

IN THE COURT OF APPEALS OF
OF MARYLAND

IN THE MATTER OF
2022 LEGISLATIVE
DISTRICTING OF THE STATE

PETITIONERS:
MARK N. FISHER
NICHOLAUS R. KIPKE
KATHRYN SZELIGA

MISC. NO. 25

**PETITIONERS' PROPOSED FINDINGS OF FACT, PROPOSED GOVERNING LEGAL
STANDARDS, AND OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**

Pursuant to the Court's February 18, 2022 Scheduling Order, Petitioners Mark N. Fisher, Nicholas R. Kipke, and Kathryn Szeliga respectfully submit their Proposed Findings of Fact, Proposed Governing Legal Standards, and Opposition to Respondent's Motion to Dismiss.

I. PROPOSED FINDINGS OF FACT

The below proposed findings of fact are based on an anticipated joint stipulation by the parties, anticipated witness testimony, and exhibits expected to be introduced into evidence. Petitioners respectfully request that the Special Magistrate allow them to supplement or amend these proposed findings of fact should new or additional information emerge during the merits hearing or be developed through the direct or cross-examination of witnesses.

Petitioners

1. Mark N. Fisher is a registered voter in Maryland. Mr. Fisher currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2011. He is a Republican elected official who represents Maryland citizens in Calvert County.

2. Nicholas R. Kipke is a registered voter in Maryland. Mr. Kipke currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates

since 2007. He is a Republican elected official who represents Maryland citizens in Anne Arundel County.

3. Kathryn Szeliga is a registered voter in Maryland. 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 Harford Counties.

The MCRC State Legislative Redistricting Plan

4. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (the "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.

5. 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.

6. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a State legislative redistricting plan to Governor Hogan.

7. On January 12, 2022, the first day of the 2022 legislative session of the General Assembly, Governor Hogan submitted the MCRC's State legislative districting plan without

change to the General Assembly. It was introduced to the Maryland General Assembly as Senate Joint Resolution No. 3 and House Joint Resolution No. 1. The MCRC's redistricting plan was referred to committee and never acted upon.

Enactment of the 2021 State Legislative Redistricting Plan

8. 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.

9. 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.

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

11. At the conclusion of the public hearings, the Department of Legislative Services ("DLS") was directed to produce a State legislative redistricting plan for the LRAC's consideration.

12. On January 7, 2022, the LRAC adopted a State legislative redistricting plan (the "Plan"). Both Republican members of the LRAC opposed the Plan.

13. On January 12, 2022, the Plan was submitted to the General Assembly as Senate Joint Resolution No. 2 and House Joint Resolution No. 2.

14. On January 27, 2022, the Plan was passed by the General Assembly and became law. All 32 Democratic members of Maryland’s Senate voted in favor of the Plan. All 14 Republican members of the Maryland Senate present voted in opposition to the Plan.¹ In the House of Delegates, 95 of the 96 Democratic members of the House of Delegates present voted in favor of the Plan.² All 42 Republican members of the House of Delegates voted in opposition to the Plan.

Measures of Compactness

15. Petitioners introduced evidence concerning four commonly used metrics for measuring the compactness of legislative districts: Reock, Polsby-Popper, Inverse Schwartzberg, and Convex Hull. The four metrics address different aspects of compactness.

16. The first three metrics are based on comparing a drawn electoral district to a circle, which is the most compact shape. The Reock score looks at the ratio of the area of the district to the area of the smallest circle that would enclose the district (also known as a “minimum bounding circle”). A “perfect” Reock score is 1, while a zero is a theoretical perfectly non-compact district.

17. The Polsby-Popper score looks at the ratio of the area of a district to the area of a circle that has the same perimeter as the district. A “perfect” Polsby-Popper score is 1, while a theoretical perfectly non-compact district would score a zero. In a state like Maryland with jagged coastlines and inlets, the Polsby-Popper scores will naturally be lower than in other similarly situated states.

18. The Inverse Schwartzberg score takes the perimeter of the district and compares it to the perimeter (circumference) of a circle that has the same area as the district. By taking the

¹ One Republican member of the Senate was absent (excused) at the time of the vote.

² Three Democratic members of the House of Delegates were absent (excused) at the time of the vote. One Democratic member of the House of Delegates cast no vote.

inverse (dividing the number “1” by this score), the scores are, like the above scores, scaled from 0 to 1, with 1 representing a perfectly compact district.

19. The final measure of compactness introduced by Petitioners is the Convex Hull score. It is similar to the Reock score except that it uses the minimum bounding *polygon* instead of the minimum bounding *circle*. By allowing for shapes other than a circle to be the benchmark, the Convex Hull score recognizes that compactness can come in many forms other than a perfect circle. Like the other scores, a 1 is the most compact district and a zero is a theoretical non-compact district.

The Challenged Districts

District 12

20. District 12 is not compact. Its shape defies description. It stretches from southcentral Howard County in the west and, through several twists and turns, ends in Glen Burnie and Marley Heights in Anne Arundel County in the east.

