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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

MONTANA CONSERVATION VOTERS; JOSEPH LAFROMBOISE; NANCY HAMILTON; SIMON HARRIS; DONALD SEIFERT; DANIEL HOGAN; GEORGE STARK; LUKAS ILLION; and BOB BROWN, Plaintiffs, v. CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, Defendant.	Cause No.: CDV 2023-702 **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

When they convened to draft a new constitution for Montana, the framers deliberately sat alphabetically rather than by political bloc. What they drafted made the point concrete: principle transcends party. The 1972 Constitution serves all Montanans, regardless of party affiliation, and includes safeguards against partisan abuse of power. Indeed, it expressly protects against discrimination on the basis of "political . . . ideas," Mont. Const. art. II, § 4, and it sets out a bipartisan redistricting process for state and federal legislative districts, Mont. Const. art. V, § 14.

In 1972, the Montana Public Service Commission ("PSC") was not a districted body. Thus, the framers had no reason to assign the task of redistricting the PSC to the bipartisan Districting and Apportionment Commission. When the Montana Legislature later created PSC districts, it assigned the task of redistricting to itself.

But it has failed to carry out its self-imposed duties. Between 1974—when the PSC was first split into districts—and 2023, the Legislature has redistricted the PSC only one time. That redistricting effort, in 2003, resulted in a map that a federal court held unconstitutional in 2021. Responding to that decision, the 2023 Legislature passed Senate Bill 109 ("SB 109") along party lines. But the new PSC map creates a new constitutional problem. The map is a clear partisan gerrymander, in contravention of the Montana Constitution's guarantees of equal protection and suffrage.

Plaintiffs ask the Court to grant their motion for a preliminary injunction and to enjoin Defendant Secretary of State Christi Jacobsen from certifying candidates under the current map, pending resolution of this matter on the merits.

BACKGROUND

I. The PSC is an elected body that performs core government functions.

A state executive branch agency and the head of the department of public service regulation, the PSC has significant power over issues affecting Montanans' daily lives. Section 2-15-2601–02, MCA; *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 29, 364 Mont. 128, 272 P.3d 71. The PSC is "invested with full power of supervision, regulation and control of" certain private, investor-owned natural gas, electric, telephone, water, and sewer companies that operate in Montana. Section 69-3-101, MCA; *see also* § 69-3-102, MCA ("The commission is . . . invested with full power of supervision, regulation, and control of [regulated utilities].").

II. Prior to 2023, the Legislature redistricted the PSC only once.

When the Montana Constitution was ratified, three PSC commissioners were elected statewide. Mont. Pub. Serv. Comm'n, *History & Organization*.[1] In 1974, the Legislature amended the law to create five districts, with one commissioner elected from each. Rev. Code Mont. 1947 § 70-101 (1977). It took nearly thirty years—until 2003—for the Legislature to redistrict the PSC to account for population shifts. Mont. 58th Leg., S. Bill 220 (2003). The 2003 amendment—like the prior districting plan—divided districts along county lines. *Id.*

Almost two decades later, a group of Montana residents successfully brought suit in federal court, contending that the PSC districts were unconstitutionally malapportioned as a result of legislative inaction and shifts in population. *Brown v.*

[1] *Available at* https://psc.mt.gov/About-Us/What-We-Do.

Jacobsen, 590 F. Supp. 3d 1273 (D. Mont. 2022). By that time, "the maximum population deviation of the Commission districts [was] roughly 24%." *Id.* at 1286.

After a bench trial, a three-judge federal district court held that the 2003 map violated the one-person, one-vote rule of the U.S. Constitution's Fourteenth Amendment. *Id.* at 1286. The court ordered Secretary Jacobsen to implement a new map—a slightly modified version of a map that she offered in the litigation—to bring the maximum population deviation within the constitutional limit. *Id.* at 1291.

III. In 2023, Montana legislators enacted an intentional partisan gerrymander.

As initially introduced, SB 109 had two clear goals: to implement the court-ordered, constitutionally permissible map and to ensure regular redistricting. Ex. 1, SB 109_1 (as introduced). Through a last-minute amendment, however, partisan-minded legislators seized the opportunity to election-proof the PSC by creating five safe Republican districts. *See* Ex. 2, SB 109 (as enacted).

When asked about the partisan effect of the new map, sponsoring Senator Keith Regier said that he "didn't check that." S. Energy & Telecoms. Hrg., at 18:18:00 (Feb. 28, 2023).[2] He claimed to have considered only geographical contiguity and population parity. *Id.* But legislators proposed alternative maps that better satisfied the stated criteria of contiguity and population parity—and these alternatives were rejected with essentially no consideration. *See* Ex. 3, SB 109 Proposed Amendments.

[2] *Available at* https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230228/-1/47041?startposition=20230228180743&mediaEndTime=20230228182558&viewMode=3&globalStreamId=4.

SB 109 is not, in fact, compact—not compared to the map it replaced, and not compared to a neutral set of permissible, possible maps. Ex. 4, Expert Rep. of Stephanie Somersille ("Somersille Rep."), at 3–4 (Nov. 28, 2023).

Moreover, SB 109 is an extreme outlier that cannot be explained by neutral redistricting criteria. *See generally* Somersille Rep. Plaintiffs' Expert Stephanie Somersille, a mathematics Ph.D. who focuses on redistricting, compared SB 109 to hundreds of thousands of maps drawn using neutral, nonpartisan criteria, consistent with generally accepted redistricting methodology. *Id.* at 2–5. In addition to being significantly less compact than the neutral datasets, SB 109 splits far more cities than expected. *Id.* at 10–12. Even when maps are drawn without regard for city boundaries, only 0.2% of the maps will split six cities—as SB 109 does. *Id.* "Therefore, it is extremely unlikely that the designers of this plan were merely indifferent to splitting city boundaries. On the contrary, it is apparent that the cities were intentionally split." *Id.* at 10.

The only reasonable explanation for SB 109's map is that it secures a partisan advantage for Republican candidates. *See id.* at 12 ("[G]iven that no reasonable districting constraint in any of ensembles accounted for the extreme partisanship of the Enacted Plan, it is extremely unlikely that it was constructed using no partisan considerations.").[3] The partisan advantage is, in fact, extreme. The most Democratic district under SB 109—the district likeliest to elect a Democrat—"f[a]ll[s] into the

[3] "Ensemble analysis" is the mathematical analysis of redistricting in which a given plan "is compared to thousands or millions of algorithmically generated alternatives that take the rules and geography of redistricting into account." Somersille Rep. 1.

bottom 0.65% of all maps in the [neutral] ensembles" used for comparison. *Id.* at 6. In other words, in the most Democratic district, roughly 99.4% of maps drawn using neutral, non-partisan criteria offer Democrats more opportunity to win a PSC seat. Democratic votes in this district were shunted to a neighboring district, the second-most Republican district, which is also an extreme outlier—"f[a]ll[ing] into the top 0.54% of all plans in the ensembles. . . . [W]hen one neighboring district has a higher vote share than expected and the other has a vote share lower than expected, in the absence of another explanation, this is a strong indicator of packing and cracking." *Id.*

Legislators engineered the map to be election-proof. Although Montana is a large, politically diverse state, the partisanship of four out of five districts—all but the least Democratic district—is essentially flat. In each of these four districts, SB 109 guarantees Democrats between 42.5% and 45% of the vote. Somersille Rep. 7. Had these districts been drawn with neutral, non-partisan criteria, a typical map's actual Democratic vote share would range from about 35% in the least Democratic district to about 50% in the most. *Id.* SB 109's flat line between districts is a classic sign of "packing and cracking for political gain." *Id* at 6.

SB 109 would deny "Democrats a single seat under all 2020 elections," even in races where the Democratic candidate significantly overperformed relative to other Democrats on the ticket. *Id.* In contrast, the map implemented as a result of the 2021 federal litigation, like the neutral ensembles used as comparison, responds to increases in the Democratic vote share with Democrats winning more seats. *Id.*

at 6–8. In other words, the only way to make sense of SB 109's deviation from the norm is that it was designed to deny non-Republicans even one seat at the table.

LEGAL STANDARD

"A preliminary injunction order . . . may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Section 27-19-201(1), MCA (as amended by S. Bill 191, eff. Mar. 2, 2023).

ARGUMENT

Plaintiffs seek a declaration that SB 109 is unconstitutional and an injunction against its enforcement. The claims presented are justiciable and do not risk entangling the judiciary in core legislative functions.

Turning to the relief requested, Plaintiffs satisfy all elements for a preliminary injunction. First, Plaintiffs are likely to succeed on the merits because the State may not dilute votes on the basis of party affiliation. Second, Plaintiffs, like all voters, will suffer irreparable injury if Defendant Jacobsen is not enjoined from certifying candidates under the gerrymandered map. Third and fourth, because Plaintiffs show impending constitutional harm, the balance of equities tips in Plaintiffs' favor and an injunction is in the public interest.

I. Plaintiffs' claims are justiciable.

"[I]t is particularly within the province of the judiciary to construe and adjudicate provisions of constitutional, statutory, and the common law as applied to

facts at issue in particular cases." *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 24. Plaintiffs seek a specific and modest remedy—an injunction against enforcement of SB 109. Judicial relief is appropriate.

While the U.S. Supreme Court has held that partisan gerrymandering claims are not justiciable in federal courts, it also has noted that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Indeed, the Court recognized that partisan gerrymanders are inherently "incompatible with democratic principles." *Id.* at 2506 (emphasis added).

Montana's sister states agree, finding partisan gerrymandering claims cognizable under their respective state constitutions. *See, e.g.*, App. B, *Grisham v. Van Soelen*, No. S-l-SC-39481, 2023 WL 6209573 (N.M. Sept. 22, 2023); App. C, *League of Women Voters of Utah v. Utah State Leg.*, No. 220901712 (Utah Dist. Ct., Salt Lake Cty. Nov. 22, 2022) (appeal pending); *Matter of 2021 Redistricting Cases,* 528 P.3d 40 (Alaska 2023); App. D, *Szeliga v. Lamone*, Nos. C-02-CV-21-001816 & C-02-CV-21-001773 (Md. Cir. Ct., Anne Arundel Cnty. Mar. 25, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379 (Ohio 2022); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737 (Pa. 2018). As the New Mexico Supreme Court persuasively reasoned:

> the question for this Court is limited to whether our constitutional responsibility to vindicate the individual right claimed in this case under [the New Mexico equal protection clause] outweighs relevant prudential concerns regarding the adjudicatory standards to be applied. Further, our Constitution contains provisions that *Rucho* did not consider, provisions with no federal counterpart.

App. B, *Grisham*, 2023 WL 6209573, at *13 (citing state constitutional provisions nearly identical to Montana Constitution Article II, §§ 1, 2, & 13).

The Montana Constitution similarly allows consideration of Plaintiffs' claims. Once the Legislature acts pursuant to a constitutional or statutory mandate in a way that "implicates individual constitutional rights"—as by drawing PSC districts—"courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257. The Court regularly reviews legislative enactments for compliance with the Equal Protection Clause, *see, e.g.*, *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct.*, 2023 MT 7, ¶ 33, 411 Mont. 201, 523 P.3d 519; *Oberson v. U.S. Dep't of Agric.*, 2007 MT 293, ¶ 15, 339 Mont. 519, 171 P.3d 715), and the Suffrage Clause, *see Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶¶ 31, 36, 410 Mont. 114, 518 P.3d 58. Plaintiffs' claims are justiciable.

II. Plaintiffs satisfy all requirements for a preliminary injunction, and SB 109 should be enjoined during the pendency of this litigation.

Plaintiffs are likely to succeed on the merits of their claims because SB 109 infringes Montanans' fundamental rights to equal protection and suffrage by diluting individuals' voting power. Given the importance of the rights SB 109 implicates and the impending 2024 election cycle, preliminary relief is necessary to prevent irreparable harm. Further, a preliminary injunction is in the public interest and promotes the equities because it will reduce electoral disruption and safeguard fundamental constitutional rights. Plaintiffs' motion should be granted.

A. SB 109 is an unconstitutional partisan gerrymander—Plaintiffs are likely to succeed on the merits of their claims.

By constitutional design, redistricting in Montana generally prevents partisan gerrymandering. *See* Mont. Const. art. V, § 14 (creating districting and apportionment commission comprising two members of each party, with the fifth member selected through a bipartisan or nonpartisan process). The PSC is the only state entity that the Montana Legislature redistricts, and the Legislature has only redistricted the PSC once prior to SB 109. Accordingly, Montana courts have had no opportunity to consider a partisan gerrymandering claim previously. But that does not make SB 109 any less unconstitutional.

Plaintiffs are likely to succeed under both the Equal Protection Clause, Mont. Const. art. II, § 4, and the Suffrage Clause, Mont. Const. art. II, § 13. Under the standards applied to equal protection challenges in Montana, SB 109 is subject to strict scrutiny, which it fails. And, even under the standards applied in jurisdictions without Montana's unique constitutional protections, SB 109 does not survive. In addition, SB 109 violates the right to suffrage because it interferes with the constitutional guarantee of "free and open elections" and "the free exercise of the right of suffrage." Mont. Const. art. II, § 13.

1. SB 109 violates equal protection under any applicable standard.

Article II, section 4 guarantees to Montanans the right to participate in elections on equal standing with their fellow citizens.

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not,

> by later arbitrary and disparate treatment, value one person's vote over that of another. . . . It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Big Spring v. Jore, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)) (cleaned up).

By intentionally denying non-Republican voters the right to meaningfully participate in PSC elections, SB 109 violates the Montana Equal Protection Clause. This is so under any potentially applicable test. First, under the generally applicable test for laws that violate fundamental rights under Article II, including equal protection, strict scrutiny applies, and Plaintiffs likely will prevail on their claim that SB 109 cannot survive strict scrutiny. Second, applying the test adopted in other jurisdictions, Plaintiffs likely will prevail by showing that: (1) SB 109 was intended to entrench power on partisan lines; (2) SB 109 meaningfully dilutes non-Republican votes; and (3) Plaintiffs' claims will be remedied by an injunction against SB 109. *Grisham*, 2023 WL 6209573, at *13 (quoting *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)). In fact, SB 109 cannot even satisfy rational basis review.

a. SB 109 is subject to strict scrutiny, which it fails.

"[P]rovid[ing] even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution," the Montana Equal Protection Clause triggers strict scrutiny whenever "a suspect class or fundamental right is affected" by government action. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445. "[P]otential equal protection

violations [are evaluated] under a three-step process: (1) [the Court] identif[ies] the classes involved and determine[s] if they are similarly situated; (2) [it] determine[s] the appropriate level of scrutiny to apply to the challenged statute; and (3) [it] appl[ies] the appropriate level of scrutiny to the statute." *A.J.B.*, ¶ 25.

First, SB 109 implicates two similarly situated classes: Republican and non-Republican voters. SB 109 draws a line on the basis of a suspect class—on partisanship or "political . . . ideas," Mont. Const. art. II, § 5—by treating voters differently "because of how they vote[] or the political party with which they [are] associated," *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016), *abrogated by Rucho*, 139 S. Ct. 2484. The two classes are similarly situated because "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29, 374 Mont. 453, 325 P.3d 1211. "Packing" is when groups of voters with similar expected voting behavior are "unnaturally concentrated in a single district," creating "a 'wasted' excess of votes that otherwise might have influenced candidate selection in one or more other districts." *In re 2021 Redistricting Cases*, 528 P.3d at 54. "Cracking" is "when like-minded voters are unnaturally divided" among districts, often "to reduce the split group's ability to elect" their preferred candidate. *Id.* SB 109 discriminates against non-Republican voters by packing and cracking voters to engineer a specific result.

Second, SB 109 both targets a suspect class and interferes with fundamental rights, triggering strict scrutiny. *Snetsinger*, ¶ 15. The Montana Equal Protection Clause expressly protects against "discriminat[ion] . . . on account of . . . political . . .

ideas," and SB 109 draws a line between voters on precisely this basis. Mont. Const. art. II, § 4. Moreover, SB 109 interferes with the fundamental right of suffrage, *see infra* II.A.2, providing a second route to strict scrutiny. Strict scrutiny applies.

Third and finally, SB 109 fails to satisfy strict scrutiny. Strict scrutiny demands: (1) a compelling government interest; and (2) narrow tailoring "to effectuate only that compelling interest." *A.J.B.*, ¶ 29. SB 109 cannot satisfy either requirement. The government has no compelling interest in disenfranchising voters or making government less responsive to Montanans. *See* Mont. Const. art. II, §§ 1, 2 (political power derives from the people, who have the right of self-government).

b. SB 109 fails intermediate scrutiny.

Even under a lesser level of scrutiny, however, SB 109 does not survive. *See Grisham*, 2023 WL 62099573, at *16–17. In *Grisham*, the New Mexico Supreme Court adopted the test Justice Kagan proposed in her dissent to *Rucho*. If the Court disagrees that strict scrutiny applies, it should adopt New Mexico's reasoning because it is premised in two constitutional provisions common to New Mexico and Montana—the popular sovereignty provision, *compare* Mont. Const. art. II, § 1, *with* N.M. Const. art. II, § 2, and the suffrage provision, *compare* Mont. Const. art. II, § 13, *with* N.M. Const. art. II, § 8. *See Grisham*, 2023 WL 6209573, at *13 (adopting intermediate scrutiny because New Mexico's constitutional protections for voters). For purposes of Plaintiffs' equal protection challenge, the primary difference between the two constitutions is that Montana confers more protections against gerrymandering because it expressly protects against political discrimination and because

interference with fundamental rights triggers strict scrutiny. *Id.* at *15; Mont. Const. art. II, § 4; *Snetsinger*, ¶ 15.

The "Kagan test" "has three parts":

> (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' predominant purpose in drawing a district's lines was to entrench their party in power by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by substantially diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

Grisham, 2023 WL 6209573, at *13 (quoting *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)). Plaintiffs satisfy all three.

First, SB 109 was enacted with intent to discriminate against non-Republican voters. Somersille Rep. 11–12. It is less compact than expected, *id.* at 3–4, unresponsive to votes cast by non-Republican voters, *id.* at 6–8, disrespectful of political subdivisions—even deliberately hostile to city boundaries, *id.* at 9–11, and evidences intentional packing and cracking across district lines, *id.* at 6. In sum, SB 109 is an outlier—"no reasonable districting constraint in any of [the] ensembles accounted for [its] extreme partisanship"—evidencing that "it is extremely unlikely that it was constructed using no partisan considerations." *Id.* at 12.

Second, Plaintiffs' votes are "substantially dilut[ed]" by SB 109. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). While one court has held that "[d]istricts drawn with an illegitimate purpose are unconstitutional [under equal protection analysis] even if the negative effect on proportional representation is slight," the effects here are far from slight. *Matter of 2021 Redistricting Cases*, 528 P.3d at 57. The court-

drawn map in effect prior to the 2023 legislative session could have resulted in one to two non-Republican commissionerships under many recent elections, and the neutral ensembles would likely yield one to two seats under nearly all recent elections. Somersille Rep. 8. In contrast, SB 109 allows none unless the election is "majority Democratic (at 51.8%)," at which point "the firewall breaks" and "there is an overreaction," which is further evidence of packing and cracking. *Id* at 9.

Third and finally, the State cannot show that it was motivated by legitimate, nonpartisan interests when it enacted SB 109. In explaining he map, the bill sponsor referred only to compactness and contiguity. But, controlling for compactness and contiguity and minimizing population deviation, SB 109 is an extreme outlier. Because neutral districting criteria cannot explain the map, "it is extremely unlikely that it was constructed using no partisan considerations." *Id.* at 12.

If the Court applies the intermediate scrutiny test recently adopted by the New Mexico Supreme Court instead of strict scrutiny, Plaintiffs are likely to succeed.

c. SB 109 fails even rational basis review.

Given the significance of the interests involved—and Montana's unique protection against political discrimination—the rational basis test does not apply. But if it did, SB 109 could not satisfy even that low bar. Laws, such as SB 109, enacted with the intent to discriminate are not "rationally related to a legitimate government interest." *Snetsinger*, ¶ 19.

"The principal purpose of the Equal Protection Clause, Article II, Section 4, of the Montana Constitution, is to ensure citizens are not subject to arbitrary and

discriminatory state action." *Id.* ¶ 27 (holding policy of denying benefits to same-sex couples unconstitutional under rational basis review). SB 109 undermines this guiding principle by discriminating against voters for an illegitimate aim—to make government less accountable by disenfranchising voters on the basis of political affiliation. "If the purpose [of choosing a district plan] is intended discrimination against a class of voters, the purpose will be considered illegitimate without needing to ask about the relationship between purpose and efficacy." *Matter of 2021 Redistricting Cases*, 528 P.3d at 57.

Here, legislators chose SB 109's PSC map because it dilutes the strength of disfavored votes. Several fair alternatives exist—including the court-imposed 2022 PSC map—and no rational explanation justifies choosing the current PSC map except to secure an unbreakable partisan stranglehold on the PSC. Implementing SB 109 will violate Plaintiffs' right to equal protection.

2. SB 109 abridges the right of suffrage.

The right of suffrage is a fundamental right: "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art II, § 13 (emphasis added). Indeed, "[i]t is perhaps the most foundational of our Article II rights and stands, undeniably, as the pillar of our participatory democracy." *Mont. Democratic Party*, ¶ 19 (quoting Mont. Const. Conv., III Verbatim Tr. at 402 (Feb. 17, 1972)).

"[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the

franchise." *Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 19, 398 Mont. 140, 454 P.3d 685 (quoting *Bush*, 531 U.S. at 105). By definition, partisan gerrymandering dilutes the voting power of citizens targeted for disparate treatment. Considering provisions nearly identical to Article II, Section 13, other state courts have held that there can be no "free and open" election under a partisan gerrymander. *See, e.g.*, *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 814 (Pa. 2018) (Pennsylvania Free Elections Clause guarantees "an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so"); *Szeliga*, No. C-02-CV-21-00117733, at 27 ("[Maryland's] Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State.").

SB 109 marks a politically dominant party's effort to entrench political power. In violation of Article II, Section 13, SB 109 interferes with the "free and open" elections guarantee by ensuring that the will of the voters is ultimately meaningless. "[I]t is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those governing reside." *Szeliga*, No. C-02-CV-21-00117733, at 94 (striking Maryland districting plan as unconstitutional partisan gerrymander under state Free Elections Clause); *see also* Mont. Const. Conv., III Verbatim Tr. at 402 ("If we are to have a true participatory democracy, we must ensure that as many people as possible vote for the people who

represent them."). Elections under SB 109 cannot be "free and open" because the bill gives the Legislature—not the people—the power to choose PSC commissioners.

A voter in a gerrymandered district is likely to inherit representatives who are "more likely to believe that their primary obligation is to represent only members of [the favored] group, rather than their constituency as a whole. This is antithetical to our system of representative democracy." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). By contrast, a fair district "fosters personal identification between the legislator and his constituency." Mont. Const. Conv., IV Verbatim Tr. at 680 (Feb. 22, 1972). District lines cannot and must not be drawn to purposefully silence members of a disfavored party. SB 109 violates the right of suffrage.

B. Plaintiffs face imminent, irreparable injury.

A preliminary injunction is intended "to prevent 'further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.'" *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 226, 935 P.2d 246, 250 (1997) (quoting *Knudson v. McDunn*, 271 Mont. 61, 63, 894 P.2d 295, 297–98 (1995). "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Mont. Democratic Party*, ¶ 38 (interference with the right of suffrage is irreparable injury); *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 60, 409 Mont. 378, 515 P.3d 301.

PSC candidate filing closes on March 11, 2024, § 13-10-201(7), MCA, and Defendant must certify candidates just ten days later, § 13-10-208. Widespread confusion for both voters and candidates will result from candidate certification under SB 109's gerrymandered map before the Court's decision on the merits.

