaped not by neutral political geography but by an effort to "pack" and "crack" Democratic voters—resulting in more districts in

which Republican candidates were strongly favored or at least competitive. *Id*. at ¶ 56-62.

{¶ 38} Petitioners have presented similar evidence concerning the March 2 plan. With respect to the Cincinnati area, Dr. Imai concludes that the March 2 plan has no safe Democratic seat in Hamilton County. Dr. Imai compared the partisan vote share of the district that each precinct in Hamilton County is assigned to in the March 2 plan against the vote share of each precinct's assigned district in each of the 5,000 simulated plans he created. His analysis shows that the simulated plans would expect voters in Cincinnati and a large area of northern Hamilton County to be included in a Democratic-leaning district. As shown in the map below, the March 2 plan draws a district line directly through the Democratic area, carving it into two districts—one of which, as in the original plan, connects Cincinnati to mostly rural Warren County through a narrow strip of land.

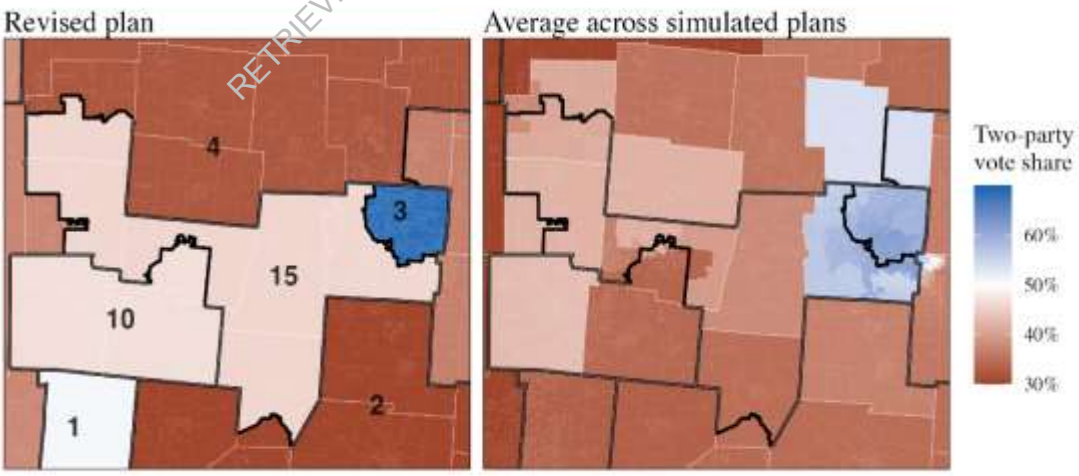


As Dr. Imai explained, "in Hamilton County, the [March 2] plan turns one safe Democratic district into a toss-up district by cracking Democratic voters."

{¶ 39} Dr. Jowei Chen, an associate professor of political science at the University of Michigan who has published academic papers on legislative

redistricting and political geography, concluded that the districts in Hamilton County are outliers in terms of both compactness and partisanship. He found that the March 2 plan's Cincinnati district has a higher Republican vote share than 84.2 percent of the simulated plans' districts containing Cincinnati. The March 2 plan achieves this result by connecting Cincinnati to Warren County instead of adjacent areas in Hamilton County. Dr. Chen notes that the March 2 plan's District 1 is less compact than the vast majority of simulated districts, having a lower Polsby-Popper score than 96.9 percent of the simulated districts containing Cincinnati. Dr. Imai reached a similar conclusion regarding the compactness of the March 2 plan's District 1: it is far less compact than expected based on his simulated plans.

{¶ 40} With respect to the Columbus area, Dr. Imai's simulated plans would expect all of Franklin County and parts of Delaware County and Fairfield County to belong to Democratic-leaning districts. But according to Dr. Imai, the March 2 plan packs Democrats into District 3 and cracks the rest into other districts, including District 15—which encompasses downtown Columbus and stretches into Shelby County, as shown in the map below.



Dr. Imai concludes that this allowed the commission to create an additional Republican district beyond what would be expected.

{¶ 41} Dr. Chen states that the two Columbus districts in the March 2 plan are more favorable to Republican candidates than the majority of those in his simulated plans: District 3 is more heavily Democratic than 89.6 percent of the simulated plans' districts containing the most Columbus population, while District 15 is more heavily Republican than 99.4 percent of the simulated plans' districts containing the second-highest Columbus population. Dr. Chen states that District 15 is also less compact than nearly every simulated district with the second-highest Columbus population. Dr. Imai similarly found District 15 to be far less compact than expected based on his simulated plans. Dr. Chen concludes that the two Columbus districts were engineered to create a more Republican-friendly outcome, achieved in part by sacrificing the compactness of District 15.

{¶ 42} Finally, with respect to the Cleveland area, Dr. Chen concludes that the Cleveland-based district in the March 2 plan is more heavily Democratic than 98.8 percent of the simulated plans' Cleveland-based districts, while the district with the second-highest Cuyahoga County population is more Republican than 100 percent of the simulated plans' districts with the second-highest Cuyahoga County population. All of Dr. Chen's simulated plans have one safe Democratic district based in Cleveland and a second competitive or Democratic-leaning district that includes parts of Cuyahoga County. In contrast, the March 2 plan packs Democrats into District 11, making District 7 safely Republican. Both districts, according to Dr. Chen, "are significantly less geographically compact than the vast majority of their geographically analogous districts in the simulated plans."

{¶ 43} Dr. Imai submitted an example plan (which was also submitted to the commission on February 22) showing a more compact treatment of all three of Ohio's largest urban areas and containing six districts favoring Democrats. According to Dr. Imai, his example plan shows it is possible to apply Article XIX

of the Ohio Constitution to Ohio's political geography without favoring the Republican Party to the degree the March 2 plan does.