21. The eye test is matched by poor scores on the Reock (.138), Polsby-Popper (.110), Inverse Schwartzberg (.332), and Convex Hull (.433) metrics.

22. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 12 is not compact:

a. District 12’s Reock score of 0.138 is a lower score than 98.2% of other legislative districts enacted around the country from 2002-2020.

b. District 12’s Polsby-Popper score of 0.110 is lower than 95.8% of other legislative districts enacted around the country from 2002-2020.

c. District 12’s Schwartzberg Score of 0.332 is lower than 95.8% of the legislative districts enacted around the country from 2002-2020.

d. District 12’s Convex Hull score of 0.434 is lower than 98.2% of the legislative districts enacted around the country from 2002-2020.

e. Of the 13,473 districts that have been drawn around the country over the past two decades, 13,378 have scored better than District 12 on at least one metric. In other words, almost every district drawn over the past 20 years has at least some aspect of compactness that exceeds the qualities of that district.

23. District 12 also is divided between Howard County and Anne Arundel County. Due to the way District 12 was drawn, residents of Anne Arundel County will be represented by a Senator from Howard County. The Senator from Howard County will have a say in matters affecting only Anne Arundel County.

24. As Respondent acknowledges in its Motion to Dismiss, District 12 was drawn to maintain the incumbency of its current Senator.

District 21

25. District 21 is not compact. It is shaped like a boomerang that includes the College Park area in the southwest, Laurel and Maryland City in the north, and a divided Crofton in the southeast.

26. It scores poorly on the Reock (.288), Polsby-Popper (.125), Inverse Schwartzberg (.354), and Convex Hull (.504) metrics.

27. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 21 is not compact:

a. In the past two redistricting cycles, 94.1% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 21.

b. In the past two redistricting cycles, 94.2% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 21.

c. In the past two redistricting cycles, 96% of the legislative districts enacted around the country have higher Convex Hull scores than District 21.

d. Only 2.41% of all legislative districts enacted around the country perform worse on all metrics than does District 21.

28. District 21 also is divided between Prince George's County and Anne Arundel County.

29. Due to the way District 21 was drawn, residents of Anne Arundel County will be represented by a Senator and three Delegates from Prince George's County. This Senator and these Delegates from Prince George's County will have a say in matters affecting only Anne Arundel County.

District 33

30. District 33 is not compact. It is yet another legislative district with a shape that defies easy explanation

31. It performs poorly on the Reock (.341), Polsby-Popper (.140), Inverse Schwartzberg (.374), and Convex Hull (.568) metrics.

32. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 33 is not compact:

a. In the past two redistricting cycles, 93.3% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 33.

b. In the past two redistricting cycles, 92% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 33.

c. In the past two redistricting cycles, 91.2% of the legislative districts enacted around the country have higher Convex Hull scores than District 33.

d. Only 4.71% of all legislative districts enacted around the country perform worse on all metrics than does District 33.

33. Political considerations played a critical role in the creation of District 33, and these considerations were placed above the requirements of Article III, § 4:

a. Delegate Rachel Munoz, a Republican member of the House of Delegates, who formerly represented District 33, was drawn out of District 33 and now resides in a bizarrely shaped section of District 31 that sits on the very edge of its border with District 33.

b. District 33 has been constructed to make more likely the election of two Democratic candidates to the House of Delegates from individual House Districts (33A and 33C) when District 33 formerly elected only one Democratic candidate as a multi-member district.

c. District 33 has been constructed to make more likely the election of a Democratic Senator from the District. Through the redrawing of District 33, Democratic registered voter numbers in District 33 have increased from approximately 38.06% to 40.88%, while Republican voter registration numbers have decreased from approximately 38.08% to 34.71%.

District 27

34. District 27 crosses the borders of and includes within its geographic footprint three counties: Calvert, Charles, and Prince George's. It even cuts off a small part of southern Calvert County, putting that part of the county into a different legislative district than the rest. Calvert County is a peninsula county that has nearly enough residents for an entire Senate District.

35. District 27 does not consist of adjoining territory and crosses an important natural boundary. Specifically, it crosses the Patuxent River to combine Calvert, Charles, and Prince George's Counties. Indeed, House District 27B is divided between Prince George's and Calvert Counties by a stretch of the Patuxent River that has no bridge crossings. In other words, for a resident of House District 27B in Calvert County to visit a resident of House District 27B in Prince George's County, the Calvert County resident would have to drive about 35-40 minutes to find a

bridge crossing in another House (or Senate) District. There also is no bridge across the Patuxent River connecting House District 27C with the western half of Senate District 27.

Districts 22, 23, 24, and 47

36. Districts 22, 23, 24, and 47 are not compact. They also are all located within Prince George’s County, making their lack of compactness particularly problematic.