First, under the new PSC map, Commissioner Annie Bukacek, who represents District 5, now resides in District 4, which is represented by Commissioner Jennifer Fielder. *See* Ex. 5, Decl. of Constance Van Kley. In 2024, Districts 2, 3, and 4 are up for election. In sharp contrast to ordinary redistricting practice, SB 109 sets forth no plan for holdover commissioners. *See* Rachel Weiss, *Submission of State Legislative Redistricting Plan* (Dec. 2022) (explaining treatment of holdover legislators).[4] Absent an injunction, one PSC district will have two holdover commissioners, while another—which has no election planned for 2024—will have no commissioner. A preliminary injunction will avoid confusion and ensure that all voters are able to cast votes for—and be represented by—a commissioner.

Second, irreparable harm will result if votes are cast under a map later held unconstitutional. Montana courts have a history of issuing preliminary injunctions to protect voters from deprivations of their constitutionally guaranteed voting rights. *See Mont. Democratic Party*, ¶ 31 (upholding preliminary injunction against unconstitutional voting laws); *Driscoll v. Stapleton*, 2020 MT 247, ¶¶ 20, 24–25, 401 Mont. 405, 473 P.3d 386 (district court did not abuse its discretion in temporarily

[4] *Available at* https://leg.mt.gov/content/Districting/2020/Legislative/report-legislative-submission-format-2022.pdf.

enjoining legislation because the evidentiary record demonstrated the "possibility of irreparable injury" through the loss of a constitutional voting right); *see also* App. A, *Brown v. Jacobsen*, No. CV 21-92-H-PJW-DWM-BMM, __ F.R.D. __, 2022 WL 122777 (D. Mont. Jan. 13, 2022) (preliminarily enjoining candidate certification). SB 109 impacts voters in every PSC district. *See* Ex. 6, Decl. of Whitney Tawney; Ex. 7, Decl. of Joseph Lafromboise; Ex. 8, Decl. of Simon Harris; Ex. 9, Decl. of Donald Seifert; Ex. 10, Decl. of Daniel Hogan; Ex. 11, Decl. of George Stark; Ex. 12, Decl. of Lukas Illion. Once a citizen votes in an unconstitutionally gerrymandered district, the harm is irreversible.

C. The balance of equities and public interest weigh in favor of Plaintiffs.

The balance of the equities and the public interest "merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The balance of equities "concerns the burdens or hardships to [Plaintiffs] compared with the burden on Defendants if an injunction is ordered," while the public interest "mostly concerns the injunction's 'impact on nonparties.'" *Id.* (quoting *Bernhardt v. L.A. Cty.*, 339 F.3d 920, 931 (9th Cir. 2003)).

Plaintiffs seek only modest relief, asking the Court to enjoin the Secretary from certifying candidates for PSC commissioner races under SB 109's gerrymandered map. The Court need not draw or consider any new districting plans. Instead, an injunction against SB 109 will merely revert to the constitutionally permissible court-ordered 2022 PSC map, which was drawn using neutral criteria.

Defendants will not be harmed by an injunction that maintains the constitutional status quo, as the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Injunctive relief will serve the public interest by vindicating Montanans' constitutional rights to suffrage and equal protection. *See Am. Beverage Co. v. City & Cty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) ("It is always in the public interest to prevent the violation of a party's constitutional rights.").

* * *

Plaintiffs are likely to succeed on the merits; irreparable harm will occur if the Court does not grant the requested relief; and the balance of equities and public interest weigh in Plaintiffs' favor. *See* § 27-19-201(4), MCA (as amended). SB 109 should be preliminarily enjoined.

CONCLUSION

Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction and enjoin implementation of SB 109.

Respectfully submitted this 29th day of November, 2023.

/s/ *Constance Van Kley*
Constance Van Kley
Christopher Patalano
Rylee Sommers-Flanagan
UPPER SEVEN LAW

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 29th day of November, 2023, by email and certified mail.

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/s/ *Constance Van Kley*
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Appendices

APPENDIX LIST

Appendix A

Brown v. Jacobsen,
No. CV 21-92-H-PJW-DWM-BMM,
2022 WL 122777
(D. Mont. Jan. 13, 2022)

2022 WL 122777
Only the Westlaw citation is currently available.
United States District Court, D. Montana,
Helena Division.

Bob BROWN, Hailey Sinoff,
and Donald Seifert, Plaintiffs,
v.
Christi JACOBSEN, in her official capacity
as Montana Secretary of State, Defendant.

CV 21-92-H-PJW-DWM-BMM
|
Signed January 13, 2022

Synopsis

Background: Citizens brought action against Montana Secretary of State, alleging that the districts established for Montana's Public Service Commission were malapportioned in violation of the United States constitution. Citizens sought appointment of a three-judge panel. The District Court, 2021 WL 6062393, granted citizens' motion for temporary restraining order and set hearing for citizens' request for preliminary injunction seeking to enjoin the candidate-certification process.

Holdings: The District Court held that:

citizens were likely to succeed on the merits of their challenge;

there was a likelihood of irreparable harm;

balance of equities tipped in citizens' favor; and

preliminary injunction was in the public interest.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO).

Attorneys and Law Firms

Constance Van Kley, Rylee K. Sommers-Flanagan, Upper Seven Law, Helena, MT, Joel Grant Krautter, Netzer Law Office, P.C., Sidney, MT, for Plaintiffs.

Brent Adam Mead, Montana Department of Justice Attorney General's Office, Helena, MT, for Defendant.

ORDER

Donald W. Molloy, District Judge, Paul J. Watford, Circuit Judge, Brian M. Morris, Chief Judge

***1** Plaintiffs Bob Brown, Hailey Sinoff, and Donald Seifert (collectively "Plaintiffs") [1] bring this action against Defendant Christi Jacobsen, in her official capacity as Montana Secretary of State, alleging that the districts established for Montana's Public Service Commission ("the Commission") are malapportioned in violation of the Fourteenth Amendment of the United States Constitution. (Doc. 1.) According to Plaintiffs, the Commission's five districts based on the existing map do not reflect the realities of Montana's population distributions, and these distortions run afoul of the one person, one vote principle. (*Id.* ¶¶ 4, 42–46.) Plaintiffs ask for a declaration that the "current configurations of Montana's Public Service Commission districts ... violate the Fourteenth Amendment." (*Id.* at 16.) Plaintiffs sought appointment of a three-judge panel pursuant to 28 U.S.C. § 2284(a) to resolve these issues. (*Id.*) The Chief Judge of the Ninth Circuit accordingly appointed a panel composed of the Honorable Donald W. Molloy, presiding judge, the Honorable Brian M. Morris, Chief Judge of the United States District Court for the District of Montana, and the Honorable Paul J. Watford of the Ninth Circuit Court of Appeals. (Doc. 3.)

Plaintiffs then filed a motion for a temporary restraining order and/or a preliminary injunction, seeking to enjoin the candidate certification process only in Districts 1 and 5, which are scheduled to hold elections in 2022. (Doc. 5 at 2.) Plaintiffs' request for a temporary restraining order was granted, and Jacobsen was temporarily restrained from implementing the candidate certification process in Districts 1 and 5. (Doc. 7 at 9.) That same order set a hearing on Plaintiffs' request for a preliminary injunction for January 7, 2022, before the three-judge panel. (*Id.*)

Between the issuance of the temporary restraining order and the January 7 hearing, Jacobsen filed a response in opposition to the request for a preliminary injunction. (Doc. 8.) In a reply to that response, Plaintiffs noted that Jacobsen did not file an answer or other responsive pleading as required by Federal Rule of Civil Procedure 12. (*See* Doc. 9 at 12

n.3.) At the January 7 hearing the parties acknowledged they had agreed to construe Jacobsen's response in opposition to Plaintiffs' request for injunctive relief as a free-standing motion to dismiss or stay the case. Following oral argument, the Court entered an order clarifying that the temporary restraining order would continue in effect until January 18, 2022, or until an order issued on the request for a preliminary injunction, whichever was earlier. (Doc. 11.) For the reasons set forth below, Plaintiffs' request for a preliminary injunction is granted. A final determination of the merits and any remedy is yet to be resolved.

I. Justiciability

As a preliminary matter, Jacobsen disputes the justiciability of Plaintiffs' claims. In particular, Jacobsen argues that Plaintiffs' claim is unripe because the Montana Legislature has not had an opportunity to respond to the 2020 United States Census data, (Doc. 8 at 10), as the data was only released in August 2021, (Doc. 1 at ¶ 26). In support of the argument that the current lawsuit is premature, Jacobsen points to "ample evidence that current legislators and holdover legislators will address this issue through the 2021–22 interim and in the 2023 regular session." (Doc. 8 at 14.) This evidence consists of a letter from Representative Katie Zolnikov, (*id.* at 36), and an email from Senator Greg Hertz, (*id.* at 38), each submitted after this case was filed, appearing to demonstrate interest from those legislators in addressing reapportionment of the Commission's districts during the 2023 session. Even so, Jacobsen's argument on ripeness is unavailing.

***2** "In determining whether a dispute is ripe, the court looks to the situation as of the time suit was filed." *Democratic Nat'l Comm. v. Watada*, 198 F. Supp. 2d 1193, 1197 (D. Haw. 2002). Events that occur after a suit is filed may moot the action, but the doctrine of ripeness is not affected by such subsequent events. *Id.* Plaintiffs filed this suit on December 6, 2021, (Doc. 1), and the communications from Hertz and Zolnikov are dated December 22 and December 30, 2021, (Doc. 8 at 36, 38). While the communications from Zolnikov and Hertz—or any like action from other state legislators—may be the impetus for future events that have the potential to render Plaintiffs' present action moot, those communications and the Legislators' purported intent have no effect on the ripeness of this action.

Moreover, ripeness is contingent on whether the facts of a case demonstrate that there is yet any need for the court to act. *See Narouz v. Charter Comms., LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). Here, the communication from state legislators supports the proposition that some action is necessary to redistrict the Commission's district map, and the essential issue is whether the redrawn five district map should derive from the Montana Legislature or the federal judiciary in advance of the 2022 election cycle. That question goes beyond the ripeness inquiry and strikes at the merits of this case. In sum, the present case is ripe for adjudication.

II. *Winter* Evaluation

To succeed on their motion for a preliminary injunction, Plaintiffs "must establish that [they] are likely to succeed on the merits, that [they] are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). At this point considering the legal briefing and oral argument, Plaintiffs have met their initial burden.

A. Likelihood of Success on the Merits

Plaintiffs must show they are likely to succeed on the merits of their challenge that the Commission's districts, based on the data from the 2020 United States Census, are malapportioned. Plaintiffs make the case that the Commission's districts are unconstitutional because they deny every voter his "constitutional right to have his vote counted with substantially the same weight as that of any other voter." (Doc. 1 at ¶ 42) (quoting *Hadley v. Junior Coll. Dist. of Met. Kansas City*, 397 U.S. 50, 53, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970).) The Supreme Court's emphasis that "[s]tates must draw congressional districts with populations as close to perfect equality as possible," *Evenwel v. Abbott*, 578 U.S. 54, 59, 136 S.Ct. 1120, 194 L.Ed.2d 291 (2016), means that when a state

> decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that

> equal numbers of voters can vote for proportionally equal numbers of officials.

Hadley, 397 U.S. at 56, 90 S.Ct. 791. "Where the maximum population deviation between the largest and smallest district is less than 10% ... a state or local legislative map presumptively complies with the one-person, one-vote rule." *Evenwel*, 578 U.S. at 60, 136 S.Ct. 1120. Put in the inverse, where the difference between the deviation in the largest district and the deviation in the smallest district exceeds 10%, the map at issue may only be constitutional if the state shows that the districts accommodate for some type of "traditional districting objective[ ]" such as "preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness." *Id.* at 59, 136 S.Ct. 1120.

***3** Here, Plaintiffs have included evidence from the 2020 Census pertaining to Montana, (Doc. 6-1), to calculate each district's respective deviation from the ideal population based on the data from that census utilizing the formula from *Evenwel.* Considering the 2020 Census, the ideal population for each district in Montana would be 216, 845. (Doc. 1 at ¶ 28.) This figure is achieved by dividing Montana's total population of 1,084,225, (*id.* ¶ 27), by five. *See Evenwel*, 578 U.S. at 59, 136 S.Ct. 1120. Relying on the 2020 Census data, the population of the smallest district, District 1, downwardly deviates approximately 14% from the ideal population while the population of the largest district, District 3, upwardly deviates approximately 10%. (Doc. 6 at 24.) Under the *Evenwel* formula, the maximum population deviation is roughly 24%, which exceeds the presumptively reasonable 10% deviation. *See* 578 U.S. at 60, 136 S.Ct. 1120. Jacobsen concedes that the 2020 Census data indicates a shift in Montana's population that has "result[ed] in large deviations across representative political districts." (Doc. 8 at 21–22; *see also id.* at 22 n.3.)

However, at the January 7 hearing, Jacobsen argued that the 2020 Census data is inapposite to the current challenge because, despite the 2022 election cycle, the Montana Legislature will not have an opportunity to respond to the 2020 Census data until it convenes in 2023. (*See* Doc. 8 at 10.) Based on this theory, Jacobsen argues that Plaintiffs cannot succeed on the merits because their claims are essentially time-barred by *Benisek v. Lamone*, —— U.S. ——, 138 S. Ct. 1942, 201 L.Ed.2d 398 (2018) (per curiam), which emphasized that "a party requesting a preliminary injunction must generally show reasonable diligence." *Id.* at 1944. Accordingly, Jacobsen argues that any viable challenge to the 2022 election cycle must be premised on the 2010 Census data, and such a challenge would fail under *Benisek* because of the time lapse between that data and the present action. Jacobsen also argues that Plaintiffs are unlikely to succeed on the merits of their challenge because the law requires that the Legislature, not the courts, take the first run at redistricting. Neither argument is persuasive at this point.

The argument that Plaintiffs' challenge is time-barred is unpersuasive for several reasons. First, Plaintiffs' challenge is measured by data from the 2020 Census and seeks to compel redistricting of *all* the districts. Thus, assuming *arguendo* that Jacobsen's time bar argument holds water, it would be inapplicable to Plaintiffs' challenge. Plaintiffs protest the boundaries of all the Commission's districts, and three of the five of those districts will be subject to the 2024 election cycle, (*cf.* Doc. 1 at ¶ 40), in which the parties agree the 2020 Census data will be relevant. Notably, the parties agree the current districts exhibit significant deviations based on the 2020 Census. (*See*, e.g., Doc. 8 at 19–20.) Thus, the breadth of Plaintiffs' challenge and the parties' agreement that the current districts do not reflect the realities of Montana's population distributions means that Plaintiffs are likely to succeed on the merits of their claim. While the parties disagree about the appropriate remedy, that dispute is independent of any time-bar argument Jacobsen raises.

Second, the emphasis on diligence in *Benisek* does not preclude Plaintiffs' challenge. In *Benisek*, the plaintiffs challenged an allegedly politically gerrymandered political map and sought a preliminary injunction six years, or three general election cycles, after the map was adopted. 138 S. Ct. at 1944. The Supreme Court characterized this six-year period as an "unnecessary, years-long delay" that weighed against granting the preliminary injunction. *Id.* Such a characterization does not give rise to an *in essentia* statute of limitations. Even if it did, the difference between alleged constitutional injuries between *Benisek* and this case casts doubt on the applicability of the *Benisek* reasoning. Unlike in *Benisek*, Plaintiffs' challenge here is not rooted in the release of a districting map that created unconstitutional districts based on malapportioned political groupings; rather, Plaintiffs challenge a stale map on the basis that new data demonstrates the districts—which were once presumptively constitutional—are no longer so. The fundamental distinction between the nature of the *Benisek* plaintiffs' claims and the current

Plaintiffs' claims frays the tether Jacobsen seeks to establish between the *Benisek* diligence rule and this case.

***4** Additionally, there is no statutory or constitutional requirement that the Montana Legislature act at certain intervals to redistrict the Commission's districts. (*Cf.* Doc. 8 at 9 (stating the Montana Constitutional requirement that legislative districts be reapportioned in the third year after a decennial census but there is no authority stating an analogous timeline for reapportionment of the Commission's districts).) Consequently, it is difficult to reconcile how —under Jacobsen's theory—Plaintiffs have acted both prematurely and belatedly in bringing this challenge because there is no requirement that the Legislature consider or change the Commission's districts on a specific timeline. At this stage in the litigation, Plaintiffs have shown a likelihood of success on the merits.

B. Irreparable Harm

Plaintiffs must establish that the prospect of irreparable harm is not merely possible but that it is "likely." *Winter*, 555 U.S. at 22, 129 S.Ct. 365. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 837 (9th Cir. 2020) (quotation marks omitted). Moreover, the loss of constitutional freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Cf. Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (determining irreparable harm in the context of a First Amendment violation). The parties disagree about the nature and scope of the injury: according to Plaintiffs, the 2020 Census data indicates that the five districts are constitutionally malapportioned, which will necessarily result in a violation of the one person, one vote principle if it is not corrected before the 2022 election cycle. Jacobsen agrees that, based on the 2020 Census, the current districts exhibit significant deviations, (Doc. 8 at 21–22), but Jacobsen argues that any viable challenge to the 2022 election cycle must be based on data from the 2010 Census and—in addition to the argument that such a challenge would be untimely—Jacobsen argues there remains at least a colorable dispute of fact as to whether the deviations based on 2010 data are unconstitutional. At this stage in the litigation, Plaintiffs have the more persuasive argument.

As noted, the parties agree that data from the 2020 Census shows that the populations in the Commission's districts substantially deviate from the ideal population. Thus, viewing the issue as Plaintiffs frame it, there exists a presumption of unconstitutionality because the maximum deviation is above 10%. *See Evenwel*, 578 U.S. at 60, 136 S.Ct. 1120. If the 2022 election cycle proceeds on the current Commission Districts, the 2020 Census data shows, (*see* Doc. 6 at 24), that the voters in that election will be precluded from exercising their Fourteenth Amendment right to have their votes counted with substantially the same degree of weight as other votes, *see Hadley*, 397 U.S. at 53, 90 S.Ct. 791. The fact that such a violation might be limited only to the districts up for election in 2022 does not eliminate the presently occurring harm because even temporally limited constitutional deprivations represent irreparable harm. *See Otter*, 682 F.3d at 826.

Moreover, Jacobsen may yet show that the deviations of the current map based on the 2020 Census data accommodate a recognized interest such as maintaining the integrity of political subdivisions. *See Mahan v. Howell*, 410 U.S. 315, 329, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). But at this stage, the presumption of unconstitutionality that attaches at this point gives rise to the requisite likelihood of irreparable harm because the malapportionment appears to improperly distribute the weight carried by each vote in the Commission's districts in contravention of the Fourteenth Amendment. The concern here is Jacobsen's timing argument regarding the challenge but Plaintiff notes it is the stale district mapping when measured by the 2020 Census that proves the point.

***5** Similarly, even if the issue is viewed as Jacobsen frames it, Plaintiffs nonetheless show a likelihood of irreparable harm. At the January 7 hearing, Jacobsen noted there may be issues of fact as to whether the current districts, under the 2010 Census, are unconstitutional because the deviation hews somewhat closely to the 16% maximum deviation that was found permissible in *Mahan.* However, in *Mahan* the presumption of unconstitutionality attached, but the State succeeded in rebutting it by pointing to permissible legislative intent in drawing districts so as to preserve political subdivisions. *See* 410 U.S. at 326, 93 S.Ct. 979. Plaintiffs show that the State could have drawn a map in 2010 that preserved county boundaries while reducing the maximum deviation below 3%. (Doc. 6 at 26.) Therefore, at this juncture the presumption of unconstitutionality exists as to the existing map of the Commission's districts, even based on the 2010 Census data.

C. Balance of the Equities

In balancing the equities, both parties invoke considerations of confusion—on behalf of both voters and candidates for the Commission—and comity. As a threshold matter, the

concern that any change to the Commission's current maps will significantly disrupt and add confusion to the 2022 election cycle may be somewhat mitigated by the expeditious resolution of this case. To that effect, as indicated below, the case will be set on an expedited trial or summary judgment briefing schedule so that the merits of this case may be resolved prior to the March 14, 2022 candidate filing deadline.

In addition, Jacobsen argues that Plaintiffs' requested relief is "unprecedented" and would likely exacerbate voter confusion. (*See* Doc. 8 at 27–28.) While the remedy imposed if Plaintiffs succeed on the merits of their ultimate challenge is reasonably subject to dispute, Jacobsen's concerns about the appropriateness of Plaintiffs' requested remedy do not tip the scales in her favor. The preliminary injunction is narrower in scope than the relief Plaintiffs request on their overall challenge, and Jacobsen's concerns that some voters might be shuffled throughout districts is speculative and does not diminish the reality that, at this stage, Plaintiffs have established a likelihood that a constitutional injury is presently occurring. Highlighting the possibility that confusion or other challenges may arise in connection with remedying the presumed constitutional injury does not obviate the injury itself.

Concerning comity, Jacobsen's argument that the Montana Legislature should have the opportunity to respond to the 2020 Census data has merit. But, at the same time, the limited record shows that the Montana Legislature has consistently failed to remedy malapportioned districts. Importantly, unlike the redistricting process for legislative districts, whereby the Montana Constitution imposes a timeline for the process to occur, Mont. Const. art. IV, § 14, there is no timeline governing the redistricting process for the Commission's districts. Left unresolved, there are likely significant violations of the constitutional principle of one person, one vote. Plaintiffs' showing of a likelihood of irreparable harm, which falls in the shadow of the Legislature's inaction, and the lack of a constitutional impetus to guarantee a legislative remedy diminishes the persuasiveness of Jacobsen's argument that deference to the Legislature is appropriate at the preliminary injunction stage.

Accordingly, this factor, too, tips in Plaintiffs' favor.

D. Public Interest

To the extent the fourth factor remains an independent consideration in this context, *cf. Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (stating that third and fourth factors merge when the government is the opposing party in the context of a stay), the public continues to have an interest in the principles recognized in the previous temporary restraining order. The public has an interest in "fair and effective representation," *see Evenwel*, 578 U.S. at 73, 136 S.Ct. 1120; the public has an interest in "orderly elections" that may be furthered by temporarily restraining the candidate certification process while the Commission's districts are under review, *see Benisek*, 138 S. Ct. at 1944; and the public has an interest in "equal voting strength for each voter," *Hadley*, 397 U.S. at 58, 90 S.Ct. 791. Jacobsen does not dispute that the public possesses these interests but emphasizes that "[t]he public interest inquiry primarily addresses impact on non-parties rather than parties." (Doc. 8 at 30) (quoting *Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003).) Consequently, Jacobsen argues that the Legislature's interest in maintaining control over the redistricting process is owed deference until the "Legislature fails to timely act after having an adequate opportunity to do so." (*Id.*)

***6** As explained above, the Legislature has had opportunities to act—and it has failed to do so. Although the 2020 Census data was released in August 2021, (Doc. 1 at ¶ 26), the Legislature has not acted since 2003 to redistrict the Commission's districts, (*see id.* ¶ 1), despite the proposed legislative bills to address the concern. The current census data confirms what the 2010 census data seems to show: that the current districts are malapportioned. [2] Thus, on balance, though the Legislature has an interest in involvement in the redistricting process, the public's interest in effective representation and equal voting strength outweighs that interest right now. And the Legislature is not precluded from acting in advance of the 2024 elections—or even the 2022 elections if a special session is called. "The legislature may be convened in special session by the governor or at the written request of a majority of the members." Mont. Code Ann. § 5–3–101(1). The party calling the special session may limit the special session to certain subjects. *Id.* Granting Plaintiffs' requested preliminary relief does not eliminate the option for the Montana Legislature or the governor to call a special session specifically focused on redistricting. The option for a special session called by either the legislative or executive branches remains on the table. [3] This option undercuts Jacobsen's argument that the public interest favors waiting until 2023 for the Legislature to act: § 5–3–101(1) preserves the opportunity for the State to provide the remedy, regardless of whether the preliminary injunction is granted.

