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Court of Appeals
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IN THE
COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	*	
2022 LEGISLATIVE	*	Misc. Nos. 21, 24, 25, 26, and 27
DISTRICTING OF THE STATE	*	
	*	
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RESPONDENTS' PROPOSED FINDINGS OF FACT AND APPLICABLE LEGAL STANDARDS

PROPOSED FINDINGS OF FACT

Maryland's Legislative Districts

1. The Maryland Constitution prescribes a process and establishes parameters for the creation of State legislative districts.

2. Article III, § 2 of Constitution requires 47 Senators and 141 Delegates. Md. Const. art. III, § 2.

3. Article III, § 3 establishes that the State shall be divided into legislative districts for the election of one Senator and three Delegates from each district, and that districts may be subdivided into single-member or mixed single- and double-member districts for Delegates. *Id*. art. III, § 3. This requirement results in 47 legislative districts.

4. Article III, § 4 requires that State legislative districts "consist of adjoining territory, be compact in form, and of substantially equal population," and that "due regard

. . . be given to natural boundaries and the boundaries of political subdivisions" in their creation. *Id*. art. III, § 4.

5. The United States Constitution also requires that State legislative districts be of substantially equal population to effectuate the principle that one citizen's vote be approximately equal in weight to another citizen's vote.

6. The Maryland Constitution does not provide any values for determining what constitutes an acceptable or unacceptable level of compactness. Due to Maryland's irregular shape and the geographic distribution of its population, it is impossible to achieve a map of wholly compact districts. It also is impossible to achieve districts that do not cross political subdivisions.

7. The Maryland Constitution confers upon the political branches the task of drawing legislative districts and does not provide any guidance on how to balance the required factors when they conflict. Balancing the requirements necessarily involves judgment calls within the discretion of the political branches.

Maryland's Redistricting Process

8. Every 10 years, states redraw legislative 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 the Voting Rights Act and other applicable federal and state constitutional provisions and voting laws.

9. Article III, § 5, establishes the process for adopting a new legislative districting plan "following each decennial census of the United States." *Id*. art. III, § 5.

10. The Governor is required to hold "public hearings" and "prepare a plan" setting forth the boundaries of the districts, and present that plan to the leadership of the General Assembly "not later than" the first day of the legislative session in the second year following the census. *Id.*

11. The General Assembly may adopt its own plan, but unless this is done within 45 days after the opening of the regular session in that second year following the census, the Governor's plan becomes law. *Id.*

Census 2020

12. On August 12, 2021, the Maryland Department of Planning released Maryland-specific population data relating to the 2020 United States Census. The Census data showed that Maryland's population had increased by 403,672 to 6,177,224 from the 2010 Census to the 2020 Census, an increase of approximately 7.0%. According to this data, Maryland's ideal population per Senate district would be 131,391, per two-member house district would be 87,594, and per single-member house district would be 43,797.

13. Maryland's population growth shown by the 2020 Census was uneven across the State.

14. The Western counties of Allegany and Garrett counties lost 6,981 and 1,291 residents from the last Census, decreases of approximately 9.3% and 4.3% respectively. By contrast, Washington County gained 7,275 residents, an increase of approximately 4.9%.

15. The suburban Washington D.C. area increased in population significantly. Frederick county gained 38,332 residents, an increase of approximately 16.4%. Montgomery County gained 90,284 residents, an increase of approximately 9.3%. Prince George's County gained 103,781 residents, an increase of approximately 12.0%.

16. The counties of Central Maryland grew by approximately 5.0% collectively, but this was marked by substantial growth in the counties surrounding Baltimore City and a substantial decline in Baltimore City itself. Whereas Anne Arundel, Baltimore, and Howard Counties grew by 9.4% (50,605 residents), 6.1% (49,506 residents), and 15.8% (45,232 residents), respectively, Baltimore City declined by 5.7% (35,253 residents). Carroll and Harford Counties also grew by 3.4% (5,757 residents) and 6.6% (16,098 residents), respectively.

17. Southern Maryland also grew significantly since the last Census. Although Calvert County only grew by 4.6% (4,046 residents), Charles County grew by 13.7% (20,066 residents) and St. Mary's County grew by 8.2% (8,626 residents).

18. The Eastern Shore exhibited modest growth as a whole. The counties with the largest increases included Wicomico (4.9%; 4,855 residents) and Queen Anne's (4.3%;

2,076 residents), while those with the biggest declines included Somerset (7.0%; 1,850 residents), and Kent (4.9%; 999 residents). The remaining shore counties were fairly stable, with Cecil (2.6%; 2,617 residents), Worcester (2.0%; 1,006 residents), and Caroline (0.7%; 227 residents) exhibiting growth and Talbot (.7%; 256 residents) and Dorchester (.3%; 87 residents) exhibiting declines.

19. The counties, their populations under the 2020 Census, and the "ideal" number of Senate districts that each could support based on population alone, are as follows:

County	2020 Census Population	# of Ideal Senate Districts
Garrett	28,806	.22
Allegany	68,106	.50
Washington	154,705	1.15
Frederick	271,717	2.07
Montgomery	1,062,061	8.09
Howard	332,317	2.53
Carroll	172,891	1.31
Baltimore	854,535	6.52
Harford	260,924	1.99
Baltimore City	585,708	4.49
Anne Arundel	588,261	4.46

Prince George’s	967,201	7.37
Charles	166,617	1.27
Calvert	92,783	.71
St. Mary’s	113,777	.87
Cecil	103,725	.79
Kent	19,198	.15
Queen Anne’s	49,874	.38
Caroline	33,293	.25
Talbot	37,526	.29
Dorchester	32,531	.25
Wicomico	103,588	.79
Somerset	24,620	.17
Worcester	52,460	.40

Development of the Governor’s Legislative Districting Plan

20. On January 12, 2021, Governor Larry Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (the “Governor’s Commission”) for the purposes of redrawing the state’s congressional and legislative districting maps based on newly released census data.

21. Under the executive order, Governor Hogan had ultimate authority over the appointment of the nine members of the Governor's Commission. All nine were Maryland registered voters. Although there are 2.2 Maryland Democratic voters to every Republican voter, the Governor chose an equal number of Republicans and Democrats for the Commission. Three were Republicans, three were Democrats, and three were registered with neither party.

22. In issuing the executive order, Governor Hogan made his views clear about what he intended the outcome of the Commission to be. He declared that "[t]he redistricting process as it has been used in Maryland for decades lacks transparency, deprives Maryland citizens of the ability to participate, and *has saddled our state with the unfortunate distinction of being home to the most gerrymandered districts in the world.*" The entire premise of the Commission was thus to fulfill the Governor's objective of reversing what he believed to be the gerrymandered districts previously in place. That would have been clear to any appointee—Democrat, Republican or Independent—who accepted appointment to the Commission.

23. Governor Hogan's Secretary of the Department of Planning was permitted to attend Governor's Commission deliberations, but no representative from the General Assembly was permitted to attend deliberations. In fact, the Governor's Commission was expressly intended to be independent from any legislative influence—but not executive influence—whatsoever.

24. Governor Hogan's Executive Order directed the Governor's Commission 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. At the same time, it forbade the Governor's Commission from considering how individuals are registered to vote, how individuals voted in the past, or the political party to which individuals belong; or from considering the domicile or residence of any individual, including an incumbent officeholder or a potential candidate for office.

25. Over the course of the following months, the Governor's Commission 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.

26. After receiving public input and deliberating, on November 5, 2021, the Governor's Commission recommended a state legislative districting map to Governor Hogan.

27. On January 12, 2022, Governor Hogan submitted the Governor's Commission's proposed final legislative districting map to the Maryland General Assembly (the "Governor's Plan").

Development of the General Assembly's Legislative Redistricting Plan

28. 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.

29. 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.

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

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

32. On December 20, 2021, the LRAC released a draft concept legislative districting map for public comment.

33. On January 7, 2021, the LRAC adopted a final legislative districting map (the "2021 Plan").

34. On January 12, 2022, the 2021 Plan was submitted to the General Assembly.

35. On January 27, 2022, the General Assembly passed the 2021 Plan (the "Enacted Plan"). Md. Code Ann., State Gov't §§ 2-201 and 2-202.

