E-FILED
Court of Appeals
Suzanne C. Johnson,
Clerk of Court
4/11/2022 4:23 PM

	*	IN THE
	*	COURT OF APPEALS
IN THE MATTER OF 2022 LEGISLATIVE DISTRICTING OF THE STATE OF MARYLAND	*	OF MARYLAND
	*	September Term, 2021
	*	Misc. No. 25, 26, & 27

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

STATE OF MARYLAND'S RESPONSE TO EXCEPTIONS TO THE REPORT OF THE SPECIAL MAGISTRATE

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
Attorney No. 9706260005
Solicitor General

ANN M. SHERIDAN
Attorney No. 9112190160
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
ssullivan@oag.state.md.us
(410) 576-6325
(410) 576-6955 (facsimile)

Attorneys for Respondent

April 11, 2022

TABLE OF CONTENTS

Page

STATE OF MARYLAND'S RESPONSE TO EXCEPTIONS TO THE REPORT OF THE SPECIAL MAGISTRATE

The Court should deny in their entirety petitioners' challenges to the 2022 legislative districting plan (the "Enacted Plan"), 2022 Md. Laws, J. Res. 1, codified as Md. Code Ann., State Gov't §§ 2-201, 2-202. In their exceptions, petitioners have failed to establish that the Special Magistrate committed any error. The Special Magistrate correctly determined that certain discovery sought by the petitioners was protected from disclosure by legislative privilege and that petitioners had failed to submit compelling evidence that the Enacted Plan is unconstitutional.

STATEMENT OF THE CASE

Redistricting Procedure

The Maryland Constitution prescribes a process for the creation of state legislative districts. Article III, § 3 establishes that the State shall be divided into legislative districts for the election of one senator and three delegates from each district, and that districts may be subdivided into single-member or mixed single- and double-member districts for delegates. Md. Const. art. III, § 3. Article III, § 4 requires that state legislative districts "consist of adjoining territory, be compact in form, and of substantially equal population," and that "due regard . . . be given to natural boundaries and the boundaries of political subdivisions" in their creation. *Id*. art. III, § 4. The "compactness" requirement, in particular, was "intended to prevent political gerrymandering," *Matter of Legis. Districting of State* ("*1984 Legis. Districting*"), 299 Md. 658, 687 (1984), although the framers of that

provision understood that it did not completely foreclose consideration of political objectives in the districting process.

Article III, § 5, establishes the process for adopting a new legislative districting plan "following each decennial census of the United States." Md. Const. art. III, § 5. 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.* 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.* Under Article III, § 5 of the Maryland Constitution, any registered voter may petition this Court to review the legislative districting of the State for violations of the Maryland Constitution or the United States Constitution. Md. Const., art. III, § 5.

2020 Census

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%. Report of Special Magistrate Appendix I (Stipulations of Fact) (hereinafter "Joint Ex. 1") at I. 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. Joint Ex. 1, J.

Maryland's population growth shown by the 2020 Census was uneven across the State. 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. Joint Ex. 1, I. By contrast, Washington County gained 7,275 residents, an increase of approximately 4.9%. Joint Ex. 1, I.

The suburban Washington D.C. area increased in population significantly. Frederick county gained 38,332 residents, an increase of approximately 16.4%. Joint Ex. 1, I. Montgomery County gained 90,284 residents, an increase of approximately 9.3%. Joint Ex. 1, I. Prince George's County gained 103,781 residents, an increase of approximately 12.0%. Joint Ex. 1, I.

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. Joint Ex. 1, I. 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). Joint Ex. 1, I. Carroll and Harford Counties also grew by 3.4% (5,757 residents) and 6.6% (16,098 residents), respectively. Joint Ex. 1, I.

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). Joint Ex. 1, I.

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). Joint Ex. 1, I. 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. Joint Ex. 1, I.

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

On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (the "Governor's Commission") for the purpose of redrawing the state's congressional and legislative districting maps based on newly released census data. Joint Ex. 1, ¶ 2.

Under the executive order, Governor Hogan had ultimate authority over the appointment of the nine members of the Governor's Commission. Joint Ex. 1, ¶ 2. All nine were Maryland registered voters. Joint Ex. 1, ¶ 2. 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. Joint Ex. 1, ¶ 2. Three were Republicans, three were Democrats, and three were registered with neither party. Joint Ex. 1, ¶ 2.

The Governor's Commission held 30 public hearings across several months. Joint Ex. 1, ¶ 3. After receiving public input and deliberating, on November 5, 2021, the Governor's Commission recommended a state legislative districting map to Governor Hogan. Joint Ex. 1, ¶ 4. 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"). Joint Ex. 1, ¶ 5.

Development of the General Assembly's Legislative Redistricting Plan

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 (the "Leadership"), formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). Joint Ex. 1, ¶ 6. The LRAC was charged with redrawing Maryland's congressional and state legislative maps. Joint Ex. 1, ¶ 6. 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. Joint Ex. 1, ¶ 7. The Leadership appointed two Republicans to the LRAC: Senator Bryan W. Simonaire and Delegate Jason C. Buckel, and named Karl S. Aro, who is not a member of Maryland's General Assembly, as Chair. Joint Ex. 1, ¶ 7. 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 this Court to assist in preparing a remedial redistricting plan that complied with state and federal law in 2002. Joint Ex. 1, ¶ 7.

The LRAC held 16 public hearings across Maryland. Joint Ex. 1, ¶ 8. At the hearings, the LRAC received testimony and comments from numerous citizens. Joint Ex. 1, ¶ 8. Near the conclusion of the public hearings, the Department of Legislative Services was directed to produce maps for the LRAC's consideration. On December 20, 2021, the LRAC released a draft concept legislative districting map for public comment. Joint Ex. 1, ¶ 9. On January 7, 2021, the LRAC adopted a final legislative districting map (the "2021 Plan"). Joint Ex. 1, ¶ 10. On January 12, 2022, the 2021 Plan was submitted to the General Assembly. Joint Ex. 1, ¶ 11. On January 27, 2022, the General Assembly passed the 2021 Plan (the "Enacted Plan"). Joint Ex. 1, ¶ 12; Md. Code Ann., State Gov't §§ 2-201 and 2-202.

Legal Challenges to the Enacted Plan

On January 28, 2022, this Court set forth procedures to govern all actions brought under Article III, § 5 of the Maryland Constitution to challenge the Enacted Plan. The Court set deadlines for filing petitions setting forth "the particular part or parts of the plan claimed to be unconstitutional under the Constitution of the United States of America, Constitution of Maryland, or federal law; the factual and legal basis for such claims; and the particular relief requested, including any alternative district configuration suggested or requested by the petitioner(s)." The Court appointed Judge Alan M. Wilner (retired) as a special magistrate to hold hearings on petitions and responses and prepare and file a report of findings and recommendations regarding them.