Jacobsen's focus on the Legislature as a harmed non-party also emphasizes the need for public input and comment in the redistricting process during the next legislative session. (Doc. 8 at 21.) Public participation is undoubtedly an important consideration. At the same time, however, to allow the candidate certification to proceed based on a presumptively unconstitutional map—and despite Plaintiffs' showing that irreparable harm is likely occurring—for the sake of legislative public comment without assured action would teeter close to elevating form over substance. The opportunity for public input is a mechanism that helps advance noted public interests in fair and effective representation; asking the public to endure a present injury to those interests so that it may have an opportunity to weigh-in during a prospective legislative undertaking ignores the ubiquitous nature of the one-person, one-vote right under the Fourteenth Amendment.

III. Conclusion

As indicated, candidate filing in Districts 1 and 5 would ordinarily begin on January 13, 2022, and close on March 14, 2022. Mont. Code Ann. § 13–10–201(7). To minimize disruption, an expedited summary judgment briefing schedule shall be set by separate order so that this action is resolved prior to the March 14, 2022 filing deadline. Accordingly,

IT IS ORDERED that Plaintiffs' motion for a preliminary injunction, (Doc. 5), is GRANTED. Consistent with the above, Jacobsen is preliminarily enjoined from certifying candidates for Commissioner in Districts 1 and 5, pending a final disposition on the merits.

IT IS FURTHER ORDERED that the temporary restraining order, (Doc. 7), is MOOTED in light of the preliminary injunction.

All Citations

--- F.R.D. ----, 2022 WL 122777

Footnotes

1 Plaintiff Brown is a resident of District 5, while Defendants Sinoff and Seifert are residents of District 3. (Doc. 1 at ¶¶ 13–15.)

2 Jacobsen argues that, had the Legislature confirmed SB 153 in 2013, the Commission's districts would have nonetheless required adjustment considering the 2020 Census. (Doc. 8 at 19–20.) This argument does not diminish the fact that the districts remain problematic; rather, it illustrates that redistricting is a dynamic process that should necessarily respond to real-world developments at regular intervals.

3 Since 1903, the governor or the legislature has called 33 special sessions. *See* MONTANA STATE LEGISLATURE, SPECIAL SESSIONS 1889–PRESENT, https://leg.mt.gov/civic-education/facts/special-sessions/ (last visited Jan. 12, 2022). These sessions have focused on issues ranging from topics as broad as "miscellaneous appropriations," (*see* 40th Leg., 1st Spec. Sess. (Mont. 1967)) to those as narrow as "to correct action on vehicle fees," (*see* 49th Leg., 1st Spec. Sess. (Mont. 1985)). *See* Fed. R. Evid. 201(b), (c). The issue of redistricting the map for the Commission's districts seems to fall within these confines.

Appendix B

Grisham v. Van Soelen,
No. S-1-SC-39481,
2023 WL 6209573
(N.M. Sept. 22, 2023)

2023 WL 6209573
Only the Westlaw citation is currently available.
Supreme Court of New Mexico.

Michelle Lujan GRISHAM in her official capacity as Governor of the State of New Mexico, Howie Morales, in his official capacity as New Mexico Lieutenant Governor and President of New Mexico Senate, Mimi Stewart, in her official capacity as President Pro Tempore of the New Mexico Senate, and Javier Martinez, in his official capacity as Speaker of the New Mexico House of Representatives, Petitioners,
v.
Hon. Fred T. Van SOELEN, District Court Judge, Fifth Judicial District Court, Respondent,
and
Republican Party of New Mexico, David Gallegos, Timothy Jennings, Dinah Vargas , Manuel Gonzales Jr., Bobby and Dee Ann Kimbro, and Pearl Garcia, Real Parties in Interest,
and
Maggie Toulouse Oliver,
Defendant-Real Party in Interest.

NO. S-1-SC-39481
|
Filing Date: September 22, 2023

Synopsis

Background: Plaintiffs brought action in the district court, alleging that the congressional districting maps violate New Mexico's Equal Protection Clause. Elected officials filed a petition for a writ of superintending control and request for stay in the Supreme Court, which was granted.

Holdings: The Supreme Court, Bacon, C.J., held that:

Court would exercise power of superintending control;

as a matter of first impression, an egregious partisan gerrymander violates the equal protection clause of the New Mexico Constitution;

a partisan gerrymander claim is justiciable under the equal protection provision of the New Mexico Constitution;

test for an equal protection claim asserting a partisan gerrymander under the New Mexico Constitution has three parts: intent, effects, and causation; and

intermediate scrutiny is proper level of scrutiny for partisan gerrymandering claim.

So ordered.

Procedural Posture(s): Other.

ORIGINAL PROCEEDING ON PETITION FOR WRIT OF SUPERINTENDING CONTROL

Attorneys and Law Firms

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Dylan Kenneth Lange, General Counsel, Albuquerque, NM, for Defendant-Real Party in Interest

Harrison, Hart & Davis, LLC, Carter B. Harrison IV, Daniel J. Gallegos, Albuquerque, NM, for Real Parties in Interest

OPINION

BACON, Chief Justice.

***1** {1} This case presents the issue of whether a partisan gerrymandering claim is cognizable and justiciable under the Equal Protection Clause in Article II, Section 18 of the New Mexico Constitution and, if so, what standards should be applied in its adjudication. N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law; *nor shall any person be denied equal protection of the laws*." (emphasis added)). Real Parties in Interest (Real Parties)—Republican Party of New Mexico, David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales Jr., Bobby and Dee Ann Kimbro, and Pearl Garcia —had filed suit as Plaintiffs in the district court, alleging that the congressional districting maps enacted in 2021 violate New Mexico's Equal Protection Clause. As Defendants in the district court, Petitioners—in their capacities as elected officials, the Governor, Lieutenant Governor-President of the

Senate, President Pro Tempore of the Senate, and Speaker of the House of Representatives [1] —filed a petition for a writ of superintending control and request for stay in this Court to resolve the aforementioned issues. Following oral argument and supplemental briefing on those issues, we filed an order and an amended order, both of which, among other things, granted the petition insofar as declaring the justiciability of a partisan gerrymander claim and providing guidance and standards for the district court. Today, we explain that order and provide additional guidance to the district court regarding the resolution of a partisan gerrymandering case.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Within a special legislative session in December 2021, the challenged congressional map and associated legislation was introduced in the Senate, approved by both chambers, and signed into law by the Governor. [2] In November 2021, the Citizen Redistricting Committee had submitted to the Legislature its proposed redistricting plans, promulgated in accordance with the Redistricting Act, NMSA 1978, §§ 1-3A-1 to -9 (2021). [3] However, the Legislature exercised its discretion to draw and enact its own maps, including the challenged congressional map. *See* Senate Bill 1, "Congress-Final Version Maps and Data" hyperlink; *see also* § 1-3A-9(B) ("The legislature shall receive the adopted district plans for consideration in the same manner as for legislation recommended by interim legislative committees.").

***2** {3} Approximately one month after the congressional map's adoption, the Real Parties filed their lawsuit in district court challenging the map as an unconstitutional partisan gerrymander. Among other claims, the Real Parties quoted *Maestas v. Hall*, 2012-NMSC-006, ¶¶ 25, 34, 274 P.3d 66, for the proposition that "[w]hen drafters of congressional maps use 'illegitimate reasons' to discriminate against regions at the expense of others, including failing to adhere to New Mexico's 'traditional districting principles,' aggrieved voters may seek redress of this constitutional injury in the courts through an equal protection challenge." The Real Parties further alleged that the challenged map "drastically" split (or "crack[ed]") [4] the votes of registered Republicans in southeastern New Mexico from a single district (Congressional District 2) into all three congressional districts and diluted those votes by splitting registered Democrats in the greater-Albuquerque area into all three districts as well. The alleged effect was to "impose[ ] a severe partisan performance swing by shifting [Congressional District] 2's strong Republican block ... into majority-Democratic seats." The Real Parties sought a declaration that the challenged map is an unconstitutional partisan gerrymander in violation of Article II, Section 18. They additionally moved for a preliminary injunction to block the map from taking effect for the 2022 congressional elections.

{4} The Real Parties also moved for injunctive relief in asking the district court to adopt "a partisan neutral congressional map consistent with [map E]," one of the three partisan-neutral congressional plans developed by the Citizen Redistricting Committee and recommended to the Legislature.

{5} Petitioners moved to dismiss the Real Parties' lawsuit, arguing under *Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 204 L.Ed.2d 931 (2019), and separation-of-powers principles that the lawsuit raised a nonjusticiable political question. The district court denied the motions, reasoning that the Real Parties had alleged "a strong, well-developed case that [the challenged map] is an unlawful political gerrymander that dilutes Republican votes in congressional races in New Mexico." The district court also held that the Real Parties' partisan-gerrymandering claim was not definitively barred by *Rucho* or state law and noted that the Real Parties had cited state law authorities, namely *Maestas* and the Redistricting Act, that may provide a standard for evaluating their equal protection claim.

{6} In separate findings and conclusions, the district court denied the Real Parties' motion for preliminary injunction, concluding among other things (1) that the court likely could not grant the requested relief of adopting map E or drawing its own map, (2) that enjoining the 2021 map would cause "chaos and confusion" for the imminent primary election, and (3) that the Real Parties had not shown a "likelihood of success on the merits." In its second letter decision on the motion, the district court further explained that, because the challenged map "will be used ... potentially for the next five (5) elections, ... the case will continue, and the Court will hear further argument at a later date on [the] complaint, that could affect the elections after 2022."

{7} Shortly after the district court filed its orders denying the motions to dismiss and for preliminary injunction, Petitioners filed the instant petition seeking a stay of proceedings and a writ of superintending control to resolve two "controlling legal issues" in the underlying suit:

> (1) Whether Article II, Section 18 ... provides a remedy for a claim of alleged partisan gerrymandering?

(2) Whether the issue of alleged partisan gerrymandering is a justiciable issue; and if such a claim is justiciable under the New Mexico Constitution, what standards should the district court apply in resolving that claim in this case?

***3** This Court stayed the proceedings in the district court and heard oral arguments, following which we ordered supplemental briefing addressing whether "the New Mexico Constitution provide[s] greater protection than the United States Constitution against partisan gerrymandering." Subsequently herein we discuss the parties' arguments in these proceedings as relevant to the issues.

{8} We granted the petition and provided guidance and standards for the district court. As we discuss further herein, our guidance and standards include (1) that a partisan gerrymandering claim is justiciable under Article II, Section 18, (2) that such a claim is subject to the three-part test articulated by Justice Kagan in her dissent in *Rucho*, (3) that at this stage in the proceedings, we need not determine the precise degree of partisan gerrymandering that is permissible under the New Mexico Constitution, (4) that intermediate scrutiny is the proper level of scrutiny for such a claim, and (5) what evidence must be considered of the relevant evidence that may be considered.

II. DISCUSSION

A. Our Exercise of Superintending Control and Standard of Review

{9} "Article VI, Section 3 of the New Mexico Constitution confers on this Court superintending control over all inferior courts and the power to issue writs necessary or proper for the complete exercise of our jurisdiction and to hear and determine the same." *Kerr v. Parsons*, 2016-NMSC-028, ¶ 16, 378 P.3d 1 (text only) (citation omitted).[5] "The power of superintending control is the power to control the course of ordinary litigation in inferior courts." *Dist. Ct. of Second Jud. Dist. v. McKenna*, 1994-NMSC-102, ¶ 3, 118 N.M. 402, 881 P.2d 1387 (internal quotation marks and citation omitted). "In granting a writ of superintending control, we may offer guidance to lower courts on how to properly apply the law." *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 30, 410 P.3d 201. We may exercise the power of superintending control "where it is deemed to be in the public interest to settle the question involved at the earliest moment." *Griego v. Oliver*, 2014-NMSC-003, ¶ 11, 316 P.3d 865 (internal quotation marks and citation omitted).

{10} The implications and constitutional interests of the underlying lawsuit warrant the exercise of this authority. The adjudication of a partisan gerrymandering claim is a matter of first impression that implicates both New Mexicans' constitutional right to vote and the Legislature's constitutional responsibility for redistricting. *See State ex rel. Walker v. Bridges*, 1921-NMSC-041, ¶ 8, 27 N.M. 169, 199 P. 370 ("[T]he supreme right guaranteed by the Constitution of the state is the right of a citizen to vote at public elections."); *see also* N.M. Const. art. IV, § 3(D) (identifying the Legislature as the provenance of reapportionment). We echo the district court's observation that uncertainty as to the applicable districting maps for upcoming elections could result in "chaos and confusion," further highlighting the clear and substantial public interest served by resolving the underlying legal issues here. *See McKenna*, 1994-NMSC-102, ¶ 5, 118 N.M. 402, 881 P.2d 1387 ("[T]his Court has used its power of superintending control to address issues of great public interest and importance." (internal quotation marks and citation omitted)). "Because this case presents an issue of first impression ... without clear answers under New Mexico law, ... we agree that this is an appropriate case in which to exercise our superintending control authority." *Torrez*, 2018-NMSC-005, ¶ 31, 410 P.3d 201 (first omission in original) (internal quotation marks and citation omitted).

B. Resolution of This Case Is Proper Under Article II, Section 18 Without Application of Interstitial Analysis

***4** {11} As a preliminary matter, we determine whether the instant claim under the Equal Protection Clause of Article II, Section 18 can be resolved through interstitial analysis. For the reasons that follow, we determine that it cannot.

{12} Under the framework for interstitial analysis announced in *State v. Gomez*, "[w]hen a litigant asserts protection under a New Mexico Constitutional provision that has a parallel or analogous provision in the United States Constitution," a state "court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined." 1997-NMSC-006, ¶¶ 19-22, 122 N.M. 777, 932 P.2d 1. Under the latter scenario, a court "may diverge from federal precedent for three reasons [or prongs]: a flawed [or undeveloped] federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.* ¶ 19. For purposes of this discussion, we consider the framework above to consist of two stages: the first stage consists of the

initial question and answer regarding the scope of federal constitutional protection, and the second stage, if no such protection applies, consists of determining which prong if any supports divergence from federal precedent.

{13} The applicability of *Gomez* is debated at length in the parties' supplemental briefing. The Real Parties first assert that a partisan gerrymander violates the federal equal protection standard, and they thus invite this Court to "adjudicate claims asserting the full substantive scope of the federal Equal Protection Clause." The Real Parties then assert in the alternative that each of the three *Gomez* prongs of interstitial analysis supports adjudication under Article II, Section 18; that *Rucho*'s holding establishes the relevant federal analysis to be "undeveloped" where federal courts cannot reach the merits of such a claim for prudential reasons; that structural differences exist for New Mexico, including our lack of provisions analogous to the "Cases" or "Controversies" of the United States Constitution's Article III, Section 2; and that distinctive New Mexico characteristics include "[t]his Court's [b]road[er] [c]onstruction of the [s]tate Equal Protection Clause."

{14} In response, Petitioners first reject the availability of the federal equal protection standard here, asserting that "the U.S. Supreme Court has *never* held that partisan gerrymandering violates the federal equal protection clause." Regarding the three *Gomez* prongs of interstitial analysis, Petitioners assert that none avail: that federal analysis is not *undeveloped*, given *Rucho*'s "ultimate rejection" of "th[at] Court's political gerrymandering jurisprudence"; that no state "structural differences command departure from *Rucho*'s federal analysis," where "[r]espect for separation of powers" should constrain this Court; and that no "[s]pecial [s]tate [c]haracteristics ... [j]ustify [d]eparture" from the federal standard. Regarding the Real Parties' assertion that this Court has construed the state Equal Protection Clause more broadly, Petitioners argue that "the State and Federal Equal Protection Clauses are coextensive, providing the same protections" (internal quotation marks and citation omitted), and that this Court has only interpreted our state Equal Protection Clause more broadly in discrete circumstances that do not apply here.

***5** {15} Notwithstanding the parties' arguments, we determine that the instant case should be resolved under Article II, Section 18 without application of interstitial analysis. Our conclusion rests primarily on the undetermined nature of the federal Equal Protection Clause—which we discuss further herein—as it applies to a partisan gerrymandering claim. Because that substantive matter is undetermined rather than undeveloped, we cannot answer "whether the right being asserted is protected under the federal constitution." *Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. Importantly, the *Gomez* framework of interstitial analysis is best suited to state constitutional claims for which the relevant "federal protections are extensive and well-articulated," whereas the framework's utility is significantly diminished when federal precedent is unclear. *Id.* ¶ 21 (internal quotation marks and citation omitted). Without a clear answer to that initial question of the *Gomez* framework, we do not reach the framework's second stage.

{16} Under the plain language of *Gomez*, interstitial analysis of the instant claim under the state Equal Protection Clause *begins* by asking whether the right to vote is protected by the federal Equal Protection Clause from vote dilution effected by a partisan gerrymander—envisioning a clear, yes-or-no answer. *See id.* ¶ 19. If *yes*, "then the state constitutional claim is not reached"; if *no*, "then [Article II, Section 18] is examined." *Id.* Because *Rucho* did not address the merits of the alleged equal protection violation therein, we are left with uncertainty as to the substantive scope of the federal standard for this context, [6] and thus we lack the clear answer required by *Gomez*'s initial question. In this regard, we read *Gomez* to require clarity as to the existence of federal protection as a prerequisite to reaching the second stage of interstitial analysis. Stated differently, proceeding to the framework's second stage without such clarity would rely on speculation as to the reach of the relevant federal protection. We do not read *Gomez* to allow such speculation, and accordingly we cannot resolve the instant case under interstitial analysis.

{17} We recognize that *Gomez* does contemplate application of interstitial analysis where the relevant federal analysis is "undeveloped," as argued by the Real Parties. *Id.* ¶ 20. However, this argument does not avail for two reasons. First, we have read *Gomez* to apply this consideration within the second stage of interstitial analysis, specifically within the first prong of "reasons to depart from established federal precedent." *State v. Adame*, 2020-NMSC-015, ¶ 14, 476 P.3d 872 (stating the first such "reason" as "the federal analysis is flawed or undeveloped"); *see also State v. Crane*, 2014-NMSC-026, ¶ 15, 329 P.3d 689. As explained, here we do not reach that second stage of the analysis.

{18} Second, *Gomez*'s incorporation of *undeveloped* federal analysis derives from *State v. Attaway*, wherein this Court

interpreted Article II, Section 10 of the New Mexico Constitution in a context not previously reached by the United States Supreme Court's interpretation of the Fourth Amendment. *Attaway*, 1994-NMSC-011, ¶ 14, 117 N.M. 141, 870 P.2d 103 ("The [United States] Supreme Court has not determined whether officers executing a search warrant must knock and announce prior to entry."). The *Attaway* Court thus reached its holding without having to navigate an established, analogous federal standard. *See id.* ¶ 20 ("The New Mexico Constitution embodies a knock-and-announce requirement." (emphasis omitted)). In this regard, we read *Gomez*'s use of "*undeveloped* federal analogs," 1997-NMSC-006, ¶ 20, 122 N.M. 777, 932 P.2d 1 (emphasis added), to mean situations in which no United States Supreme Court standard for a federal provision exists relevant to a state court's analysis of a specific provision of the New Mexico Constitution. In contrast to the issue in *Attaway*, the issue of partisan gerrymandering under the Federal Equal Protection Clause has been debated extensively over decades by the United States Supreme Court, *see Rucho*, 139 S. Ct. at 2497-98, resulting in the uncertainty discussed above regarding the scope of the federal standard. We determine that this uncertainty is not what the *Gomez* Court envisioned by its use of "undeveloped."

***6** {19} Further, because that uncertainty necessarily extends to the relationship of our state Equal Protection Clause to its federal analog, we deem that any ruling by this Court interpreting or relying on the unknown scope of the federal provision—regardless of the prevailing party—would be especially uncertain. In the event of subsequent federal development in this area of law, the circumstances of New Mexico's ensuing congressional elections could indeed be thrown into chaos and confusion. Accordingly, we determine that exercising our constitutional "power of superintending control to address issues of great public interest and importance," *McKenna*, 1994-NMSC-102, ¶ 5, 118 N.M. 402, 881 P.2d 1387 (internal quotation marks and citation omitted), warrants a ruling solely under Article II, Section 18, thus allowing the public to rely on the result. [7]

{20} Under our determination that this case cannot be resolved under interstitial analysis, we need not further address the parties' arguments in this regard.

C. A Partisan Gerrymandering Claim Is Justiciable Under Article II, Section 18

{21} Citing *Rucho*, 139 S. Ct. at 2494, Petitioners argue that this Court should hold a partisan gerrymandering claim to be nonjusticiable, that is, not "capable of being disposed of judicially." *Justiciable*, *Black's Law Dictionary* (11th ed. 2019). Petitioners assert that separation of powers principles are offended by adjudication of such "fundamentally political dispute[s]"; that the New Mexico Equal Protection Clause is "coextensive" with its federal analog, and thus additional state constitutional or statutory guideposts are necessary for adjudication under Article II, Section 18; and that political question doctrine precludes the justiciability of a partisan gerrymandering claim. Implicitly, these arguments suggest that concerns regarding federal standards of justiciability should override state judicial concerns regarding constitutional violations of equal protection and, consequently, that a partisan gerrymandering claim under Article II, Section 18 is excepted from judicial review. We disagree.

1. The right to vote is of paramount importance in New Mexico

{22} At the outset, we emphasize that "[t]he right to vote is the essence of our country's democracy, and therefore the dilution of that right strikes at the heart of representative government." *Maestas*, 2012-NMSC-006, ¶ 1, 274 P.3d 66; *see State ex rel. League of Women Voters of N.M. v. Advisory Comm. to N.M. Compilation Comm'n*, 2017-NMSC-025, ¶ 1, 401 P.3d 734 ("[T]he elective franchise ... is among the most precious rights in a democracy."). In *State ex rel. League of Woman Voters v. Herrera*, we "reiterat[ed] the longstanding and fundamental principle that the right to vote is of paramount importance. The courts of New Mexico have long held that in service of this important right, courts should guard against voter disenfranchisement whenever possible and interpret statutes broadly to favor the right to vote." 2009-NMSC-003, ¶ 8, 145 N.M. 563, 203 P.3d 94 (citations omitted). We have further identified voting as "a fundamental personal right or civil liberty ... which the Constitution explicitly or implicitly guarantees." *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747.

***7** {23} In addition, we recognize that other provisions in our state Bill of Rights—specifically Article II, Sections 2, 3, and 8—support that the right to vote is of paramount importance in New Mexico. Article II, Section 2 (Popular Sovereignty Clause) provides, "All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good." Article II, Section 3 (Right of

Self-Government Clause) provides, "The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state." Article II, Section 8 (Freedom of Elections Clause) provides, "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." As we discuss herein, we determine that the right to vote is intrinsic to the guarantees embodied in these provisions of our state Bill of Rights.

{24} We begin this discussion with our Freedom of Elections Clause, which we have also characterized as our Free and Open Clause. *See, e.g.*, *Crum v. Duran*, 2017-NMSC-013, ¶ 2, 390 P.3d 971. By its plain language, the Clause implicitly asserts the importance of "the free exercise of the right of suffrage." N.M. Const. art. II, § 8. We have characterized the Freedom of Elections Clause as "intended to promote voter participation during elections" and as "Provid[ing] a Broad Protection of the Right to Vote." *Crum*, 2017-NMSC-013, ¶¶ 2-6, 390 P.3d 971; *see also Gunaji v. Macias*, 2001-NMSC-028, ¶ 29, 130 N.M. 734, 31 P.3d 1008 ("[A]n election is only 'free and [open]' if the ballot allows the voter to choose between the lawful candidates for that office."). In *Crum*, we further noted with approval the Missouri Supreme Court's interpretation of that state's "substantively identical" provision "to mean that 'every qualified voter may freely exercise the right to vote without restraint or coercion of any kind and that his or her vote, when cast, shall have the same influence as that of any other voter." *Id.*, 2017-NMSC-013, ¶ 9, 390 P.3d 971 (text only) (quoting *Preisler v. Calcaterra*, 362 Mo. 662, 243 S.W.2d 62, 64 (1951) (en banc)).