The Legal Challengers

36. Petitioners Mark Fisher, Nicholaus Kipke, and Kathryn Szeliga (Miscellaneous No. 25) are Republican members of Maryland's House of Delegates and registered Maryland voters. They challenge senate districts 7, 9, 12, 21, 22, 23, 24, 25, 27, 31, 33, 42, and 47. They contend the districts violate the requirements of Article III, § 4. These Petitioners have not proposed an alternative plan, but have asked that the Court order the adoption of the Governor's Commission plan should the General Assembly fail to enact a new legislative districting plan that resolves the constitutional issues they have raised.

37. Petitioners Brenda Thiam and Wayne Hartman (Miscellaneous No. 26) are Republican members of Maryland's House of Delegates and registered Maryland voters. They, along with Petitioner Patricia Shoemaker, a registered Maryland voter, adopt and incorporate by reference the Fisher Petition challenges. They also challenge the mix of single-member and multi-member house districts set forth in Maryland's Constitution.

These petitioners have not proposed an alternative plan for the Court's consideration, except by reference to the proposal by the Fisher petitioners that the Court adopt the Governor's Commission plan.

38. Petitioner David Whitney (Miscellaneous No. 24) is a Maryland registered voter who challenges senate districts 11, 23, 21, 22, 24, 25, and 26, and house districts 27B and 30A. Mr. Whitney has not proposed an alternative plan for the Court's consideration.

39. Petitioner Seth Wilson (Miscellaneous No. 27) is a Maryland registered voter who challenges senate district 2 and its house districts, 2A and 2B. Mr. Wilson has not proposed an alternative plan for the Court's consideration.

Challenge to Maryland's Mixed Single and Multi-Member House Districts

40. Article III, § 3 of the Maryland Constitution expressly authorizes the use of a combination of single-member and multi-member house districts. Md. Const. art. III, § 3 ("Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.").

41. Despite the express authorization provided in the Maryland Constitution, Petitioners Thiam, Hartman, and Shoemaker contend that Maryland's combination of single-member and multi-member house districts violates both Maryland and federal

constitutional provisions. They ask the Court to enjoin the General Assembly to pass a legislative districting plan with only single-member house districts.

42. Petitioners Thiam, Hartman, and Shoemaker all reside in areas designated for single-member house districts under the Enacted Plan. Through their petition, they essentially complain on behalf of residents of multi-member districts, none of whom have filed a challenge.

County Splits and Border Crossings Under Both Plans Are Roughly Equivalent

43. The Governor's Plan splits Anne Arundel County into six districts, Baltimore City into five districts, Baltimore County into nine districts, Caroline County into two districts, Carroll County into two districts, Charles County into three districts, Cecil County into two districts, Frederick County into two districts, Harford County into three districts, Howard County into three districts, Montgomery County into eight districts, Prince George's County into eight districts, Wicomico County into two districts, and Washington County into two districts.

44. The Enacted Plan includes roughly the same number of county splits as the Governor's Plan. The number of county splits is identical except that it includes one less district for Baltimore County, one less district for Charles County, one more district for Calvert County, and one more district for Montgomery County.

45. The Governor's Plan includes the following border crossings: District 2 crosses from Washington County into Frederick County; District 14 crosses from Howard

County into Carroll County; District 16 crosses from Baltimore City into Baltimore County; District 27 crosses from Howard County into Baltimore County; District 31 crosses from Calvert County into Anne Arundel County; District 39 crosses from Prince George's County into Charles County; District 41 crosses from St. Mary's County into Charles County; District 43 crosses from Baltimore County into Harford County; District 44 crosses from Harford County into Cecil County. There are a total of nine county border crossings in the Governor's Plan.

46. The Enacted Plan includes the following border crossings: District 2 crosses from Washington County into Frederick County; District 7 crosses from Baltimore County into Harford County; District 9 crosses from Howard County into Montgomery County; District 12 crosses from Howard County into Anne Arundel County; District 21 crosses from Prince George's County into Anne Arundel County; District 27 crosses from Charles County into Prince George's County into Calvert County; District 29 crosses from St. Mary's County into Calver County; District 35 crosses from Harford County into Cecil County; District 43 crosses from Baltimore City into Baltimore County. There are a total of 10 county border crossings in the Enacted Plan.

The Enacted Plan Avoids Some of the Potential Voting Rights Act Violations Implicated by the Governor's Plan

47. One powerful indicium of gerrymandering is incumbent displacement by placing incumbents in the same district so they are required to run against each other.

48. The Governor's Plan pairs 6 of Maryland's 14 Black incumbent senators with other incumbents thereby jeopardizing those senate seats. The Enacted Plan jeopardizes no Black incumbent's senate seat.

49. The Governor's Plan pairs 21 of Maryland's 44 Black incumbent delegates with other incumbents thereby jeopardizing those seats. The Enacted Plan pairs only 8 of the 44 Black incumbent delegates.

50. Charles County residents are 50.1% Black and 41.6% white. Calvert County residents are 81% white and 13.3% Black. Petitioners criticize District 27 of the Enacted Plan on the basis that it crosses into three counties: Calvert, Prince George's, and Charles, and protects a Democratic Senator and two Democratic Delegates "at the expense of Calvert County." A comparison of the Enacted Plan map and the Governor's Plan map demonstrates that the drawing of District 27 treats Charles County and Calvert County equitably by leaving both counties largely within a single district and cutting off only a small portion of each.

51. The Governor's Plan, by contrast, favors white-majority Calvert County by including all of it within District 31 at the expense of Black-majority Charles County which it splits between Districts 39, 40 and 41.

Challenged Districts

District 2

52. Only Petitioner Wilson challenges District 2. That district crosses from Washington County into Frederick County on both the Governor's Plan and the Enacted Plan.

53. Such a cross-over is necessary to meet the population target that will satisfy the one-person, one-vote requirement. Garrett and Allegany Counties are not populous enough to comprise their own legislative district; thus, District 1 must extend into Washington County. But Garrett, Allegany and Washington Counties are not populous enough to comprise two legislative districts on their own. Thus, District 2 had to extend into Frederick County.

54. In addition, District 2B is a subdistrict that is largely coterminous with the municipal boundaries of the City of Hagerstown, and is otherwise located entirely within Washington County. Thus, District 2B gives due regard to the boundaries of political subdivisions. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 7

55. District 7 includes part of Baltimore County and part of Harford County. It closely follows the contours of former District 7 on the 2012 Plan and thereby maintains the "core[] of [the] prior district" and continuity for many of the voters in that district. *In re 2012 Legislative Districting*, 436 Md. 121, 177 (2013) (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).

56. In addition, Baltimore County is populous enough, by itself, to comprise approximately 6.52 legislative districts. Thus, at minimum one county crossing would be required. However, Carroll County, to Baltimore County's west, is populous enough to support 1.31 legislative districts. Because District 5 in Carroll County is almost perfectly coterminous with Carroll County's western border with Frederick County, District 42, on Carroll County's eastern border, needed to cross into Baltimore County. And because the portion of District 42 located in Baltimore County—approximately .69 of a legislative district—was greater than the .52 of a district that Baltimore County could sustain in excess of 6, an additional crossing was going to be needed.

57. In addition, the Court-drawn 2002 map had crossings in both the western boundary of Baltimore County with Carroll County (then-District 5) and the Eastern boundary of Baltimore County with Harford County (District 7). None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 9

58. District 9 is largely within Howard County with a piece that juts into the northern portion of Montgomery County. Howard County's population can support 2.53 legislative districts based on the ideal district population. Thus, at least one district within Howard County will need to cross one county line. However, because Montgomery County's population supports 8.09 legislative districts, the portion of District 9 that extends

into Montgomery County cannot comprise population amounting to more than .09 of a legislative district, since Montgomery County otherwise has 8 legislative districts, not one of which crosses another county line. Thus, a Howard County district must cross another county line to achieve population equality. In this case, District 12 crosses into Anne Arundel County on Howard County's eastern border.

59. Both District 9 and District 12 crossed into other counties from Howard County under the Court-drawn 2002 and the 2012 legislative maps. In both cases, District 9 extended north into Carroll County from Howard County, while District 12 extended northeast into Baltimore County from Howard County. In this regard, the current Enacted Plan is similar to both of these precedents, except that District 9 extends into Montgomery County and District 12 extends into Howard County.