Within the time allowed by the Court's Order, four petitions were filed: No. 24 by David Whitney on February 9, 2022; No. 25 by Mark N. Fisher, Nicholaus R. Kipke, and

Kathryn Szeliga on February 10, 2022; No. 26 by Brenda Thiam, Wayne Hartman, and Patricia Shoemaker on February 10, 2022; and No. 27 by Seth E. Wilson on February 10, 2022.

Judge Wilner held a scheduling conference on February 17, 2022 and set a schedule for the good faith exchange of discovery or notice of a dispute that may require a ruling. Judge Wilner scheduled a merits hearing on March 23, 2022. A discovery dispute arose between petitioners in No. 25 and the respondents. Following a hearing on petitioners' motion for discovery, on March 10, 2022, Judge Wilner determined that the requested discovery was barred by legislative privilege.

Judge Wilner held a merits hearing on the petitions on March 23 and 24, 2022, and issued a report and recommendations, on April 4, 2022, recommending that all petitions be denied. Petitioners in Nos. 25, 26, and 27 filed exceptions on April 8, 2022.

ARGUMENT

I. STANDARD OF REVIEW

This Court has original jurisdiction to consider challenges to the legal validity of the legislative apportionment plan. *In re 2012 Legis. Districting* ("*2012 Legis. Districting*"), 436 Md. 121, 128 (2013). The Court may, as it did in this case, designate a special magistrate to hold a hearing, receive evidence, hear argument, make findings of fact and conclusions of law, and recommendations. *Grant v. County Council of Prince George's County*, 465 Md. 496, 543-44 (2019) (describing process in legislative districting cases). Although the report of the special magistrate "is only advisory, the court should give full consideration to it, particularly with respect to the credibility of witnesses. . . .

[T]he [magistrate's] findings of fact from the evidence are prima facie correct and they will not be disturbed unless determined to be clearly erroneous." *In re Bennett*, 301 Md. 517, 530 (1984) (internal citation and quotation marks omitted).

In reviewing challenges to the Enacted Plan, the Court's role is limited to determining whether it complies with constitutional principles. *2012 Legis. Districting*, 436 Md. at 159. "It is not the Court's role to determine how a legislative apportionment plan best may embody the ideals supporting those principles." *Id.*

II. APPLICABLE LEGAL STANDARDS

A. Presumption of Validity and Burden of Proof

Petitioners challenge a statute enacted by the General Assembly. 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." *2012 Legis. 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." *2012 Legis. Districting*, 436 Md. at 137-38.

B. Districting Criteria Under Article III, § 4

Under Article III, § 4, "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 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." *1984 Legis. Districting*, 299 Md. at 681.

C. 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 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* ("*1993 Legis. Districting*"), 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).

D. Adjoining Territory

The Court has interpreted Article III, § 4's "adjoining territory" provision 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 Legis. Districting of the State* ("*2002 Legis. Districting*"), 370 Md. 312, 360 (2002) (quoting *1984 Legis. Districting*, 299 Md. at 675-76 (other citations omitted)). The Court has never found a violation of the adjoining territory requirement in a state districting plan and did not reach the issue in 2002 or 2013. As noted by the dissenting opinion in the 2002 legislative districting 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).

2002 Legis. Districting, 370 Md. at 414-15.

E. 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." *1984 Legis. Districting*, 299 Md. at 687. 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.*

F. 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." *2012 Legis. 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." *2012 Legis. Districting*, 436 Md. at 156. To conduct this analysis, the Court must consider 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." *2002 Legis. Districting of State*, 370 Md. at 358-59, 362 (citing *In re Legis. 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," *id.* 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.

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

Under Article III, § 3 of the Constitution,

> 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.

III. MISCELLANEOUS NO. 25 EXCEPTION 3 SHOULD BE DENIED BECAUSE THE SPECIAL MAGISTRATE PROPERLY DENIED DISCOVERY OF MATERIAL COVERED BY LEGISLATIVE PRIVILEGE.

The Court should reject the Fisher petitioners' third exception challenging Judge Wilner's ruling on their request for discovery into the legislative process, for at least four reasons:

First, in light of Article 10 of the Maryland Declaration of Rights, Article II, § 18 of the Maryland Constitution, and the precedent construing and applying the legislative privilege and immunity established by these provisions, Judge Wilner correctly concluded that "legislators and their staff and consultants cannot be compelled to explain their legislative conduct or events that occurred in a legislative session, other than before the legislative body." Amend. Order of the Special Magistrate Regarding Discovery 9 (Mar. 11, 2022).

Second, the petitioners' challenge to this discovery ruling relies primarily on federal district court decisions that do not constitute valid authority, even within the courts that issued them, and, therefore, they cannot provide useful guidance to this Court.

Third, even if those federal court decisions could be considered, they do not purport to analyze or apply the legislative privilege afforded to legislators and their staff under the Declaration of Rights and the Maryland Constitution; that is, the courts in the cases petitioners cite were considering a separate and distinct federal common law legislative

privilege, which does not derive from, and pays no heed to, the Maryland Constitution. Unlike federal courts, this Court has no ability to disregard the requirements of Maryland's Constitution.

Finally, the Court should decline to consider the petitioners' challenge to Judge Wilner's discovery ruling because of their delay in seeking this Court's review of the ruling until after the evidentiary hearing's completion. The relief sought by petitioners' third exception, if granted, would amount to discovery of information that would be of little practical benefit to them unless Judge Wilner were to conduct further evidentiary hearings, for which there is no time available, given the exigencies of the election schedule.

A. The Legislative Privilege Established by the Maryland Constitution and Declaration of Rights Prevents Discovery into the Legislative Activities of Legislators and Their Staff.

Petitioners' discovery requests sought information regarding details of the legislative process that led to the enactment of the statute establishing the 2022 State legislative districting plan. Specifically, petitioners sought disclosure of the following: who specifically drafted the legislation; what specific criteria, if any, were used to draft the legislation; who, if anyone, provided instructions to the drafters regarding what criteria should be used in drafting the challenged portions of the legislation; and what specific instructions, if any, were given to the drafters regarding those portions of the legislation.[1] This requested information falls squarely within the scope of Maryland's constitutional legislative privilege.

[1] Amend. Order of the Special Magistrate Regarding Discovery 4-5.

Article 10 of the Maryland Declaration of Rights[2] and Article III § 18 of the Maryland Constitution[3] afford Maryland legislators and their staff absolute immunity, and a corresponding privilege, with respect to legislative activities and related communications. *Mandel v. O'Hara*, 320 Md. 103, 113 (1990); *Blondes v. State*, 16 Md. App. 165, 175 (1972). This privilege "has served both to protect the integrity of the legislative process by insuring the independence of individual legislators and to reinforce the separation of powers embodied in our tripartite form of government." *Blondes*, 16 Md. App. at 175. As explained in *Montgomery County v. Schooley*, 97 Md. App. 107, 113-14 (1993) (Wilner, C.J.), the privilege afforded under the Maryland Constitution is read *in pari materia* with similar protections afforded members of Congress and their staff under the federal Constitution's Speech or Debate Clause, *see* U.S. Const. art. I, § 6, cl. 1,[4] and both provisions "are to be read broadly to effectuate their purposes and to protect not only words spoken in debate but anything generally done in a session of the House by one of its members in relation to the business before it." *Schooley*, 97 Md. App. at 114 (internal quotation marks and alterations omitted).