37. The Reock, Polsby-Popper, Inverse Schwartzberg, and Convex Hull scores for District 22, 23, 24, and 47 are as follows:

District	Reock	Polsby-Popper	Inverse Schwartzberg	Convex Hull
22	.448	.115	.340	.639
23	.236	.132	.363	.549
24	.222	.083	.289	.571
47	.268	.127	.356	.473

38. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 22 is not compact:

a. In the past two redistricting cycles, 95.3% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 22.

b. In the past two redistricting cycles, 95.3% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 22.

c. Only 4.12% of all legislative districts enacted around the country perform worse on all metrics than does District 22.

39. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 23 is not compact:

a. In the past two redistricting cycles, 93.3% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 23.

b. In the past two redistricting cycles, 93.3% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 23.

c. In the past two redistricting cycles, 92.8% of the legislative districts enacted around the country have higher Convex Hull scores than District 23.

d. Only 2.82% of all legislative districts enacted around the country perform worse on all metrics than does District 23.

40. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 24 is not compact:

a. In the past two redistricting cycles, 90.5% of the legislative districts enacted around the country have higher Reock scores than District 24.

b. In the past two redistricting cycles, 98% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 24.

c. In the past two redistricting cycles, 97.9% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 24.

d. In the past two redistricting cycles, 90.1% of the legislative districts enacted around the country have higher Convex Hull scores than District 24.

e. Only 1.08% of all legislative districts enacted around the country perform worse on all metrics than does District 24.

41. When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 47 is not compact:

a. In the past two redistricting cycles, 94% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 47.

b. In the past two redistricting cycles, 94% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 47.

c. In the past two redistricting cycles, 97.2% of the legislative districts enacted around the country have higher Convex Hull scores than District 47.

d. Only 1.95% of all legislative districts enacted around the country perform worse on all metrics than does District 47.³

II. GOVERNING LEGAL STANDARDS FOR PETITIONERS' CLAIMS

A. Claims Under Article III, § 4 of the Maryland Constitution

1. The Legal Standards for Petitioners' Claims Under Article III, § 4

Article III, § 4 of Maryland's 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." These requirements are mandatory. *In re Legislative Districting of the State*, 370 Md. 312, 356 (2002). They may not "be subordinated to justifications not mandated by the Federal or State Constitutions." *In re 2012 Legislative Districting of the State*, 436 Md. 121, 135 (2013).

The requirements of § 4 are mandatory because they protect important interests. "[T]he contiguity and compactness requirements, and particularly the latter, are intended to prevent political gerrymandering." *In re Legislative Districting of State*, 299 Md. 658, 675 (1982). "The contiguity requirement 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

³ Petitioners also have asserted challenges to Districts 7, 9, 25, 31. These challenges are based, at least in part, upon claims of partisan gerrymandering. While Petitioners believe substantial evidence supporting these challenges exists, Respondent has invoked legislative privilege to deny Petitioners access to that evidence. As a result, the evidence in support of these challenges is necessarily limited and may in certain cases be insufficient. *See also infra* n.4.

connected, as distinguished from territory separated by other territory.” *Id.* at 675-76. Compactness requires “a close union of territory (conducive to constituent-representative communication).” *Id.* at 688.

The “due regard” requirement is “integrally related to the compactness and contiguity requirements” and is intended “to preserve those fixed and known features which enable voters to maintain an orientation to their own territorial areas.” *Id.* at 681. The “due regard” requirement also recognizes the critical role that Maryland’s counties play in the governance of the State. *In re Legislative Districting of the State*, 370 Md. at 357-60. In sum, the “due regard provision works to preserve local political interests, insofar as it ensures geographically concurrent political representation, and acts as a deterrent to the gerrymandering of legislative districts.” *In re 2012 Legislative Districting of the State*, 436 Md. at 152.

Once a petitioner presents “compelling evidence” in support of a challenge under Article III, § 4, “the State has 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 of the State*, 436 Md. at 137-38.

Based on the above proposed findings of fact, it is clear that Districts 12, 21, 22, 23, 24, 27, 33, and 47 fail the requirements of contiguity, compactness, due regard for political subdivisions, and/or due regard for natural boundaries.

2. The Voting Rights Act

Throughout its motion to dismiss, Respondent asserts that certain districts in the Plan are “voting rights districts.” Presumably, Respondent intends to argue that certain challenged districts are drawn as they are to satisfy Section 2 of the Voting Rights Act (“VRA”), 52 U.S.C. § 10301(a), and thus need not comply with the requirements of Article III, § 4. That would require Respondent to show, as a starting point, the VRA’s basic threshold condition: the existence of a large,

geographically compact, and politically cohesive racial group. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Indeed, states that ignore traditional redistricting criteria—like those set forth in Article III, § 4—to purposefully draw majority-minority districts “must have a strong basis in evidence for finding that the threshold conditions” for VRA liability are present. *Bush v. Vera*, 517 U.S. 952, 978 (1996).

Respondent appears to apply the label “voting rights district” to any legislative district with a significant minority voting age population or a minority incumbent. As an initial matter, traditional redistricting criteria should not be subordinated to race substantially more than is reasonably necessary for Voting Rights Act compliance. *Id.* at 979. Thus, the VRA “does not require a State to create, on predominantly racial lines, a district that is not ‘reasonably compact.’” *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997).