60. Petitioners challenge District 12 on the basis of compactness, but it is more compact than a number of the districts in the Governor's Plan. Petitioners also claim that District 9 divides Ellicott City, Columbia, Highland, Damascus, and Clarksburg, but none of these are municipalities, and thus none are "political subdivisions" for the purpose of Article III, § 4 of the Constitution. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 12

61. As explained above, District 12 is another district in Howard County that must cross county lines—in this case, Anne Arundel County—for population equality reasons.

62. District 12's subdistricts—Districts 12A and 12B—are wholly situated in Howard County and Anne Arundel County, respectively, and thus give due regard to the boundaries of political subdivisions. District 12 does not divide the towns or localities of Columbia, Elkridge, Linthicum and Ferndale, because these are not municipalities and thus are not "political subdivisions" under Article III, § 4.

63. District 12 is also not meaningfully less compact than any district in the Governor's Commission plan. The Reock (.25 and .23) and Polsby-Popper (.22 and .16) compactness scores for Districts 12A and 12B exceed the minimum scores for subdistricts in the Governor's Commission plan (.17 for Reock, .06 for Polsby-Popper). And District 12 itself, which is the lowest-scoring district in the Enacted Plan on those metrics (.14 Reock, .11 Polsby-Popper), is not meaningfully less compact than the lowest scoring district in the Governor's Commission plan (.17 Reock, .12 Polsby-Popper). None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 21

64. District 21 is located partially in Prince George's County and partially in Anne Arundel County. District 21 is one of 8 legislative districts located wholly or partially

in Prince George's County. According to 2020 Census data, Prince George's County has sufficient population to support 7.37 legislative districts; thus, at least one Prince George's County district must extend into a different county, assuming it could find .63 of a district (*i.e.* 8 – 7.37) in an adjoining county to complete an eighth district. Anne Arundel County has sufficient population to support 4.46 legislative districts; thus, at least one Anne Arundel County district must extend into a different county.

65. With regard to Prince George's County, the population available from Anne Arundel County for a cross-county district – approximately .46 of a district's worth, minus the population contributed by Anne Arundel County to District 12 in its cross-county district with Howard County—was insufficient to make up for Prince George's County's need for .63 of a district to complete an eighth district. Accordingly, Prince George's County needed a district with another crossing to make up the population deficit. This occurs with District 27, which crosses into both Charles and Calvert Counties at Prince George's County's southern and southeastern borders.

66. With regard to Anne Arundel County, it required an additional .54 of a district's worth of population to round up its 4.46-district population to the nearest whole. It obtained this population through the population available from Howard County via District 12, and the population available from Prince George's County through District 21.

67. District 21's shape and characteristics also comport with its historical boundaries. In both the Court-drawn 2002 and the 2012 legislative maps, District 21

ascended up Prince George's County's northwest border with Montgomery County, before turning east to cross into Anne Arundel County. District 21 consists of adjoining territory and is compact; its Reock and Polsby-Popper scores exceed those of the lowest-scoring district in the Governor's Commission plan. That it may cross the boundaries of the towns or localities of Crofton, Odenton, Fort Meade, Maryland City, Adelphi, Hillendale, Calverton, and Langley Park, even if true, is irrelevant, since these are not municipalities. Otherwise, it does not cross the boundaries of municipalities like College Park and Laurel, which lie wholly within its boundaries. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 22

68. District 22 is wholly within Prince George's County. It scores relatively high on the Reock compactness scale with a .45 rating, and its Polsby-Popper rating is no lower than that of any district in the Governor's Commission plan. It also consists of adjoining territory, and gives due regard to municipalities such as Edmonston, Riverdale Park, University Park, Hyattsville, Greenbelt, Berwyn Heights, and all but a de minimis portion of Glenarden. That it may divide one or more town or locality is irrelevant. District 22's footprint is very similar to its footprint in the 2012 and Court-drawn 2002 legislative plans. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 23

69. District 23 is wholly within Prince George's County, and further gives due regard to the boundaries of the municipality of Bowie, which lies entirely within its boundaries but for a de minimis portion. It is more compact than a number of districts in the Governor's Plan, and consists of adjoining territory.

70. District 23 is very similar to the District 23 that was constituted as part of the Court-drawn 2002 legislative plan and the 2012 legislative plan. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 24

71. District 24 is wholly within Prince George's County. It further gives due regard to the boundaries of municipalities like Capitol Heights, Fairmount Heights, Seat Pleasant, and all but de minimis portions of Bowie and Glenarden. That it may divide towns or localities is irrelevant. District 24 is more compact than a number of districts in the Governor's Plan, and it consists of adjoining territory.

72. District 24 is virtually identical in appearance and location to the version of District 24 that existed under the 2012 legislative plan, and is similar to the same district that existed under the Court-drawn 2002 legislative plan. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 25

73. District 25 is wholly within Prince George's County. It further gives due regard to the boundaries of municipalities like Morningside, District Heights, and Capital Heights. It scores relatively high on the Reock compactness scale with a .45 rating, and exceeds the minimum Polsby-Popper score for districts in the Governor's Commission plan. Moreover, it consists of adjoining territory.

74. District 25 is virtually identical to the version of this district that was drawn by the Court of Appeals for the 2002 legislative plan. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 26

75. District 26 is located entirely within Prince George's County, and gives due regard to the boundaries of municipalities Morningside and Forest Heights. It consists of adjoining territory. Moreover, its boundary with District 25 does not somehow undermine its compactness (as Petitioner Whitney alleges), as an oddly shaped boundary does not by itself determine that the compactness requirement of Article III, § 4 has been violated. Otherwise, no standard against which District 26 should be measured is provided.

76. District 26 preserves the core of the preceding district under the 2012 Plan, as the districts appear to occupy an extremely similar footprint within Prince George's County. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 27

77. District 27 is the second Prince George's County district that extends beyond Prince George's County's boundaries, which it does for population reasons as stated above. As noted, Prince George's County has enough population to support 7.37 ideally populated districts. It obtained some of the additional population to make an 8th district from Anne Arundel County via District 21, and obtained the remainder from Charles County and Calvert County.

78. Charles County has sufficient population to comprise 1.27 districts, and on that basis it has the minimum number of districts for population reasons required under the plan: one district entirely within its boundaries (District 28), and a shared district with Prince George's County (District 27). St. Mary's County, to Charles County's south, has sufficient population to comprise .87 districts, so its only legislative district must extend beyond its borders to find sufficient population. It does this via District 29, which extends into Calvert County. Calvert County, in turn, only has sufficient population to comprise .71 districts, and contributes approximately .13 worth of a district to District 29, which it shares with St. Mary's County. Its remaining .58 of a district's worth of population is dedicated to District 27, which it shares with Prince George's County and Charles County.

79. District 27 is relatively compact, with Reock and Polsby-Popper scores of .46 and .29, respectively (much higher than the minimum scores for any district in the Governor's Commission plan). Moreover, it preserves the core of the prior district: Under the 2012 legislative plan, District 27 also extended between Calvert, PG and Charles

Counties, like it does under the Enacted Plan. Under the Court-drawn 2002 legislative plan, District 27 extended between Calvert and PG Counties. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

80. A comparison of the Enacted Plan map and the Governor's Plan map demonstrates that the drawing of District 27 treats Black-majority Charles County and white-majority Calvert County equitably by leaving both counties largely within a single district and cutting off only a small portion of each. The Governor's Plan, by contrast, favors white-majority Calvert County by including all of it within District 31 at the expense of Black-majority Charles County which it splits between Districts 39, 40 and 41. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 31

81. District 31 lies wholly within Anne Arundel County. Whether it divides towns or localities is irrelevant, as these are not "political subdivisions" for purposes of Article III, § 4. District 31 is also compact. Its Reock (.41) and Polsby-Popper (.26) substantially exceed the lowest-scoring districts for each metric (.17 and .12, respectively).