[2] "The freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature." Md. Decl. of Rights. art. 10.

[3] "No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate." Md. Const. art. III, § 18.

[4] "[The Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. 1, §6, cl. 1.

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity'" and bars any suit based on legislative conduct. *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)); *Mandel*, 320 Md. at 106.[5] "'[L]egislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege. . . .'" *Schooley*, 97 Md. App. at 118 (citation omitted). This privilege covers not only legislators, but also legislative aides performing legislative acts. *Gravel v. United States*, 408 U.S. 606, 618 (1972). That is, "for the purpose of construing the privilege a Member [of the legislature] and his aide are to be 'treated as one,'" meaning "the 'Speech or Debate Clause prohibits inquiry into things done by . . . the [legislator's] agent or assistant which would have been legislative acts, and therefore privileged, if performed by the [legislator] personally.'" *Id.* at 616. "[T]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and . . . if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated." *Id.* at 616-17.

The protection of legislative privilege does not depend upon whether a legislator has been sued. Under Maryland's counterpart to the federal Speech or Debate Clause, a

[5] Courts distinguish between two categories of immunity: absolute and qualified. "An absolute immunity from tort liability stands even if the official acts in bad faith, or with malice or corrupt motives. . . . Qualified immunity is destroyed by bad faith, malice, or improper intent." *Mandel*, 320 Md. at 107 (quoting *Prosser & Keeton on Torts* § 132, at 1057, 1059-60 (5th ed. 1984)) (citations omitted).

legislator and any legislative aide, "even if not a party to the action and thus not subject to any direct consequence of it, cannot be compelled to explain, other than before the legislative body of which he is a member, either his legislative conduct or 'the events that occurred' in a legislative session." *Schooley*, 97 Md. App. at 117. This "testimonial immunity" afforded by constitutional legislative privilege has been held to protect legislators from both compelled oral testimony and compelled production of documents. *Brown & Williamson Tobacco Co. v. Williams*, 62 F.3d 408, 420-21 (D.C. Cir. 1995); *id.* at 421 ("A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen."); *see MINPECO, S.A. v. Conticommodity Servs., Inc*., 844 F.2d 856, 859 (D.C. Cir. 1988) ("A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive."). When, as in this case, litigation or attempted discovery focuses "on the legislative process itself or on the end product of that process," the legislative privilege cannot be waived for the body or an individual member by another member. *Schooley*, 97 Md. App. at 121.

Under these principles, Judge Wilner correctly concluded that Maryland's constitutional legislative privilege required denial of petitioners' requests for discovery into the legislative process. Unquestionably, the legislative process that generated the 2022 Plan is protected by legislative privilege. The privilege protects legislators "acting in the sphere of legitimate legislative activity." *State v. Holton*, 193 Md. App. 322, 339 (2010), *aff'd*, 420 Md. 530 (2011) (internal quotation marks and citation omitted). The creation of the legislative districting plan is committed to the General Assembly by the Constitution

itself. *See* Md. Const. art. III, § 5. And the LRAC was formed by the General Assembly to assist it in discharging these constitutional duties. *See*, *e.g.*, *Schooley*, 97 Md. App. at 118-19 ("It is evident, and appellees do not contend otherwise, that, in considering the councilmanic redistricting plan in general and Bill No. 56–91 in particular, the County Council was acting in a legislative capacity.").

It is equally apparent that the information sought by petitioners—the details of who did what and told what to whom during the legislative process—epitomizes the type of information that is protected by legislative privilege. In *Floyd v. Baltimore City Council*, 241 Md. App. 199 (2019), for example, the plaintiff sued to remedy alleged violations of the Open Meetings Act with respect to committee meetings held in the city council's process of enacting legislation, and she subpoenaed the testimony of two council members. The circuit court granted a motion to quash the subpoenas on grounds of legislative privilege. On appeal, the intermediate appellate court looked to *Schooley*, as well as other authority, from which it gleaned that "[l]egislative privilege may be invoked to protect a legislator from being 'required to testify regarding . . . actions' taken within the sphere of legitimate legislative activity." *Id.* at 213. In affirming the circuit court's order quashing the subpoenas, the court noted that the questions Ms. Floyd wished to ask the council members "were directed to certain amendments to the legislation, and why certain actions were taken in regard to its passage." *Id.* These kinds of questions, the court concluded, "involve 'the deliberative and communicative processes . . . with respect to the consideration and passage or rejection' of the legislation at issue." *Id.* Similarly, here petitioners sought discovery into "why certain actions were taken," *id.*, in the drafting of

the 2022 Plan, and, consistent with the holding in *Floyd*, Judge Wilner concluded that the legislative privilege precluded that discovery.

Finally, there is no question that the legislative privilege extends to legislative staff, as well as to advisory bodies such as the LRAC convened by the legislature to assist it in its legislative functions. The analogous federal "Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618. Legislative privilege extends beyond proceedings and meetings for a legislative body and includes "a meeting with citizens or private interest groups" as well as "caucuses and meetings with political officials called to discuss pending or proposed legislation." *Schooley*, 97 Md. App. at 123. Moreover, this Court, like the Supreme Court, has taken a "functional" approach, according to which the "scope of immunity," and therefore the scope of legislative privilege, "is determined by function, not office.'" *Mandel*, 320 Md. at 120 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731, 785 (1982) (White, J., dissenting)). Consequently, even "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan*, 523 U.S. at 55; *Kensington Volunteer Fire Dep't. Inc. v. Montgomery County*, 684 F.3d 462, 471 (4th Cir. 2012) (same).

These principles make clear that petitioners cannot evade the protection of legislative privilege by insisting that they are pursuing information available to legislative staff and "that their discovery requests could be satisfied without testimony from any member of the General Assembly." Misc. No. 25 Exceptions at 35 n.5. Petitioners

themselves have acknowledged that the ultimate aim of their discovery requests was to impute the requested information to legislators, since their professed objective was to obtain evidence of legislators' intent. *See* Report of Special Magistrate Appendix III, Misc. No. 25 Petitioners' Proposed Findings at 14 n.4.

To justify their demand for information from legislative staff, petitioners cite *Floyd* for the proposition that the legislative privilege "is not absolute—particularly when applied to legislative staff members, officers, or other employees of the legislative body." Misc. No. 25 Exceptions at 35. But petitioners misunderstand *Floyd*, which does not stand for the notion that legislative staff lack the full protection of legislative privilege. True, the opinion in *Floyd* does state in passing that legislative privilege "extends as well to legislative staff members, officers, or other employees of the legislative body, but, as to them, it is 'less absolute' than to the 'legislators themselves.'" 241 Md. App. at 213 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). But the significance that may be attributed to the quoted statement is, at most, very limited, for at least three reasons.