{¶ 44} In *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 62, we held that the original plan contained oddly shaped districts in each of Ohio's three largest metropolitan areas and that the "inescapable conclusion" was that those districts were "the product of an effort to pack and crack Democratic voters." As the above expert analyses demonstrate, those problems persist in the March 2 plan.

4. Additional comparisons

{¶ 45} Dr. Imai compared the partisan vote shares of the March 2 plan's districts with those of his 5,000 simulated plans and concluded that the three most competitive Democratic-leaning districts in the March 2 plan are much less Democratic-leaning than almost all of the Democratic-leaning districts in his simulated plans. One of those districts in the March 2 plan has a Republican vote share that is 1.9 standard deviations above the median Republican vote share of the comparable districts in the simulated plans and has a Republican vote share that is higher than the Republican vote share in 86.6 percent of the simulated plans' counterpart districts. The other two districts have Republican vote shares that are 2.8 and 3.5 standard deviations above the median for comparable districts in the simulated plans and are higher than 99.75 percent of the simulated plans' counterpart districts.

{¶ 46} Dr. Imai also identified two districts that are slightly Republican-leaning toss-up districts under the simulated plans yet are safely Republican under the March 2 plan. These districts (District 10 and District 15) have Republican vote shares that are 3.4 and 5.5 standard deviations above the median of comparable simulated districts. And he analyzed the districts at the extremes of vote share for each party, concluding that the two most-Democratic districts (District 3 and District 11) are packed, having lower Republican vote shares than counterpart districts in the simulated plans. By contrast, the most-Republican districts are less

packed, containing lower Republican vote shares than expected based on the simulated plans. This analysis leads Dr. Imai to conclude that the March 2 plan favors Republicans "by turning Democratic-leaning districts into toss-up districts while making slightly Republican-leaning districts into safe Republican districts."

{¶ 47} Dr. Chen similarly compared the March 2 plan to his 1,000 simulated plans, leading him to conclude that the March 2 plan "is an extreme partisan outlier, both at a statewide level and with respect to the partisan characteristics of its individual districts." As noted above, according to Dr. Chen, the most-Democratic district in the March 2 plan (District 11 in Cleveland) is more heavily Democratic than 98.8 percent of the most-Democratic districts in each of Dr. Chen's 1,000 simulated plans. The second-most-Democratic district in the March 2 plan (District 3 in Columbus) is more heavily Democratic than 90.4 percent of the second-most-Democratic districts in each of the simulated plans. In comparison, the most-Republican district (District 2 in southern Ohio) is *less* heavily Republican than 90.1 percent of the most-Republican districts in Dr. Chen's simulated plans.

{¶ 48} According to Dr. Chen, these characteristics "are consistent with an effort to favor the Republican Party by packing Democratic voters into a small number of districts that very heavily favor the Democratic party." Dr. Chen concludes that by allocating more Democratic voters to the most partisan districts, the March 2 plan allocates fewer Democratic voters to other districts, making them more Republican. Dr. Chen notes that four districts in the March 2 plan have higher Republican vote shares than 95 percent of their counterpart districts in the simulated plans, making them unusually safe Republican districts due to the packing of Democratic voters into Districts 2, 3, and 11.

{¶ 49} Using the definition of "competitive" promoted by the proponents of the original congressional-district plan (i.e., having a partisan vote share between 46 and 54 percent), Dr. Chen further concludes that the March 2 plan is a statistical outlier. *See Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 19. The

March 2 plan has nine "safe Republican" districts (one more than the original plan), which is more than the number of safe-Republican districts in 97 percent of Dr. Chen's 1,000 simulated plans. The March 2 plan includes two safe-Democratic districts (the same as the original plan), which is fewer than the number of safe-Democratic districts in 95 percent of the simulated plans.

{¶ 50} Finally, Dr. Chen notes that the March 2 plan is less compact than all 1,000 of his simulated plans under the Polsby-Popper and Reock metrics.[6]

{¶ 51} Dr. Imai's and Dr. Chen's comparison analyses show that the March 2 plan's significant favoritism of the Republican Party did not result from the application of neutral map-drawing criteria.

5. Other measures of partisan bias

{¶ 52} In *Adams*, we credited expert analysis showing that the original plan unduly favored the Republican Party and disfavored the Democratic Party. __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 63-66. Petitioners have presented similar evidence showing that the March 2 plan likewise unduly favors the Republican Party.

{¶ 53} Dr. Rodden concluded that a 3 percent statewide shift in favor of Democrats (bringing them to 50 percent of the statewide vote) would lead to Democrats winning, at most, five seats (i.e., 33 percent of the seats) under the March 2 plan. A 3 percent shift in favor of Republicans (bringing them to 56 percent of the statewide vote) would lead to Republicans winning 13 seats (i.e., 87 percent of the seats). Dr. Rodden also calculated that the March 2 plan has an

6. The Reock score is a method accepted by political scientists to measure the compactness of a district.

efficiency gap of 10 percent, which he says is relatively high in comparison to alternative plans he considered.[7]

{¶ 54} Dr. Rodden further points out that the March 2 plan treats Republican and Democratic incumbents differently. Of 12 Republican incumbents, ten are in safe Republican-leaning districts, one is in a nominally Democratic-leaning district that retains about 70 percent of the population of his previous district, and one did not seek reelection. By contrast, of the four Democratic incumbents, two are in safe Democratic-leaning districts, one is in a district with a bare Democratic majority with only about half of the residents of the new district having been residents of her previous district, and one did not seek reelection.