82. District 31 preserves the core of the prior district, as it largely occupies the same footprint as it did in the 2012 legislative plan as well as the Court-drawn 2002 legislative plan. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 33

83. District 33 is located wholly within Anne Arundel County. The district is compact, as it scores .34 on the Roeck scale and .14 on Polsby-Popper—both scores higher than the minimum scores in the Governor's Commission plan. That it may divide towns and localities like Crofton, Odenton, Severna Park, and Arnold, is irrelevant, since these are not political subdivisions. By contrast, District 33B gives due regard to the boundaries of Prince George's County and the municipality of Bowie by abutting, but not crossing into, either of those subdivisions.

84. District 33 preserves the core of the prior district, as its footprint approximates that of the same district under the 2012 legislative plan. At the same time, District 32 enjoyed significant population growth, requiring District 33 to take on some of the population formerly located within District 32. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 42

85. District 42 is comprised of the northern third of Baltimore County and the eastern part of Carroll County. It reflects a county boundary crossing that is necessitated by population demands. As noted above, Carroll County's population can support 1.31 districts. Because the remainder of Carroll County is comprised by District 5, which does not extend into any other county, Carroll County needed to contribute its excess .31 of a

district of population to a district that crossed into another county. That district is District 42.

86. In addition, Baltimore City's population decline required the extension of District 43 out from from Baltimore City into Baltimore County further forcing District 42 into Carroll County from Baltimore County.

87. District 42 is compact. It has a Reock score of .46 and Polsby-Popper score of .18, both easily exceeding the lowest such scores for districts in the Governor's Commission plan. It also gives due regard to the boundaries of municipalities like Hampstead (which is fully encompassed by District 42C) and Manchester and Carroll (both of which lie entirely outside of the boundaries of District 42C). Whether it divides other towns and localities is irrelevant. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

District 47

88. District 47 is located wholly within Prince George's County. It preserves the core of the prior district in that it leaves a virtually identical footprint to the versions of District 47 under the 2012 legislative plan as well as the Court-drawn 2002 legislative plan. In addition, District 47's current shape preserves its character as a minority opportunity district under the Voting Rights Act for Black voters. Meanwhile, House District 47A is majority Black while House District 47B is majority Hispanic, preserving yet another minority opportunity district.

89. District 47 is also compact; it is more compact than the lowest scoring district on the Governor's Plan according to either compactness measure identified by Plaintiffs. None of the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

Testimony of Allan J. Lichtman

Qualifications

88. Allan J. Lichtman, Ph.D., is an expert in historical statistical methodology, political history, American political history, voting rights, and partisan redistricting. He is a Distinguished Professor of History at American University in Washington, D.C. During his 46 years at American University, he has previously served as Chair of the History Department and Associate Dean of the College of Arts and Sciences. He received his B.A. in History from Brandeis University in 1967 and Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data.

89. Dr. Lichtman is the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as *Political Methodology*, *Journal of Interdisciplinary History*, *International Journal of Forecasting*, and *Social Science History*. In addition, he has co-authored *Ecological Inference* with Dr. Laura Langbein, a standard text on the analysis of social science data, including political information. His scholarship also includes the use of quantitative and qualitative methods to conduct contemporary and historical studies, published in academic

journals such as *Proceedings of the National Academy of Sciences*, *American Historical Review*, *International Journal of Forecasting*, *International Journal of Information Systems & Social Change*, and *Journal of Social History.*

90. Quantitative and historical analyses also grounds Dr. Lichtman's books, including, *Prejudice and the Old Politics: The Presidential Election of 1928*, *The Thirteen Keys to the Presidency* (co- authored with Ken DeCell), *The Keys to the White House*, *White Protestant Nation: The Rise ofthe American Conservative Movement*, and *FDR and the Jews* (co-authored with Richard Breitman). His recent book, *The Embattled Vote in America*, published in September 2018 by Harvard University Press, examines the history and current status of voting rights in America.

91. Dr. Lichtman has received numerous awards in recognition of his outstanding scholarship. He is a recipient of the Alfred Nelson Marquis Lifetime Achievement Award for the top 5% of persons included in Marquis Who's Who, 2018. He was also listed by rise.global as #85 among the 100 most influential geopolitical experts in the world.

92. Dr. Lichtman has worked as a consulting or testifying witness for both plaintiffs and defendants in more than 100 voting and civil rights cases, providing testimony on many issues that draw upon historical, social science, and quantitative analysis. His work includes cases for the United States Department of Justice and cases for many civil rights organizations.

93. In many of these cases he has testified in defense of, or in a challenge to, redistricting plans. Dr. Lichtman has served as an expert in redistricting cases in Illinois,[1] Florida,[2] Texas,[3] New Jersey,[4] North Carolina,[5] and Maryland.[6] In the U.S. Supreme Court case *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 427, 439 (2006), the majority opinion authoritatively cited his statistical work to invalidate a congressional district in southwest Texas for diluting the votes of Hispanics.

Analysis

94. Dr. Lichtman analyzed the Enacted Plan against the backdrop of the Democrats' overwhelming majority in voter registration and recent election results in Maryland to determine whether, as has been alleged, the Enacted Plan constitutes a partisan

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[1] *See Campuzano v. Illinois State Board of Elections*, *200 F. Supp. 2d 905* (*N.D. Ill. 2002*); *Committee for a Fair and Balanced Map, et al. v. Illinois State Board of Elections*, 835 F. Supp. 2d 563 (N.D. Ill. 2011); *Radogno, et al. v. Illinois State Board of Elections*, No. 1:2011cv04884 (N.D. Ill. 2011); *McConchie v. Illinois State Board of Elections*, No. 1:21-cv-03091 (N.D. Ill. 2021).

[2] *See Congresswoman Corrine Brown v. Ken Detzner*, Case No. 4:15cv398-MW/CAS (N.D. Fla.); *League of Women Voters of Fla. v. Ken Detzner*, Case No: 2012-CA-2842 (Fla. Cir. Ct.).

[3] *See Harding v. County of Dallas*, No. 3:15-CV-131-D (N.D. Tex.); *Texas v. United States*, No. 1:11-cv- 1303-RMC-TBG-BAH (D.D.C.); *Shannon Perez v. Greg Abbott*, SA-11-CV-360 (2017)).

[4] *See Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).

[5] *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016).

[6] *See Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated sub nom.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Szeliga v. Lamone*, Nos. C-02-CV-21-001816, C-02-CV-21-001773 (Cir. Ct. AA Cty.)

gerrymander in favor the Democrats. Dr. Lichtman further evaluated the opinions of Mr. Sean Trende, offered in support of the Fisher Petitioners' claims in this case.

95. Partisan gerrymandering is the practice of deliberately and unfairly manipulating district lines to favor one party over others. It exists when, as a result of drawing legislative lines in a redistricting process, the party controlling the redistricting gains a substantial unfair advantage over the opposition party. Under this standard, according to Dr. Lichtman, the Enacted Plan is not a partisan gerrymander.

96. Dr. Lichtman concludes that the Enacted Plan is not a partisan gerrymander in favor of the Democrats. He establishes that according to party registration data and recent election results, as embodied by the Cook Political Report's Partisan Voter Index (PVI) for Maryland, Maryland is an overwhelmingly Democratic state. Democrats on average enjoy a 2.2 to 1 registration advantage over Republicans in Maryland. In addition, the PVI, which measures how States perform at the presidential level compared to the nation as a whole, rates Maryland as a D+14 State, tied (along with Massachusetts and California) as the second-most Democratic state in the nation, trailing only Hawaii. Finally, Maryland's two-party Democratic presidential vote of 67% in the 2020 presidential election also places it among the three leading Democratic States in the country, with a percentage similar to the three most-Republican states to have voted for former President Trump.

97. Political science research shows that in first-past-the-post, two-party systems like what we have in Maryland, the party winning the largest share of the vote almost always wins an even larger share of the seats. This research suggests that in states where the lead party enjoys 67% of the two-party vote (like in Maryland), that party can expect to occupy just above 80% of the State's legislative seats. Similarly, in states where the lead party enjoys a PVI advantage of +14 (as in Maryland), that party can expect to occupy approximately 75% of the State's legislative seats.

98. In Maryland, the Democrats currently occupy 70% of the seats in Maryland's Senate and House of Delegates, and even if one were to treat every new district in which Democrats have a party registration advantage as being a district that is likely to be won by a Democrat (in fact, the Democrats have party registration advantages in more districts than they currently occupy), the Democrats would only occupy 77% of the General Assembly's seats—exactly in line with expectations. The Enacted Plan is not a partisan gerrymander in favor of the Democrats.