Nor is there a VRA requirement to draw districts to preserve minority incumbents. To be sure, the election of minority public officials is a factor in determining whether minority voters, because of a governmental practice or structure, “do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.” *Gingles*, 478 U.S. at 44. But it does not follow that the VRA requires a legislative district to be drawn in a way that ensures the election of a minority incumbent.

If a district does not fulfill a VRA mandate, the district should comply with Maryland’s Constitution. A district with a majority-minority voting population or a minority incumbent is not *per se* a “voting rights district” that is excepted from requirements of Article III, § 4.

B. Additional Constitutional Violations

1. The Legal Standards Governing Petitioners' Claims Under Article 7 of the Declaration of Rights⁴

Article 7 of Maryland's 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." This provision is intended to guarantee the "fair and free exercise of the electoral franchise," *State Bd. of Elections v. Snyder*, 435 Md. 30, 61 (2013), and is "even more protective of rights of political participation than the provisions of the federal Constitution," *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 150 (2003).

In the redistricting context, the Court may find that a law offends the "fair and free exercise of the electoral franchise," if it violates the traditional redistricting criteria set forth in Article III, § 4 of the Maryland Constitution.⁵ See *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814-18 (Pa. 2018) (adopting similar factors as the proper measure of a partisan gerrymandering claim under Pennsylvania's "free and equal" elections clause). When these neutral criteria are

⁴ Petitioners' claims under Articles 7, 24, and 40 of the Declaration of Rights and Article I, § 7 of the Maryland Constitution are based on claims of the subordination of traditional redistricting criteria to partisan political considerations and/or the intentional dilution of Republican voting strength in certain of the challenged districts. Petitioners believe that substantial evidence exists that partisan political considerations played a leading role in the construction of many of the challenged districts and that Republican voting strength was intentionally diluted on a partisan basis. Due to Respondent's invocation of legislative privilege, however, Petitioners do not have access to certain necessary evidence that would establish these claims.

⁵ Adjoining territory, compactness, equal population, and due regard for political subdivisions and natural boundaries are traditional redistricting criteria. *Shaw v. Reno*, 509 U.S. 630, 647 (1993); *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964). This Court has recognized that "[e]qual apportionment, contiguity and compactness have been referred to as the trinity of equitable representation." *In re Legislative Districting of State*, 299 Md. at 676 n.9.

subordinated to partisan politics in the creation of congressional districts, Article 7 has been violated. *See id.* at 817; *see also In re Legislative Districting of the State*, 370 Md. at 370.

Second, a law offends the “fair and free exercise of the electoral franchise” whenever it infringes upon, diminishes, or dilutes citizens’ votes on a partisan basis. *See Md. Green Party*, 377 Md. at 152 (“[I]nsofar as a minor political party's only option to nominate a candidate is through the process of submitting nomination petitions, a scheme which improperly invalidates a registered voter's signature on a nominating petition unconstitutionally infringes on the right of suffrage guaranteed to all qualified voters by Article 1 of the Maryland Constitution and Article 7 of the Maryland Declaration of Rights.”); *see also Snyder*, 435 Md. at 61 (“The elective franchise is the highest right of the citizen, and the spirit of our institutions requires that every opportunity should be afforded for its fair and free exercise. However ambiguously or obscurely statutes or constitutions may be phrased, it would not be just to give them a construction in hostility to the principles on which free governments are founded.”). If a law infringes upon, diminishes, or dilutes citizens’ votes on a partisan basis, strict scrutiny should be applied and the State should be required to demonstrate that the law at issue was narrowly tailored to achieve a compelling governmental interest. *See, e.g., Harper v. Hall*, 2022 N.C. LEXIS 166, ¶ 161 (N.C. Feb. 14, 2022).

2. The Legal Standards Governing Petitioners’ Claims Under Article I, § 7 of the Maryland Constitution

Article I, § 7 of the Maryland Constitution provides: “The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.” This provision requires the General Assembly to pass laws concerning elections that are fair and evenhanded. *See Socialist Workers Party v. Sec’y of State*, 317 N.W.2d 1, 11 (Mich. 1982) (explaining that Michigan’s “purity of elections” clause “unmistakably requires . . . fairness and evenhandedness in the election

laws of this state”).⁶ It is violated whenever a law is passed that “affords an unfair advantage to one party or its candidates over a rival party or its candidates.” *See id.*

3. The Legal Standards Governing Petitioners’ Claims Under Article 24 of the Declaration of Rights

Article 24 of the Maryland Declaration of Rights guarantees “[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.” This Court has held that Article 24 includes by implication the concept of equal protection. *Md. Green Party*, 377 Md. at 157.

“Special scrutiny” should be applied to any law that “deprives, infringes upon, or interferes with personal rights or interests deemed to be fundamental.” *Id.* at 161. The right to vote is fundamental; indeed, it “is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society. *Snyder*, 435 Md. at 61 (cleaned up); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (explaining that “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms”).