{¶ 55} Finally, Dr. Warshaw submitted three charts comparing the congressional-district plan that was in effect from 2011 through 2020, the invalidated plan, and the March 2 plan. Applying several social-science metrics to a variety of data sets, Dr. Warshaw shows that the March 2 plan is nearly as biased as last decade's plan and the invalidated plan. This evidence supports the conclusion that the March 2 plan unduly favors the Republican Party.

6. Petitioners have satisfied their burden

{¶ 56} Petitioners have satisfied their burden by showing beyond a reasonable doubt that the March 2 plan unduly favors the Republican Party in violation of Article XIX, Section 1(C)(3)(a) of the Ohio Constitution. Comparative analyses and other metrics show that the March 2 plan allocates voters in ways that unnecessarily favor the Republican Party by packing Democratic voters into a few dense Democratic-leaning districts, thereby increasing the Republican vote share of the remaining districts. As a result, districts that would otherwise be strongly Democratic-leaning are now competitive or Republican-leaning districts. In

7. The efficiency gap measures the difference between the parties' respective "wasted votes" (i.e., the number of votes above the 50 percent plus 1 that a party needs to win an election), divided by the total number of votes cast.

addition, the March 2 plan carves districts around the state's largest cities to combine Democratic voters in those areas with Republican voters in rural areas, thereby creating more Republican-leaning districts.

{¶ 57} Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe offer little in response to petitioners' evidence. They start by questioning the idea that experts can assist the court in determining whether a plan complies with the standards set forth in Article XIX, Section 1(C)(3)(a). They argue that if the commission were "required to measure the constitutionality of its plans using a specific mathematical test or compactness score, it would have been included in [Article XIX]." But, as we have already concluded, expert analysis is probative of whether a plan unduly favors or disfavors a political party in violation of Section 1(C)(3)(a). *See Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 42-66. And expert analysis is a tool equally as available to respondents as it is to petitioners. There is no rationale to support disregarding the expert analysis submitted by petitioners.

{¶ 58} Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe nevertheless argue that even if we consider petitioners' evidence, it is "conflicting and contradictory." They give two examples. First, they argue that all of Dr. Imai's simulated plans included eight or nine Republican-leaning districts while most of Dr. Chen's simulated plans included ten Republican-leaning districts. Second, they criticize the example plan that Dr. Imai submitted to the commission because it included nine Republican-leaning districts, even though most (80 percent) of his simulated plans included only eight Republican-leaning districts. The fact that the experts have identified a range of probable Republican-leaning seats (rather than a definitive number), they say, shows that the experts' " 'math' is unreliable." These criticisms are unfounded. Even though Dr. Imai and Dr. Chen predict different seat allocations depending on the methods of

analysis and data sets used, their analysis remains probative of whether the March 2 plan unduly favors or disfavors a political party.

{¶ 59} Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe also assert that Dr. Imai has put his "thumb on the scale" and "gam[ed] the math" by using data from six statewide federal elections from 2012 to 2020 (referred to in *Adams* as the "FEDEA dataset") to predict that Republicans should expect to win eight, or maybe nine, seats. *See Adams* at ¶ 19, 48-49. They cite to the analysis of their own expert, Sean P. Trende, who is the senior elections analyst for RealClearPolitics, a company that produces a political website, and a visiting scholar at the American Enterprise Institute focusing on American politics. His analysis shows that when different data sets are applied to Dr. Imai's simulation program, more than eight or nine Republican seats can be expected. Trende's analysis, however, does not undermine the reliability of Dr. Imai's projections. Dr. Imai explained that he used the FEDEA dataset because that was the data set the General Assembly had used in assessing the plan it passed. Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe have not shown and cannot show that Dr. Imai's analysis has been manipulated to derive a particular result favorable to petitioners' cases.

{¶ 60} As a final matter, Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe claim that we should not rely on petitioners' evidence, because there has not been time for full discovery, particularly the cross-examination of petitioners' experts. This argument, too, is not based on sound reasoning. The scheduling order in these cases required the parties to file evidence within 25 days of this court's entry. 166 Ohio St.3d 1452, 2022-Ohio-1016, 184 N.E.3d 138. Depositions of petitioners' experts could have been taken during that time.

D. Article XIX, Section 1(C)(3)(b)

{¶ 61} Article XIX, Section 1(C)(3)(b) of the Ohio Constitution provides that when the General Assembly passes a congressional-district plan by a simple majority, it "shall not unduly split governmental units, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations." In *Adams*, we explained that "the splitting of a governmental unit may be 'undue' if it is excessive or unwarranted." __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, ¶ 83. We held that the original congressional-district plan unduly split Hamilton, Cuyahoga, and Summit Counties. *Id*. at ¶ 5, 77. The evidence showed that the original plan did not need to split Hamilton and Cuyahoga Counties twice and that it did not need to split Summit County at all. *Id*. at ¶ 84-93. The original plan's excessive splitting of these counties resulted in noncompact districts that could not be explained by neutral redistricting criteria and served no purpose other than to confer a significant partisan advantage on the political party that drew the districts. *Id*. at ¶ 77, 88, 93. Petitioners argue that the March 2 plan, too, unduly splits counties in violation of Section 1(C)(3)(b).

{¶ 62} As an initial matter, we reject the *League* petitioners' argument that District 15 violates Section 1(C)(3)(b) because it splits five counties. Section 1(C)(3)(b) prohibits the excessive or unwarranted splitting of individual governmental units, *see Adams* at ¶ 83; it does not limit the number of partial governmental units a single district may include. The *League* petitioners do not argue that the splitting of any of the individual counties in District 15 was unwarranted. Rather, they argue that the partial governmental units should not be part of District 15.