99. This same phenomenon rebuts the notion that Maryland's mix of single-member and multi-member House of Delegates districts serves to advantage Democrats at the expense of Republicans. If that were the case, the Democratic advantage in seats in the House of Delegates could be expected to exceed the lead-party advantage in House seats where mixed single- and multi-member districts are not used, but that is not the case. The

Democrats' share of House seats in Maryland is in line with expectations based on Democrats' dominance in Maryland along measures such as PVI.

100. Moreover, the Enacted Plan is at least as fair to Republicans as the Governor's Commission plan is. The Enacted Plan includes one *fewer* majority Democratic Senate district than the Governor's Commision plan (out of 47 total Senate districts), and one more majority Democratic House district than the Governor's Commission plan (out of 141 House districts). And even the latter result is explained by the way in which the Governor's Commission plan arranges the three single-memer districts it creates within Senate District 46 to pack Democrats into one district to open the door for a Republican advantage in the other two single-member districts.

101. This is striking given that the Governor's Commission was not an independent, bipartisan citizen's commission, as those kinds of entities are used in other states. Among other things:

a. The Commission was not free to choose its own criteria in drawing district lines. Instead, the Governor required the Commission not only to follow legal requirements, but forbade the Commission from considering individuals' voter registration or voting history or their domicile (including that of incumbents).

b. The Commission was not independent. Rather, the Governor—a single, partisan elected official—had authority to appoint all nine

members. In such circumstances, it is reasonable to assume the Governor would not appoint anyone to the Commission whose views were at odds with his own, regardless of political affiliation. It also raises questions as to the Commissioners' own independence, given that they may consider themselves—consciously or sub-consciously—charged with fulfilling the Governor's objectives of eliminating what he believes to be "the most gerrymandered districts in the nation."

c. The Commission was not representative of Maryland voters, given Democrats' 2.2 to 1 registration advantage over Republicans in Maryland, and 2.9 to 1 registration advantage over unaffiliated voters.

d. The Commission's procedures were not free from unbalanced political influence, since the Governor's political appointee (Director of Planning, Robert McCabe) acted as an advisor to the Commission, while no representative of Democratic leadership in the General Assembly was permitted to do so. Indeed, the Governor specified that the Commission was intended to be "independent from legislative influence," but apparently not from partisan executive branch influence.

102. While the Governor's Commission plan does not appear to treat Republicans and Democrats any differently than the Enacted plan, it does appear to unduly pair incumbents, especially Democratic incumbents, and especially Black Democratic incumbents.

103. Incumbent displacement is an especially powerful tool for achieving partisan advantage, given the incumbency advantage in election contests. With regard to Senate districts, the Governor's Commission plan pairs roughly equivalent Democratic and Republican incumbents (16 of 35 Democratic incumbents, or 46%; 6 of 12 Republican incumbents, or 50%), but pairs 6 out of 14 Black Democratic Senators, or 43%. By contrast the Enacted Plan pairs no incumbents in the Senate, Republican or Democratic, Black or White.

104. With regard to House districts, the Governor's Commission plan pairs 44 of 99 Democratic Delegates, or 44%, but only 6 of 42 Republican Delegates, just 14%. Similarly, the Governor's Commission plan pairs 21 of 44 incumbent Black Delegates, or 49%. By contrast, the Enacted Plan pairs 17 of 99 Democratic incumbents, or 17%, and 15 of 42 Republican incumbents, or 36%. The Enacted Plan also pairs only 8 of 44 incumbent Black Delegates, just 18%. Although the Enacted Plan pairs proportionally more Republican than Democratic incumbent Delegates, the Governor's Commission plan does so in the opposite direction to a greater extent: 44% of Democratic incumbents paired, compared to just 14% of Republican incumbents paired, a difference of 30 percentage

points. The Enacted Plan pairs 36% Republican incumbents and 17% Democratic incumbents, a difference of just 19 percentage points.

105. The Enacted Plan also fares better than the Governor's Commission plan with regard to the traditional criterion of preserving the core of prior districts, which this Court recognized as a valid criterion in *In re 2012 Legislative Districting of the State*, 436 Md. 121, 135 (2013). Preserving the cores of districts maintains continuity for voters and the relationships between voters and their representatives. On the other hand, disrupting the cores of districts can have severe consequences for incumbents. On average, the core retention is 87% for the Enacted Plan compared to 64% for the Governor's Commission plan.

106. In terms of compactness scores, the Enacted Plan does not score meaningfully differently than the Governor's Commission plan. On average, the Governor's Commission plan scores higher by .13 points per district under the Reock test, and by .08 points per district under the Polsby-Popper test. Of the 21 challenged districts and subdistricts, all but one of the Enacted Plan's districts scores higher than the lowest scoring district in the Governor's Commission plan under the Reock test, and 18 of the 21 challenged districts and districts score higher than the lowest scoring district in the Governor's Commission plan under the Polsby-Popper test.

107. But Dr. Lichtman asserts that there is not necessarily a positive connection between geography—that is, requirements that districts be compact, contiguous, and

adhere to natural and political boundaries—and gerrymandering. In fact, the opposite can be true, particularly in a State like Maryland that exhibits "partisan clustering," a phenomenon whereby Democrats are concentrated in dense urban areas and Republicans are more evenly distributed across the State. Under these circumstances, a map that appears to be compact can conceal a substantial partisan gerrymander.

Testimony of Sean Trende

108. Petitioners Fisher, Kipke and Szeliga (Miscellaneous No. 25) have offered expert opinion testimony from Sean Trende.

109. Mr. Trende, who has served as an expert in numerous cases defending Republican-enacted redistricting plans, has never published any research paper in any peer reviewed academic journal.

110. Mr. Trende's opinions in this case are limited to the issue of compactness. He assigned four different compactness metrics to each district.

111. However, Mr. Trende provides no standards by which any of these compactness scores can be deemed either too low or too high to support a conclusion that a district is not sufficiently compact. Indeed, he admits that no such standard exists.

112. Instead, Mr. Trende compared the compactness scores of the 13 districts challenged by the Fisher petitioners with the compactness scores of legislative districts in other states.

113. However, Trende's analysis does not account for geographic features, natural boundaries or population distributions in the comparator states. Moreover, Trende undertakes what is essentially an apples-to-oranges comparison, comparing only the *challenged* districts in the Enacted Plan—chosen, presumably, because of their allegedly poor compactness (among other things)—to *all* districts in other States. Although state-to-state comparisons of compactness are meaningless, a truer comparison would have involved *all* of the Enacted Plan's districts as compared to those of a comparator state, not just the cherry-picked assortment.

114. Further, Mr. Trende has not analyzed the compactness of the districts proposed in the Governor Commission's map, because he was not asked to do so, even though the Petitioners who hired him have asked that the Governor Commision's map be imposed as an alternative to the Enacted Plan.

115. Mr. Trende also has not analyzed the compactness of the districts in any previous Maryland redistricting map, including the map enacted in 2011.

116. Accordingly, Mr. Trende's analysis is not useful to determine whether any of the challenged districts violate Article III, § 4.

APPLICABLE LEGAL STANDARDS

Presumption of Validity and Burden of Proof

The 2022 Legislative Districting Plan is a statute enacted by the General Assembly. Md. Code Ann., State Gov't §§ 2-201, 2-202. Therefore, '"[t]he basic rule is that there is

a presumption' that the statute is valid." *Whittington v. State*, 474 Md. 1, 19 (2021) (citation omitted). That is, '"enactments of the [General Assembly] are presumed to be constitutionally valid and [ ] this presumption prevails until it appears that the [statute] is invalid or obnoxious to the expressed terms of the Constitution or to the necessary implication afforded by, or flowing from, such expressed provisions.'" *In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 579 (2015) (citation omitted; brackets in original). For this reason, "all challengers to a legislative reapportionment plan[] carry the burden of demonstrating the law's invalidity." *In re 2012 Legislative Districting*, 436 Md. 121, 137 (2013) (citation omitted). The State need make no showing unless "a proper challenge under Article III, § 4 is made and is supported by 'compelling evidence.'" *Id.* Only if petitioners present such "compelling evidence" will the State have "the burden of producing sufficient evidence to show that the districts are contiguous and compact, and that due regard was given to natural and political subdivision boundaries." *In re 2012 Legislative Districting*, 436 Md. at 137-38.