Thus, laws that substantially infringe upon or interfere with the right to vote are subject to “special scrutiny.” *Md. Green Party*, 377 Md. at 161. In order to pass constitutional muster such

⁶ There is very limited case law interpreting and applying Article I, § 7; thus, Petitioners rely on another state’s interpretation of a similar constitutional provision.

laws must either be: (1) reasonably necessary to the accomplishment of legitimate government objections; or (2) necessary to promote a compelling government interest. *Id.* at 163. Partisan politics is neither a legitimate nor compelling government interest. *See, e.g., Harper v. Hall*, 2022 N.C. LEXIS 166, ¶ 161.

4. The Legal Standards Governing Petitioners' Claims Under Article 40 of the Declaration of Rights

Article 40 of the Maryland Declaration of Rights guarantees “that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects.” No form of speech is entitled to greater constitutional protection than political speech. *State v. Brookins*, 380 Md. 345, 355 (2004). When a law burdens core political speech, the Court should apply “exacting scrutiny,” and uphold the law “only if it is narrowly tailored to serve an overriding state interest.” *Id.*

The State, moreover, may not retaliate against citizens on the basis of their political views. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982) (“If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.”); *see also Newell v. Runnels*, 407 Md. 578, 608-09 (2009) (recognizing that governments generally may not fire or demote an employee based on the employee’s exercise of his or her freedom of speech). Thus, “[w]hen the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny.” *Harper*, 2022 N.C. LEXIS 166, ¶ 157.

III. OPPOSITION TO RESPONDENT’S MOTION TO DISMISS

A. Article III, § 5 Does Not Authorize the Granting of a Motion to Dismiss

As an initial matter, Respondent’s motion to dismiss is not authorized under Article III, § 5, which provides: “Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.” Nothing in Article III, § 5 authorizes the granting of a motion to dismiss prior to a review of a petition on its merits.

B. The Motion to Dismiss Standard in Civil Cases

Even if such a motion is authorized, Respondent has failed to demonstrate that such a motion should be granted under the traditional standard governing such motions in civil cases. When considering a motion to dismiss under Maryland Rule 2-322(b)(2), the Court must “assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them.” *Pittway Corp. v. Collins*, 409 Md. 218, 239 (2009). The Court, moreover, “must view all well-pleaded facts and the inferences from those facts in a light most favorable to the plaintiff.” *Id.* Dismissal “is proper only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff.” *Id.* In other words, a trial court may grant a motion to dismiss only if the complaint fails “on its face, [to] disclose[] a legally sufficient cause of action.” *Fioretti v. Md. State Bd. of Dental Exam’rs*, 351 Md. 66, 72 (1998). As explained below, Petitioners have clearly stated claims in their Petition under this standard.

C. Respondent’s Motion to Dismiss Petitioner’s Claim Under Article III, § 4

Respondent’s motion to dismiss Petitioners’ claims under Article III, § 4 is based on two faulty arguments. First, Respondent claims that Petitioners have not demonstrated that the

challenged districts fail the compactness requirement of Article III, § 4. (Mot. to Dismiss at 14-16.) This argument fails for at least three reasons:

- As an initial matter, the Petition clearly alleges that the challenged districts are not compact—both as a matter of common sense and under well-established metrics that measure the compactness of election districts. (Pet. ¶¶ 25-26, 31, 34-35, 38-40, 49-50, 55-56, 61, 65-66.)
- As set forth in the above proposed findings of fact, moreover, Petitioners have additional evidence, including comparisons with enacted state legislative districts from other states over the last two redistricting cycles, that clearly establishes the non-compactness of the challenged districts.
- Finally, Respondent claims that the lowest Reock and Polsby-Popper scores from the MCRC plan are lower than those for the districts Petitioners have challenged. Petitioners, of course, are not challenging the MCRC plan.⁷ Moreover, the district to which Respondent's point—District 1—suffers from a problem of geography. It cannot be compact as a result of the peculiar geography of Maryland's western panhandle. The districts Petitioners are challenging do not have geographical limitations that prevent them from being compact.

Respondent also seems to suggest that there is no way to objectively measure compactness. (Mot. to Dismiss at 14.) But the compactness requirement is part of the Constitution, and this Court has held that it is mandatory. *In re Legislative Districting of the State*, 370 Md. at 356.

⁷ Nor are Petitioners asking for enactment of the MCRC plan unless the General Assembly is unable or unwilling to enact a new State legislative districting plan if this Court so orders. (Pet. Request for Relief, at 19.)

Respondent’s argument, therefore, is really a dispute with the language of the Constitution. Neither Respondent nor this Court, however, can ignore a constitutional requirement.

Respondent next claims that Petitioners have failed to state a claim under the “due regard for political subdivisions” component of Article III, § 4 because towns and localities are not political subdivisions. (Mot. to Dismiss at 17.) This argument misconstrues Petitioners’ claims. Petitioners’ challenges under the “due regard for political subdivision” component of Article III, § 4 are based on the unnecessary crossing of county lines that occurs in many of the challenged districts.⁸ (See Pet. ¶¶ 28, 32, 44, 52, 58, 62.)