{¶ 63} Petitioners fail to develop any other arguments supporting their claim that the March 2 plan violates Section 1(C)(3)(b). They focus on the fact that Districts 1 and 15 pair urban areas with rural areas and that those districts have relatively poor compactness scores. In *Adams*, we recognized that the pairing of

urban and rural areas and poor compactness scores could be problematic *consequences* of unduly splitting certain counties. *See id*. at ¶ 77, 84-93. But under Section 1(C)(3)(b), petitioners must show, as a threshold matter, that the splitting itself—i.e., not just the effects of the splits—is "excessive or unwarranted." *Adams* at ¶ 83. Without that threshold showing, petitioners are merely repeating their claim that the plan unduly favors or disfavors a political party in violation of Section 1(C)(3)(a).

{¶ 64} The *Adams* petitioners showed that the original plan split Hamilton, Cuyahoga, and Summit Counties an excessive number of times. *See id*., __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, at ¶ 87 (crediting evidence that "splitting Hamilton County into three districts is 'statistically anomalous' "); ¶ 90 (noting that Summit County need not be split at all); ¶ 91 (noting that only 8 of Dr. Imai's 5,000 simulated plans split Cuyahoga County twice). Petitioners in these cases again challenge the splitting of Hamilton County, but unlike the original plan, the March 2 plan splits Hamilton County only once (as it must, due to population requirements).[8] Unlike in *Adams*, petitioners have not identified evidence showing that the splitting of the counties in District 1 or 15 is inherently excessive or unwarranted. Petitioners' arguments address only the *manner* in which the March 2 plan splits certain counties. That concern (presented alone, as petitioners have done) relates only to whether the plan unduly favors or disfavors a political party under Section 1(C)(3)(a).

IV. CONCLUSION

{¶ 65} For the foregoing reasons, the March 2 plan does not comply with Article XIX, Section 1(C)(3)(a) of the Ohio Constitution and is therefore invalid. By operation of Article XIX, Section 3(B)(1), within 30 days, the General Assembly must pass a plan that complies with the Constitution. If the General

8. Hamilton County's population (830,639 as of the most recent federal decennial census) is too large to be contained in a single congressional district.

Assembly fails to do so, Article XIX, Section 3(B)(2) will require the commission to adopt a constitutional plan within 30 days of the General Assembly's failure.

Relief granted.

O'CONNOR, C.J., and DONNELLY and STEWART, JJ., concur.

BRUNNER, J., concurs, with an opinion.

KENNEDY and DEWINE, JJ., dissent, with an opinion.

FISCHER, J., dissents, with an opinion.

BRUNNER, J., concurring.

{¶ 66} I fully concur in the majority opinion. I write separately to respond to the first dissenting opinion, which takes the position that the congressional-district plan passed by the Ohio Redistricting Commission on March 2, 2022 ("March 2 plan"), is lawful because it "reasonably attempts to maximize competitive seats," dissenting opinion of Kennedy and DeWine, JJ., ¶ 91. That position is not supported by the record. And endorsing respondents' abuse of the legislative privilege is unjustifiable.

{¶ 67} In *Rucho v. Common Cause*, ___ U.S. ___, 139 S.Ct. 2484, 2500, 204 L.Ed.2d 931 (2019), the United States Supreme Court stated that creating a "fair" redistricting plan is difficult because the word "fair" may mean different things to different people. The interpretation of the word "fair" depends on the goal of the drafters—i.e., whether their goal is to prioritize the creation of competitive districts, to create proportionality, or to adhere to "traditional" redistricting criteria. *Id.* However, those goals sometimes conflict. For example, "making as many districts as possible more competitive" could lead to a high degree of disproportionality. *Id.* In reaching the conclusion that the March 2 map was designed to prioritize competitive districts and is therefore constitutional, the first dissenting opinion falls short, not determining whether the underlying record supports that conclusion.

{¶ 68} Maximizing competitive districts was the publicly stated goal behind the plan passed by the General Assembly and signed by the governor in November 2021 ("the first plan"). *See Adams v. DeWine*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, ¶ 17-19, 22. But the first plan was not created in the public eye. Respondents[9] created it entirely in private.

{¶ 69} During discovery in *Adams*, the petitioners requested evidence concerning the creation of the first plan—including, for example, evidence substantiating who was drafting the plan, what instructions were given to the map drawers, and how the respondents were analyzing a district's competitiveness. But respondent President of the Senate Matt Huffman and respondent Speaker of the House Robert Cupp broadly invoked legislative privilege to avoid responding to any inquiry regarding legislators' statements and decisions during the creation of the plan. The petitioners in *Adams* objected to the respondents' invocation of legislative privilege at depositions and in their merit briefs. Unfortunately, the highly expedited nature of that case prevented the issue of legislative privilege from being fully litigated.