Redistricting Procedure

The required procedure for revising the boundaries of the Legislative Districts or subdistricts following each decennial census is set forth in Article III, § 5 of the Maryland Constitution. Although some of the petitioners seek to portray in a negative light the process of the 2022 State legislative plan's enactment, no petitioner contends that the procedural requirements of § 5 were not satisfied.

Districting Criteria Under Article III, § 4

Article III, § 4 provides that "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."

The Court of Appeals has recognized the tension between and among these three criteria. "Thus it is that the state constitutional requirements of § 4 work in combination with one another to ensure the fairness of legislative representation," but it is "a plain fact" that "they tend to conflict in their practical application, . . . viz, population could be apportioned with mathematical exactness if not for the territorial requirements, and compactness could be achieved more easily if substantially equal population apportionment and due regard for boundaries were not required." *Matter of Legislative Districting of State*, 299 Md. 658, 681 (1984).

Population Equality

Article III, § 4 of the Maryland Constitution, like Section 2 of the Fourteenth Amendment to the United States Constitution, requires that the State's legislative districts have substantially equal population. This standard has been interpreted to allow for less than precise mathematical equality among districts. The Court of Appeals has held that Article III, § 4 "does not impose a stricter standard for population than the 10% rule imposed by the Fourteenth Amendment." *Legislative Redistricting Cases*, 331 Md. 574, 600-01 (1993). The "10% rule" refers to the Supreme Court's holdings that, under the

Fourteenth Amendment's Equal Protection Clause, maximum deviations of district population of under 10% were "minor deviations" that did not require justification by the State, *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), and that permissible rationales for justifying deviation from pure population equality may include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

More recently, in *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. 253, 259 (2016) (rejecting challenge to state legislative redistricting plan alleging that district population deviations less than 10% were caused by "political efforts to help the Democratic Party" rather than attempts to comply with the Voting Rights Act), the Supreme Court reaffirmed the 10% rule and opined that "[g]iven the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, . . . attacks on deviations under 10% will succeed only rarely, in unusual cases," *id*. *Harris* clarified that if the population deviation between the largest and the smallest district is less than 10%, then a challenger cannot simply rely on sheer numbers to establish a violation, but must show that the deviation "reflects the predominance of illegitimate reapportionment factors rather than the 'legitimate considerations' to which we have referred in *Reynolds* and later cases." *Id*. *Harris* also reaffirmed the Supreme Court's previous holding that district population deviations,

including those over 10%, can be justified by "'legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* at 258 (quoting *Reynolds*, 377 U.S. at 579). Examples of such policies listed by the Court include not only "'traditional districting principles such as compactness [and] contiguity,'" but also "maintaining the integrity of political subdivisions," and the "competitive balance among political parties*.*" *Harris*, 578 U.S. at 258 (citations omitted).

The Supreme Court in *Harris* distinguished its summary affirmance in *Cox v. Larios*, 542 U.S. 947 (2004), a decision discussed in *In re 2012 Legislative Districting*, 436 Md. 121, 169-73, 179 (2013). *Larios* summarily affirmed a three-judge court's conclusion that Georgia's legislative redistricting plan, with total district population deviation of less than 10%, had violated the Equal Protection Clause by using population deviation for partisan advantage. *Harris* explained that the circumstances in *Larios* differed from other cases because "those attacking the plan had shown that it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality among districts." *Harris*, 578 U.S. at 264. Specifically, in *Larios*, it had been shown that "population deviation as well as the shape of many districts 'did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts,'" and that "[n]o legitimate purposes could explain them." *Harris*, 578 U.S. at 264 (quoting *Larios*, 542 U.S. at 949). Whether anything remains of *Larios* as guidance for this Court is questionable, in light of the Supreme Court's post-

Harris decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), holding that partisan gerrymandering claims are not justiciable as a matter of federal law. *See In re 2012 Legislative Districting*, 436 Md. at 182 (noting with approval that, in resolving petitioners' "one person, one vote" challenge, the Special Master "applied, and properly so, the Supreme Court's political gerrymander cases," including *Larios*).

It is unclear that any of the petitions before the Court actually raise a challenge to the 2022 State legislative districting plan's population equality *per se*, given that the plan's maximum deviation is well below the 10% threshold. The petition in Misc. No. 26 purports to invoke "'one person, one vote' principles," Petition ¶ 2, but the substance of the petition's challenge focuses on an objection to the plan's use of both multimember and single-member House districts. In this regard, it is worth noting that, in describing the attributes of the remedial plan ordered in 2002, the Court acknowledged that its plan had fourteen multimember House districts (described as "shared senatorial districts"), but nonetheless "the Court's Plan contain[ed] districts still substantially equal in population—remaining, in fact, within the ten percent deviation[.]" *In re Legislative Districting of State*, 370 Md. 312, 375 (2002).

Adjoining Territory

Article III, § 4's "adjoining territory" provision has been interpreted to impose a "contiguity requirement," which '"mandates that there be no division between one part of a district's territory and the rest of the district; in other words, contiguous territory is

territory touching, adjoining and connected, as distinguished from territory separated by other territory.'" *In re Legislative Districting of the State*, 370 Md. 312, 360 (2002) (quoting *Matter of Legislative Districting of the State*, 299 Md. 299, 675-76 (1984) (other citations omitted)). The Court has never found a violation of the adjoining territory requirement in a state redistricting plan, and did not reach the issue in 2002 or 2013. As noted by the dissenting opinion in the 2002 legislative redistricting case, however, the history of the provision reflects that "[m]ere separation of a district by any body of water does not render it noncontiguous." *Id.* at 383 (Raker, J., dissenting).

That observation by Judge Raker finds support in the 2002 Report of the Special Master, who reviewed the history of the "adjoining territory" provision's adoption:

> This phrase "adjoining territory" in Section 4 was adopted from the Proposed Constitution of 1968. Consequently, the floor debate at the constitutional convention that drafted that document is an aid to the interpretation of "adjoining territory." During the floor debate on December 1, 1967, an amendment was proposed to substitute the term "adjoining land area" for "adjoining territory." After that proposed amendment failed, the Chairman of the Committee on the Legislative Branch concluded that "we can't use a prohibition about crossing a body of water." [Minutes of Proceedings of the Constitutional Convention] at 6315-16, 6332-35. Later, another amendment was offered to prohibit the creation of a district "that crosses the center of the Chesapeake Bay." *Id.* at 6525-31, 6439-42. When it appeared, however, that the proposed amendment might also prevent the creation of a district which crossed the Susquehanna River, the Committee Chairman expressed his concern that "if we start adding tributaries, estuaries, and other bodies of water ... we won't know where we stand." *Id.* The Chairman stated that he would support the amendment only if it was limited to the Bay. *Id.* at 6529-31. As a result, the proposed amendment was withdrawn. *Id.* at 6541-42.

> Subsequently, the Committee of the Whole of the Convention placed on the record a statement that it was "our intention that under the interpretation of the words adjoining and compact ... a redistricting commission or the General Assembly could not form a district, either a Senate district or a Delegate district by crossing the Chesapeake Bay." *Id.* at 6574-75.
>
> In other contexts, this Court has interpreted the term "adjoining territory" so that separation of two areas by water does not render them non-contiguous. *See Anne Arundel County v. City of Annapolis,* 352 Md. 117, 721 A.2d 217 (1998) (under municipal annexation statute, areas of land separated by water does not render them non-contiguous).

In re Legislative Districting of the State, 370 Md. at 414-15; *see also* 85 Op. Att'y Gen. 183 (2000) (opining, based on the history of Article III, § 4, that "contiguity is not interrupted by navigable water, regardless of whether the water is spanned by a bridge or tunnel or is crossed by a ferry," but "a district that crossed the Chesapeake Bay to include portions of its western and eastern shores might be subject to challenge").