{25} While we have not had prior occasion to construe either our Popular Sovereignty Clause or our Right of Self-Government Clause, we determine that Article II, Sections 2 and 3 by their plain language are constitutional provisions articulating the sovereignty of the people over their government, which sovereignty under our system of representative democracy is ensured by the right to vote. These two provisions—which have no federal analog—underscore the importance of the franchise to effectuating the other rights guaranteed by the New Mexico Constitution. To that extent, we agree with the Real Parties that we "should construe the Equal Protection Clause's application here *in par*[*i*] *materia* or through the 'prism' of [these] other Bill of Rights provisions that also speak directly to the right to fair electoral representation." *Cf. Herrera*, 2009-NMSC-003, ¶ 8, 145 N.M. 563, 203 P.3d 94 ("[T]he right to vote is of paramount importance."); *Walker*, 1921-NMSC-041, ¶ 8, 27 N.M. 169, 199 P. 370 ("[T]he supreme right guaranteed by the Constitution of the state is the right of a citizen to vote at public elections."); *Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392, 722 P.2d 643 (recognizing "the principle that constitutions must be construed so that no part is rendered surplusage or superfluous"); *State v. Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431, 863 P.2d 1052 ("Surely, the framers of the Bill of Rights of the New Mexico Constitution meant to create more than 'a code of ethics under an honor system.' " (quoting Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1369-72 (1983))).

{26} We need not determine here whether these broad constitutional provisions are merely "meant to express ... basic political principle[s]" or are meant "as a textual enumeration of certain substantive rights." Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?*, 39 N.M. L. Rev. 375, 399, 403 (2009) (discussing the New Mexico Constitution Article II, Section 4). The right to vote *is* the essential democratic mechanism intrinsic to these provisions that links the people to their guaranteed power and rights. We therefore read Article II, Section 18 together with Sections 2, 3, and 8 to evaluate an individual's right to vote under the New Mexico Constitution.

2. Vote dilution can rise to a level of constitutional harm for which Article II, Section 18 provides a remedy

***8** {27} In the seminal case of *Reynolds v. Sims*, the United States Supreme Court stated in the one-person, one-vote context that the "federally protected right suffers substantial dilution where a favored group has full voting strength and the groups not in favor have their votes discounted." 377 U.S. 533, 555 n.29, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (text only) (citation omitted); *see Maestas*, 2012-NMSC-006, ¶ 1, 274 P.3d 66. In reliance on *Reynolds*, this Court has recognized constitutional harm where the individual right to vote is infringed, including through debasement or dilution. *Wilson v. Denver*, 1998-NMSC-016, ¶ 27, 125 N.M. 308, 961 P.2d 153 (" '[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' " (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362)); *see also State ex rel. Witt v. State Canvassing Bd.*, 1968-NMSC-017, ¶ 22, 78 N.M. 682, 437 P.2d 143 (" 'To the extent that a citizen's right to vote is debased, [that individual] is that much less a citizen.' " (quoting *Reynolds*, 377 U.S. at 567, 84 S.Ct. 1362)).

{28} A partisan gerrymander by its very nature results in vote dilution. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (defining "the problem of partisan gerrymandering" as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); *cf. Vieth v. Jubelirer*, 541 U.S. 267, 274-75, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (recognizing a historical gerrymander as a political party's " 'attempt to gain power which was not proportionate to its numerical strength' " (citation omitted)). Just five years ago, a unanimous United States Supreme Court agreed that the "harm" of vote dilution "arises from the particular composition of the voter's own district, which causes his vote —having been packed or cracked [8] —to carry less weight than it would carry in another, hypothetical district." *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1930–31, 201 L.Ed.2d 313 (2018).

{29} However, some degree of vote dilution under a partisan gerrymander does not offend the United States Constitution. *See Rucho*, 139 S. Ct. at 2497 ("[W]hile it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, a jurisdiction may engage in constitutional political gerrymandering." (internal quotation marks and citation omitted)); *see also Gaffney*, 412 U.S. at 753, 93 S.Ct. 2321 ("Politics and political considerations are inseparable from districting and apportionment."). Stated differently, depending on the degree of vote dilution under a political gerrymander, it may not rise to the level of constitutional harm.

{30} Although some degree of partisan gerrymandering is permissible, *egregious* partisan gerrymandering can effect vote dilution to a degree that denies individuals their "inalienable right to full and effective participation in the political process[ ]," *Reynolds*, 377 U.S. at 565, 84 S.Ct. 1362, and "enable[s] politicians to entrench themselves in office as against voters' preferences," *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). [9] The consequences of such entrenchment under a partisan gerrymander include that ensuing elections are effectively predetermined, essentially removing the remedy of the franchise from a class of individuals whose votes have been diluted.

***9** {31} To allow such a result would be an abdication of our duty to "apply the protections of the Constitution" when the government is alleged to have threatened the constitutional rights that all New Mexicans enjoy; accordingly, we would be derelict in our responsibility to vindicate constitutional protections, including the equal protection guarantee, were we to deny a judicial remedy to individuals directly affected by such a degree of vote dilution. *See Griego*, 2014-NMSC-003, ¶ 1, 316 P.3d 865 ("[W]hen litigants allege that the government has unconstitutionally interfered with a right protected by the Bill of Rights, or has unconstitutionally discriminated against them, courts must decide the merits of the allegation. If proven, courts must safeguard constitutional rights and order an end to the discriminatory treatment."); *see also Walker*, 1921-NMSC-041, ¶ 8, 27 N.M. 169, 199 P. 370; *cf. Gill*, 138 S. Ct. at 1930-31 ("Remedying the individual voter's harm [of vote dilution] ... requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be.").

{32} Similarly, we fail to see how all political power would be "vested in and derived from the people" and how "all government of right [would] originate[ ] with the people" and be "founded upon their will," as required by the Popular Sovereignty Clause, if the will of an entrenched political party were to supersede the will of New Mexicans. N.M. Const. art, II § 2. In such a scenario, the will of the people would come second to the will of the entrenched party, and the fundamental right to vote in a free and open election as required by Article II, Section 8 of the New Mexico Constitution would be transformed into a meaningless exercise. *See* N.M. Const. art. II § 8 ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). Such a result cannot stand.

{33} We reiterate and emphasize that although we refer to federal cases for the purpose of guidance, such cases do not compel our result. Rather, our opinion is separately, adequately, and independently based upon the protections provided by the New Mexico Constitution. *See* N.M. Const. art. II, § 18; *id.* § 3 ("The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state."); *see also Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the

result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

{34} We conclude that a partisan gerrymander of an egregious degree violates the democratic principles expressed above in the New Mexico Constitution and our precedent through disparate treatment of a class of voters and thus is cognizable under Article II, Section 18. *See Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 19, 138 N.M. 331, 120 P.3d 413 ("[A] politically powerless group has no independent means to protect its constitutional rights."). Given the consequences of entrenchment, we reiterate that denial of a judicial remedy to individuals directly affected by such a degree of vote dilution would be a dereliction of our responsibility to vindicate constitutional protections, including the equal protection guarantee.

3. A partisan gerrymandering claim under Article II, Section 18 is not excepted from judicial review

{35} In accordance with our foregoing conclusions on the New Mexico Constitution, we next address Petitioners' arguments that a partisan gerrymandering claim should be excepted from judicial review.

***10** {36} As a general proposition under separation of powers principles, this Court conducts judicial review of legislation alleged to commit constitutional harm. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 15, 119 N.M. 150, 889 P.2d 185 ("The reviewability of executive and legislative acts is implicit and inherent in the common law and in the division of powers between the three branches of government."). The judiciary's proper "function and duty [is] to say what the law is and what the Constitution means." *Dillon v. King*, 1974-NMSC-096, ¶ 28, 87 N.M. 79, 529 P.2d 745 (*citing Marbury v. Madison*, 5 U.S. 137, 178, 1 Cranch 137, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")); *United States v. Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (same); *see* N.M. Const. art. III, § 1. "[T]he primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, ... has been vested in the judicial branch." *Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431, 863 P.2d 1052 (internal quotation marks and citation omitted); *see Moore v. Harper*, 600 U.S. 1, 143 S. Ct. 2065, 2079, 216 L.Ed.2d 729 (2023) ("Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts."). "When government is alleged to have threatened any of [the provisions in the New Mexico Bill of R]ights, it is the responsibility of the courts to interpret and apply the protections of the Constitution." *Griego*, 2014-NMSC-003, ¶ 1, 316 P.3d 865.

{37} However, in conducting such review,

> "[w]e will not question the wisdom, policy, or justness of a statute, and the burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute. An act of the Legislature will not be declared unconstitutional in a doubtful case, ... and if possible, it will be so construed as to uphold it."

Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, ¶ 11, 306 P.3d 457 (alteration and omission in original) (citation omitted); *cf. Pirtle v. Legis. Council Comm.*, 2021-NMSC-026, ¶ 32, 492 P.3d 586 (" '[I]t is only when a legislative body adopts internal procedures that 'ignore constitutional restraints or violate fundamental rights' that a court can and must become involved." (quoting *United States v. Ballin*, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321 (1892))).

a. Judicial review of a partisan gerrymander does not offend separation of powers principles

{38} To the extent that Petitioners assert that judicial review of redistricting "do[es] violence to New Mexico's constitutional separation of powers," we reject such a blanket proposition. We agree with Petitioners that "th[is] Court should not interject itself into this fundamentally political dispute *to impose its own policy preference* as to just how 'fair' maps need to be" (emphasis added). To conduct judicial review with such a purpose would contradict the judicial limitation expressed above in *Bounds*. Our proper role, here as in conducting judicial review of legislation generally, is determining whether the acts of the political branches have exceeded constitutional authority. *See Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 2, 378 P.3d 13 ("When litigants allege that the government has unconstitutionally discriminated against them, courts must decide the merits of the allegation because if proven, courts must resist shrinking from their responsibilities as an independent branch of government, and refuse to perpetuate the discrimination ... by safeguarding constitutional rights. Such is the constitutional responsibility of the courts."); *see also Moore*, 143 S. Ct. at 2083 ("[W]hen legislatures make laws, they are bound

by the provisions of the very documents that give them life."). The fact that the results of adjudication in a partisan gerrymandering case, as Petitioners assert, "*will*—not maybe—favor one political party over [an]other" reflects the nature of the case, not judicial policymaking.[10] *Cf. Rucho*, 139 S. Ct. at 2519-23 (Kagan, J., dissenting) (concluding that "judicial oversight of partisan gerrymandering" by the lower courts there "us[ed] neutral and manageable—and eminently legal—standards").

***11** {39} We will leave no power on the table in properly fulfilling our constitutional obligations, including to vindicate individual rights. As we explained in *Griego*, when the "government is alleged to have threatened" rights such as equal protection of the law and the right to vote, "it is the responsibility of the courts to interpret and apply the protections of the Constitution" to both safeguard individual rights and put an end to the discriminatory treatment. 2014-NMSC-003, ¶ 1, 316 P.3d 865. *See Reynolds*, 377 U.S. at 566, 84 S.Ct. 1362 ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.").

> [T]he Equal Protection Clause of the New Mexico Constitution affords "rights and protections" independent of the United States Constitution. While we take guidance from the Equal Protection Clause of the United States Constitution and the federal courts' interpretation of it, we will nonetheless interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate. ... Federal case law is certainly informative, but only to the extent it is persuasive. In analyzing equal protection guarantees, we have looked to federal case law for the basic definitions for the three-tiered approach [regarding the level of scrutiny to apply to legislation], but we have applied those definitions to different groups and rights than the federal courts.

b. New Mexico's Equal Protection Clause should not be read as coextensive with the federal Equal Protection Clause for purposes of a partisan gerrymandering claim

{40} Petitioners further assert that the instant case is nonjusticiable because the New Mexico Equal Protection Clause is coextensive with its federal counterpart and the additional requisite "standards and guidance" identified in *Rucho* for justiciability do not exist in New Mexico law.

{41} Petitioners' view of the state Equal Protection Clause does not square with our precedent. As Petitioners recognize, we have interpreted Article II, Section 18 as providing broader protection than the Fourteenth Amendment in other contexts.

{42} In *Griego*, we held that "[d]enying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution." 2014-NMSC-003, ¶ 68, 316 P.3d 865. In *Breen*, we stated,

2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413 (citations omitted); *id.* ¶ 50 (holding that certain provisions of the Workers' Compensation Act "violate equal protection by discriminating against the mentally disabled in violation of equal protection guarantees").

{43} Petitioners attempt to confine *Griego* and *Breen* as cases wherein we have "invoked Article II, Section 18's Equal Protection Clause as providing greater protection of civil rights only to protect against historical, invidious and purposeful discrimination against a discrete group of vulnerable plaintiffs." Petitioners also note that in both cases we "pointed to the enaction of legislation protecting the very same class of plaintiffs." *See Griego*, 2014-NMSC-003, ¶ 48, 316 P.3d 865 (citing recent legislation prohibiting discrimination and profiling based on sexual orientation and "add[ing] sexual orientation as a protected class under hate crimes legislation"); *Breen*, 2005-NMSC-028, ¶ 27, 138 N.M. 331, 120 P.3d 413 ("protecting the mentally disabled against possible discrimination" by statutorily defining the " 'least drastic means principle' "). However, nothing in *Griego* or *Breen* expresses that these features identified by Petitioners were necessary to our finding broader "rights

and protections" under Article II, Section 18. Given the constitutional importance of the right to vote, as discussed above, we reject any suggestion that an absence of these features negates protection under our state Equal Protection Clause.

***12** {44} Petitioners also argue that, due to the provisions' textual similarity, "[u]nsurprisingly, New Mexico courts have repeatedly held that the State and Federal Equal Protection Clauses are coextensive, providing the same protections" (internal quotation marks and citation omitted). We note, however, that Petitioners do not cite this Court's cases for their proposition regarding equal protection. Instead, Petitioners cite two New Mexico Court of Appeals cases and one federal district court case that itself cites a third New Mexico Court of Appeals case. *See E. Spire Commc'ns, Inc. v. Baca*, 269 F. Supp. 2d 1310, 1323 (D.N.M. 2003) (citing *Valdez v. Wal-Mart Stores, Inc.,* 1998-NMCA-030, ¶ 6, 124 N.M. 655, 954 P.2d 87); *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 16, 122 N.M. 401, 925 P.2d 518; *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 1980-NMCA-081, ¶ 4, 95 N.M. 391, 622 P.2d 699. The Real Parties in reply make the apt observation that the cited Court of Appeals cases predate *Breen* and *Griego*. Without more, these citations therefore do not support Petitioners' argument.

{45} Because Article II, Section 18 should not be read as coextensive with the Fourteenth Amendment in this context, we do not accept Petitioners' premise that, to the extent the federal Equal Protection Clause may be read to lack standards supporting justiciability of a partisan gerrymander, the New Mexico Equal Protection Clause does as well. Our rejection of the premise is bolstered by the undetermined nature of the substantive scope of the federal Equal Protection Clause. Accordingly, we reject the assertion that New Mexico law lacks adequate standards and guidance, a point that we address more fully subsequently herein by setting out the applicable equal protection test.

{46} Notwithstanding our conclusion, we concur with Petitioners' argument that neither *Maestas* nor the Redistricting Act is a source of redistricting standards that bind the Legislature. Quoting *Rucho* and *Maestas*, the Real Parties point to "traditional districting principles" (*Maestas*, 2012-NMSC-006, ¶ 34, 274 P.3d 66) and the Redistricting Act as supplying "standards and guidance for state courts to apply" (*Rucho*, 139 S. Ct. at 2507). *Maestas*, however, only mandates the use of "traditional districting principles" for *court*-drawn plans when the political branches have failed to reach agreement. *Maestas*, 2012-NMSC-006, ¶¶ 31, 34, 274 P.3d 66. It says nothing about whether the *Legislature* is bound by such principles in the political redistricting process. *See, e.g.*, *id.* ¶ 34 ("These guidelines ... should be considered by a state court when called upon to draw a redistricting map."). Significantly, the *Maestas* Court was careful to describe these principles as "guidelines that are relevant to state districts," not as binding requirements that provide a constitutional basis for striking down a duly enacted district map. *Id.* The Redistricting Act, although requiring the Citizen Redistricting Committee to prepare and submit nonpartisan redistricting plans to the Legislature, specifies that those plans are merely recommendations which the Legislature is not required to follow. *See* § 1-3A-9(B) ("The legislature shall receive the adopted district plans for consideration in the same manner as for legislation *recommended* by interim legislative committees." (emphasis added)). Thus, the Real Parties' reliance on the traditional redistricting principles in *Maestas* and the Redistricting Act as standards to satisfy *Rucho* is misplaced.

c. Political question doctrine is nonbinding and does not avail

{47} Petitioners also assert that this Court should follow "the holding and rationale of *Rucho*" when, Petitioners allege, "There is no means for the Judiciary to supply a clear and discernable standard."[11] *See Rucho*, 139 S. Ct. at 2494 ("Among the political question cases the [United States Supreme] Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].' " (second alteration in original) (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. 691)).

***13** {48} The political question doctrine as applied in *Rucho* binds federal courts through Article III, Section 2 of the United States Constitution, whereas "the New Mexico Constitution does not expressly impose a [parallel] 'cases or controversies' limitation on state courts." *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746. Notwithstanding their nonbinding status, we have stated that prudential considerations should guide this Court's discretion in the context of conferring standing, *N.M. Right to Choose/NARAL v. Johnson,* 1999-NMSC-005, ¶ 13, 126 N.M. 788, 975 P.2d 841, and we have noted that " 'prudential rules' of judicial self-governance, like standing, ripeness, and mootness, are 'founded in concern about the proper—and properly limited—role of courts in a democratic society' and are always relevant concerns,"

Shoobridge, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746 (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). In other words, federal prudential standards—including the political question doctrine—are relevant here but are merely persuasive, a point that Petitioners acknowledge.

{49} Because the federal prudential standard is merely a persuasive consideration instead of a requirement, the question for this Court is limited to whether our constitutional responsibility to vindicate the individual right claimed in this case under Article II, Section 18 outweighs relevant prudential concerns regarding the adjudicatory standards to be applied. Further, our Constitution contains provisions that *Rucho* did not consider, provisions with no federal counterpart. *See* N.M. Const. art. II, §§ 2, 3, and 8. Given the importance of the right to vote, and the manageable standards to be applied under our own constitution discussed below, we conclude that the constitutional concerns here outweigh the prudential concerns. We hold that a partisan gerrymander claim is justiciable under Article II, Section 18 of the New Mexico Constitution.

D. A Partisan Gerrymandering Claim Under Article II, Section 18 Is Subject to the Three-Part Test Articulated by Justice Kagan in Her *Rucho* Dissent

{50} For an equal protection claim asserting a partisan gerrymander under Article II, Section 18, we adopt the three-part test articulated by Justice Kagan in her *Rucho* dissent:

> As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' predominant purpose in drawing a district's lines was to entrench their party in power by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by substantially diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

139 S. Ct. at 2516 (Kagan, J., dissenting) (text only) (citations omitted).

{51} This test fits within our existing equal protection framework. "The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly." *Breen*, 2005-NMSC-028, ¶ 10, 138 N.M. 331, 120 P.3d 413. Where the evidence in a partisan gerrymandering claim satisfies this threshold question, the district court should then apply the Kagan test to determine whether the disparate treatment of vote dilution rises to the level of an egregious gerrymander. As discussed above, the touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment through intentional dilution of individuals' votes, and the Kagan test serves to determine whether the disparate treatment in an alleged gerrymander rises to such a level. *See* N.M. Const. art. II, § 2 (providing that our Popular Sovereignty Clause vests *all* political power in, and derives all power from, the people rather than a particular party engaging in allegedly egregious gerrymandering); *id.* § 8 (requiring that "[a]ll elections ... be free and open"). We find it inconceivable that the framers of our constitution would consider an election in which the entrenched party effectively predetermined the result to be an election that is "free and open."

***14** {52} In *Rucho*, the dissent provides relevant discussion of the purpose and scope of this test and of the lower courts' standards on which it is based. *See generally*, 139 S. Ct. at 2509-25 (Kagen, J., dissenting); *id.* at 2513 (Kagen, J., dissenting) ("Partisan gerrymandering of the kind before us ... subverts democracy ... [and] violates individuals' constitutional rights."). On the one hand,

> courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious

> gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland.

Id. at 2509 (Kagen, J., dissenting). On the other hand, we agree and caution that

> [j]udges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

Id. at 2515-16 (Kagen, J., dissenting) (concurring in the majority's identification of "some dangers everyone should want to avoid"). We emphasize that "by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard [in the Kagan test] invalidates the most [egregious], but only the most [egregious], partisan gerrymanders." *Id.* at 2516 (Kagen, J., dissenting).

E. So Long as the Degree Is Not Egregious in Intent and Effect, We Need Not Determine at This Stage of the Proceedings the Precise Minimum Degree That Is Impermissible Under Article II, Section 18

{53} Our ruling on the petition for extraordinary writ resolves pure questions of law and comes before any record has been developed in the district court. At this stage in the proceedings, we conclude that we need not determine the precise minimum degree of partisan gerrymander that would constitute an egregious partisan gerrymander.

{54} We recognize the concerns raised in *Rucho*, albeit under the rubric of justiciability analysis, regarding the difficulty of "provid[ing] a standard for deciding how much partisan dominance is too much." *Rucho*, 139 S. Ct. at 2498 (internal quotation marks and citation omitted) ("[T]he question is one of degree."). However, we conclude that those concerns are outweighed by the constitutional harm effected by an egregious partisan gerrymander. To withhold relief for such harm would illogically render the political branches' *most* egregious violations of equal protection immune to judicial review by virtue of there being *less* egregious partisan gerrymanders which are hard to assess, which would be contrary to Article II, Sections 2, 3, and 8 of our New Mexico Constitution.

***15** {55} Our duty to vindicate individual rights outweighs any prudential concern that the minimum degree of constitutional harm under an egregious partisan gerrymander is difficult to specify. We find such a concern assuaged by the fact that plaintiffs in such cases will bear the burden to establish that the evidence places defendants' actions within the range of constitutional harm, and by our own prudential directive in *Bounds*: "An act of the Legislature will not be declared unconstitutional in a doubtful case, and if possible, it will be so construed as to uphold it." 2013-NMSC-037, ¶ 11, 306 P.3d 457 (text only) (citation omitted).

F. Intermediate Scrutiny Is the Proper Level of Scrutiny for Adjudication of a Partisan Gerrymandering Claim Under Article II, Section 18

{56} Balancing the competing constitutional interests involved, we determine that intermediate scrutiny is the proper level of scrutiny for a partisan gerrymandering claim under Article II, Section 18. Our determination is based on the nature of the restricted right rather than on the legislative classification involved, which the Real Parties concede cannot invoke strict scrutiny. *See Breen*, 2005-NMSC-028, ¶ 12, 138 N.M. 331, 120 P.3d 413 ("Only legislation that affects the exercise of a fundamental right or a suspect classification such as race or ancestry will be subject to strict scrutiny." (internal quotation marks and citation omitted)). "The determination of which level of scrutiny is applicable under the Constitution is a purely legal question, and is reviewed de novo." *Id.* ¶ 15.