{¶ 70} Senate President Huffman and House Speaker Cupp later sought to rely on assertions about some of the very same subjects over which they had invoked legislative privilege. For example, as support for the claim that the first plan prioritized competitive districts, Senate President Huffman and House Speaker Cupp

9. In the complaints in Supreme Court case Nos. 2022-0298 and 2022-0303, petitioners named four respondents: Secretary LaRose in his official capacity as secretary of state, House Speaker Cupp in his official capacity as House speaker, Senate President Huffman in his official capacity as Senate president, and the commission. Senator McColley and Representative LaRe were not named as parties in the original complaints. They filed a motion for leave to file an amended notice of their substitution, notifying the court that they had been appointed to the commission to replace Senate President Huffman and House Speaker Cupp, who are no longer members of the commission. To the extent the commission is a party, Senator McColley and Representative LaRe asked to be substituted for their predecessors on the commission. This court granted Senator McColley and Representative LaRe's motion. 166 Ohio St.3d 1523, 2022-Ohio-1887, 188 N.E.3d 179. Senate President Huffman, House Speaker Cupp, Senator McColley, and Representative LaRe filed a joint merit brief in this matter.

asserted in their merit brief in *Adams* that Ray DiRossi, an employee of the Senate Republican caucus and a drawer of that first plan, "testified that he was instructed to create maps in compliance with Article XIX [of the Ohio Constitution], and which included more competitive districts than Ohio's current congressional plan." But the portion of DiRossi's deposition they cited for this point is disingenuously circular, lacking any substance to support their contention: DiRossi testified that he was aware that "President Huffman *made public commentary about* the importance of having competitive districts." (Emphasis added.) That is not evidence of what instructions legislators gave to DiRossi as the first plan was created.

{¶ 71} The respondents in *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, pointed to nothing else in the record to support the assertion that DiRossi had been instructed to create competitive districts or to convincingly establish that maximizing competitiveness had been the overall goal of legislators when the first plan was created. In finding that the plan violated Article XIX, Sections 1(C)(3)(a) and (b) of the Ohio Constitution, we reviewed the record and concluded that the respondents' competitiveness rationale was a "post hoc rationalization." *Adams* at ¶ 45.

{¶ 72} The dissenting opinion in *Adams* accepted the respondents' unsupported assertion that the plan had been designed to create competitive districts and would have approved the plan on the ground that the competitiveness rationale was reasonable. *Id.* at ¶ 167-186 (Kennedy, Fischer, and DeWine, JJ., dissenting). In doing so, however, it pointed to nothing in the record concerning the actual creation of the first plan. *Id*. at ¶ 167-170 (Kennedy, Fischer, and DeWine, JJ., dissenting). The law, as expressed by the dissent in *Adams*, is not supported by the record. No underlying evidence supports the premise that the respondents had designed the first plan to maximize competitive districts.

{¶ 73} In drawing the March 2 plan, respondents made minimal changes from the first plan. When petitioners sought discovery into the behind-closed-doors

work on the March 2 plan, respondents again invoked legislative privilege. The record therefore provides no more support for the idea that the March 2 plan was designed to maximize the number of competitive districts than it did for the first plan.

{¶ 74} Notwithstanding this, the first dissenting opinion reasserts what was stated in the dissenting opinion in *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __. It asserts that the March 2 plan "reasonably attempts to maximize competitive seats," dissenting opinion of Kennedy and DeWine, JJ., at ¶ 91, but it again points to nothing in the record supporting that assertion. The dearth of evidence in the record to support respondents' arguments is due to respondents' own decision to invoke legislative privilege. Bare reliance by the dissent on the statements in respondents' briefs is insufficient to constitute law.

{¶ 75} There is yet another fundamental problem with the first dissenting opinion. It is well established in Ohio that a litigant may not abuse a privilege by using it as both a sword and a shield. It is patently unfair to invoke a privilege during discovery and then waive it selectively to gain an evidentiary foothold to the detriment of the party seeking the discovery. *See Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 41; *State v. Houck*, 2d Dist. Montgomery No. 09-CA-08, 2010-Ohio-743, ¶ 38; *see also In re Lott*, 424 F.3d 446, 454 (6th Cir.2005), quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991) ("To be sure, litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. '[T]he attorney-client privilege cannot at once be used as a shield and a sword' " [brackets added in *Lott*]).

{¶ 76} Courts in other jurisdictions have rejected attempts by legislators to use the legislative privilege as both a sword and a shield in redistricting litigation. *See Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y.2012) ("once the [legislative] privilege is invoked, the Court should not later allow the proponent of the privilege to strategically waive it to the prejudice of other parties"); *Commt. for a Fair &*

Balanced Map v. Illinois State Bd. of Elections, N.D.Ill. No. 11 C 5065, 2011 WL 4837508, at *11 (Oct. 12, 2011); *Singleton v. Merrill*, N.D.Ala. Nos. 2:21-cv-1291, 2021 WL 5979516, at *8 (Dec. 16, 2021) (rejecting legislators' defense of redistricting plan because it "depend[ed] on their assertions about their intent and motives during the legislative process, [and] they [invoked the legislative privilege to] refuse to participate in any discovery that would allow the * * * plaintiffs to challenge those assertions").

{¶ 77} This issue has not been raised until now. The first dissenting opinion does not have a discussion of either the scope of the legislative privilege or the way it may be used. Allowing respondents to invoke the legislative privilege to prohibit discovery into officials' goals in the creation of the first plan and the March 2 plan, and then allowing respondents to rely on bare assertions about those subjects in defense of those plans, is an invitation to parties to avail themselves of this abuse of power in the future. This court should ensure that discovery is available in cases like this so that the court can meaningfully judge whether a party's arguments about what they designed a plan to do can be tested by evidence in the record or are instead simply post hoc rationalization. This court should not accept a party's abuse of legislative privilege, particularly when that party uses it to create a contrived evidentiary basis in support of a legal argument. To look the other way—as the dissent did in *Adams*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, and as the first dissenting opinion does again here, creates the risk that Ohio's constitutional requirements for drawing congressional districts can be effectively avoided and thereby defeated by an abuse of legislative privilege.

{¶ 78} For these reasons, I offer this concurring opinion while also joining the majority opinion.

KENNEDY and DEWINE, JJ., dissenting.