Compactness

The Court's interpretation of Article III, § 4's compactness requirement has proceeded from a recognition of Maryland's distinctive geography, which would have been well understood by the framers. Because of the State's "bizarre geographic configuration," including its oddly shaped border and an "internal structure" that "is further fragmented by numerous other rivers, water bodies and topographic irregularities," "[c]learly, the State's geography inhibits the geometric fashioning of districts of symmetrical compactness and it was hardly the purpose of the compactness requirement to promote aesthetically pleasing

district configuration forms." *Matter of Legislative Districting of State*, 299 Md. 658, 687 (1984). Rather, the Court has found "it obvious that a mathematical formulation for determining whether a particular district is unconstitutionally noncompact was not within the contemplation of the constitutional framers when proposing adoption of § 4 of Article III of the Maryland Constitution." *Id.* Consequently, "[o]ddly shaped or irregularly sized districts of themselves do not, therefore, ordinarily constitute evidence of gerrymandering and noncompactness," and "irregularity of shape or size of a district is not a litmus test proving violation of the compactness requirement." *Id.*

Instead, the Court's precedent sees compactness "as a requirement for a close union of territory (conducive to constituent-representative communication), rather than as a requirement which is dependent upon a district being of any particular shape or size." *Id.* at 688. "[I]n determining whether there has been compliance with the mandatory compactness requirement, due consideration must be afforded . . . to the 'mix' of constitutional and other factors which make some degree of noncompactness unavoidable, *i.e.,* concentration of people, geographic features, convenience of access, means of communication, and the several competing constitutional restraints, including contiguity and due regard for natural and political boundaries, as well as the predominant constitutional requirement that districts be comprised of substantially equal population." *Id.* When considering a compactness challenge "it is not the province of the judiciary to strike down a district as being noncompact simply because a more

geometrically compact district might have been drawn"; instead, "the function of the courts is limited to assessing whether the principles underlying the compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations." *Id.*

Due Regard for Natural Boundaries and Boundaries of Political Subdivisions

The "primary intent" of Article III, § 4's "due regard" provision is "to preserve those fixed and known features which enable voters to maintain an orientation to their own territorial areas." *Id.* at 681. "Like compactness and contiguity, the 'due regard' requirement is of mandatory application, although by its very verbiage it would appear to be the most fluid of the constitutional components outlined in § 4." *Id.*

The Court's 2013 decision clarified the correct application of Article III, § 4 in a "due regard" to political boundaries challenge, which necessarily involves consideration of the other legal requirements for districting, starting with the need for equal population. Summarizing the Special Master's report, with which the Court agreed, the decision explains that "the critical question at issue in a due regard inquiry is whether a challenged border crossing can be justified as necessary to accomplish a superseding, or equally significant, constitutional requirement." *In re 2012 Legislative Districting*, 436 Md. at 146. It is only '"upon the presentation of compelling evidence tending to indicate an unnecessary incursion'" that '"the State has the burden of demonstrating compliance with the due regard requirement with respect to the incursion.'" *Id.* (quoting Special Master's

report). "If a county's adjusted population cannot justify an additional Legislative District, substantially equal in population to all others within the State, a political subdivision crossing will be necessary in order to achieve substantial equality in population. In this situation, the due regard requirement is subordinated to the Fourteenth Amendment requirement of substantially equal population across legislative districts." *In re 2012 Legislative Districting*, 436 Md. at 156. To conduct this analysis, the Court must take into account not only whether one county has an excess or deficit of population needed to form a district, but also whether a neighboring county has an excess or deficit of population. *Id.* (observing that Baltimore *City*'s population amounting to "approximately 5.1 ideal legislative districts" was "a fact to be considered" but "another fact that must be considered is that Baltimore *County* did require the creation of an additional legislative district in order to achieve population equality"). If the crossing is necessary, whether to achieve population equality or for another legal reason that is "superseding, or equally significant," *id.* at 146, then "the Enacted Plan [does] not violate the due regard requirement," *id.* at 157. Under these circumstances, "[w]here that crossing should have been placed is not for this Court to determine," because "the choice of where the . . . crossing would be located and what form that crossing would take was a political one, well within the authority of the political branches to make." *Id.* at 159.

As to which governmental entities are "political subdivisions" within the meaning of the "due regard" provision, the Court has concluded that the requirement applies to the

boundaries of counties and "incorporated municipalities." *In re Legislative Districting of State*, 370 Md. 312, 358-59, 362 (2002) (citing *In re Legislative Districting of State*, 271 Md. 320, 324 (1974)). On the other hand, the "due regard to natural boundaries" provision has not been analyzed to any significant extent in the Court's redistricting cases. The Court has never identified a specific instance of a redistricting plan's failure to give due regard to a natural boundary. In striking down the 2002 plan, the Court held that the record did not show "that in its formulation, due regard was given to natural boundaries and the boundaries of political subdivisions," 370 Md. at 368, but the Court's decision did not discuss any crossing of natural boundaries. The decision's description of the Court's own plan points out the lower number of shared districts, while saying nothing about natural boundaries of any kind. *Id*. at 374-75.

The Legislature's Constitutional Authority to Choose Between Multimember and Single-Member House Districts

Article III, § 3 provides,

> The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.

This provision specifically rejects any prohibition on "subdivi[ding] any one or more of the legislative districts . . . into three (3) single-member delegate districts or one

(1) single-member delegate district and one (1) multi-member delegate district." Thus, § 3 expressly preserves the General Assembly's power to choose whether to subdivide a legislative district and to select from two constitutionally permissible methods of subdivision. By contrast, no mention of legislative district subdivision appears in either the districting criteria set forth in Article III, § 4, or the procedural requirements for enactment and judicial review of a legislative districting plan found in Article III, § 5, or elsewhere in the Maryland Constitution or Declaration of Rights. By expressly addressing subdivision of legislative districts, § 3 necessarily overrides any implied prohibition that might arguably be found in Article III, § 4 or other portions of the Maryland Constitution and Declaration of Rights.

Article 7 of the Declaration of Rights

Article 7 of the Declaration of Rights provides, "That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." The Court has never recognized Article 7 of the Declaration of Rights as the source of any constitutional requirement for legislative redistricting. Although litigants challenging legislative redistricting have in two prior instances referenced Article 7, *see In re Legislative Districting of State*, 370 Md. 312, 333, 335, 402-03, 404 (2002) (describing claims asserted by Gandel and Schofield petition and Cole/Prettyman/Lagater petition);

Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 423 (1962)(describing complaint), in neither case did the Court deem it necessary or appropriate to discuss application of Article 7 in the redistricting context. Instead, most recently the Court has specified that "[w]ith respect to Maryland law, the provisions that govern the legislative redistricting process were adopted by the Maryland voters in 1970, *see* Ch. 785 of the Acts of 1970, and 1972, Ch. 363 of the Acts of 1972, when the State Constitution was amended." *In re 2012 Legislative Districting*, 436 Md. at 132. These requirements are the ones found in Article III, §§ 2-5.

Though Article 7 is an important constitutional guarantee, its application has been limited to contexts that involve the right to participate in elections but do not involve redistricting. Its inapplicability to redistricting makes sense, given the history of the provision. Article 7 has its origins in the Constitution of 1776, where it appeared as Article 5 of the Declaration of Rights in substantially the same form.[7] At the time of its promulgation, Maryland did not have legislative districts; under the original Constitution of 1776, Delegates represented and were elected by eligible voters residing within the

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

counties at large. *See* Const. of 1776 art. 2.[8] Thus, the framers' directive that elections should be "free and frequent" could not have had any reference to what was then a non-existent legislative districting process.

Since 1776, Article 7 has not been interpreted to encompass rights that are implicated in the redistricting challenges now before the Court. For example, the petition in Misc. No. 25 contends that "Article 7 protects the "right to an equally effective power to select the legislative representatives of their choice," Pet. ¶ 72, but Article 7 has never been interpreted to guarantee the kind of outcome-based "right" the petition seeks to enforce. Instead, the Court has held that Article 7 "embodies the same principles" represented in Article I, § 1 of the Constitution. *State Board of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 60 (2013); *see* Dan Friedman, *The Maryland State Constitution: A Reference Guide* 50 (Praeger 2006) (noting that Article 7 of the Declaration of Rights "describes the policy that animates" Article I of the Constitution) ("*The Maryland State Constitution*"). Article I, § 1 provides, in relevant part, that "[a]ll elections shall be by ballot," and that "every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time of the closing of registration next preceding the election, shall be entitled to vote." Art. I, § 1. This provision was promulgated as part of the 1851 Constitution "as a 'democratizing reform' to preserve the secrecy and

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

independence of voters from the State's aristocratic classes who dominated Maryland politics at the time." *Snyder*, 435 Md. at 60 (quoting Friedman, *The Maryland State Constitution*, at 50-51). Thus, as Article I, § 1 makes clear, the rights embodied by Article 7 relate to the right of citizens to participate in elections.