{57} "Under ... the New Mexico Constitution, there are three standards of review that this Court uses when reviewing equal protection claims: strict scrutiny; intermediate scrutiny; and the rational basis test." *State v. Ortiz*, 2021-NMSC-029, ¶ 27, 498 P.3d 264 (text only) (citation omitted). As we explained in *Marrujo*:

> Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as ... voting ...—which the Constitution explicitly or implicitly guarantees.... Under this analysis the burden is placed upon the state to show that the restriction of a fundamental right ... supports a compelling state interest, and that the legislation accomplishes its purposes by the least restrictive means. Otherwise the statute will be invalidated....
>
> [Intermediate] scrutiny is triggered by ... [l]egislation that impinges upon an important—rather than fundamental—individual interest[.] ... This level of evaluation is more sensitive to the risks of injustice than the rational basis standard and yet less blind to the needs of governmental flexibility than strict scrutiny. The burden is on the party maintaining the statute's validity—the state—to prove that the classification is substantially related to an important governmental interest.
>
> The rational basis standard of review is triggered by all other interests.

1994-NMSC-116, ¶¶ 10-12, 118 N.M. 753, 887 P.2d 747 (internal quotation marks and citations omitted).

{58} The right to vote being fundamental, we do not consider the rational basis test here, regardless of the importance of the governmental interest in redistricting. Thus, we explain why intermediate scrutiny, rather than strict scrutiny, is the proper level of scrutiny for a partisan gerrymandering claim under the New Mexico Equal Protection Clause.

{59} As previously discussed, we recognize the right to vote as "a fundamental personal right or civil liberty," which ordinarily would warrant strict scrutiny. *Marrujo*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747; *see Torres v. Village of Capitan*, 1978-NMSC-065, ¶ 23, 92 N.M. 64, 582 P.2d 1277 (quoting *Reynolds*, 377 U.S. at 562, 84 S.Ct. 1362) (noting that voting rights are " 'fundamental interests' that must be subjected to the strictest standard"); *see also Richardson v. Carnegie Library Restaurant, Inc.*, 1988-NMSC-084, ¶ 31, 107 N.M. 688, 763 P.2d 1153 (" 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' " (ellipsis omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943))), *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 36, 125 N.M. 721, 965 P.2d 305. We have also said that "[t]he nature of the individual interest and of the legislative classification determines the appropriate level of scrutiny, not the importance of the government's goal or the vagaries of history." *Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶ 19, 110 N.M. 621, 798 P.2d 571, *overruled on other grounds*, 1998-NMSC-031, ¶ 36, 125 N.M. 721, 965 P.2d 305.

***16** {60} However, we also recognize the Legislature's constitutional responsibility for redistricting under Article IV, Section 3 of the New Mexico Constitution. The importance of such a responsibility eclipses that of a statutory goal and counsels against strict scrutiny. *See Trujillo*, 1990-NMSC-083, ¶ 21, 110 N.M. 621, 798 P.2d 571 (recognizing "the nearly fatal invocation of strict scrutiny" for challenged legislation (internal quotation marks and citation omitted)); *see also Richardson*, 1988-NMSC-084, ¶ 31, 107 N.M. 688, 763 P.2d 1153 ("Strict scrutiny has operated as an antimajoritarian safeguard. Accordingly, the application of the strict scrutiny test has resulted in the virtual immunization of certain liberties from legislative affliction.").

{61} Critically, strict scrutiny entails the least restrictive means analysis, which would render vulnerable a legislative districting plan involving any degree of partisan gerrymandering. To hold the state to a least restrictive means requirement in redistricting where some degree of partisan gerrymandering is constitutionally permissible would be unreasonable and contradictory. *Cf. Torres*, 1978-NMSC-065, ¶ 22, 92 N.M. 64, 582 P.2d 1277 ("Great latitude must of necessity be accorded the discretionary acts of the legislature, and every reasonable presumption in favor of the validity of its action must be indulged.").

{62} Instead, under intermediate scrutiny a court applies a *less* restrictive means analysis, thereby "allowing for a more flexible accommodation of legislative purposes ... [while] not abandon[ing] totally the concern with over- and under-inclusiveness that, under strict scrutiny, is given form as the *least* restrictive alternative test." *Trujillo*, 1990-NMSC-083, ¶ 28, 110 N.M. 621, 798 P.2d 571 (emphasis added). The

less restrictive means test abides with the "hallmark" of intermediate scrutiny to "assess[ ] the importance of the state interest by balancing it against the burdens imposed on the individual and on society." *Id.* ¶ 29 ("[A] state's interest in preserving limited educational funds for legal residents did not justify statute's burden on the interests of children of [undocumented immigrants]." (*citing Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982))). "While the *least restrictive alternative* need not be selected if it poses serious practical difficulties in implementation, the existence of *less restrictive alternatives* is material to the determination of whether the classification substantially furthers an important governmental interest." *Id.* ¶ 30. Such balancing of interests abides with the objective of the Kagan test to apply a "standard [that] invalidates the most [egregious], but only the most [egregious], partisan gerrymanders." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

{63} Under the foregoing considerations, we hold that intermediate scrutiny properly balances the competing constitutional interests of a partisan gerrymandering claim. "Therefore, when applying intermediate scrutiny, [a c]ourt must examine (1) the governmental interests served by the [restriction of the right affected], and (2) whether the [restriction of the right affected] under the statute bear[s] a substantial relationship to any such important interests. The burden is on the party supporting the legislation's constitutionality." *Breen*, 2005-NMSC-028, ¶ 30, 138 N.M. 331, 120 P.3d 413 (internal quotation marks and citation omitted).

G. While All Relevant Evidence May Be Considered by the District Court in a Partisan Gerrymandering Claim, the District Court Shall Consider and Address Evidence of Packing or Cracking Relating to an Individual Plaintiff's Own District

{64} In applying the Kagan test within a partisan gerrymandering claim, a district court may consider all evidence relevant to whether the challenged legislation seeks to effect political entrenchment through intentional and substantial vote dilution. To satisfy the effects prong, however, a plaintiff must provide sufficient evidence that the plaintiff's own district was either *packed* or *cracked*, depending on the allegations, and that the resultant dilution of the plaintiff's vote is substantial. *Cf. Rucho*, 139 S. Ct. at 2492 ("[A] plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly 'cracked' or 'packed' district." (quoting the unanimous holding in *Gill*, 138 S. Ct. at 1931)). For a district court to find a violation of Article II, Section 18, such district-specific evidence of disparate treatment should be as objective as possible, for example, by comparing voter registration percentages or data for the political party affiliation of the individual plaintiffs under the prior districting map against parallel percentages or data under the challenged districting map. Further, a district court adjudicating a partisan gerrymandering claim must determine whether the evidence shows the challenged redistricting map substantially diluted the votes of plaintiffs within their district, though statewide evidence may also be relevant. [12] *See Gill*, 138 S. Ct. at 1929-31; *see also Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

***17** {65} We find a useful evidentiary template in *Rucho*, where extensive evidence of intent and effect indicated that the districting plans in North Carolina and Maryland were "highly partisan, by any measure." 139 S. Ct. at 2491. This record in *Rucho* supports that many forms of evidence may be relevant to prove predominant intent and substantial effect for an egregious partisan gerrymander. Regarding the effects prong of the Kagan test, we reiterate that evidence of substantial dilution of plaintiffs' votes must rely on objective district-specific evidence. [13] We point to the evidence in *Rucho* as guidance to the district court, not as limitation on what other relevant evidence may be considered.

{66} Regarding the Kagan test's third prong of causation, we reiterate that "if the plaintiffs make those showings [of intent and effects], the State must come up with a legitimate, non-partisan justification to save its map." *Id.* at 2516 (Kagan, J., dissenting).

{67} We conclude by emphasizing that the touchstone of an egregious partisan gerrymander under Article II, Section 18 is political entrenchment through intentional dilution of individuals' votes, thereby invoking the protections of Article II, Sections 2, 3, and 8. In an egregious partisan gerrymandering claim, evidence of disparate treatment sufficient to establish a violation of the New Mexico Equal Protection Clause must prove under intermediate scrutiny that the predominant purpose underlying a challenged map was to entrench the redistricting political party in power through vote dilution of a rival party; that individual plaintiffs' rival-party votes were in fact substantially diluted by the challenged map; and, upon those showings, that the State cannot demonstrate a legitimate, nonpartisan justification for the challenged map.

{68} **IT IS SO ORDERED.**

WE CONCUR:

MICHAEL E. VIGIL, Justice

DAVID K. THOMSON, Justice

JULIE J. VARGAS, Justice

BRIANA H. ZAMORA, Justice

All Citations

--- P.3d ----, 2023 WL 6209573

Footnotes

1 Secretary of State Maggie Toulouse Oliver, also named as a real party in interest, asserted that she is a nominal party and therefore has declined to take a position on the questions presented in this matter.

2 Senate Bill 1, 2021 N.M. Laws, 2d Spec. Sess., ch. 2, §§ 1-5, https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=1&year=21s2 (last visited Sept. 18, 2023) (choose "Final Version" and "Congress-Final Version Maps and Data" hyperlinks); *see* NMSA 1978, § 1-15-15 (2021), § 1-15-16 (2021), § 1-15-16.1 (2021), § 1-15-17 (2021), § 1-15-15.2 (2021).

3 *See* Citizen Redistricting Committee, *CRC District Plans & Evaluations* (reissued Nov. 8, 2021) at 4, https://www.nmredistricting.org/wpcontent/uploads/2021/11/2021-11-2-CRC-Map-Evaluations-Report-Reissued-1.pdf (last visited Sept. 8, 2023); *see also* § 1-3A-5(A)(1)(a) (providing that the committee shall "adopt three district plans each for ... New Mexico's congressional districts"); § 1-3A-7(C)(1) (prohibiting the use of partisan data other than "to ensure that the district plan complies with applicable federal law"); § 1-3A-9(A) ("The committee shall deliver its adopted district plans ... to the legislature by October 30, 2021, or as soon thereafter as practicable ....").

4 As expressed in the Alaska Supreme Court's *In re 2021 Redistricting Cases*:

> Gerrymandering often takes one of two forms, "packing" or "cracking." "Packing" occurs when groups of voters of similar expected voting behavior are unnaturally concentrated in a single district; this may create a "wasted" excess of votes that otherwise might have influenced candidate selection in one or more other districts. "Cracking" occurs when like-minded voters are unnaturally divided into two or more districts; this often is done to reduce the split group's ability to elect a candidate of its choice.

528 P.3d 40, 54 (Alaska 2023) (footnotes omitted).

5 The "text only" parenthetical as used herein indicates the omission of all of the following—internal quotation marks, ellipses, and brackets—that are present in the quoted source, leaving the quoted text itself otherwise unchanged.

6 By way of illustration, we note that, pre-*Rucho*, the United States Supreme Court recognized that invidious discrimination against *political* groups, like that against racial groups, could be cognizable under equal protection:

> What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example,

> multimember districts may be vulnerable, if racial *or political* groups have been fenced out of the political process and their voting strength invidiously minimized.

Gaffney v. Cummings, 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (emphasis added). However, as that proposition regarded the merits, we cannot know if the principle would be applicable by a court unbound by the federal standard of nonjusticiability announced subsequently in *Rucho*. *See* 139 S. Ct. at 2494, 2496.

7 We take note of Justice Bosson's observations that "*Gomez* is not inscribed in granite; it is not part of the state Constitution. It is merely a means to an end ... [intended to] serve[ ] the purposes of justice and an independent development of our state Constitution." *State v. Garcia*, 2009-NMSC-046, ¶ 56, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring). We agree that *Gomez* does not bind this Court as to our analysis of state constitutional questions, and we encourage thoughtful and reasoned argument in the future addressing whether the interstitial approach is the proper method to ensure the people of New Mexico the protections promised by their constitution. *Cf.* Jeffery S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 174, Oxford Univ. Press (2018) ("[A] chronic underappreciation of state constitutional law has been hurtful to state *and* federal law and the proper balance between state *and* federal courts in protecting individual liberty.").

8 As described by Justice Kagan,

> Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

Rucho, 139 S. Ct. at 2513-14 (Kagen, J., dissenting) (citations omitted).

9 We note that the dangers for democracy of such gerrymanders are recognized in *Rucho* by both the majority and the dissent. *See Rucho*, 139 S. Ct. at 2506 (the majority recognizing that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" as well as "the fact that such gerrymandering is 'incompatible with democratic principles' " (quoting *Ariz. State Legislature*, 576 U.S. at 791, 135 S.Ct. 2652)); *id.* at 2507 ("Our conclusion does not condone excessive partisan gerrymandering."); *id.* at 2509 (Kagan, J., dissenting) ("The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights[.] ... If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.").

10 We note the *Rucho* majority's public perception concern that, without "especially clear standards," "intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." 139 S. Ct. at 2498 (internal quotation marks and citation omitted). However, we find no explanation in *Rucho* for how such risk is distinct from that borne by courts in numerous other contexts under their constitutional mandate to interpret the laws. We also note and affirm the dissent's full agreement that "[j]udges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other." *Id.* at 2515 (Kagen, J., dissenting).

11 Though not an ingredient of our conclusion here, we note that the formulation of the political question doctrine urged by Petitioners involves a bright-line approach to political questions being nonjusticiable, as followed by the supreme courts of Kansas and North Carolina. *See Rivera v. Schwab*, 315 Kan. 877, 512 P.3d 168,

185 (2022); *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393, 399 (2023). Instead, we interpret the seminal political question cases of *Baker v. Carr* and *Marbury* as requiring a case-by-case analysis, *Baker*, 369 U.S. 186, 210-11, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding ... whether the action of [another] branch exceeds whatever authority has been committed[ ] is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *id.* at 217, 82 S.Ct. 691 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."), that excepts a political question from nonjusticiability where the case involves vindication of individual rights, *see Marbury*, 5 U.S. at 166 ("[T]here exists, and can exist, no power to control [executive] discretion [where t]he subjects [of an executive officer's acts] are political. They respect the nation, *not individual rights, and ... when the rights of individuals are dependent on the performance of* [*such an executive officer's*] *acts*[,] *he ... is amenable to the laws for his conduct*[ ] *and cannot at his discretion sport away the vested rights of others. ... But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured*[ ] *has a right to resort to the laws of his country for a remedy*." (emphasis added)).

12 In *Gill*, the United States Supreme Court articulated propositions that we find persuasive of our conclusions above, albeit in the context of establishing Article III standing. First, the *Gill* Court recognized the well-established proposition "that a person's right to vote is 'individual and personal in nature.' " 138 S. Ct. at 1929 (quoting *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362). Next, "[t]o the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. ... The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked." *Id.* at 1930. Finally, *Gill* invoked the reasoning of racial and one-person, one-vote gerrymandering jurisprudence in analyzing the nature of constitutional harm and remedy under a partisan gerrymandering claim. *See id.* at 1930-31.

In the same vein, we also note Justice Kagan's related discussion in her concurrence in *Gill*:

> The harm of vote dilution, as this Court has long stated, is individual and personal in nature. It arises when an election practice—most commonly, the drawing of district lines—devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps contracted the value of urban citizens' votes while expanding the value of rural citizens' votes. But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered disadvantage to herself as an individual: Her vote counted for less than the votes of other citizens in her State. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim—in the one-person, one-vote context or any other—always alleges.

138 S. Ct. at 1935 (Kagan, J., concurring) (text only) (citations omitted).

13 By way of example, we note the voter registration evidence from Maryland's Sixth Congressional District, which offers a stark before-and-after comparison of registered Republican voters dropping from 47% under the prior map to 33% under the challenged map. *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting).

Appendix C

League of Women Voters of Utah v. Utah State Legislature,
No. 220901712 (Utah Dist. Ct.,
Salt Lake Cty. Nov. 22, 2022)

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**RULING AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** Case No. 220901712 Judge Dianna M. Gibson

Before the Court is the Motion to Dismiss filed by Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator Stuart Adams (collectively, "Defendants")[1] on May 2, 2022 ("Motion"). The Court heard oral argument on August 24, 2022. On October 14, 2022, Defendants filed a Notice of Supplemental Authority Regarding Legislative Defendants' Motion to Dismiss and Memorandum in Support. Having considered the Motion, the memoranda submitted both in support and opposition to it, and the arguments of counsel at oral argument, the Court issued a Summary Ruling on October 24, 2022. The Court now issues the legal analysis supporting that Ruling.

BACKGROUND

Defendants move to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Utah Rules of Civil Procedure. In reviewing a motion to dismiss under Rule 12(b)(6), courts accept all the facts alleged in the Complaint as true. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. Legal conclusions or opinions couched as facts are not "facts," and therefore are not accepted as true. *Koerber v. Mismash*, 2013 UT App 266, ¶ 3, 315 P.3d 1053.

With respect to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), when a defendant mounts only a "facial attack" to the court's jurisdiction, courts presume that "all of the factual allegations concerning jurisdiction are . . . true."[2] *Salt Lake County v. State*, 2020 UT 27, ¶¶ 26-27, 466 P.3d 158. Here, Defendants have mounted a facial

[1] Lieutenant Governor Deidre Henderson is not a party to this Motion.

[2] "Motions under rule 12(b)(1) fall into two different categories: a facial or a factual attack on jurisdiction." *Salt Lake County*, 2020 UT 27, ¶26. Because a factual challenge "attacks the factual allegations underlying the assertion of jurisdiction," courts do not presume the truth of plaintiff's factual allegations. *Id.* However, in a facial challenge, "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.*

attack on jurisdiction. Therefore, under Rule 12(b)(1) and 12(b)(6), the Court accepts the allegations in the Complaint as true in reciting the facts of this case. In addition, the Court views those facts and all reasonable inferences drawn from them in the light most favorable to Plaintiffs as the non-moving party.[2] *Oakwood Vill. LLC.*, 2004 UT 101, ¶ 9. The facts recited below are taken from Plaintiffs' Complaint.

In November 2018, Utah voters passed Proposition 4, titled the Utah Independent Redistricting Commission and Standards Act, which was a bipartisan citizen initiative created specifically to reform the redistricting process and establish anti-gerrymandering standards that would be binding on the Utah Legislature. (Compl. ¶¶ 2, 73, 75.) Proposition 4 was presented to Utah voters as a "government reform measure invoking the people's constitutional lawmaking authority." (*Id.* ¶ 77.) Proponents of the measure argued "[v]oters should choose their representatives, not vice versa." (*Id.* ¶ 78.) Under then-existing laws, proponents maintained, "'Utah politicians can choose their voters' because 'Legislators draw their own districts with minimal transparency, oversight or checks on inherent conflicts of interest.'" (*Id.*)

Proposition 4 created the Independent Redistricting Commission, a seven-member bipartisan-appointed commission that would take the lead in formulating various state-wide redistricting plans. (*Id.* ¶¶ 2, 80-82.) The Independent Redistricting Commission was required to conduct its activities in an independent, transparent, and impartial manner, to apply "traditional non-partisan redistricting standards" to establish neutral map-making standards and to abide by certain listed redistricting standards. (*Id.* ¶¶ 83-84, 86.) Specifically, Proposition 4 provided that final maps must "abide by the following redistricting standards to the greatest extent practicable and in the following order of priority:" (a) "achieving equal population among districts" using the most recent census; (b) "minimizing the division of municipalities and counties across

multiple districts;" (c) "creating districts that are geographically compact;" (d) "creating districts that are contiguous and that allow for the ease of transportation throughout the district;" (e) "preserving traditional neighborhoods and local communities of interest;" (f) "following natural and geographic features, boundaries, and barriers;" and (g) "maximizing boundary agreement among different types of districts." (Compl. ¶ 86.)

In addition, all redistricting plans were to be open for public comment, considered in a public hearing, and voted on by the Legislature. (*Id.* ¶¶ 85, 88.) If the Legislature voted to reject the redistricting map, "Proposition 4 required the Legislature to issue a detailed written report explaining its decision and why the Legislature's substituted map(s) better satisfied the mandatory, neutral redistricting criteria." (*Id.* ¶ 88.) Proposition 4 also authorized "Utahns to sue to block a redistricting plan that failed to conform to the initiative's structural, procedural, and substantive standards." (*Id.* ¶ 89.) "A majority of Utah citizens from a range of geographic areas and across the political spectrum voted to approve Proposition 4 and enact it into law." (*Id.* ¶ 90.)

Sixteen months later, on March 11, 2020, Plaintiffs contend that the Legislature effectively repealed the Utah Independent Redistricting Commission and Standards Act and instead passed SB 200, which established new redistricting criteria. (*Id.* ¶ 93.) SB 200 effectively "eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4's enforcement mechanisms." (*Id.* ¶ 96.) While SB 200 retained the Independent Redistricting Commission, its role is now wholly advisory; the Legislature is not required to consider any recommended redistricting maps and in fact, the Legislature may disregard any recommended maps without explanation. (*Id.* ¶ 94.) "SB200 returned redistricting to the pre-Proposition 4, unreformed status quo where the Legislature could freely devise anti-democratic maps—as if the people had never spoken." (*Id.* ¶ 97.) SB200

eliminated neutral redistricting criteria, enforcement mechanisms and all transparency and public accountability provisions. (*Id.* ¶¶ 97-98.) In April 2021, the Utah Legislature formed its twenty-member Legislative Redistricting Committee (LRC). (*Id.* ¶¶ 142-143.)

Even after SB200's reforms, many legislators represented that the Legislature would honor the people's will to prevent undue partisanship in the mapmaking process. (*Id.* ¶ 99.) For example, Senator Curt Bramble, the chief sponsor of SB200 said he was "committed to respecting the voice of the people and maintaining an independent commission." (*Id.* ¶ 100.) Then-Senate Majority Leader Evan Vickers vowed that the Legislature would "meet the will of the voters" and reinstate in SB200 "almost everything they've asked for." (*Id.*) Representative Brad Wilson indicated the Legislature would leave Proposition 4's anti-gerrymandering provisions largely intact, and Representative Steinquist represented the Legislature would "make sure that we have an open and fair process when it comes time for redistricting." (*Id.* ¶ 101.)

Despite these representations, the LRC conducted a "closed-door" mapmaking process. (*Id.* ¶¶ 142-143.) The LRC did not publish the full list of criteria that guided its redistricting decisions, but instead offered a one-page infographic for public map submissions that stated three criteria the Legislature said it would consider: "population parity among districts, contiguity, and reasonable compactness." (*Id.* ¶ 145.) The LRC "did not commit to avoid unduly favoring or disfavoring incumbents, prospective candidates, and/or political parties in its redistricting process." (*Id.* ¶ 147.) The LRC solicited some public input about Utah's communities and voters' preferences during hearings, but Plaintiffs allege "the LRC does not appear to have used that testimony to guide its redistricting process." (*Id.* ¶ 148.)

Notwithstanding SB200, the Independent Redistricting Commission met thirty-two times from April to November 2021, and fulfilled its duties as originally contemplated under

Proposition 4. (*See generally id.* ¶¶ 104-126, 132-140.) Just before the Commission's final deadline, former Republican Congressman Rob Bishop abruptly resigned from the Commission. (*Id.* ¶ 127.) He cited the proposed map, which he believed would result in one Democrat being elected to Congress, as a reason for his resignation. (*Id.* ¶ 129.) He stated that "[f]or Utah to get anything done" in Congress, the State "need[s] a united House delegation . . . having everyone working together." (*Id.*) On November 1, 2021, the Independent Redistricting Committee presented three maps to the Utah Legislature's LRC and explained in detail the non-partisan process used to prepare the maps. (*Id.* ¶¶ 139-140.)

In early November 2021, the Legislature adopted its own map – the 2021 Congressional Plan ("Plan") – over the three maps created and proposed by the Independent Redistricting Committee. (*Id.* ¶¶ 141, 149.) Despite the Legislature's ostensible goal of hearing public input on the Plan at a public hearing scheduled on Monday, November 8, 2021, the LRC released the Plan publicly on Friday, November 5, 2021 around 10:00 pm, giving the public just two weekend days to review the Plan. (*Id.* ¶¶ 156, 159-60.) The LRC received significant public response at the public hearing and through comments on the LRC's website, hundreds of emails, protests at the Capitol, and a letter to the Legislature from prominent Utah business and community leaders. (*Id.* ¶¶ 161-65, 169.)