The remainder of Respondent’s motion to dismiss Petitioners’ Article III, § 4 claim is based on arguments and alleged facts that go far outside the Petition. Because these arguments are based on purported facts not alleged in the Petition they are not properly resolved through a motion to dismiss. See, e.g., *Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 475 (2004) (explaining that “the universe of facts pertinent to the court’s analysis of [a motion to dismiss] are limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any”).

D. Respondent’s Motion to Dismiss Petitioner’s Claims Under Articles 7, 24, and 40 of the Declaration of Rights and Article I, § 7 of the Maryland Constitution

1. Article III, § 4 Is Not the Only Applicable Constitutional Provision In this Case

Respondent argues that Article III, § 4 is the only provision of the Maryland Constitution addressing gerrymandering and therefore claims challenging Maryland’s legislative districts cannot be brought under other provisions of Maryland’s Constitution or Declaration of Rights. (Mot. to Dismiss at 29.) Respondent’s argument fails for at least two reasons.

⁸ To be sure, the Petition contains references to divided towns and localities. Those allegations, however, are not the basis for Petitioners’ claim that the challenged districts violate the “due regard for political subdivision” component of Article III, § 4.

First, drawing legislative districts in a way that favors one political party over another violates rights guaranteed by several provisions of Maryland’s Constitution and Declaration of Rights. As explained below, partisan gerrymandering violates citizens’ rights to free elections, equal protection, and free speech as guaranteed by Articles 7, 24, and 40 of the Declaration of Rights, and the requirement in Article I, § 7 of the Constitution that the General Assembly enact laws for the purity of Maryland’s elections. These constitutional provisions are different than Article III, § 4 and by their terms protect basic civil rights that Article III, § 4 does not. Thus, Article III, § 4 does not limit the protections against partisan gerrymandering afforded under Articles 7, 24, and 40 of the Declaration of Rights or Article I, § 7.

This Court has implicitly recognized as much in prior cases considering challenges to state redistricting plans. Despite the numerous constitutional challenges to claimed partisan gerrymandering raised in these prior cases, never has this Court found that such challenges could only be asserted under Article III, § 4. Instead, the Court has addressed and ultimately rejected these claims on their merits, not because Article III, § 4 was the only provision under which such a claim could be brought. *See In re 2012 Legislative Redistricting of the State*, 436 Md. at 159-88 (rejecting federal and state equal protection challenges to a “political discrimination” claim on the merits); *Legislative Redistricting Cases*, 331 Md. 574, 610-11 (1993) (rejecting on the merits an equal protection challenge to state redistricting plan based on claim of political gerrymandering); *In re Legislative Districting of State*, 299 Md. at 685 (rejecting on the merits an “invidious discrimination” claim under the federal constitution based on political gerrymandering). These cases make clear that the Court has not construed Article III, § 4 as the sole constitutional provision applicable to claims of partisan gerrymandering in redistricting.

Respondent cites only one case, *Lamone v. Capozzi*, 396 Md. 53 (2006), in support of its claim that “[a]n interpretation of the Maryland Constitution that would allow ‘partisan

gerrymandering’ challenges to proceed under *other* constitutional provisions would upset the balance embodied by Article III, § 4.” (Mot. to Dismiss at 34-35.) In *Capozzi*, however, the Court rejected an argument in support of an early voting statute based on Article 7 of the Declaration of Rights because specific provisions of the Constitution prohibited early voting. 396 Md. at 75-76. In other words, *Capozzi* rejected a statute that conflicted directly with the Maryland Constitution; it did not hold that constitutional claims could not be made because an issue was addressed elsewhere in the Maryland constitution.

2. Article 7 of the Declaration of Rights

Petitioners have alleged a claim under Article 7 of the Declaration of Rights. As courts from other states applying similar provisions in their state constitutions recently have found, partisan gerrymandering violates the rights guaranteed by “free elections” clauses like Article 7. *See Harper*, 2022 N.C. LEXIS 166, ¶¶ 133-141; *League of Women Voters*, 178 A.3d at 821. More specifically, a “free elections” clause like Article 7 bars the General Assembly from creating legislative districts that ensure the election of candidates from one political party and/or diluting the votes of citizens on the basis of political affiliation and viewpoint. *See Harper*, 2022 N.C. LEXIS 166, ¶ 141; *League of Women Voters*, 178 A.3d at 814. Simply put, Article 7 prohibits the State from creating legislative districts in a way that ensures the continued control of one political party because such elections, by definition, are not free or fair and interfere with citizens’ right of suffrage. *See League of Women Voters*, 178 A.3d at 821 (“An election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not ‘free and equal.’ In such circumstances ... the General Assembly, has in fact ‘interfere[d] to prevent the free exercise of the right of suffrage.’”).

Petitioners clearly allege that the Plan eliminates certain citizens’ effective power to select the delegates of their choice, creates Maryland legislative districts that ensure the election of

candidates from the Democratic Party, and dilutes the votes of citizens based on political affiliation and viewpoint. (*See, e.g.*, Pet. ¶¶ 16-17, 29, 33, 37, 42, 47, 53, 59, 63, 71-74.) The Petition therefore alleges a violation of Article 7.