First, it cannot be deemed part of *Floyd*'s holding, because the questions presented there, as summarized by the opinion, did not include any question pertaining to the applicability of legislative privilege to legislative staff. *See Floyd*, 241 Md. App. at 204 and n.2 (stating questions presented). Second, the Supreme Court decision quoted in *Floyd*'s statement, *Dombrowski*, has been superseded and limited by subsequent Supreme Court decisions holding that legislative privilege and legislative immunity apply equally to legislators and their staff when they engage in the legislative process and, thus, the Supreme Court will "draw no distinction" between the two. *Eastland v. U. S. Servicemen's*

Fund, 421 U.S. 491, 507 (1975); *see Gravel*, 408 U.S. at 616 ("for the purpose of construing the privilege a Member and his aide are to be 'treated as one'"); *Doe v. McMillan*, 412 U.S. 306, 312 (1973) ("[I]t is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report."); *Eastland*, 421 U.S. at 506, 507 (1975) ("[T]he actions of the Members [of Congress] and the Chief Counsel [to a congressional subcommittee] fall within the 'sphere of legitimate legislative activity'"; "We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena. We draw no distinction between the Members and the Chief Counsel").

The Supreme Court in *Gravel* expressly distinguished *Dombroski* on the ground that there the record contained nothing to suggest involvement of a member of Congress in the wrongdoing alleged, whereas the legislative aide, who was counsel to a Senate committee, "was charged with conspiring with state officials to carry out an illegal seizure of records[.]" *Gravel*, 408 U.S. at 619. As limited by *Gravel*, *Dombroski* at most stands for the principle that legislative immunity does not completely prevent an action against a legislative aide for engaging in unlawful acts, where legislators themselves are not implicated in the wrongdoing. That limited exception would have no pertinence in this case, where there is no allegation of wrongdoing by legislative aides, and the purpose

of the petitioners' discovery requests is to pursue evidence that the legislature itself violated the Constitution.

Finally, the circumstances in *Floyd* offer little support for the petitioners' effort to obtain discovery from legislative staff about the legislative process. In a pretrial ruling in *Floyd* that was not challenged on appeal, the circuit court cited legislative privilege as the ground for granting a motion in limine to limit the testimony of a legislative aide to "administrative details" concerning "only those matters related to the Council's compliance with the requirements of the [Open Meetings] Act." 241 Md. App. at 208, 206. As circumscribed by the order in limine, the scope of permissible testimony did not include questions "directed to certain amendments to the legislation, and why certain actions were taken in regard to its passage." *Id.* at 213. Unlike the testimony allowed in *Floyd*, the information sought by the petitioners here goes directly to "why certain actions were taken in regard to [the] passage" of the 2022 Plan. *Id.* Under *Floyd*, legislative privilege bars access to that information, whether it is sought from legislators directly or from legislative staff.

Therefore, the Constitution and applicable precedent fully support Judge Wilner's decision to deny petitioners' request for discovery into the legislative process.

B. The Federal District Court Cases on Which Petitioners Rely Do Not Constitute Valid Authority.

In arguing to Judge Wilner, the Fisher petitioners "rel[ied] principally on *Benisek v. Lamone*, 241 F. Supp.3d 566, 575 (D. Md. 2017)," Amended Order of Special Magistrate Regarding Discovery at 6. In their third exception, the petitioners continue to rely

primarily on *Benisek*, but also attempt to enlist support from an opinion in another federal district court decision, *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (Murnaghan, J., and Motz, J.). Neither decision can serve as valid authority for the petitioners' contentions.

First, the two decisions were issued by federal district courts, and, even under the best of circumstances, "district court opinions do not have precedential authority." *Matheny v. United States*, 469 F.3d 1093, 1097 (7th Cir. 2006) (citations omitted). As the Supreme Court has explained, '"A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'" *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). For this reason, "[m]any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity." *Id.* (citation omitted). "Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." *Id.* If, according to the Supreme Court, a federal district court decision lacks the ability to "settle constitutional standards" under the federal Constitution regarding qualified immunity, it certainly cannot serve as reliable authority to determine the applicability of absolute legislative immunity and legislative privilege under the Maryland Constitution.

Yet, the two decisions the petitioners emphasize lack even the limited value of a typical district court decision. As for *Benisek*, "the judgment in that case was vacated by the United States Supreme Court, which remanded to the U.S. District with instructions to

'dismiss for lack of jurisdiction.'" Amend. Order of the Special Magistrate Regarding Discovery 8 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)). Specifically, the Supreme Court answered in the negative the question "whether the courts below [in *Benisek* and *Rucho*] appropriately exercised judicial power . . .," and determined the claims asserted "to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho*, 139 S. Ct. at 2491, 2494. "Given that the district court [in *Benisek*] did not have subject matter jurisdiction . . ., the activities in the district court"—including the discovery dispute ruling on which petitioners rely—"are a nullity when the district court lacks subject matter jurisdiction to consider a matter." *Board of Trs. of Leland Stanford Junior Univ. v. Chinese Univ. of Hong Kong*, 860 F.3d 1367, 1374 (Fed. Cir. 2017) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)). A federal district court's discovery ruling in a case declared by the Supreme Court to be "outside the courts' competence," *Rucho*, 139 S. Ct. at 2494, and therefore a "nullity," does not constitute authority at all, and cannot supply a basis for granting petitioners' exception.

Similarly unhelpful are the statements from *Marylanders for Fair Representation* that petitioners quote, which were subsequently abrogated by the Supreme Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Petitioners quote *Marylanders for Fair Representation* for the idea that "legislative privilege 'does not . . . necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy,'" 144 F.R.D. at 304 (Murnaghan, J., and Motz, J.), and they further assert that "[t]his is particularly true in the unique context

of legislative redistricting[.]" Misc. No. 25 Exceptions at 35-36. But the Supreme Court in *Bogan* rejected that line of thinking entirely. Instead, *Bogan* made clear that "officials"—whether inside or "outside the legislative branch"— "are entitled to legislative immunity when they perform legislative functions," and "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 55, 54. The Supreme Court based this conclusion on its longstanding recognition that "it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 55 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). Thus, a court's determination of whether legislative privilege applies must be "stripped of all considerations of intent and motive." *Bogan*, 523 U.S. at 55.

C. Even If Considered, *Benisek*'s Analysis Is Inapplicable and Unhelpful Because It Applied the Federal Common Law Privilege, Which Differs Materially from Maryland's Constitution-Based Legislative Privilege.