Notwithstanding significant public opposition to the LRC's map, on November 9, 2021, the Utah State House voted to approve the 2021 Congressional Plan. (*Id.* ¶¶ 171, 173.) Five House Republicans joined all House Democrats in voting against the Plan. (*Id.*) The next day, November 10, 2021, the Senate voted 21-7 to approve the Plan. (*Id.* ¶ 180.) One Republican Senator joined all Democratic Senators to vote against the Plan. (*Id.*) On November 12, 2021, Governor Cox signed the bill into law. (*Id.* ¶ 201.) While answering questions from the public

about the Plan, Governor Cox "acknowledged there was 'certainly a partisan bend' in the Legislature's redistricting process and conceded that 'Republicans are always going to divide counties with lots of Democrats in them, and Democrats are always going to divide counties with lots of Republicans in them.'" (*Id.* ¶ 200.) Governor Cox additionally "agreed that 'it is a conflict of interest' for the Legislature to 'draw the lines within which they'll run.'" (*Id.*)

The 2021 Congressional Plan splits both Salt Lake and Summit Counties, the two counties that typically oppose Republican candidates. (*Id.* ¶ 192.) The Plan "cracks" urban voters in Salt Lake County—Utah's largest concentration of non-Republican voters—dividing them between all four congressional districts and immersing them into sprawling districts reaching all four corners of the state. (*Id.* ¶¶ 192, 207.) It also divides Summit County into two. (*Id.* ¶ 192.) The Plan, however, leaves intact urban and suburban voters in both Davis and Utah counties, because those voters tend to support Republican candidates. (*Id.*) In addition, fifteen municipalities were divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities were divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty and up to three hundred miles away. (*Id.* ¶¶ 242-251.)

Proponents of the Plan maintain that the boundaries were drawn with the intent of ensuring a mix of urban and rural interests in each district. (*Id.* ¶ 158.) In a statement explaining the decision to divide Salt Lake County between all four districts, the LRC said, "[w]e are one Utah, and believe both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation." (*Id.*) Notably, rural voters and rural elected officials opposed the

Legislature's urban-rural justification. Two reported commenters stated: "[a]s a voter in a rural area I'm entirely uncomfortable with my vote being used to dilute the power of another"; and "[a]s a Republican who lives in a more rural part of the state, I have the same complaint as those living in Salt Lake. Please do not dilute our vote by splitting us up between all four districts! I'm far more interested in having everybody fairly represented than I am in electing more people from my own party." (*Id.* ¶¶ 194, 195.) This sentiment was also echoed by Governor Cox, who "stated that he supports a redistricting process that focuses on preserving 'communities of interest,' such as the Commission's neutral undertaking, which he reaffirmed is 'certainly one area where that is a good way to make maps, try to keep people similarly situated together, communities together is something that I think is positive." (*Id.* ¶ 200.)

Plaintiffs assert that the "LRC's process was designed to achieve—and did in fact achieve—an extreme partisan gerrymander." (*Id.* ¶ 144.) Plaintiffs assert the Plan was intentionally created to maximize Republican advantage in all four congressional districts, not to ensure an urban-rural mix. (*Id.* ¶ 190.) Plaintiffs contend that "amplifying representation of rural interests at the cost of urban interests" is not a legitimate redistricting consideration, and the "purported need" to have rural interests represented in all four districts was "a pretext to unduly gerrymander the 2021 Congressional Plan for partisan advantage." (*Id.* ¶¶ 188, 189.)

Based on the 2021 Congressional Plan, each district contains a minority of non-Republican voters "that will be perpetually overridden by the Republican majority of voters in each district, blocking these disfavored Utahns from electing a candidate of choice to any seat in in the congressional delegation." (*Id.* ¶ 226.) While congressional plans from previous years had contained at least one competitive congressional district, all four districts under the 2021 Plan contain a substantial majority of Republican voters. (*Id.* ¶¶ 65, 175, 226, 232.) Notably, Senator

Scott Sandall admitted that political considerations affected the Legislature's redistricting decisions. (*Id.* ¶ 151.) He said the LRC "never indicated the legislature was nonpartisan. I don't think there was ever any idea or suggestion that the legislative work wouldn't include some partisanship." (*Id.*)

Some partisanship is inherent in the redistricting process. Here, however, Plaintiffs contend that the 2021 Congressional Plan subordinates the voice of Democratic voters and entrenches the Republican party in power for the next decade. (*Id.* ¶ 205, 206.) The Plan "protects preferred Republican incumbents and draws electoral boundaries to optimize their chances of reelection." (*Id.* ¶ 197.) And it converts "the competitive 4th District into a safe Republican district to enhance Republican Representative Burgess Owens' prospects to win reelection." (*Id.* ¶ 198.)

As a result, on March 17, Plaintiffs, including two organizational plaintiffs—the League of Women Voters of Utah and Mormon Women for Ethical Government—and seven individual plaintiffs, filed suit, alleging that Defendants violated Plaintiffs' constitutional rights by repealing Proposition 4 and adopting the intentionally-gerrymandered 2021 Congressional Plan. All Defendants, except for Defendant Lieutenant Governor Deidre Henderson, moved to dismiss Plaintiffs' Complaint.[3]

ANALYSIS

Defendants filed a Motion to Dismiss the action, in its entirety, arguing the Court lacks subject matter jurisdiction under Rule 12(b)(1) of the Utah Rules of Civil Procedure. In addition, they move to dismiss each of Plaintiffs' five claims for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Utah Rules of Civil Procedure. Essentially, Defendants

[3] Because Lieutenant Governor Henderson did not join in the Motion, any claims against her are unaffected by this Court's ruling.

contend that claims of partisan gerrymandering are not justiciable. And, if they are, partisan gerrymandering does not violate the Utah Constitution. Many of the issues raised in this case are matters of first impression, including whether partisan redistricting / gerrymandering presents a purely political question.

A motion to dismiss under Rule 12(b)(1) of the Utah Rules of Civil Procedure "is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Salt Lake County v. State*, 2020 UT 27, ¶ 26, 466 P.3d 158 (quoting *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993)). A motion under Rule 12(b)(6) challenges a plaintiffs' right to relief based on the alleged facts. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226 (citation omitted). At this stage of the litigation, the Court's "inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case." *Id.* ¶ 8 (cleaned up).

I. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED. This Court Has Jurisdiction to Hear Plaintiffs' Redistricting Claims. Plaintiffs' Constitutional Claims are Justiciable.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs' redistricting claims (Counts One through Four) present nonjusticiable political questions. (Defs.' Mot. at 5.) The Court disagrees.

Under the political question doctrine, a claim is not subject to the Court's review if it presents a nonjusticiable political question. *See Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995). "The political question doctrine, rooted in the United States Constitution's separation-of-powers premise, prevents judicial interference in matters wholly within the control and discretion of other branches of government. Preventing such intervention preserves the integrity of functions lawfully delegated to political branches of government." *Id.* (cleaned up).

Political questions are those questions which have been wholly committed to the sole discretion of a coordinate branch of government, and those questions which can be resolved only

by making "policy choices and value determinations." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). When presented with a purely political question, "the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer." *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). In deciding whether a claim presents a nonjusticiable political question, the Court must consider two questions: (1) whether it "involve[es] 'a textually demonstrable constitutional commitment of the issue to a coordinate political department[]"or (2) whether there is "a lack of judicially discoverable and manageable standards for resolving it.'" *Matter of Childers-Gray*, 2021 UT 13, ¶ 64, 478 P.3d 96 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Defendants contend that Plaintiffs' claims involve political questions for both these reasons. For the reasons discussed below, Defendants are incorrect on both points.

A. Redistricting is not exclusively within the province of the Legislature.

Defendants first assert that Article IX, Section 1 of the Utah Constitution represents a "textually demonstrable constitutional commitment" of the redistricting power to the Legislature." (Defs.' Mot. at 6.) Article IX, Section 1 states, in relevant part: "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. Defendants argue this provision delegates the responsibility for drawing congressional districts to the Legislature, and because no other provision in the Utah Constitution confers redistricting authority on any other branch or to the people, redistricting authority rests exclusively with the Legislature and is exempt from judicial review. (Defs.' Mot. at 7.)

The Utah Constitution does give the Legislature authority to "divide the state into congressional, legislative and other districts," but nothing in the Utah Constitution restricts that power to the Legislature or states that such power is exclusively within the province of the

Legislature. Even a cursory analysis reveals that the redistricting power is not exercised solely by the Legislature. While redistricting is primarily a legislative function, the governor and the people also exercise some degree of redistricting power. Redistricting laws and maps are submitted to the governor for veto like any other law under Article VII, Section 8 of the Utah Constitution. In addition, the Utah Constitution makes clear that "[a]ll political power is inherent in the people." Utah Const. art. I, § 2. In line with this authority, Utah's citizens have historically exercised power over redistricting through initiatives and referendums, including Proposition 4. *See also Parkinson v. Watson*, 291 P.2d 400, 403 (Utah 1955) (describing redistricting referendum proposing a constitutional amendment, which was submitted to the people in 1954 after the Legislature failed to reach a compromise regarding congressional district apportionment). And in the past, independent citizen redistricting committees have conducted redistricting. *See* 1965 Utah Laws, H.B. No. 8, Section 4, eff. May 11, 1965. At a minimum, because the executive branch and the people share in the redistricting power, both under the Utah Constitution and historically, this Court concludes that redistricting power is not solely committed to the Legislature.

Further, the constitutionality of legislative action is not beyond judicial review. Courts regularly review legislative acts for constitutionality. The United States Supreme Court in *Marbury v. Madison* famously stated that reviewing statutes to determine if they are constitutional is "the very essence of judicial duty" under our constitutional form of government. 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803). In fact, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Courts have a duty to review acts of the Legislature to determine whether they are constitutional. *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) (stating courts cannot "shirk [their] duty to find an act of the Legislature

unconstitutional when it clearly appears that it conflicts with some provision of our Constitution."); *see also Skokos,* 900 P.2d at 541 ("If a claim involves the interpretation of a statute or questions the constitutionality of a particular political policy, courts are acting within their authority in scrutinizing such claims."). Courts also cannot "simply shirk" their duty by finding a claim nonjusticiable, merely because the case involves "significant political overtones." *Matter of Childers-Gray*, 2021 UT 13, ¶ 67 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). Were it otherwise, the legislature would be the sole judge of whether its actions are constitutional, which is inconsistent with our Constitution, separation of powers, and longstanding principles of judicial review. *See, e.g.*, *Matheson*, 641 P.2d at 680; *Marbury*, 5 U.S. at 178; *see also Ritchie v. Richards,* 14 Utah 345, 47 P. 670, 675 (1896) (Batch, J., concurring) ("[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial.").

Other constitutional provisions designate various duties to the Legislature—e.g., the compensation of state and local officers in art. VII, § 18; public education in art. X, § 2; and gun regulation in art. I, § 6—but that does not mean that the Legislature's power in those areas is beyond judicial review. For example, in the case of public education, the Utah Supreme Court has held:

> [t]he legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. . . . However, its authority is not unlimited. The legislature, for instance, cannot establish schools and programs that are not open to all the children of Utah or free from sectarian control . . . for such would be a violation of . . . the Utah Constitution.

Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 2001 UT 2, ¶ 14, 17 P.3d 1125. Even though the Utah Constitution explicitly grants authority over education to the Legislature, that authority must be exercised in a manner consistent with the Utah Constitution.

This principle equally applies to redistricting. As Defendants' counsel acknowledged during oral argument, the Legislature is bound to follow the United States and Utah Constitutions when engaging in the redistricting process. And outside the context of this litigation, Defendants have acknowledged that "[t]he redistricting process is subject to the legal parameters established by the United States and the Utah Constitutions, state and federal laws, and caselaw."[4] Given these acknowledgements, it follows that "the mere fact that responsibility for reapportionment is committed to the [Legislature] does not mean that the [Legislature's] decisions in carrying out its responsibility are fully immunized from any judicial review." *Harper*, 868 S.E.2d at 534. That proposition would be wholly inconsistent with this Court's obligation to enforce the provisions of the Utah Constitution. *See Matheson*, 641 P.2d at 680.

In addition, the Utah Supreme Court has previously reviewed the Utah Legislature's redistricting actions. In *Parkinson*, the plaintiffs challenged the Legislature's redistricting act alleging that it created districts with vastly unequal populations. *Parkinson*, 291 P.2d at 401. In its decision, the Utah Supreme Court initially expressed reluctance to interfere with the Legislature's redistricting actions given the importance that the three branches of government remain separate. *See id.* at 403. The Utah Supreme Court, however, did not dismiss the claim as a nonjusticiable political question. *Id.* at 400. Instead, it engaged in judicial review and reviewed the map for constitutionality, ultimately determining that congressional districts with unequal populations were not unconstitutional.

Notably, after previously reviewing partisan gerrymandering cases, the United States Supreme Court, in a 5 - 4 decision, recently concluded that such claims are nonjusticiable in

[4] Plaintiffs cited this quote from a report by Utah State Legislature on Utah's redistricting in 2001. Office of Legislative Research and General Counsel, 2001 Redistricting in Utah (Jan. 2022), le.utah.gov/documents/redistricting/redist.htm (last accessed May 25, 2022). The Court takes judicial notice of the report pursuant to Utah Rules of Evidence 201(b)(2).

federal courts. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019). While the United States Supreme Court has backed away from evaluating redistricting claims, it does not follow that such claims are nonjusticiable in Utah courts for several reasons. First and foremost, the *Rucho* Court specifically stated: "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.... Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507.

Utah courts also are not bound by the same justiciability requirements as federal courts under Article III. Several Utah cases have noted that, on matters like standing and justiciability, a lesser standard may apply. *See, e.g., Laws v. Grayeyes*, 2021 UT 59, ¶ 77, 498 P.3d 410 (Pearce, J., concurring); *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098; *Brown v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶¶ 17-18, 228 P.3d 747; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

Utah courts at times decline to merely follow and apply federal interpretations of constitutional issues. *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 27, 450 P.3d 1092. They "do not presume that federal court interpretations of federal constitutional provisions control the meaning of identical provisions in the Utah Constitution." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935. They do not merely presume that federal construction of similar language is correct, *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106. And they recognize that federal standards are sometimes "based on different constitutional language and different interpretative case law." *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 45. Utah courts have also interpreted the Utah constitution to provide more protection than its federal counterpart when federal law was an "inadequate safeguard" of state constitutional rights. *Tiedmann*, 2007 UT 49, ¶¶ 33, 42-44.

While the *Rucho* majority decision conclusively resolved the issue justiciability for federal courts, given the split in the decision and the dissent authored by Justice Kagan, the issue was clearly not that cut and dry, even for the federal courts. Justice Kagan wrote that most members of the Supreme Court agree that partisan gerrymandering is unconstitutional. And four of the nine justices agreed that partisan gerrymandering is justiciable, judicially manageable standards exist, and the dissent discussed tests that exist and have been applied by the federal courts. *Rucho v. Common Cause*, 139 S. Ct. at 2509-2525 (Kagan, J., dissenting) (stating, in reference to the majority opinion, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks it is beyond judicial capabilities."). Federal caselaw may prove helpful in this case as the litigation proceeds, but the majority's holding in *Rucho* – that partisan gerrymandering is not justiciable – is not binding on this Court and this Court declines to follow it.

B. Judicially discoverable and manageable standards exist.

Defendants argue that the Court lacks jurisdiction because there are no judicially discoverable or manageable standards for resolving redistricting claims because redistricting is a purely political exercise, based entirely on the Legislature's consideration and weighing of competing policy interests in deciding where to draw boundary lines. (Defs.' Mot. at 10.) The Court disagrees.

Plaintiffs' Complaint challenges the constitutionality of the 2021 Congressional Plan and the Utah Legislature's action. Determining whether the 2021 Congressional Plan violates the Utah Constitution involves no "policy determinations for which judicially manageable standards are lacking." *Baker*, 369 U.S. at 226. Instead, it involves legal determinations, the standards for which are provided both in the Utah Constitution and in caselaw. Utah courts have previously

addressed the Free Elections, Uniform Operation of Laws, Freedom of Speech and Association and the Right to Vote clauses of the Utah Constitution and, for some clauses, there are well-developed standards that have been applied by Utah courts in various scenarios.[5] And Utah courts are regularly asked to address issues of first impression, to interpret constitutional provisions and statutes for the first time and to apply established constitutional principles to new legal questions and factual contexts.[6] There is no reason why this Court cannot do the same here.

In reviewing Plaintiffs' redistricting claims, the Court will simply be engaging in the well-established judicial practice of interpreting the Utah Constitution and applying the law to the facts. The Utah Supreme Court has stated that "the Utah Constitution enshrines principles, not application of those principles," and it is the court's duty to determine "what principle the constitution encapsulates and how that principle should apply." *Maese,* 2019 UT 58, ¶ 70 n. 23. In applying constitutional principles to new types of claims, the Court uses "traditional methods of constitutional analysis," which starts with analyzing the plain language of the constitution and taking into consideration "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper

[5] While the constitutional provisions Plaintiffs cite have never been applied by Utah courts for redistricting claims, they have been applied in a variety of other contexts. The following are examples, not an exhaustive list. The Utah Supreme Court has applied Article I, Section 17 of the Utah Constitution (Free Elections Clause, Plaintiffs' Count One) while analyzing the right of a political candidate to appear on a party's ticket. *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). It has applied Sections 2 and 24 of Article I (Uniform Operation of Laws, Count Two) in the context of a citizen initiative. *Gallivan v. Walker,* 2002 UT 89, 54 P.3d 1069. It has applied Sections 1 and 15 of Article I in an obscenity case. *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235. And the Utah Supreme Court has applied Article IV, Section 2 in a case in which a prison inmate challenged a residency requirement in registering to vote. *Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985).

[6] For example, in *State v. Roberts*, the Utah Supreme Court applied the Utah Constitution to determine whether a reasonable expectation of privacy exists for electronic files shared in a "peer-to-peer file sharing network." 2015 UT 24, ¶ 1, 345 P.3d 1226. *See also State v. Limb*, 581 P.2d 142, 144 (Utah 1978) (addressing automobile exception); *Dexter v. Bosko*, 2008 UT 29, ¶ 19 (unnecessary rigor provision applied to seatbelts); *State v. James*, 858 P.2d 1012, 1017 (Utah Ct. App. 1993) (due process applied to video recorded interrogations).

interpretation of the provision in question." *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921, n.6 (Utah 1993).

In addition, in addressing redistricting, Utah's court are not without judicially-discoverable or manageable standards. *Rucho* specifically recognized that "provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. at 2507. Here, the people of Utah passed Proposition 4, which codified into law the people's will to apply traditional redistricting criteria in congressional districting. *See supra* pp. 3-4. Other state courts have addressed claims involving partisan gerrymandering. In fact, seven state courts in North Carolina, Pennsylvania, Florida, Ohio, Maryland, New York, and Alaska have concluded that partisan gerrymandering claims are cognizable under their respective state constitutions.[7] Some have set forth criteria and factors that may be considered in such analyses. *See, e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1, 118-21 (Pa. 2018) (discussing consideration of traditional redistricting criteria, including contiguity, compactness, and respect for political subdivisions, and establishing "neutral benchmarks" for evaluating gerrymandering claims). Federal courts have applied various tests to address partisan gerrymandering. *See, e.g., Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (discussing application of a three-part test, including consideration of intent, effects, and causation, and discussing generally other tests previously applied). Utah courts have historically relied on case law from other state and federal courts in addressing questions that arise under Utah law. *See, e.g., Am. Bush,* 2006 UT 40, ¶ 11; *Ritchie v. Richards*, 47 P. 670, 677-79 (1896).

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[7] *See Harper*, 868 S.E.2d at 558-60; *League of Women Voters v. Commonwealth*, 645 Pa. 1, 128 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371-72 (Fla. 2015); *Adams v. DeWine*, 2022 WL 129092 at *1-2 (Ohio Jan. 14, 2022); *Szeliga v. Lamone*, Nos. C-02-cv-21-001816 & C-02-CV-21-001773 at 93-94 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022), https://redistricting.lls.edu/wp-content/uploads/MDSzeliga-20220325-order-granting-relief.pdf; *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022); *In the Matter of the 2021 Redistricting Cases*, S-18419 (Alaska May 24, 2022) (applying *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987)) (opinion forthcoming).

This Court can do the same here, taking into consideration material differences in our constitutions and state laws.

This case is in the beginning stages. The parties have not conducted discovery. No evidence has been presented and the parties have not yet presented their positions regarding appropriate tests or criteria that should be considered and applied. As this case proceeds through litigation and with specific input from both parties, this Court can determine what criteria or factors should be considered in this case, under Utah law. *See Harper*, 868 S.E.2d at 547-48 (stating specific standards for evaluating state legislative apportionment schemes should be developed in the context of actual litigation); *accord Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.").

Utah courts, including this one, recognize the separation of powers. To be clear, this Court will not review the Legislature's legitimate weighing of policy interests. The judiciary is not a political branch of government; policy determinations are for the Legislature to decide. As the Utah Supreme Court has stated, "[i]t is a rule of universal acceptance that the wisdom or desirability of legislation is in no wise for the courts to consider. Whether an act be ill advised or unfortunate, if it should be, does not give rise to an appeal from the legislature to the courts." *Parkinson*, 291 P.2d at 403. However, even in cases involving political issues, the Court is bound to review the Legislature's actions, not to weigh in on policy matters, but to determine whether there has been a constitutional violation. *Matheson*, 641 P.2d at 680.

Judicial review of legislative action to determine constitutionality does not derogate from the primacy of the state legislature's role in redistricting. However, because redistricting is not wholly within the control of the Legislature, the constitutional claims presented here are not political questions, and because judicially discoverable and manageable standards exist to review constitutional challenges and redistricting claims, the Court concludes that it has jurisdiction in this case to review the Legislature's actions to determine if they are constitutional.

Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is DENIED.

II. Defendants' Motion to Dismiss the Committee and Individual Defendants is DENIED.

Defendants move to dismiss Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Senator J. Stuart Adams, and Representative Brad Wilson (collectively, Committee and Individual Defendants). (Defs.' Mot. at 14.) Defendants' Motion is based on two arguments. First, they argue that the Committee and Individual Defendants are immune from suit based on claims related to their actions as legislators. Second, the Committee and Individual Defendants assert they are unable to provide Plaintiffs' requested relief, and as such, should be dismissed. (*Id.*).

Regarding immunity, the Committee and Individual Defendants are correct that Utah law grants them immunity from certain lawsuits. However, that grant of immunity does not make them immune to all claims. To the contrary, Utah law only grants legislators immunity from claims of *defamation* related to their actions as legislators. Utah has adopted the common law legislative immunity and legislative privilege doctrines through its Speech or Debate Clause,[8]

[8] Utah's Speech or Debate Clause states: "[m]embers of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding

which Utah courts interpret as providing legislative immunity only from *defamation* liability. *See Riddle v. Perry*, 2002 UT 10, ¶ 10, 40 P.3d 1128. In *Riddle*, the Utah Supreme Court declined to provide absolute legislative immunity in all instances. It explained that the policy consideration behind the legislative immunity doctrine is "the importance of full and candid speech by legislators, even at the possible expense of an individual's right to be free from defamation." *Id.* ¶ 8. Here, Plaintiffs are not seeking relief from defamation. Under this limited view of legislative immunity,[9] the Committee and the Legislative Defendants are not immune.

The Committee and Individual Defendants also assert that they cannot provide the relief requested and that any order from this Court directed at them "would blatantly violate the separation of powers." (Reply at 15.) The Committee's and Individual Defendants' argument on this point is less than two pages. They do not cite any authority, legal or otherwise, to support that the Committee and the Defendants cannot provide *any* relief requested or that any order from the Court, directed at them, would violate the separation of powers.[10] Such unsupported arguments are insufficient to satisfy Defendants' burden on a motion to dismiss. *See Bank of Am. v. Adamson*, 2017 UT 2, ¶ 13, 391 P.3d 196 ("A party must cite the legal authority on which its

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each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place." Utah Const. art. VI, § 8.