3. Article I, § 7 of the Maryland Constitution

As explained above, Article I, § 7 requires the General Assembly to pass laws concerning elections that are fair and evenhanded. *See Socialist Workers Party*, 317 N.W.2d at 11. The provision is violated when an election law “affords an unfair advantage to one party or its candidates over a rival party or its candidates.” *See id.*

The Petition alleges that the 2021 Plan is not fair or evenhanded. Through intentional partisan manipulation, it divides Republican voters into legislative districts across Maryland in a way that unlawfully favors Democratic candidates in many of the challenged districts. (*See, e.g.*, Pet. ¶¶ 16-17, 29, 33, 37, 42, 47, 53, 59, 63, 75-78.) Thus, the Petition alleges that the Plan intentionally dilutes the voting power of many Republicans and renders their votes nearly meaningless in legislative elections in the above districts. (*Id.* ¶¶ 75-78.)

Respondent claims that Article I, § 7 does not prohibit partisan gerrymandering because it “is a mandate to the General Assembly to act to protect election administration,” and “not a limitation on the General Assembly’s authority when it engages in such activities.” (Mot. to Dismiss at 40.) This argument, however, presents a curious and potentially dangerous interpretation of Article I, § 7: according to Respondent, it requires the General Assembly to pass laws to prevent election corruption, but does not prevent the General Assembly from enacting laws that corrupt Maryland’s elections.

Respondent’s argument overlooks a simple truth: a constitutional mandate to perform a certain duty carries with it a corresponding prohibition on acting inconsistent with that duty. *See Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 696-97 (2007) (citing

authority explaining that “[t]he constitutional authority to implement a constitutional provision . . . does not authorize the General Assembly by statute . . . to contradict or amend the Constitution” and “the constitutional authority to implement a constitutional provision, by rules, does not authorize a rule which is inconsistent with that provision”). Thus, a constitutional obligation to enact laws that prevent election corruption, like Article I, § 7, also prohibits the enactment of laws that corrupt elections. *See, e.g., Wells v. Kent County Bd. of Election Comm’rs*, 168 N.W.2d 222, 227 (Mich. 1969) (“[T]he constitutional mandate to the legislature to enact laws to preserve the purity of elections has been interpreted by this Court to carry with it the corollary that any law enacted by the legislature which adversely affects the purity of elections is constitutionally infirm.”).

The legislative history upon which Respondent relies also supports an interpretation of Article I, § 7 that makes it broadly applicable to laws that corrupt elections, like the 2021 Plan. As Respondent notes, the original version of this constitutional provision, found in the 1851 Constitution, did not reference the “purity of elections”—it specifically authorized the General Assembly to disenfranchise individuals convicted of certain crimes. (*See* Mot. to Dismiss at 41-42.) The 1864 Constitution added the phrase “purity of elections,” but it linked the phrase to voter registration and to disenfranchising certain categories of people. (*See id.*) The 1867 Constitution adopted the “purity of elections” language we have today by removing all references to voter registration and disenfranchisement. (*See id.* at 42-43.) And as Respondent recognizes, the provision now operates to ensure “that those who are entitled to vote are able to do so, free of corruption and fraud.” (*Id.* at 43.) Respondent claims this legislative history means that Article I, § 7 has always been linked to the mechanics of voting. (*See id.* at 44-45.) But the distinct changes over time of the “purity of elections” provision mean something. And the changes it underwent repeatedly expanded its meaning from a provision disenfranchising certain voters to

one that now requires the General Assembly to ensure that elections are free from corruption. The history of Article I, § 7 thus counsels against Respondent’s claim that it applies only to the “mechanics” of elections and supports Petitioners’ broader reading of the provision.

4. Articles 24 and 40 of the Declaration of Rights

Finally, Respondent argues that Petitioners have failed to state claims for violations of Articles 24 and 40 of the Declaration of Rights, which protect Marylanders’ rights to equal protection and freedom of speech. Respondent’s argument rests on the United States Supreme Court’s decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that equal protection and freedom of speech challenges to partisan gerrymandering were not justiciable in the federal courts. *Id.* at 2506-07. For several reasons, *Rucho* should not guide the Court’s application of Articles 24 and 40 of Maryland’s Declaration of Rights.

First, Maryland courts, not the Supreme Court, determine the meaning and scope of Article 24 and Article 40. It is true that this Court has stated Article 24 and Article 40 are coextensive with or *in pari materia* with the Fourteenth and First Amendments. (Mot. to Dismiss at 46.) This Court, however, also has stated:

Many provisions of the Maryland Constitution, such as Article 24 of the Declaration of Rights and Article III, § 40, 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. Furthermore, cases interpreting and applying a federal constitutional provision are only persuasive authority with respect to the similar Maryland provision.

Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621 (2002). In fact, the Court has “consistently recognized that the federal Equal Protection Clause and Article 24 guarantee of equal protection of the laws are complementary but independent, and ‘a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.’” *Md. Green Party*, 377 Md. at 158. Thus, when necessary, the Court has “ensured that the rights provided by Maryland law are fully protected by departing from the United States Supreme Court’s analysis of the parallel federal right.” *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013) (collecting cases).

This Court, therefore, is not bound to follow the Supreme Court’s conclusion regarding the justiciability of equal protection and free speech challenges to partisan gerrymandering in federal courts. It can—and should—find that Maryland’s guarantees of equal protection and freedom of speech prohibit the practice. This is particularly so in light of the important issues at stake in this case—including the equal power to elect the candidate of one’s choice—and the broad protections afforded by Articles 24 and 40. Indeed, just last month, the Supreme Court of North Carolina found—despite the holding of *Rucho*—that extreme partisan gerrymandering in that state’s legislative districts violated the equal protection and free speech clauses of North Carolina’s constitution (among other constitutional provisions). *Harper*, 2022 N.C. LEXIS 166, ¶¶ 142-157.⁹

Second, the Supreme Court in *Rucho* made clear that its decision did “not condone excessive partisan gerrymandering” or “condemn complaints about districting to echo into a void.”

⁹ Respondent cites *Legislative Redistricting Cases*, 331 Md. at 610-11, and *In re 2012 Legislative Districting of the State*, 436 Md. at 182, for the general proposition that this Court has followed Supreme Court guidance regarding the justiciability of political gerrymandering claims. (Mot. to Dismiss at 46.) Both those cases, however, either explicitly or implicitly recognized that political gerrymandering claims are justiciable. *Legislative Redistricting Cases*, 331 Md. at 610-11; *In re 2012 Legislative Districting of the State*, 436 Md. at 182.

139 S. Ct. at 2507. Rather, the Court highlighted the important role that state courts have in protecting against extreme partisan gerrymandering. *Id.* As the Court stated, “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” *Id.*¹⁰ Thus, the Supreme Court both recognized the independent duty state courts have to interpret their own constitutions and invited state courts to apply state constitutional provisions to prevent extreme partisan gerrymandering. *See id.* The Court should accept that invitation and find that the guarantees of equal protection and freedom of speech in Maryland’s Declaration of Rights extend beyond those the Supreme Court in *Rucho* assigned to the Fourteenth and First Amendment.

Third, the primary concern of the Court in *Rucho*, upon which Respondent heavily relies here, was that workable tests could not be created to govern equal protection and freedom of speech claims in cases involving extreme partisan gerrymanders. *See* 139 S. Ct. at 2502. But ten federal judges in the *Rucho* litigation (including two judges of the United States District Court for the District of Maryland, two judges from the United States District Court for the Middle District of North Carolina, two judges from the United States Court of Appeals for the Fourth Circuit, and four justices of the United States Supreme Court) were satisfied that workable tests do exist. *See Rucho*, 139 S. Ct. at 2516-19 (Kagan, J., dissenting); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 515, 517-20, 523-24 (D. Md. 2018), *vacated by Rucho*, 139 S. Ct. 2484 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861-68 (M.D.N.C. 2018), *vacated by Rucho*. 139 S. Ct. 2484 (2019). The wisdom and reasoning of these judges and justices should not be lost on this Court simply because a bare majority of the Supreme Court felt otherwise, especially because this Court is not

¹⁰ Although the Court was referencing specific provisions in state constitutions concerning political gerrymandering, 139 S. Ct. at 2507, the principle expressed applies more broadly.

bound by *Rucho*. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).¹¹

The tests used by the lower courts in *Rucho* and endorsed by the four dissenting justices, as well as those standards set forth above are “utterly ordinary” and are “the sort of thing courts work with every day.” See *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting). They are certainly tests that this Court can discern, manage, and apply consistently to the facts of individual cases. Indeed, this Court has, on at least one occasion, applied a test to an equal protection partisan gerrymandering claim in a challenge to state legislative districting. *Legislative Redistricting Cases*, 331 Md. at 610-11. Contrary to Respondent’s claims, therefore, tests exist that courts can apply to political gerrymandering claims in connection with Maryland’s legislative districts.

Respectfully submitted,

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¹¹ It also seems likely that *Rucho*’s “decision of whether unmanageability warrants judicial abdication involved practical considerations that lie beyond the constitutional meaning of Article III.” *The Supreme Court 2018 Term: Leading Case: Rucho v. Common Cause*, 133 Harv. L. Rev. 252, 259 (Nov. 2019). In other words, the Supreme Court likely based its decision on concerns about whether federal courts should hear gerrymandering cases, not whether they can. See *id.* at 261.

CERTIFICATE OF SERVICE

I certify that on March 22, 2022, the foregoing Petitioners' Proposed Findings of Fact, Proposed Governing Legal Standards, and Opposition to Respondent's Motion to Dismiss was filed and served via the Court's MDEC system. A copy of the foregoing also was sent to the parties in Misc. Nos. 24, 26, and 27 by electronic mail.

/s/ Strider L. Dickson

Strider L. Dickson