If the Court were to consider the *Benisek* analysis urged by petitioners, the *Benisek* decision itself clearly shows that it does not even purport to provide guidance on how to apply the legislative privilege when it is based on a constitutional guarantee like the one found in Maryland's Constitution. Instead, the district court applied the legislative privilege recognized under the federal common law for state officials and did not apply the federal Constitution's Speech or Debate Clause or the Maryland Constitution's counterpart to that Clause. *See id.* at 573. That is, *Benisek*, like the federal court case law on which it exclusively relied, analyzed and applied only the federal "common law doctrine" of

legislative immunity and legislative privilege that "is rooted in principles of comity[.]" *Id.* While the common law privilege has similarities to the constitutional privilege, "the Supreme Court's decisions make clear that the [common law] privilege does not *absolutely* protect state legislative officials from discovery into communications made in their legislative capacity." *Id.* at 574 (emphasis in original). The district court in *Benisek* relied on *United States v. Gillock*, 445 U.S. 360 (1980), to explain that "where important federal interests are at stake," the interests in comity that might otherwise counsel extension of the privilege to State officers must "yield." *Benisek*, 241 F. Supp. 3d at 574 (D. Md. 2017) (quoting *Gillock*, 445 U.S. at 372). In *Gillock*, the Supreme Court reasoned that the separation of powers interests that undergirded the federal Speech and Debates Clause were simply not present when State officers were involved in federal proceedings. *Gillock* considered separation of powers irrelevant to the relationship of the federal government to the states, because "where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," thus eliminating "the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators." 445 U.S. at 370. The Court further declined to apply the Tennessee Constitution's Speech or Debate Clause, or to grant a privilege equivalent to the one afforded by federal Speech or Debate Clause, in part because Congress might have, but had chosen not to, provide by statute "that a state legislator . . . should be accorded the same evidentiary privileges as a Member of Congress." *Id.* at 374.

Here, where the Maryland Constitution supplies both the authorization for this Court's original jurisdiction and the basis of petitioners' claims, the Maryland Speech or Debate Clause unavoidably pertains to the petitioners' requests for discovery into the legislative process. Moreover, unlike the analysis that applies in federal court, the privilege conferred by Maryland's Clause necessarily implicates "the core doctrine of separation of powers" under Article 8 of the Declaration of Rights, especially when, as here, the petitioners challenge "the end product" of the legislative process. *Schooley*, 97 Md. App. at 114, 121. Unlike the federal district court in *Benisek* and the other federal courts that have applied the federal common law privilege, this Court and other Maryland courts applying Maryland's constitutional legislative privilege must take care to prevent the "dismantling [of] the separation of powers pillar upon which the privilege is, in part, based." *Id.* at 121. Also unlike the circumstances in the federal common law cases, the petitioners do not assert any federal interest that might justify their discovery request, but they instead insist that the discovery they sought was needed to help them establish their claims regarding "the requirements of Article III, § 4" of the Maryland Constitution. Misc. No. 25 Exceptions at 38. Nor is the privilege question before the Court derived from some common law right that is subject to "balanc[ing]" against "the significance of the [other] interests at stake." *Benisek*, 241 F. Supp. 3d at 574. Instead, the question is governed by Maryland Constitution's Speech or Debate Clause, in a proceeding before a tribunal that was created by, is subject to, and is charged with applying, that same Constitution.

Unlike the federal common law privilege, the legislative privilege established in the Maryland Constitution is not a conditional one; it is absolute. *See Mandel*, 320 Md. at 107,

134. The protection of legislative immunity is particularly warranted "[i]f the attack is on the legislative process itself or the end product of that process," because "the motives and legislative conduct of each member associated with the challenged process or product necessarily comes into question." *Schooley*, 97 Md. App. at 121. In *Floyd*, the Court of Special Appeals rejected the plaintiff's call for it to carve out an exception to the legislative privilege based on her argument that applying the privilege would "strip[] the [Open Meetings] Act of all force and purpose"; the court explained that "a judicial carve-out of an exception to the application of that doctrine" was "a policy issue to be addressed by the General Assembly and not by the courts." *Floyd*, 241 Md. App. at 214. Here, petitioners contend that they have no other way of getting the information they have requested. Under the jurisprudence of Maryland appellate courts, even if the contention were true, it would not suffice to overcome the protections of Article 10 of the Declaration of Rights and Article III, § 18 of the Constitution. This Court has been fulfilling its duties under Article III, § 5 for five decades, and in that time, the Court has been able to resolve legislative redistricting challenge without engaging in or permitting inquiries into legislators' motives or deliberations. Judge Wilner rightly concluded that the legislative privilege does not permit such an inquiry in this case.

D. Petitioners' Delay in Seeking This Court's Review of the Special Magistrate's Discovery Ruling Has Rendered Relief Unavailable Given the Demands of the Election Schedule.

When this Court issued its January 28, 2022 Order establishing procedures for all challenges to the 2022 legislative districting plan, the Court declared that, "[g]iven the nature of this matter, and limitations and constraints attendant thereto, time is of the essence

in determining the validity of the 2022 legislative districting plan." Order 2. The Court also put all potential petitioners on notice that the Court was poised to issue "further order(s) . . . upon advice of the Special Magistrate" concerning matters to include "procedures for discovery[.]" *Id.* at 2-3. After conferring with the parties, Judge Wilner, on February 18, 2022, issued Interim Scheduling Order No. 1, which established the schedule that would govern the proceedings, including a deadline of March 11, 2022 for "good faith exchange of all discovery"; an advance deadline of March 8, 2022 for the parties to inform the Special Magistrate "of an inability to achieve that objective"; and a remote hearing date of March 10, 2022 to resolve "any outstanding issues." Int. Sched. Order No. 1, at 3. The same order further established the clear expectation that "an exchange of proposed findings of fact" would occur on March 22, 2022; a "hearing on the merits" would "commence on March 23, 2022 and extend, if necessary, through March 25, 2022"; and Judge Wilner would aim "to file his Report with the Court of Appeals on April 5, 2022." *Id.* at 4. Thus, as early as February 18, the parties knew that the entirety of the Special Magistrate proceedings would conclude by March 25, 2022, and that the Report was likely to issue by April 5, 2002.

On March 10, 2022, after considering written and oral argument from counsel, Judge Wilner issued a written order "Regarding Discovery" denying, on legislative privilege grounds, the Fischer petitioners' request for discovery into the legislative process. Despite their awareness that "time is of the essence" and that their ability to make use of the requested information in evidentiary hearings before Judge Wilner would expire no later than March 25, 2022, the petitioners made no attempt to seek this Court's review of

the discovery order until April 8, 2022—15 days after the evidentiary hearing concluded on March 24, 2022. Were this not an original jurisdiction case, such delay might be understandable, since parties in cases within the circuit courts' general jurisdiction must ordinarily await final judgment before seeking review of discovery rulings. But in this case, where this Court already has jurisdiction, there is no reason to await an appeal from final judgment, since no appeal is necessary to secure redress from this Court, whose attention has been focused on this important matter since at least January 28, 2022.