[9] The *Riddle* Court explained the limits of the Utah's legislative immunity doctrine:

> In determining the contours of the legislative proceeding privilege, we adopt the privilege as set forth in section 590A of the Restatement (Second) of Torts: "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he [or she] is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

Id. ¶ 11 (alteration in original).

[10] Notably, Utah courts have allowed lawsuits against individual legislators to proceed. *See, e.g., Matheson v. Ferry*, 657 P.2d 240, 244 (Utah 1982); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978); *Rampton v. Barlow*, 23 Utah 2d 383, 384, 464 P.2d 378 (1970); *Romney v. Barlow*, 24 Utah 2d 226, 227, 469 P.2d 4497 (1970). This Court is not aware of any legal authority, either at the state or federal level, that prohibits all lawsuits naming legislators. If any legal precedent exists to justify the dismissal of any defendant, it is incumbent on the moving party to present that authority to the Court.

argument is based and then provide reasoned analysis of how that authority should apply in the particular case."). While Defendants certainly raise important issues that the parties and this Court will consider as this case proceeds,[11] the arguments made at this stage are simply insufficient to justify dismissing the Committee and the Individual Defendants. *See Gardiner v. Anderson*, 2018 UT App 167, ¶ 21 n.14, 436 P.3d 237 ("[I]t is not the district court's burden to research and develop arguments for a moving party.").

Regarding the Committee and Legislative Defendants' separation of powers argument, the Court has a duty to review the Legislature's acts if it appears they conflict with the Utah Constitution. *Matheson*, 657 P.2d at 244. Indeed, to hold otherwise would make the Legislature the ultimate arbiter of what is constitutional, which would in fact violate the separation of powers principle by intruding on this Court's constitutional role. *See id.* At this stage, it appears this Court can give Plaintiffs at least some of the relief requested without intruding on the Legislature's powers, which is sufficient to defeat Defendants' Motion to Dismiss.

Defendants' Motion to Dismiss the Committee and the Legislative Defendants is DENIED.

III. Defendants' Motion to Dismiss Counts One through Four is DENIED; Defendants' Motion to Dismiss Count Five is GRANTED.

Defendants' move to dismiss each of Plaintiffs' four constitutional challenges to the 2021 Congressional Plan asserting that Utah's Constitution, and specifically the Free Elections Clause, Equal Protection Clause, Free Speech and Association Clause and the Right to Vote Clause, does not expressly prohibit partisan gerrymandering. Defendants

[11] The precise relief that Plaintiffs seek and might be entitled to is not entirely clear at this stage of the litigation. Thus, any ruling the Court could make would be merely advisory and the Court declines to do so. *Salt Lake County v. State*, 2020 UT 27, ¶36, 466 P.3d 158 ("[W]e do not issue advisory opinions."). The Court recognizes, however, that the issues raised by Defendants are legitimate questions that the Court will address if and when the issues are fully ripe and briefed.

take the position that these provisions should be interpreted narrowly to protect *only* every citizen's right to cast a vote in an election. Nothing more. They argue generally that the 2021 Congressional Plan does not prohibit any citizen from voting in an election. New boundary lines do not prohibit each citizen from physically casting a vote or from freely speaking and associating with like-minded voters on political issues. Further, they argue that the Utah Constitution does not guarantee "equal voting power," a vote that is politically "equal in its influence," any political success, or a beneficial political outcome. In addition, Defendants move to dismiss Plaintiffs' fifth claim, asserting that the Utah Constitution does not prohibit the Legislature from either amending or repealing the Utah Independent Redistricting Commission and Standards Act, Title 20A, Chapter 19, of the Utah Code, which is the law that went into effect with the successful passage of Proposition 4.

Defendants' motion is made under Rule 12(b)(6) of the Utah Rules of Civil Procedure, asserting that Plaintiffs have failed to state a claim under the Utah Constitution.

> "The purpose of a rule 12(b)(6) motion is to challenge the *formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case*." *Van Leeuwen v. Bank of Am. NA*, 2016 UT App 212, ¶ 6, 387 P.3d 521 (cleaned up). Accordingly, "dismissal is justified *only* when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Id.* (cleaned up).

Pioneer Homeowners Ass'n v. TaxHawk Inc., 2019 UT App 213, ¶ 19, 457 P.3d 393, *cert. denied sub nom., Pioneer Home v. TaxHawk, Inc.*, 466 P.3d 1073 (Utah 2020) (emphasis added). The Court's review of Defendant's Motion at this stage is limited to considering only "the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Lewis v. U.S. Bank Tr. NA*, 2020 UT App 55, ¶ 9, 463 P.3d 694, 697 (internal quotation marks excluded).

Each of Plaintiffs' claims is based on the Utah Constitution. Constitutional interpretation starts with evaluating the plain text to determine "the meaning of the text as understood when it

was adopted." *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 18, 450 P.3d 1092 (discussing generally process of constitutional interpretation). "The goal of this analysis is to discern the intent[12] and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. "While we first look to the text's plain meaning, we recognize that constitutional language is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Id.* ¶ 10. The Court's focus is on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Patterson v. State of Utah*, 2021 UT 52, ¶ 91, 405 P.3d 92.

In addition to analyzing the text, prior caselaw guides us to analyze "historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.'" *Maese,* 2019 UT 58, ¶ 18 (quoting *Am. Bush*, 2006 UT 40, ¶ 12). The language of the text, in certain circumstances, may begin and end the analysis. However, "[w]here doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Maese,* 2019 UT 58, ¶ 23 (cleaned up) (explaining merely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact is not a recipe for sound constitutional interpretation.").[13] The Court may also

[12] The Utah Supreme Court has explained that "[w]hile we have at times used language of 'intent' in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it. Evidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself." *Maese*, 2019 UT 58, ¶ 59 n.6.

[13] In interpreting the Utah Constitution, "we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy. Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light

consider caselaw from sister states, with similar provisions made contemporaneously to the framing/ratification of Utah's Constitution, and federal caselaw interpreting similar provisions from the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 11.

Both parties have provided to the Court some relevant material to support their competing interpretations of the Utah Constitution, of which this Court may take judicial notice of under Rule 201 of the Utah Rules of Evidence. At this stage, the Court cannot consider factual matters outside the pleadings on a motion to dismiss without converting the motion into to one for summary judgment. Utah R. Civ. P. 12(b); *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12, 104 P.3d 1226. Neither party has made such a request. Therefore, at this stage, the Court need only decide whether Plaintiffs have stated a claim, not whether Plaintiffs will succeed on those claims. Because each claim involves separate legal issues, the Court addresses each individually below.

a. Plaintiffs Sufficiently State a Claim under the Free Elections Clause (Count One).

Defendants assert that Plaintiffs have failed to, and cannot, state a claim under the Free Elections Clause. Defendants argue the plain language of the Free Elections Clause does not expressly prohibit partisan gerrymandering and that it guarantees only "the freedom to *cast a vote* without interference from civil or military power." (Defs.' Reply at 17 (emphasis added).) The Court disagrees.

The Free Elections Clause states: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah

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of their historical background and the then-contemporary understanding of what they were to accomplish. This case, like many others, proves the wisdom of the axiom that '[a] page of history is worth a volume of logic.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092, 1098 (discussing and quoting *Society of Separationists v. Whitehead*, 870 P.2d 916, 920–21, and n. 6 (Utah 1993)).

Const. art. I, § 17. Defendants argue that this Court must interpret the provision as a whole, arguing that the second clause, which states that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," necessarily modifies or limits the first. (Defs.' Reply at 17.) The Court rejects this interpretation.

1. The Plain Meaning of "All *elections* shall be *free.*"

There are two express rights guaranteed by the Free Elections Clause, not just one. First and foremost, "all *elections* shall be *free.*" The second, "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The clause is constructed as a compound sentence, separating two independent clauses by the conjunction "and." This sentence construction supports that these two clauses are to be given equal value. Nothing in the construction or choice of conjunction suggests to this Court that the second independent clause was intended to limit the first. Defendants also provide no authority, legal or otherwise, to support such interpretation.

What did the term "all *elections* shall be *free*" mean to the people of Utah in 1895, when the Utah Constitution was adopted? There is little historical information on Utah's Free Elections Clause. While the Clause was discussed during the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for State of Utah, in Mar. 25, 1895,[14] the discussion provides no guidance as to what the clause was intended to protect or how to interpret the key words. The reported transcript of the proceedings reflects that the Free Elections Clause was passed with no debate. One modification was made to the final text. As originally proposed, the Free Elections Clause stated that "[a]ll elections shall be free and equal." A successful motion was made to remove "equal," but with no discussion. Defendants argue the removal is significant, revealing

[14] Found at le.utah.gov/documents/conconv/22.htm ("Convention Proceedings").

the drafter's intent to not guarantee "voting power." (Defs.' Mot. at 21, n.16.) Plaintiffs, on the other hand, argue that "equal" was removed because it was "superfluous," because the term "free," as defined in 1891, already contained an equality component. (Pls' Opp'n at 26.) Neither party, however, provided any authority to support their respective arguments.[15] And the debate regarding this clause is of little assistance.

There are no early Utah common law cases discussing the Free Elections Clause. There are no Utah cases from any time period defining the term "elections." Notably, neither party focused on this term nor provided a definition or any legal analysis of it.[16] The meaning of the term "elections," however, is critical to this analysis and critical to interpreting this clause.

An "election" is defined by Merriam-Webster as the "act or process of electing." *Election*, Merriam-Webster, https://www.merriam-webster.com/dictionary/elections (noting first known use of this term, with this definition, was the 13th century). To "elect" is "to select by vote for an office, position or membership." *Elect,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elect. Other dictionary sources define the term similarly: "An election is a process in which people vote to choose a person or group of people to hold an official position." *Election*, (noun), Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/election.[17]

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[15] The Court agrees with Defendants that the removal means something. But there is insufficient historical information before the Court to determine what was intended by the removal. The Court need not determine why it was removed; instead, the Court focuses on interpreting the clause as it is written.

[16] Notably, neither party provided a definition of "elections." Both parties focused primarily on and provided definitions for the word "free." Based on the Court's analysis, the definition of "elections" does not appear to have changed over time and it does not appear to be subject to widely different interpretations. This Court is not a linguistics expert and did not undertake independent scientific research, but it did resort to standard dictionary definitions to assist in interpreting the plain language of the Free Elections Clause. *See generally State v. Rasabout*, 356 P.3d 1258 (2015) (discussing generally interpretation methods under Utah law).

[17] "*Election* (noun), the act or process of choosing someone for a public office by voting." *Election*, Britannica Dictionary, https://www.britannica.com/dictionary/election. An "election" is "the process of choosing a person or a

"Election" also means the "right, power, or privilege of making a choice." *Election,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elections. Similar definitions were used in the late 1800s. *See e.g., State v. Hirsch,*[18] 125 Ind. 207, 24 N.E. 1062, 1063 (1890) (discussing various definitions of "election" and stating it "is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place, and manner prescribed by law.").

The term "free" as defined in the 1891 Black's Law Dictionary means: "[u]nconstrained; having power to follow the dictates of his own will;" "[e]njoying full civic rights;" and "[n]ot despotic; assuring liberty;[19] defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." *Free*, Black's Law Dictionary, 1st ed. 1891. (Pls.' Opp'n at 26-29; Defs.' Reply at 16-20). "Free" was also defined as "[o]pen to all citizens alike[.]" *Free,* Anderson, Dictionary of Law, 1889.

Two notable terms justify further analysis. First, "unconstrained" means "not held back or constrained." *Unconstrained*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unconstrained (noting definition first used in the 14th century). "Constrained" means "to force by imposed stricture, restriction or limitation;" "to force or produce in an unnatural or strained manner." *Constrained*, Merriam-Webster,

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group of people for a position, especially a political position, by voting." *Election (noun)*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/election.

[18] In *State v. Hirsch*, 125 Ind. 207, 24 N.E. 1062, 1063 (Ind. 1890), the Indiana Supreme Court analyzed the meaning of the term "elections" to interpret a state statute prohibiting liquor sales on "election day." Notably, the Court recognized that "[u]nder our form of government we have a well-defined system of choosing or electing officers, regulated by law." *Id.*

[19] "Liberty" is defined as "the quality or state of being free; the power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment or various social, political, or economic rights and privileges; the power of choice." *Liberty,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/liberty (noting the definition has been used since the 14th century).

https://www.merriam-webster.com/dictionary/constrain (noting definition used in the 14th century).

Second, "despotic" means "of, or relating to, or characteristic of a despot // a despotic government." *Despotic*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despotic#h1 (noting this term, with this definition, was first used in 1604). "Despot" in turn means "a ruler with absolute power and authority; one exercising power tyrannically; a person exercising absolute power in a brutal or oppressive way." *Despot*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despot (noting this definition came into being with the beginning of democracy at the end of the 18th century). The United States Supreme Court in 1866 explained what it means to be despotic: "In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot." *Ex parte Milligan*, 71 U.S. 2, 81, 18 L. Ed. 281 (1866).

The first clause "all elections shall be free" guarantees to Utah's citizens an election *process* that is free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained process, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process to either ensure continued control or to attain an electoral advantage. This right given to Utah citizens, necessarily imposes a limit on the legislature's authority when overseeing the election process.

The second clause specifically provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. Art. I, § 17. This portion of the clause prohibits a civil or military power from interfering with the free exercise of the right of suffrage. It does not, however, expressly preclude a governmental power, like the

legislature, from providing "by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942).

Anderson v. Cook is the only Utah case discussing the Free Elections Clause. In *Anderson,* a potential candidate submitted a petition to appear on a primary election ballot, but the acting county clerk refused to certify the nomination of the candidate for the primary election. *Id.* at 280. In affirming the county clerk's decision, the *Anderson* Court concluded that the petition was not timely filed, that the political party could not designate a candidate without an effective petition, and that the primary election laws did not provide for a "write in" candidate (while noting that general election laws did). *Id.* at 281-82. The candidate argued to deny him the right to appear on the ballot would violate the Free Elections Clause. *Id.* at 285. The *Anderson* Court did not fully interpret or analyze the clause. More importantly, it did not conclude that the Free Elections Clause did not apply to the issues presented. Rather, it held:

> While this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party. It cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise, or inhibit it *from prescribing reasonable methods and proceedings* for determining and selecting the persons who may be voted for at the election.

Anderson v. Cook, 102 Utah 265, 130 P.2d 278, 285 (1942) (emphasis added).

While the *Anderson* Court found no constitutional violation (i.e., because the candidate's petition was not filed in accordance with the law), the case does support that claims regarding the election *process* cannot be made under the Free Elections Clause. It supports that the Legislature necessarily has a role in providing "reasonable" regulation, machinery, and organization of the exercise of the right to vote. Additionally, the Legislature must "provide by law for the conduct

of elections, and the means of voting, and the methods of selecting nominees." *Anderson*, 130 P.2d at 285.

Based on the Court's analysis, and contrary to Defendants' arguments, Utah's Free Elections clause guarantees more than merely the right to vote.

2. Free Election Clauses and the English Bill of Rights

The history of free election clauses also supports that they were intended to prohibit tyrannical or despotic governmental manipulation of the election process to either ensure continued power or to attain electoral advantage. The first state free election clauses derived from a provision in the English Bill of Rights of 1689. *See Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022) (quoting historical sources discussing the origin of Free Elections Clauses in Virginia, Pennsylvania, and North Carolina). The original provision provided: "election of members of parliament ought to be free," and "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage." *Id.* (citing Bill of Rights, 1689, 1 W. & M. Sess. 2 c. 2 (Eng.)). The key principle driving these reforms was "avoiding the manipulation of districts that diluted votes for electoral gain." *Id.* North Carolina's free election clause was enacted following passage of similar provisions in Virginia and Pennsylvania, with the intent to "end the dilution of the right of the people to select representatives to govern their affairs," and to "codify an explicit provision to establish protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* (cleaned up). While not identical to Utah's, North Carolina's free election clause states simply: "All elections shall be free."

Defendants argue there is no evidence that Utah's Free Elections Clause, specifically, was based on the English Bill of Rights. This is true. Utah does not have the same well-

developed caselaw like North Carolina, specifically tracing the origin of this specific constitutional provision directly to the English Bill of Rights. However, the Utah Supreme Court has recognized that at least one provision in the Utah Constitution arose from the English Bill of Rights of 1689. *See, e.g.*, *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (discussing Utah's cruel and unusual punishment clause), *abrogated by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533; *see also State v. Houston,* 2015 UT 40, ¶¶ 166-170, 353 P.3d 55, 99-100 (Lee, J. concurring) (discussing English Bill of Rights and English origins of protection against "cruel and unusual punishment"). Based on *Bott,* the English Bill of Rights certainly had some influence on Utah's Constitution, as did other state constitutions and the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 31 (stating "the drafters of the Utah Constitution borrowed heavily from other state constitutions and the United States Constitution" and English common law.).

The history and evolution of our representative democracy in the United States was well known to the Utah Supreme Court in 1896, as it evaluated legislative action and various challenges to an election process. *See Ritchie v. Richards*, 14 Utah 345, 47 P. 670, 675 (1896) (stating elections should be "honest and fair"). In a concurring opinion, Justice Batch rejected the proposition that all legislative action is presumed constitutional and beyond judicial review. *Id.* at 675. Specifically, he rejected an interpretation of the Utah Constitution that would vest the legislature with "a power so arbitrary" that it likened it to "the parliament of Great Britain, under a monarchial form of government." *Id.*; *see also id.* at 681 (Miner, J., concurring in J. Batch's opinion).

Utah caselaw from 1891 reflects the strong sentiment at that time regarding the fundamental nature of the right to vote and the importance of protecting it from illegal acts of

election/government officials. *See Ferguson v. Allen,* 7 Utah 263, 26 P. 570, 574 (1891). The Utah Supreme Court in *Ferguson*, while analyzing allegations of election fraud, stated that the right to vote is fundamental and "[t]hat no legal voter should be deprived of that privilege by an illegal act of the election authorities is a fundamental principle of law." *Id.* at 573. The *Ferguson* court stated: "[a]ll other rights, civil or political, depend on the *free* exercise of this one, and *any material impairment* of it is, to that extent, a subversion of our political system." *Id.* at 574 (emphasis added). It further reasoned that the "rights and wishes of all people are too sacred to be cast aside and nullified by the illegal and wrongful acts of their servants, no matter under what guise or pretense such acts are sought to be justified." *Id.*

3. *Harper v. Hall* and Defendants' cited cases.

In line with the reasoning in *Ferguson*, the North Carolina Supreme Court in *Harper v. Hall* held that partisan gerrymandering is a cognizable claim under North Carolina's free elections clause, stating:

> partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. *Partisan gerrymandering prevents election outcomes from reflecting the will of the people* and such a claim is cognizable under the free elections clause.

Harper v. Hall, 868 S.E.2d 499, 542, *cert. granted sub nom. Moore v. Harper,* 142 S. Ct. 2901 (2022) (emphasis added).

Defendants cite two cases from Colorado and Idaho, suggesting that those states narrowly interpret their free elections clauses. They do not. In fact, in reviewing both cases, the Colorado

and Idaho courts apply their respective free elections clauses to address the "process" and not just merely the act of casting voting.

Defendants cite the Colorado case *Neelley v. Farr*, 158 P. 458 (Colo. 1916), stating that the Colorado Supreme Court interpreted Colorado's "free and open elections" provision to mean that "voters' right to the act of suffrage [be] free from coercion." *Id.* at 467. While that quote is part of the analysis, the *Neelley* court's decision does not support that the Court narrowly interpreted the Colorado free and open election clause to mean only that it protects against vote coercion. Notably, the case did not address redistricting. Rather, it addressed whether votes obtained from a "closed precinct," where the non-preferred candidates' party and voter information were prohibited (due to alleged industrial necessity), violated the free and open elections clause. The *Neelley* Court concluded that it did, and it excluded all votes cast, legal and illegal, from the precinct. *Id.* at 515.[20] While there are numerous quotes from the case regarding "free and open elections" that support that free and open elections means more than simply casting a vote, one quote is particularly instructive:

> There can be no free and open election in precincts where the legitimate activity of a political organization is interfered with and its members excluded either by private interests or public agencies or by the co-operation of both. So here a private, extrinsic agency, assisted by a public agency, the board of county commissioners, obtruded itself between a political organization and the electorate, and excluded one side to the controversy from the public territorial entity wherein the right of suffrage must be exercised.

Neelley v. Farr, 61 Colo. 485, 526, 158 P. 458, 472 (1916). This case supports that Colorado's free and open elections clause protects the *process*. In addition, congressional

[20] The *Neelley* court also stated: "under our form of government, if there is anything that should be held sacred, it is the ballot; and, if the aspirants for office, the election officials, and the party leaders so far forget themselves as to commit, or permit the commission of, gross frauds, so that the will of the legal electors cannot be determined, there is nothing left for the courts to do but to set aside the election in the precincts contaminated by such fraudulent conduct." *Neelley v. Farr*, 61 Colo. 485, 515, 158 P. 458, 468 (1916).

districts drawn through partisan gerrymandering to ensure one parties' election success to the exclusion of others does not meet the *Neelley* court's definition of a "free and open" election.

Defendants also cite *Adams v. Lansdon*, 110 P. 280 (Idaho 1910). *Adams* also does not deal with redistricting. Rather, the issue before the *Adams* court was whether requiring voters to vote for a first and second choice violated the portion of the Idaho's free and lawful elections clause, which stated: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." *Id.* at 282. In rejecting the argument, the *Adams* court interpreted the provision to prevent only "civil or military officers" from "meddl[ing] with or intimidat[ing] electors" at polls; it ruled that imposing the requirement to vote for a first and second choice was a reasonable exercise of the legislature's power. *Id.* Notably, the *Adams* courts' ruling does not generally determine what "free elections" means. It also does not hold that a congressional map that predetermines elections is a reasonable exercise of the legislature's power and that such map does not meddle or interfere with the lawful exercise of the right to vote.

Based on the plain text of the Free Elections Clause, Utah caselaw, and decisions from other state courts, Utah's Free Elections Clause guarantees more than merely the right to cast a vote. It guarantees an election *process* free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained *process*, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process, including through redistricting, to either ensure continued control or to attain an electoral advantage. As such, this Court concludes that partisan gerrymandering is a cognizable claim under Utah's Free Elections Clause.

4. Application of Plaintiffs' "effects-based" test.

Plaintiffs assert that this Court should assess Plaintiffs' Free Elections Clause claim under an effects-based test, which evaluates whether: "(1) the Enacted Plan has the effect of substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the dilution." (Pls.' Opp. at 17, 29.) The Court notes that this is Defendants' Motion, but Defendants neither address nor object to Plaintiffs' proposed test. Under the circumstances, and without adequate briefing, the Court adopts Plaintiffs' test solely for the purposes of deciding the current motion.

Assuming the allegations in the Complaint to be true, the Court concludes that Plaintiffs have sufficiently pled a claim under Utah's Free Elections Clause. First, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan has the effect of substantially diminishing or diluting the power of democratic voters, based on their political views. Plaintiffs allege that the Plan achieves extreme and durable partisan advantage by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to diminish their electoral strength. (Compl. ¶ 207.) In doing so, the Plan makes it systematically harder for non-Republican voters to elect a congressional candidate. It entrenches a single party in power and will reliably ensure Republicans and Republican incumbents are elected in all of the State's congressional seats for the next decade, despite a compact and sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise a majority of a district covering most of Salt Lake County. (*Id.* ¶¶ 6, 206-209, 226-231.)

Second, there is no legitimate justification to dilute Plaintiffs' vote, and the dilution cannot be explained by application of traditional redistricting principles. (*Id.* ¶¶ 187-98, 233-54.)