{¶ 79} These cases are about an election that will not be held until 2024. The new complaints filed in this court protest the congressional-district plan adopted by the Ohio Redistricting Commission on March 2, 2022 ("the March 2 plan") in response to the majority's decision in *Adams v. DeWine*, ___ Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, which invalidated the plan that had been passed by the General Assembly in November 2021 ("the first plan").

{¶ 80} In *Adams*, the majority held that the first plan violated Article XIX, Section 1(C)(3)(b) of the Ohio Constitution because that plan unduly split governmental units—specifically, Hamilton, Cuyahoga, and Summit Counties. *Id.* at ¶ 5. In these cases, the majority admits that the March 2 plan does not excessively split any county. Majority opinion, ¶ 64. We agree. We disagree, however, with the majority's conclusion that the March 2 plan is invalid because it violates Article XIX, Section 1(C)(3)(a) of the Ohio constitution for " 'unduly favor[ing] or disfavor[ing] a political party or its incumbents.' " Majority opinion at ¶ 28, quoting Article XIX, Section 1(C)(3) of the Ohio Constitution. Therefore, we would hold that the March 2 plan is constitutional and order its use for the 2024 primary and general elections. Because the majority does otherwise, we dissent.

{¶ 81} While the March 2 plan is new, there is little that could be considered "new information" in the majority opinion. The majority applies the same faulty analysis that it used in *Adams* and therefore fails to present "any workable standard about what it means to unduly favor a political party." *Adams* at ¶ 107 (Kennedy, Fischer, and DeWine, JJ., dissenting). The majority clings to proportionality, which appears in Article XI of the Ohio Constitution but not in Article XIX, the relevant provision in this case. Nevertheless, as the dissenting opinion in *Adams* explains, the majority believes that the partisan breakdown should "roughly equate to what would happen under a system of proportional representation." *Id.* at ¶ 108. By making policy rather than applying the law, *id.* at ¶ 110, the majority "wrest[s]

from the political branches of our government the authority that rightly belongs to them," *id*. at ¶ 111.

I. BACKGROUND

{¶ 82} Despite the far-off relevance of another redistricting plan, the majority rushed these cases to completion. The majority's scheduling order for these cases sacrificed a robust discovery process in exchange for a speedy result. As we wrote in our opinion concurring in part and dissenting in part as to the scheduling order, "[t]his case most likely will turn on the credibility of expert testimony," and "25 days is insufficient" time for discovery, given the need to schedule depositions for numerous fact and expert witnesses. 166 Ohio St.3d 1452, 2022-Ohio-1016, 184 N.E.3d 138, ¶ 5 (Kennedy, Fischer, and DeWine, JJ., concurring in part and dissenting in part). Each side filed its evidence on April 25, leaving no time to depose the other's experts, and we are left with a discovery process that has produced a large amount of information but little critical analysis. In our opinion, we advocated for a 25-day period after expert reports were exchanged so that each side could conduct further discovery. *Id.* at ¶ 28. And as we predicted, the 25-day discovery time left no time to depose experts or to challenge the bases on which those experts made their decisions. While it is easy to see what has been lost due to the truncated discovery period, it is far more difficult to see what has been gained. The 2022 election cycle is set. Consequently, there was no need to cut discovery short and hurry these cases along. This truncated discovery period enables the majority to cherry-pick its preferred expert evidence, without the adverse parties being able to test the reliability of that evidence through cross-examination. None of the normal procedural safeguards that facilitate truth finding are present in these cases, despite the majority outsourcing its entire analysis to expert testimony that exists in a vacuum.

{¶ 83} The majority holds that the March 2 plan is "slightly less favorable to the Republican Party (or more favorable to the Democratic Party) than the [first]

plan." Majority opinion at ¶ 35. The majority guesstimated in *Adams*, ___Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, at ¶ 47, that Republicans would win 12 of Ohio's 15 Congressional seats under the first plan. Under the March 2 plan, the majority concludes that there are five Democratic-leaning districts and ten Republican-leaning districts. Majority opinion at ¶ 16. Because we would have held that the first plan did not unduly favor Republicans and was constitutional, we conclude that the March 2 plan, which the majority admits is less favorable to Republicans than the March 2 plan, is also constitutional.

II. ANALYSIS

A. Does the commission's plan have to comply with Article XIX, Section 1(C)?

{¶ 84} Respondents argue that these cases are easily resolved because a plan adopted by the commission need not comply with any of the requirements of Article XIX, Section 1(C)(3) of the Ohio Constitution. They argue that the admonitions in Article XIX, Section 1(C) apply only to plans passed by the General Assembly. For example, Section 1(C)(3)(a) states that the "*general assembly* shall not pass a plan that unduly favors or disfavors a political party or its incumbents." (Emphasis added.)

{¶ 85} Although respondents raise a serious argument, we are mindful of the " 'cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.' " *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 51, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration*, 362 F.3d 786, 799 (C.A.D.C.2004) (Roberts, J., concurring in part and in judgment). Indeed, this dissenting opinion will not address this issue because, whether it was required to or not, the March 2 plan satisfies the requirements of Article XIX, Section 1(C)(3)(a) and (b) of the Ohio Constitution. So, it is unnecessary to decide more.

B. The March 2 plan complies with Section 1(C)(3)(b)

{¶ 86} As we explained in *Adams*, the first plan complied with Article XIX, Section 1(C)(3)(b). *Adams*, ___Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, at ¶ 216 (Kennedy, Fischer, and DeWine, JJ., dissenting). Accordingly, we agree with the majority today that the March 2 plan also complies with Section 1(C)(3)(b). There was no undue splitting of counties in the first plan, and there is no undue splitting of counties in the March 2 plan.