Under these circumstances, the Court should decline to consider the petitioners' objections to the Special Magistrate's discovery order, because it is too late for any meaningful relief to be granted. As early as January 28, the Court recognized the severe time constraints imposed by the need to conduct elections in an orderly manner, Even if the constitutional legislative privilege did not prevent the Court from granting petitioners' request for discovery into the legislative process, as it certainly does, the information petitioners have sought would not benefit them unless the Court were to direct that the Special Magistrate conduct further evidentiary proceedings to assess what bearing, if any, the discovered facts might have on the petitioners' claims. But the parties have known since February 18, 2022, that the window of opportunity for evidentiary hearings would be severely limited, and that the window would close on March 25, 2022. As a practical matter, the election schedule does not permit the luxury of further evidentiary hearings. For this reason, in addition to the others explained above, the Fisher petitioners' Exception 3 should be rejected.

IV. MISCELLANEOUS NO. 25 EXCEPTIONS 1 AND 2 SHOULD BE DENIED BECAUSE THE SPECIAL MAGISTRATE CORRECTLY FOUND THAT PETITIONERS FAILED TO PRESENT COMPELLING EVIDENCE THAT ANY SENATE DISTRICT VIOLATES ARTICLE II, § 4 OF THE CONSTITUTION.

A. Petitioners' Reliance Upon a Flawed Compactness Analysis to the Exclusion of All Other Considerations Failed to Constitute Compelling Evidence that Senate Districts 12, 21, 23, 24, 33, and 47 Violate Article III, § 4 of the Maryland Constitution.

Judge Wilner correctly recognized that the Enacted Plan was entitled to a presumption of constitutional validity, and that petitioners had the burden of demonstrating the law's invalidity by compelling evidence. *2012 Legis. Districting*, 436 Md. at 137. In the absence of such "compelling evidence" the State was not required to demonstrate "that the districts are contiguous and compact, and that due regard was given to natural and political subdivision boundaries." *Id.* at 137-38. Because the petitioners' case did not constitute compelling evidence, they are incorrect that Judge Wilner erred in assessing the burdens of proof.

As an initial matter, petitioners have abandoned all challenges to Senate Districts 12, 21, 23, 24, 33, and 47 with the exception of compactness.[6] Compactness, however, is but one factor the Maryland General Assembly must consider and balance when undertaking legislative districting. Md. Const. art. III, § 4. The Maryland Constitution and

[6] Nine days prior to the evidentiary hearing, Former Governors Michael F. Easley, Arnold Schwarzenegger, William Weld, and Christine Todd filed an amicus brief in support of petitioners arguing that extreme partisan gerrymandering harms democracy and violates the Maryland Constitution. Although petitioners had alleged that the challenged districts were drawn to favor Democrats and disfavor Republicans, they put on no evidence to support that assertion. Given the lack of evidence that the Enacted Plan constituted extreme partisan gerrymandering, the brief of amici is not pertinent to any issue in this case.

the Equal Protection Clause of the Fourteenth Amendment also require that each district be of substantially equal population. *Id*.; *2012 Legis. Districting*, 436 Md. at 130-31 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). Additionally, legislative districting in Maryland must give "[d]ue regard" "to natural boundaries and the boundaries of political subdivisions." Md. Const. art. III, § 4. Finally, any legislative districting plan must avoid disenfranchising or abridging the right to vote of any citizen on account of race. *2012 Legis. Districting*, 436 Md. at 132 (citing § 2 of the Voting Rights Act of 1965 (42 U.S.C. § 1973)). When these requirements conflict, as they often do, they must be balanced against each other.

Judge Wilner was correct that petitioners' compactness analysis did not constitute compelling evidence of a violation of Article III, § 4. Petitioners attempted to make their case through their expert Sean Trende who applied four of "hundreds" of available compactness measures to the challenged districts. March 23, 2022 Evid. Hrg., https://www.courts.state.md.us/sites/default/files/import/coappeals/media/2022legislativedistricting/20220322legislativedistrictingevidentiaryhearing, Part 1, at 1:32:09-45.[7] As Mr. Trende acknowledged, however, there is "no magic number" that indicates a district is not compact. Part 1, 1:48:00-20; *see Matter of Legis. Districting of State*, 299 Md. at 687 (observing that "it [is] obvious that a mathematical formulation for determining whether a particular district is unconstitutionally noncompact was not within the contemplation of the

[7] Due to the unavailability of transcripts, all citations to the evidentiary hearing will be to the webcast available at this link and will be referred to as March 23, 2022 Evid. Hrg., Part 1 or Part 2 with the time stamp.

constitutional framers when proposing adoption of § 4 of Article III of the Maryland Constitution"). In an attempt to illustrate the noncompactness of the challenged districts, Mr. Trende compared them to over 13,000 house and senate districts enacted in every state in the country between 2002 and 2020. March 23, 2022 Evid. Hrg., Part 1, 1:48:50-49:20, 2:29:25-30:03. Mr. Trende did not examine the comparator districts to account for differences in population distributions, geographic features, or legal requirements. He did not compare the challenged districts to the districts in the Governor's Commission's proposed plan. March 23, 2022 Evid. Hrg., Part 1, 2:30:08-18. Nor did he do a direct comparison with previously enacted Maryland plans. March 23, 2022 Evid. Hrg., Part 1, 2:31:40-55.

Mr. Trende did no analysis of county or municipal border crossings. March 23, 2022 Evid. Hrg., Part 1, 2:34:31-43. He did no analysis of whether districts crossed natural boundaries. March 23, 2022 Evid. Hrg., Part 1, 2:34:49-35:00. Significantly, he did not examine whether the challenged districts were drawn to favor Democrats or disadvantage Republicans. March 23, 2022, Evid. Hrg., Part 1, 2:35:00-26. By contrast, the State's expert Dr. Alan Lichtman did conduct a gerrymandering analysis of the Enacted Plan and concluded that it did not constitute a partisan gerrymander in favor of Democrats. March 23, 2022 Evid. Hrg., Part 2, 2:00:34-01:02.