Moreover, the first step in any "analysis of a constitutional challenge" in the elections context "is to determine, in a realistic light, the extent and nature of the burden imposed on voters by the challenged enactments." *Burruss v. Board of Cty. Comm'rs of Frederick Cty.*, 427 Md. 231, 264 (2012). But the Court of Appeals' precedents confirm that the rights protected by Article 7 relate to the rights of eligible citizens to participate directly in the electoral process—rights that are not implicated by the boundaries of a legislative district in which a voter finds herself. In other words, Petitioners' rights to "free and frequent elections" and to "suffrage" under Article 7 are not burdened by the 2022 Plan. *Suessman v. Lamone*, 383 Md. 697, 731-33 (2004) (construing Md. Const. art. 1, § 1 and Articles 7 and 24 of the Declaration of Rights and holding that a prohibition against unaffiliated voters voting in party primary elections did not implicate "fundamental right" to vote). Petitioners' claims under Article 7 should be rejected.

Article I, § 7 of the Maryland Constitution

Article I, § 7 of the Constitution directs the General Assembly to "pass Laws necessary for the preservation of the purity of Elections." Like Article 7 of the Declaration of Rights and Article I, § 1, Article I, § 7 has never been recognized by the Court as a

source of constitutional requirements for legislative districting. Article I, § 7 has been mentioned only once in the Court's legislative redistricting precedents, and there the Court merely described the claim asserted in a petition, without further addressing the claim. *See In re Legislative Districting of State*, 370 Md. at 330 (describing Curry petition). Although interpretation of this provision has evolved since it first appeared in the Constitution of 1851, Article I, § 7 has only ever been interpreted to constitute an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud. It has never been interpreted as a restraint on the General Assembly's authority to act. Rather, it is "'a mandate to execute a power implicitly assumed to exist independently of the mandate.'" 61 Md. Op. Att'y Gen. 254, 256 (1976) (quoting *Hennegan v. Geartner*, 186 Md. 551, 555 (1945)). That is, the General Assembly's authority to pass laws to "preserve the purity of elections" exists independently of this provision. *See Kenneweg v. Allegany Cty. Comm'rs*, 102 Md. 119 (1905) ("The power to legislate in regard to elections—primary or general—if unrestrained by the Constitution itself, is inherent in the General Assembly, and the provision just cited, instead of conferring the power, is a mandate to execute a power implicitly assumed to exist independently of the mandate."). Thus, Article I, § 7 must be read as imposing an affirmative "*duty* upon the legislature to pass such laws," *Maryland Constitutional Law*,

Alfred S. Niles (Hepbron & Haydon 1915), rather than a restriction on the General Assembly's authority when it does so act.

Consistent with this interpretation, this Court has held that the General Assembly's "creat[ion of] boards of canvassers" while "giv[ing] them explicit directions how to collect and count votes, and carefully limit[ing] their authority to the performance of that function," were examples of legislation fulfilling the duty imposed by Article I, § 7. *Lamb v. Hammond*, 308 Md. 286, 303 (1987). Similarly, this Court has held that the promulgation of election-related anti-corruption statutes served the purposes of Article I, § 7, *see Smith v. Higinbothom*, 187 Md. 115, 128-34 (1946), and that the express directive to the General Assembly to pass such laws signified an exclusive grant that preempted local legislative efforts in this space, *see, e.g.*, *County Council for Montgomery Cty. v. Montgomery Ass'n, Inc.*, 274 Md. 52, 60-65 (1975) (holding that the "purity of elections" clause, among others, "demonstrate[s] that the General Assembly is obligated to enact . . . a comprehensive plan for the conduct of elections in Maryland," thereby preempting local legislative efforts to regulate campaign finance activities). Thus, this Court has interpreted Article I, § 7, to require the General Assembly to prescribe the mechanics of elections, and to embody those mechanics with protections against corruption or fraud.

Article 24 and Article 40 of the Declaration of Rights

Article 24 of the Declaration of Rights provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or,

in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Decl. or Rights art. 24. Although there is no express "equal protection clause" set forth in this provision, this Court has held that the due process or "Law of the Land" clause in this article "embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment." *Murphy v. Edmonds*, 325 Md. 342, 353 (1992); *see 2012 Legislative Districting*, 436 Md. at 159 n.25 (equating the standard for evaluating petitioners' "political discrimination" claim under Article 24 with "the Federal right"). Moreover, this Court has "long recognized that decisions of the Supreme Court interpreting the Equal Protection Clause of the federal Constitution are persuasive authority in cases involving the equal treatment provisions of Article 24." *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, 640 (1983).

This Court has taken a similar approach vis-à-vis the United States Constitution with regard to claims under Article 40 of the Declaration of Rights, which guarantees (in relevant part) "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." Md. Decl. of Rights art. 40. Although this Court "has sometimes held out the possibility that Article 40 could be construed differently from the First Amendment in some circumstances, the Court has generally regarded the protections afforded by Article 40 as 'coextensive' with

those under the First Amendment." *Clear Channel Outdoor, Inc. v. Director, Dep't of Fin. of Baltimore City*, 472 Md. 444, 457 (2021).

To the extent this Court has addressed partisan gerrymandering claims of the type petitioners assert, whether under the federal Constitution or the Maryland Declaration of Rights, the Court has consistently followed Supreme Court guidance. *See Legislative Redistricting Cases*, 331 Md. 574, 610-11 (1993) (applying as dispositive of petitioners' partisan gerrymandering claims the analysis in *Davis v. Bandemer,* 478 U.S. at 109, and noting that "[i]n *Davis,* only six justices found the question of partisan political gerrymandering to represent a justiciable controversy"); *2012 Legislative Districting*, 436 Md. at 182 (holding that in considering and rejecting "the political gerrymander iteration" of petitioners' "one person, one vote" claim brought under both the federal Constitution and Article 24 of the Declaration of Rights, the Special Master "applied, and properly so, the Supreme Court's political gerrymander cases"); *see* Report of the Special Master, *In re Legislative Districting*, Misc. Nos. 1, 2, 3, 4, 5, 9 (Sept. 2012) (Wilner, J.) at 49-50 & n.20, available at https://www.courts.state.md.us/coappeals/highlightedcases (discussing the Supreme Court's uncertainty about the justiciability of partisan gerrymandering claims as reflected in *Davis*, 478 U.S. 109 (1986), *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), and surmising "[t]he net effect seems to be that political gerrymandering remains, in theory, a justiciable issue, but

no clear standards exist for adjudicating that issue, and, if history is a guide, no judicial relief on that ground is likely.").

In light of this Court's precedent generally treating these provisions as *in pari materia* with their federal counterparts, petitioners' assertion of Article 24 and Article 40 as the basis for their partisan gerrymandering claims faces a problem: the Supreme Court held in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), that partisan gerrymandering claims are nonjusticiable under the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, or any other provision of federal law. The Supreme Court reached that conclusion after spending a generation searching for a manageable and politically neutral standard that would enable a court to adjudicate partisan gerrymandering claims fairly. Nothing presented in the petitions now before this Court suggests that petitioners have succeeded in discovering what the Supreme Court could not, which is a manageable, neutral, and fair standard.

RESERVATION OF RIGHT TO SUPPLEMENT OR AMEND

Defendants respectfully request that the Court allow them to supplement or amend these proposed findings of fact and articulation of legal standards should new or additional information emerge during trial or be developed through the direct or cross-examination of witnesses.

Dated: March 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 22nd day of March, 2022, the foregoing was filed and served electronically by the MDEC system on all persons entitled to service:

/s/ Steven M. Sullivan

Steven M. Sullivan