C. The March 2 plan complies with Section 1(C)(3)(a)

{¶ 87} We continue to disagree with the majority's approach to determining whether a redistricting plan "unduly favors" one political party. It is true that Article XIX leaves undefined what it means to "unduly favor" a party. In *Adams* at ¶ 40, the majority held that the requirement in Article XIX, Section 1(C)(3)(a) that a plan not unduly favor or disfavor a political party or its incumbents does not prohibit a plan from favoring one party but that it does prohibit "favoritism not warranted by legitimate, neutral criteria." But in *Adams*, the majority chose one type of criteria—proportional representation, which does not exist in Article XIX—as the baseline against which partisan favoritism is measured. That is, the majority requires that the share of winning districts for each party should match the proportion of the popular vote for each party in a particular group of previous elections.

{¶ 88} The problem with the majority opinion's analysis that there is no such requirement in Article XIX. In Article XI, which applies to General Assembly redistricting, proportionality is something the commission is instructed to attempt, and Article XI, Section 6 of the Ohio Constitution provides the formula for the commission to apply. But there is nothing in Article XIX that establishes proportionality as an aspirational goal, much less a requirement. "The majority simply substitutes its own sense of fairness for the text of Article XIX." *Adams* at ¶ 144 (Kennedy, Fischer, and DeWine, JJ., dissenting). In substituting our own

sense of fairness for that of the governmental body that is constitutionally assigned the duty to create the redistricting plan, the majority goes beyond the judicial power granted to this court in Article 4 of the Ohio Constitution. *Id*. at ¶ 150.

{¶ 89} When passing a congressional-district plan as part of a simple majority vote, the General Assembly must prepare "an explanation of the plan's compliance with" Article XIX, Section 1(C)(3)(a) through (c). Ohio Constitution, Article XIX, Section 1(C)(3)(d). As for the first plan, the General Assembly wrote, "The plan contain[ed] six Republican-leaning districts, two Democratic-leaning districts, and seven competitive districts"; only one district paired incumbents, and they were members of the Republican party; "[t]he plan split[] only twelve counties and only fourteen townships and municipal corporations"; and "visual inspection of the congressional district plan demonstrate[d] that it dr[ew] districts that [were] compact." 2021 Sub.S.B. No. 258, Section 3, 733-734, available at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb258/EN/05/sb258_05_EN?format=pdf (accessed July 8, 2022) [https://perma.cc/DF75-WC9K].

{¶ 90} There is nothing in the Constitution that precludes map makers from seeking to maximize competitive districts, and such a goal does not cause undue favoritism. And, as we opinion stated in *Adams*, ___Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, the range of plus or minus 4 percent of 50 percent is within the bounds of the map drawers' constitutional mandate. *Id*. at ¶ 178 (Kennedy, Fischer, and DeWine, JJ., dissenting). We further explained: "The General Assembly, this state's policymaking body, chose that range. We have no authority or competence to monitor the dividing line between competitive and not." *Id.* at ¶ 177.

{¶ 91} The March 2 plan is again oriented toward competitiveness. As explained by Sean P. Trende, a senior elections analyst for RealClearPolitics who tracks, analyzes, and writes about elections, the plan features two noncompetitive districts favoring Democrats (Districts 3 and 11) and six noncompetitive districts favoring Republicans (Districts 2, 4, 5, 6, 8, and 12). The other districts are

competitive in the same way we decided was acceptable in regard to the first plan—within 4 percentage points of 50 percent. There are seven such districts in the new plan: District 1 (50.7 percent Democrat), District 7 (54 percent Republican), District 9 (52.8 percent Democrat), District 10 (52.2 percent Republican), District 13 (53 percent Democrat), District 14 (53 percent Republican), and District 15 (53.9 percent Republican). The March 2 plan meets the standard that we found to be acceptable in *Adams*—i.e., it reasonably attempts to maximize competitive seats.

{¶ 92} The commission's choice to focus on creating competitive districts where they are possible is consistent with Article XIX, Section 1(C)(3)(a) and its requirement that districts do not unduly favor a political party or its incumbents. "Competitive districts are widely considered a laudable objective, the sort of objective voters desire; they do not unduly favor or disfavor political parties but allow the electorate to elect." *id.* at ¶ 163 (Kennedy, Fischer, and DeWine, JJ., dissenting). The majority, on the other hand, prioritizes guaranteed outcomes over competitive elections. There is no constitutional basis for such a choice.

{¶ 93} Given the political geography of Ohio, when the neutral map-drawing rules of Article XIX, Section 2 are followed, certain results are likely. The map-drawing rules in Section 2 are based on representation by geographical area; those rules are not designed to create districts of the likeminded. We have the same representatives as our neighbors but not necessarily the same representatives as those who think like us. The adoption of Article XIX did not make Ohio the only state in the union to guarantee a proportion of congressional seats for each party based on historical vote totals from past political races.

{¶ 94} This court is not an equal partner with the General Assembly and the commission when it comes to redistricting. A plan passed by the General Assembly or adopted by the commission does not automatically come to this court for our blessing. Our role is limited and is triggered only when someone protests a plan. We are not involved in the policy determination of the best way to achieve the

requirements of Article XIX, Section 1(C)(3)(a). We are limited to exercising judicial power, which is "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Muskrat v. United States*, 219 U.S. 346, 361, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

{¶ 95} It is not for us to decide how we would draw a congressional-district map. Instead, "our precedent in redistricting cases applies a strong presumption that a plan is constitutional." *Adams*, ___Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, at ¶ 150 (Kennedy, Fischer, and DeWine, JJ., dissenting), citing *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 22, *superseded by constitutional amendment as stated in League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St. 3d ___, 2022-Ohio-65, ___ N.E.3d ___.