The insufficiency of Mr. Trende's flawed analysis of compactness is demonstrated by examining the 2002 legislative district map that was commissioned and ordered by this Court after it found the 2002 enacted plan invalid. With legislative elections imminent, the Court had no time to return the matter to the political branches, so it appointed its own

technical consultants to assist it in preparing a legislative redistricting plan. *2002 Legis. Districting of State*, 370 Md. at 318-19.[8] Because the Court, unlike the political branches, was required to avoid partisan politics, its "only guideposts [were] the strict legal requirements." *Id.* at 323. Accordingly, the Court "directed the consultants to remove even from view where any incumbents lived" and "prepare for [its] consideration a redistricting plan that conformed to federal constitutional requirements, the Federal Voting Rights Act, and the requirements of Article III, § 4 of the Maryland Constitution." *Id.* What resulted from those instructions was a district plan not appreciably different from the Enacted Plan. *See, e.g.*, former District 47. Joint Ex. 1, H.[9]

Although petitioners contend that District 33 was redrawn to exclude Delegate Rachel Munoz, no nefarious intent can be inferred from the movement of those district lines. As a preliminary matter, Delegate Munoz was not elected to her delegate seat. March 23, 2022 Evid. Hrg., Part 2, 46:00-09. She was appointed in November 2021, *id.*, after the LRAC had held 9 public meetings and the day before its 10th public meeting. Furthermore, the evidence demonstrated that an adjacent district, 32, had a significant population growth giving it a population above the 10% relative deviation from the ideal population permitted by the Equal Protection Clause of the Fourteenth Amendment. Joint

[8] One of the consultants appointed by the Court in 2002, Karl S. Aro, served as the Chair of the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC") that created the 2022 Enacted Plan. Joint Ex. 1, ¶ 7.

[9] For further comparison, maps of each individual district in the 2002 plan are available at https://planning.maryland.gov/Redistricting/Pages/MD-Cong-Legis-Dist.aspx.

Ex. 1, F at 2. That population increase necessitating a shift of voters to adjacent districts which thereby affected those districts' relative deviations. *Id.* That those inevitable shifting of lines resulted in movement of registered Democrats and Republicans in a manner that may have benefitted Democrats does not demonstrate unlawful gerrymandering.

B. Petitioners Failed to Present Compelling Evidence That Senate District 27 Violates Article III, § 4 of the Maryland Constitution.

Petitioners take a different approach on District 27 because their own expert acknowledged that District 27 scores well on compactness measures. March 23, 2022 Evid. Hrg., Part 1, at 2:13:35. Instead, petitioners contend that District 27 does not give due regard to political subdivisions and natural boundaries. In particular, they complain that it crosses three counties and the Patuxent River. The evidence demonstrates, however, that county crossings were required by changes in population distribution. When such crossings are required due to shifts in population, the legislature has discretion as to where to make those crossings. *2012 Legis. Districting*, 436 Md. at 159 ("In the absence of evidence of invidious, impermissible discrimination, the choice of where the Baltimore County 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.")

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). Joint Ex. 1, G. 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 and across the Patuxent River to find sufficient population. Joint Ex. 1, G. It does this via District 29, which extends into Calvert County.[10] 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. Joint Ex. 1, G. 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.

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. Joint Ex. 1, C. 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. Joint Ex. 1, B. Petitioners failed to present compelling evidence that the factors required by Article III, § 4, or any other legal obligation, were subordinated to political concerns.

V. MISCELLANEOUS NO. 26 EXCEPTIONS SHOULD BE DENIED BECAUSE PETITIONERS HAVE NOT PRESENTED COMPELLING EVIDENCE THAT THE ENACTED PLAN'S MIX OF MULTI-MEMBER AND SINGLE MEMBER DISTRICTS VIOLATES THEIR CONSTITUTIONAL RIGHTS.

[10] Former Legislative District 29C of the Court's 2002 districting plan similarly crossed the river to extend from St. Mary's County to Calvert County, and all of 29 was split between St. Mary's, Charles, and Calvert Counties. *See* Map of 2002 Legislative Districts 29A, 29B, and 29C, https://planning.maryland.gov/Documents/OurProducts/Redistrict/LegDist/District/Color_Map/LegDist/LD29ABC_Col-100.pdf.

Petitioners acknowledge, as they must, that the Maryland Constitution expressly permits the adoption of a legislative districting plan that includes a mix of multimember and single-member House of Delegates districts. (Misc. No. 26 Exceptions at 5-6.) They nevertheless assert that the use of this permitted practice invalidates the Enacted Plan because the practice "infringe[s] their rights under the [Maryland] Declaration [of Rights], including Articles 7 (Free Elections), 24 (Equal Protection/Due Process), and 40 (Free Expression), and Art. 1, § 7 of the [Maryland] Constitution." (*Id.* at 5.) Although petitioners contend that they seek to invalidate the Enacted Plan, but not Article III, § 3 of the Constitution, they provide no evidence, let alone compelling evidence, as to how the Enacted Plan's particular manifestation of single and multi-member districts infringes their rights. Instead, they rely on a purported conflict between Article III, § 3 and the other constitutional provisions they cite. There is no conflict.

A. Article 7 of the Declaration of Rights Does Not Govern Legislative Districting.

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 2002 Legis. Districting of State*, 370 Md. at 333, 335, 402-03, 404 (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." *2012 Legis. 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.[11] At the time of its promulgation, Maryland did not have legislative districts; under the original Constitution of 1776, Delegates represented and were elected by eligible voters residing within the counties at large. *See* Const. of 1776 art. 2.[12] Thus, the framers' directive that elections

[11] 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."

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

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

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 County Comm'rs of Frederick County*, 427 Md. 231, 264 (2012). But this Court's 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).

B. Articles 24 and 40 of the Declaration of Rights Do Not Govern Legislative Districting.

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 Legis. 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 County 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).

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 is unavailing because both the Supreme Court and this Court have "made clear that such a district is not *per se* unlawful under the Equal Protection Clause." *2012 Legis. Districting* 436 Md. at 141 (citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964)). The Supreme Court has further recognized that multimember districts are not "necessarily unconstitutional when used in combination with single-member districts in other parts of the State." *White v. Regester*, 412 U.S. 755, 765 (1973).

Indeed, in the seminal legislative redistricting case of *Reynolds v. Sims*, the Supreme Court sought to reassure States that, notwithstanding its holding that the Constitution

required district population equality in both houses of a State's bicameral legislature, the two houses of a legislature could still differ by, for example, having one composed of single-member districts while the other "could have at least some multimember districts," 377 U.S. 533, 576-77 (1964), and the Court further recognized that a State "might desire to achieve some flexibility by creating multimember or floterial districts," *id.* at 579.

In the decades since, aside from cases involving the assertion of a valid claim of racial discrimination under the Equal Protection Clause or the Voting Rights Act[13]—a type of claim raised in none of the pending petitions—the Supreme Court has rejected challenges to multimember legislative districts, including challenges that objected to the use of different types of districts. *Burns v. Richardson*, 384 U.S. 73 (1966) (rejecting challenge to State's mix of multimember and single member districts similar to Maryland's); *Fortson v. Dorsey*, 379 U.S. 433 (1965) (rejecting challenge to the use of a combination of single member districts and countywide voting from residence districts).

This Court has similarly upheld the combination of single and multimember districts permitted by Article III, § 3. *1984 Legis. Districting*, 299 Md. at 658, 673, 674 (("A multimember legislative district is not per se unconstitutional under the equal protection clause," and "[c]onsistent with these principles from *Reynolds*, § 3 of Article III of the

[13] *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (affirming finding that county's at-large system "was being maintained for the invidious purpose of diluting the voting strength of the black population"); *Regester*, 412 U.S. at 769 (affirming finding that multimember district "invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives").

Maryland Constitution . . . permits both single-member and multi-member delegate districts."); *2012 Legis. Districting*, 436 Md. at 143 (holding that petitioner "failed to show that any multi-member district provided for in the Enacted Plan would have the effect of diluting or canceling the voting strength of any racial or political element, he has failed to make a case for declaring any such district unlawful"); *2002 Legis. Districting of State*, 370 Md. at 347, 409, 439 (applying the factors set out in *Gingles v. Thornburg*, 478 U.S. 30 (1986), in rejecting claims that multimember districts were unconstitutional and that they had been used to discriminate on the basis of race); *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 675 (1974) (upholding residence districts on the Eastern Shore). Notably, this Court itself used a mix of single and multimember districts in the remedial plan it drew in 2002. *In re Legis. Districting of State*, 369 Md. 601, 603 (2002) (per curiam order) (reciting as part of the Court plan's "General Provisions" that "(c) Each legislative district may be subdivided into 3 single member delegate districts or into 1 single member delegate district and 1 multimember delegate district").

In *2012 Legislative Districting*, this Court quoted Supreme Court language suggesting that multimember districts "may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 436 Md. at 142 (quoting *Whitcomb*, 403 U.S. at 143). The Court hastened to add that the challenger must '"carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.'" *2012 Legis. Districting*, 436 Md. at 142 (citation omitted). Petitioners have made no such showing.

C. Article I, § 7 of the Constitution Does Not Govern Legislative Districting.

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 2002 Legis. 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 Op. Md. 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 County 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," Alfred S. Niles, *Maryland Constitutional Law*, (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, *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 County 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.

D. Article III, § 3's Express Authorization of Mixed Single and Multi-Member Districts Necessarily Overrides Any Implied Prohibition that Might Be Read into Other Constitutional Provisions.

Under Article III, § 3,

> 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.*

(Emphasis added.) 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, including those cited by the Thiam petitioners.

As explained in *State v. Smith*, 305 Md. 489, 511 (1986), the "basic rule of construction that ordinarily the specific prevails over the general" applies to constitutional interpretation such that a "specific power" recognized by a constitutional provision "would

prevail over the general principle or a general power relating thereto," and would do so "whether the general principle was in the Declaration of Rights and the specific power was in the Constitution or whether both were in the Constitution." This rule of construction has special force with respect to Article III, § 4, given that the modern version of § 4 was adopted at the same time, in the same enactments, as Article III, § 3. *See* 1969 Md. Laws, ch. 785; 1972 Md. Laws, ch. 363. The same legislators who adopted Article III, § 3's provision expressly safeguarding the General Assembly's district subdivision prerogatives could not have intended, without saying so, for Article III, § 4 to eliminate or impose obstacles to the creation of multimember districts.

E. Petitioners Have Failed to Demonstrate, or Even Allege, that the Enacted Plan is the Product of Invidious Discrimination.

Petitioners put on no evidence that the mix of single and multimember districts provided for in the Enacted Plan "would have the effect of diluting or canceling the voting strength of any racial or political element." *2012 Legis. Districting*, 436 Md. at 143. They thus have "failed to make a case for declaring any such district unlawful." *Id.*

Indeed, petitioners' solution to the purported Constitutional violation manifested in the Enacted Plan's mix of single and multimember districts demonstrates that they are not aggrieved by the plan. They seek to replace the Enacted Plan with one comprised of all single-member districts, but all of the petitioners are already in single-member districts. Without any input from voters in multi-member districts, and without any evidence that the configuration of districts is unlawful, they seek to abolish those districts. The Court should adopt Special Magistrate Wilner's recommendation to reject Petition No. 26.

VI. MISCELLANEOUS NO. 27 EXCEPTIONS SHOULD BE DENIED BECAUSE THE SPECIAL MAGISTRATE CORRECTLY FOUND THAT PETITIONER FAILED TO DEMONSTRATE THAT HOUSE DELEGATE DISTRICT 2A IS UNCONSTITUTIONAL.

Petitioner Wilson asserts that "the General Assembly failed to give due regard to political subdivisions as required by Article III, Section 4 when it drew a two-member district (2022 LRAC District 2A) that crossed county boundaries for no reason." Misc. No. 27 Exceptions at 3. He acknowledges that population concerns required legislative district 2 to cross from Washington County into Frederick County, and further acknowledges that multimember house delegate districts are permissible, but he contends that subdistrict 2A should not have crossed county lines. Misc. No. 27 Exceptions at 5. Mr. Wilson's challenge fails because once a border crossing is required by population constraints, "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." *2012 Legis. Districting*, 436 Md. at 159 (emphasis added).

The evidence established that District 1 had to extend into Washington County because Garrett and Alleghany Counties are not populous enough to comprise their own legislative district. Special Magistrate's Report at 3. And Garrett, Alleghany, and Washington Counties are not populous enough to comprise two senate districts, so District 2 had to extend into Frederick County. Special Magistrate's Report at 3. District 2 includes a subdistrict 2B that is largely coterminous with the municipal boundaries of the City of Hagerstown. Joint Ex. 1, K-1, District 2. The configuration of District 2 and its subdistricts thereby gives due regard to the boundaries of political subdivisions.

Mr. Wilson has failed to present compelling evidence that the Enacted Plan violates Article III, § 4 or any other constitutional provision. The Court should deny his exceptions.

CONCLUSION

The exceptions to the Report of the Special Magistrate should be denied, the recommendations to deny the petitions should be adopted, and the petitions should be denied in their entirety.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Steven M. Sullivan
_____
STEVEN M. SULLIVAN
Attorney No. 9706260005
Solicitor General

/s/ Ann M. Sheridan
_____
ANN M. SHERIDAN
Attorney No. 9112190160
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
ssullivan@oag.state.md.us
(410) 576-6325
(410) 576-6955 (facsimile)

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that, on this 11th day of April, 2022, the foregoing was filed and served electronically by the MDEC system on all persons entitled to service:

Brenton H.J. Conrad, Esq.
McAllister, DeTar, Showalter & Walker LLC
706 Giddings Avenue
Suite 305
Annapolis, Maryland 21401
bconrad@mdswlaw.com

Strider L. Dickson, Esq.
McAllister, DeTar, Showalter & Walker LLC
706 Giddings Avenue
Suite 305
Annapolis, Maryland 21401
sdickson@mdswlaw.com

David K. Bowersox, Esq.
Hoffman, Comfort, Offutt, Scott & Halstad, LLP
24 North Court Street
Westminster, Maryland 21157
dbowersox@hcolaw.com

Seth Wilson, Esq.
12010 Warrenfeltz Lane
Hagerstown, Maryland 21742-4497

/s/ Ann M. Sheridan
_____
/Ann M. Sheridan