{¶ 96} But the outcome of these cases today demonstrates that the majority has once again assumed an oversized role in the process of drawing a congressional-district map by perpetuating its own standard of what constitutes "unduly favoring" a political party. The majority faults the commission for not following that standard. But in reality, there is only one standard that matters. The majority clearly has a number of Democrat congressional seats in mind, and any plan that does not result in that number will be deemed unconstitutional and therefore invalid.

III. CONCLUSION

{¶ 97} We agree with the majority that the March 2 plan meets the requirements of Article XIX, Section 1(C)(3)(b) of the Ohio Constitution. But we dissent because the majority continues to require proportional representation, which does not exist as a requirement anywhere in Article XIX. We would hold that the March 2 plan complies with Article XIX, Section 1(C)(3)(a) of the Ohio Constitution and that that plan should apply to the 2024 primary and general elections.

FISCHER, J., dissenting.

{¶ 98} I fully join the other dissenting opinion. I write to expound on a few points of particular importance.

I. Petitioners have not proven their cases beyond a reasonable doubt

{¶ 99} As noted in the majority opinion, the challenges of the petitioners in these cases are "subject to the highest standard of proof: proof beyond a reasonable doubt." Majority opinion, ¶ 27.

{¶ 100} But petitioners do not even meet the lower clear-and-convincing-evidence burden of proof or the even lower preponderance-of-the-evidence burden of proof. In any event, petitioners have not satisfied their burden of showing beyond a reasonable doubt that the March 2 plan unduly favors the Republican Party in violation of Article XIX, Section 1(C)(3)(a) of the Ohio Constitution.

{¶ 101} In Section II(A) of their merit brief, respondents Senate President Huffman, Senator Rob McColley, Representative Jeff LaRe, and Speaker of the House Robert Cupp set forth a detailed argument pointing out numerous flaws in the evidence that is relied on in the majority opinion. In the interest of brevity, I will not reprint that argument here; however, respondents have both identified numerous flaws in the experts' reports relied on in the majority opinion and raised significant doubts as to whether petitioners have presented a full mathematical analysis. These flaws and incomplete analyses directly attack the majority opinion. The majority opinion not only sidesteps respondents' points but also faults respondents for failing to depose petitioners' experts within the limited time that this court provided for discovery. Majority opinion at ¶ 60.

{¶ 102} In doing so, the majority opinion turns the burden of proof on its head. Respondents have *no* burden of production in these cases. Instead, it is incumbent upon petitioners to prove their cases beyond a reasonable doubt. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-

Ohio-65, ___ N.E.3d ___¶ 78-79, citing *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 20-21; *see also Adams v. DeWine*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, ¶ 26. Respondents have raised more than reasonable doubts, regardless of whether petitioners' experts could have or should have been deposed. Indeed, those and other reasonable doubts are further explored in the other dissenting opinion. In concluding otherwise, the majority opinion seems to ultimately apply some lesser burden of proof, even though it purports to apply the beyond-a-reasonable-doubt burden of proof. Because petitioners have not satisfied their burden of proof, I must respectfully dissent from the majority opinion.

II. The procedure used in these cases is fundamentally flawed

{¶ 103} In addition, I have deep concerns regarding the process used by this court to decide these cases. These cases arose under our exclusive, original jurisdiction pursuant to Article XIX, Section 3(A) of the Ohio Constitution. Despite the fact that we are the "trial court" in these cases, this court has subjected these cases to an unnecessarily compressed schedule. This compressed schedule negatively impacted our decision-making process in two ways. First, the timeline limited the type and quality of evidence that this court could consider in making its decision. By forgoing the standard discovery process, this court was forced to (1) consider only the unexamined assertions of the parties' experts and (2) rely on stipulated evidence. The lack of adversarial hearings here has prevented this court from hearing direct testimony and cross-examination. This complete absence of adversarial proceedings has deprived this court and the citizens of Ohio of the legal crucible that provides everyone—including members of the bench, the bar, and the public—with the best view of the evidence. There is an old saying: "bad facts make bad law." That saying might be slightly altered here: "a bad understanding of a case makes a bad decision."

{¶ 104} Second, the compressed timeframe has resulted in a lack of transparency, which is particularly concerning given the high-profile nature of these cases and the fact that they seem to be of great interest to all Ohioans. It would have been very easy for this court to schedule some public hearings at which the parties could have presented their cases, including direct testimony and cross-examination, and this court could have received a full picture of the evidence. These hearings could have been broadcast for all Ohioans to see, just as all our oral-argument sessions are. There is absolutely no reason for this court's failure to hold such public hearings.

{¶ 105} This court's failure to hold even one hearing in these cases undoubtedly raises concerns among the public regarding this court's lack of transparency, and one might wonder why such concerns have not been voiced in the media. Regardless, if this court is to strike a constitutionally enacted and mandated congressional plan, it should do so in the light of day, providing Ohioans with a meaningful opportunity to understand not just all the evidence before this court but also this court's decision-making process in such an important matter.

III. Conclusion

{¶ 106} This court's misguided rush to decide these cases has resulted in an unnecessary and truncated procedure that has effectively tied this court's hands and rendered it unable to make a fully informed decision. Given the evidence before this court, petitioners have failed to satisfy their burden of showing beyond a reasonable doubt that the March 2 plan unduly favors the Republican Party in violation of Article XIX, Section 1(C)(3)(a) of the Ohio Constitution.

{¶ 107} Accordingly, I respectfully dissent.

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