The only stated justification is that Defendants intended "to ensure a mix of urban and rural areas in each congressional district." (Defs.' Mot. at 5, 23, 26.) Defendants contend that explanation is nothing more than a pretext. (Compl. ¶¶ 128-130, 177-78, 180-81, 187-198.) At this stage, the Court cannot resolve any disputes of fact. Therefore, it must accept Plaintiffs' well-pled allegations as true.

Further, Plaintiffs allege that the Plan was enacted for partisan advantage, based on the nature of the boundary lines, lack of transparency in the redistricting process, and the actions and statements made by elected officials involved in approving the Plan. (*Id.* ¶¶ 3-5, 141-198, 200, 233-235, 254, 275.) Finally, seeking partisan advantage is neither a compelling nor a legitimate governmental interest, because it "in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government." *Harper*, 868 S.E.2d at 549.

Based on the facts alleged in the Complaint, and the Court's legal analysis above, the Court concludes that Plaintiffs have sufficiently stated a claim under the "effects-based" test for violation of Utah's Free Elections Clause.

This Court recognizes that there will always be incidental political considerations and partisan effects during redistricting, even when neutral and traditional redistricting criteria are applied. The United States Supreme Court recognizes that "[n]ot every limitation on the right to vote requires judicial intervention. Some administrative burdens on the franchise are unavoidable. But some so alter the nature of the franchise that they deny a citizen's 'inalienable right to full and effective participation in the political process.'" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "Because self-government is fundamentally predicated upon voters choosing winners and losers in the political marketplace, elections must reflect the voters' judgments and

not the state's." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J. concurring) ("In a free society the State is directed by political doctrine, not the other way around."). Key to the success of our government is "public confidence in the integrity of the electoral process," which ultimately "encourages citizen participation in the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). What is clear in a representative democracy, and under Utah's Free Elections clause, is that the way in which a government/legislature regulates, manages, provides for, and ultimately shapes the electoral process matters. As such, government/legislative action in this area should not be, and in this case is not, beyond constitutional challenge.

Plaintiffs should have the opportunity to present their case. Defendants' Motion to Dismiss Count One is DENIED.

b. **Plaintiffs Sufficiently State an Equal Protection Claim (Count Two).**

Next, Defendants maintain that Plaintiffs fail to state an equal protection claim because the Congressional Plan does not impact any fundamental right or the right to vote because each voter can freely vote for the candidate of their choice. Defendants also argue the 2021 Congressional Plan doesn't create a suspect classification. And, Defendants argue, any "perceived inequality" is the "product of the imbalance in the political makeup in the state and the corresponding political outcomes that reflect that imbalance of political opinion." (Defs.' Mot. at 22; Defs.' Rep. at 21.) The Court disagrees. Based on the well-established three-part test set forth in *Gallivan v. Walker*, 2002 UT 89, ¶ 31, 54 P.3d 1069, Plaintiffs sufficiently state a claim for violation of Utah's Equal Protection Clause.

Plaintiffs' equal protection claim is based on their contention that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their equal protection rights

under the Uniform Operation of Laws Clause of the Utah Constitution. (Compl. ¶¶ 187-198, 271-82.) The Utah Constitution states that "all free governments are founded on their authority for their equal protection and benefit." Utah Const. art. I, § 2. The Uniform Operation of Laws Clause states that "[a]ll laws of a general nature shall have uniform operation." *Id.* art. I, § 24. Equal protection is inherent in the basic concept of justice. *Malan v. Lewis,* 693 P.2d 661, 670 (Utah 1984).

In comparing the federal Equal Protection Clause and Utah's equal protection guarantees (which are embodied in the Uniform Operation of Laws Clause), the Utah Supreme Court noted that both embody similar fundamental principles, generally that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Gallivan,* 2002 UT 89, ¶ 31 (internal quotation marks omitted). Utah courts have noted that Utah's constitutional protections are "in some circumstances, more rigorous than the standard applied under the federal constitution." *Id.* ¶ 33.[21] In other words, Utah's protections are "at least as exacting," *id.,* but in some cases more protective that its federal counterpart. *Blue Cross & Blue Shield of Utah v. State Tax Comm'n,* 779 P.2d 634, 637 (Utah 1989). For instance, "article I, section 24 demands more than facial uniformity; the law's *operation* must be uniform." *Gallivan,* 2002 UT 89, ¶ 37. The test applied

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[21] The *Gallivan* Court reasoned:

> Even though there is a similitude in the "fundamental principles" embodied in the federal Equal Protection Clause and the Utah uniform operation of laws provision, "our construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause," *Malan,* 693 P.2d at 670; *see also Ryan v. Gold Cross Servs., Inc.,* 903 P.2d 423, 426 (Utah 1995), and "[w]e have recognized that article I, section 24 ... establishes different requirements from the federal Equal Protection Clause." *Whitmer v. City of Lindon,* 943 P.2d 226, 230 (Utah 1997).

Gallivan v. Walker, 2002 UT 89, ¶ 33.

to determine compliance with the Uniform Operation of Laws Clause remains the same in all cases; however, the level of scrutiny given to legislative enactments varies. *Blue Cross*, 779 P.2d at 637 (stating this provision operates to restrain the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by the law").

Under Utah law,

> A law does not operate uniformly if persons similarly situated are not treated similarly or if persons in different circumstances are treated as if their circumstances were the same. In other words, [w]hen persons are similarly situated, it is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit."

Id. ¶ 37 (cleaned up). The Uniform Operation of Laws Clause "protects against discrimination within a class and guards against disparate *effects* in the application of laws." *Id.* ¶ 38 (emphasis added). The courts have a responsibility to determine "whether a classification operates uniformly on all persons similarly situated within constitutional parameters." *Id.* Utah laws must not "operate unequally, unjustly, and unfairly upon those who come within the same class." *Blackmarr v. City Ct. of Salt Lake City,* 86 Utah 541, 38 P.2d 725, 727 (1934).

Gallivan v. Walker is not a redistricting case, however, the principles espoused in the context of apportionment are no less applicable here. Notably, the *Gallivan* Court stated: "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Gallivan*, 2002 UT 89, ¶ 72 (citing *Reynolds v. Sims,* 377 U.S. 533,

565–66, 84 S. Ct. 1362 (1964) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686 (1954))). *Gallivan* also recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems just." *Id.*

Plaintiffs assert that the right to vote is fundamental, and therefore heightened scrutiny applies based on the test set forth in *Gallivan*, 2002 UT 89, ¶¶ 42-43. Defendants, on the other hand, argue that because no fundamental or critical right or suspect classifications are implicated, the "rational basis" test, set forth in *State v. Angilau,* 2011 UT 3, ¶ 12, 245 P.3d 745, applies. At this stage, the Court need not decide which test applies as a matter of law because Plaintiffs have alleged facts sufficient to satisfy both standards.

Plaintiffs sufficiently allege facts to support that heightened scrutiny should apply. Plaintiffs have alleged that the 2021 Congressional Plan affects their fundamental right to vote. (Compl. ¶¶ 2, 261-262, 276-277, 301-307.) They have alleged that their right to vote has been burdened, diluted, impaired, abridged and is effectively meaningless, solely because of their political views and past votes. (*Id.*) The *Gallivan* court recognizes the right to vote as fundamental, stating:

> [n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. (citing *Reynolds*, 377 U.S. at 560 (1964)).

Under the Uniform Operation of Laws analytical model set forth in *Gallivan*, at this stage, Plaintiffs must allege that (1) the challenged law creates a classification, (2) that the "classification is discriminatory" or "treats the members of the class or subclasses disparately," and that it is (3) reasonably necessary to further a legitimate legislative goal. *Id.* ¶¶ 42-43.

First, Plaintiffs allege that the 2021 Congressional Plan, like the multi-county signature requirement in *Gallivan*, operates to create classifications. (Pls.' Opp'n at 34.) Plaintiffs allege that the district boundary arbitrarily classifies voters based on partisan affiliation and geographic location. (Compl. ¶¶ 4, 207-227, 274-275.) *Gallivan* recognized that the multi-county signature requirement created two subclasses of registered voters based on where they lived, rural and urban voters. *Gallivan*, 2002 UT 89, ¶ 44. Defendants contend that party affiliation is not a "suspect classification." However, at this stage, Plaintiffs have alleged, and this Court accepts as true, that the 2021 Congressional Plan operates to classify voters by both partisan affiliation and geographic location.

Second, Plaintiffs allege that the 2021 Congressional Plan treats similarly situated voters disparately. (*Id.* ¶¶ 4, 15, 23, 29-33, 36, 130, 187-198, 271-276.) Plaintiffs allege that Utah's Republican and non-Republican voters are similarly situated for redistricting purposes because both groups are entitled to equally weighted votes. The same is true for voters living in both urban and rural settings. Plaintiffs allege that the 2021 Congressional Plan diminishes the voting strength of non-Republican and urban voters, while amplifying the strength of Republican and rural voters. (*Id.* ¶¶ 30-33, 36, 188, 265, 276.)

Third, Plaintiffs sufficiently allege that there is no "legitimate" legislative goal in seeking a partisan advantage through redistricting, which effectively pre-determines election outcomes, targets disfavored voters, dilutes their vote and shifts voting power from all the people to a subset of people. (*Id.* ¶¶ 270-82.) They also allege there is no legitimate interest in amplifying the interests of rural or suburban voters to the detriment of urban voters.[22] (*Id.* ¶ 280.) Plaintiffs

[22] The *Gallivan* Court held that the multi-county signature requirement did not further a legitimate legislative purpose because it "invidiously discriminates against urban registered voters in violation of the one person, one vote principle." *Gallivan*, 2002 UT 89, ¶ 49.

also allege that Defendants' stated justification for the placement of district boundaries, to ensure an urban/rural mix, was merely a pretext to ensure partisan advantage and dilution of non-Republican votes. (*Id.* ¶¶ 177, 187-197.) Accepting these facts and the facts in the Complaint as true, Plaintiffs have stated a claim for equal protection under the Uniform Operation of Laws Clause.

Defendants contend that no fundamental right is implicated, and that partisan affiliation is not a suspect classification. As such, they maintain the Court should apply the rational basis standard. Based on that standard, Defendants assert that "the Legislature voted on congressional district lines for the *reasonable* purpose of ensuring balance of urban and rural areas in each congressional district." (Defs.' Mot. at 26 (citing Compl. ¶ 187).). Defendants' argument goes to the merits of Plaintiffs' claim, rather than to whether they have sufficiently stated a claim. While the Complaint does reflect that proponents of the 2021 Congressional Plan represented that the district lines were "necessary" to balance urban and rural interests, it does not state that the purpose was reasonable. In addition, Defendants ignore paragraphs 188 to 198 of the Complaint, in which Plaintiffs allege that rationale was a pretext. On a motion to dismiss, this Court does not decide the merits. Rather, it assumes the well-pleaded facts in the Complaint to be true. Plaintiffs allege that Defendants' urban/rural justification is merely a pretext. For purposes of this motion, this Court assumes that fact to be true. This Court cannot, at this stage, resolve disputes of fact or make credibility determinations.

Even reviewed under the rational basis test, Plaintiffs' Complaint still states a claim. Under that standard, this Court considers: "(1) whether the classification is reasonable; (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a

reasonable relationship between the classification and the legislative purpose."[23] *State v. Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745 (internal quotation marks omitted). Courts will "uphold a statute under the rational basis standard if [the statute] has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." *Id.* ¶ 10 (internal quotation marks omitted) (second alteration in original) (emphasis added). Assuming factors one and three are established, the Complaint alleges sufficient facts to show that there is no legitimate legislative objective in either seeking partisan advantage through redistricting or in establishing districts to predetermine the outcome of elections and to ensure that incumbents continue to hold their seats.

For the reasons stated above, Plaintiffs have stated an equal protection claim under both a heightened scrutiny and rational basis standard. The Motion to Dismiss Count Two is DENIED.

c. Plaintiffs Sufficiently State a Claim for Violation of Plaintiffs' Right to Free Speech and Association (Count Three).

Defendants assert that the 2021 Congressional Plan and the congressional district boundaries established therein neither implicate nor violate Plaintiffs' Free Speech and Association rights. The Court disagrees.

Article I, Section 1 of the Utah Constitution states that "[a]ll persons have the inherent and inalienable right to . . . assemble peaceably, . . . petition for redress of grievances, [and to] communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. Article I, Section 15 states, in pertinent part, that "[n]o law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, § 15. The Utah Supreme Court has explained that together, Sections 1 and 15 of Article I "prohibit laws which either directly

[23] The Court also notes that whether a classification is in fact "reasonable" or whether legislative objectives are "legitimate" are inherently factual determinations. At this stage, the Court cannot "find facts" nor decide if the classification is "reasonable" or if the legislative objectives are "legitimate," without a developed factual record. On a motion to dismiss, the only issue before the Court is whether Plaintiffs have alleged sufficient facts to state a claim under Utah's Uniform Operation of Laws Clause.

limit protected [free speech] rights or indirectly inhibit the exercise of those rights." *Am. Bush*, 2006 UT 40, ¶ 21 (noting drafter of Utah's Constitution borrowed heavily from other state constitutions and the United States Constitution and finds its roots in English common law). Notably, the United States Supreme Court has recognized a First Amendment interest in voting. *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)); *Burdick*, 504 U.S. at 438 (observing that "voters express their views in the voting booth.").

The role of free speech is central to our representative democracy. In *American Bush*, the Utah Supreme Court discussed the history of free speech in Utah. 2006 UT 40, ¶ 13. That court recognized that "[t]he framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Id.* And, because "'[a]ll political power is inherent in the people,' only Utah's citizens themselves had the right to limit their own sovereign power to act through their elected officials." *Id.* ¶ 14 (citing Utah Const. art. I, § 2). "'Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.'" *Harper*, 868 S.E.2d at 545 (citing Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970)).

Plaintiffs allege that the 2021 Congressional Plan divides up the only two predominately Democratic counties in Utah. Salt Lake County is divided among the four congressional districts; Summit County is divided among two. Fifteen municipalities are divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities are divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Plaintiffs allege free

speech and association rights have in fact been burdened by these new boundaries. Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty to three hundred miles away. (*Id.* ¶¶ 242-251.) The proximity between voters discourages, burdens, or effectively impacts free speech and association. Plaintiffs allege that these predominately democratic communities were intentionally divided or "cracked" solely because of their political views and past votes. (*Id.* ¶¶ 192, 275.) The effect of the "cracking" is that their non-Republican views are subordinated, votes are diluted, voices are silenced, and Republican-advantage and control is locked in in all four congressional districts for the next decade. (*Id.* ¶¶ 36, 275, 293-94.)

Plaintiffs allege that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their free speech and association protections. They allege the 2021 Congressional Plan is both discriminatory and retaliatory and based solely on their protected political views and past votes. (Compl. ¶ 3-4, 36, 205-207. 209, 283-97.) Plaintiffs allege that the 2021 Congressional Plan burdens free speech and association in multiple ways. Specifically, it "restrains and mutes Plaintiffs' ability to express their viewpoints," "abridges the ability of voters with disfavored views to effectively associate with other people holding similar viewpoints," "impairs Plaintiffs' ability to recruit volunteers, secure contributions, and energize other voters to support Plaintiffs' expressed political views and associations," "retaliates against Plaintiffs for exercising political speech that Defendants disfavor," "prevent[s] [voters] from being able to associate and elect their preferred candidates who share their political views," divides Plaintiffs "to make their voices too diluted to be heard and guarantee they are not represented in any meaningful way because of

their disfavored views," and dilutes non-Republican votes. (*See generally* Compl., Compl. ¶¶ 289-294.)

Defendants assert that the Free Speech and Association Clauses do not apply to the redistricting process. (Defs.' Mot. at 26.) Defendants contend that the placement of a congressional district boundary "does not in any way restrict an individual's speech or impair an individual's ability to communicate," citing two federal district court cases, *Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011) and *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 487, but without any legal analysis. (Defs.' Reply at 26-27.)

In *Radogno*, the federal district court rejected Plaintiffs' First Amendment claims, holding that such rights were not burdened by the redistricting plan at issue. Specifically, the *Radogno* Court reasoned:

> Plaintiffs are every bit as free under the new redistricting plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to successfully elect their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights.

Radogno, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011).[24] *Radogno*'s First Amendment analysis of partisan political gerrymandering, under federal law, makes sense and is persuasive generally. However, that rationale may not apply to every case or to every fact scenario. In addition, it is not binding on this Court.

[24] Notably, the *Radogno* court did not dismiss outright plaintiffs' equal protection claim under the Fourteenth Amendment, but instead granted plaintiffs' leave to amend to plead a "workable test" or "reliable standard" to evaluate such claim. *Radogno*, 2011 WL 5025251, at *6 (discussing generally partisan gerrymandering cases under federal law, noting that some have reached the conclusion that they are justiciable, but not solvable).

In *Johnson v. Wis. Elections Comm'n*, the Wisconsin Supreme Court noted that in *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 139 S. Ct. 2484, 2499–500 (2019), "[t]he United States Supreme Court recently declared there are no legal standards by which judges may decide whether maps are politically 'fair.'" *Johnson*, 2021 WI 87, ¶ 3, 399 Wis. 2d 623, 631. The *Johnson* court agreed that "fairness" is not a judicially manageable standard and that "deciding what constitutes 'fair' partisan divide . . . would encroach on the constitutional prerogatives of the political branches." *Id.* ¶ 45. The court emphasized that it would not decide whether the maps were fair but would fulfill its judicial role of "declaring what the law is and affording the parties a remedy for its violation." Like the *Johnson* court, this Court is not asserting that it has a role in deciding "fairness." And Plaintiffs here are not arguing that the 2021 Congressional Plan is unfair. They assert that it violates the Utah Constitution, and, as previously emphasized, the Court does not hesitate to engage in constitutional review.

Defendants also assert that the Free Speech and Association clauses of the Utah Constitution do not protect the redistricting process because "the framers of our [Utah] constitution . . . envisioned a limited freedom of speech." *Am. Bush*, 2006 UT 40, ¶ 42. The *American Bush* case, however, has only minimal relevance, if any, to this specific issue. *American Bush* did not involve redistricting, allegations of gerrymandering or voting rights. Instead, the *American Bush* court characterized the right to free speech as "limited" while discussing whether obscenity—in that case, nude dancing—was protected speech. *Am. Bush*, 2006 UT 40, ¶¶ 31-58. Consequently, the holding that the Utah Constitution's free speech protections do not extend to obscenity has little, if any, relevance to the issues at bar. Notably, unlike obscenity, voting is a fundamental right, and its exercise is a form of protected speech.

Laws v. Grayeyes, 2021 UT 59, ¶ 61 (stating "the right to vote is sacrosanct"); *Doe v. Reed*, 561 U.S. at 224 (recognizing a First Amendment interest in voting).

Defendants also assert there can be no First Amendment violation because Plaintiffs have no right to political success. *See Cook v. Bell*, 2014 UT 46, ¶ 34, 344 P.3d 634 (addressing whether the Legislature's limits on the right to initiative imposed severe restrictions on free speech and association). The Court does agree that "First Amendment jurisprudence . . . does not guarantee unlimited participation in political activity, nor does it establish a right to political success." *Id.* ¶ 57. However, it does protect "individuals from regulations that directly discourage or prohibit political expression." *Id.*

This Court notes there is a distinction between incidental political impacts that flow from neutral government action and government action aimed at discouraging, burdening, or prohibiting speech and association in order to secure an electoral advantage. Where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward," courts cannot and should not intervene in a neutrally administered electoral system. *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S. Ct. 791 (rejecting argument that "one-party rule" demands application of First Amendment to ensure competition or a "fair shot at party endorsement"). But when a state takes steps, under either election laws or by redistricting, to grant its preferred party a durable monopoly, this deviation from neutrality undermines the competitive mechanism that undergirds the democratic process, and it burdens a voters' right to participate in a fair election. *See Williams v. Rhodes*, 393 U.S. 23, 31-32, 89 S. Ct. 5, 10-11 (1968) (holding Ohio's ballot-access laws, which favored the long-established Republican and Democratic parties, placed an unequal burden on the right to vote

and the right to associate to form a new political party).[25] "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC,* 572 U.S. 185, 191, 134 S. Ct. 1434, 1444 (2014). As such, the government cannot and should not "restrict political participation of some in order to enhance the relative influence of others." *Id.*

In *Harper v. Hall,* the North Carolina Supreme Court recognized that there is a cognizable claim for violation of free speech and association rights based on partisan gerrymandering. *Harper v. Hall*, 868 S.E.2d 499, 546 (N.C. 2022). The North Carolina Supreme Court stated:

> When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny."

Id. (holding congressional map subject to strict scrutiny and requiring it to be "narrowly tailored to advance a compelling governmental interest"). This practice "distorts the expression of the people's will." *Id.* Under these circumstances, "[t]he diminution or dilution of voting power based of partisan affiliation . . . suffices to show a burden on that voter's speech and associational rights." *Id.* ¶ 161. This Court is persuaded that partisan gerrymandering that effectively entrenches a state's preferred party in office discriminates on the basis of viewpoint dilutes the

[25] In *Williams,* the State of Ohio asserted "that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President." *Williams*, 393 U.S. at 28–29. While noting that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors," the Court stated: "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. *Id.*

non-favored party's vote, burdens / impairs the citizens' rights to exercise a meaningful vote and to associate. *See Vieth*, 541 U.S. at 314 (Kennedy, J, concurring); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

Plaintiffs assert that heightened scrutiny applies to the free speech and association claims. Plaintiffs have also cited several cases in support of that assertion. *See, e.g., Reed v. Town of Gilbert*, Ariz., 135 S. Ct 2218, 2227 (2015); *Harper v. Hall*, 868 S.E.2d at 546. In their Reply, Defendants do not challenge that contention or seek to distinguish these cases with respect to this issue. Thus, in the absence of any contrary argument or authority, the Court assumes, for purposes of analyzing the motion at bar, that strict scrutiny applies to the free speech and association claims.[26] Based on the factual allegations in the Complaint, which this Court must accept as true, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan violates their rights to free speech and association because it discourages and burdens political expression, is discriminatory and retaliatory based on disfavored political views and past voting history, and it dilutes Plaintiffs' voting power. (*See generally* Compl.; Compl. ¶¶ 288-294.) Plaintiffs also allege that Defendants have "cracked" and "packed" the congressional voting districts to intentionally dilute the voting power of those who have disfavored views, namely Democrats.

Plaintiffs also have sufficiently alleged that there is no compelling or legitimate government interest in drawing congressional district boundaries to give Republicans an electoral advantage, to the detriment of non-Republican voters' right to free speech and association. (*Id.* ¶ 295.) Plaintiffs also allege the 2021 Congressional Plan is not narrowly

[26] By applying strict scrutiny for purposes of this Motion, the Court is not necessarily ruling that Plaintiffs' assertion is correct. But given the briefing and accepting the factual allegations in the Complaint as true, including that the Legislature intentionally drawing the maps to punish Plaintiffs for expressing disfavored views, the Court adopts this standard solely for the purpose of determining if Plaintiffs have stated a viable claim for relief.

tailored to serve any legitimate state interest. (*Id.* ¶ 296.) Plaintiffs have sufficiently stated a claim for violation of their Free Speech and Association rights.

For the reasons stated above, Defendants' Motion to Dismiss Count Three is DENIED.

d. Plaintiffs Sufficiently State a Right to Vote Claim (Count Four).

Defendants assert Plaintiffs fail to state a claim for violation of the Right to Vote Clause. Defendants also argue, without citation to any legal authority, that the Right to Vote Clause was intended to deal solely with voter qualifications and that there is no basis in Utah law to interpret the provision to guarantee anything other than the right to physically cast a ballot. Defendants also argue that the 2021 Congressional Plan does not prevent Plaintiffs or any other qualified Utah citizens from voting, therefore there can be no constitutional violation. (Defs.' Mot. at 27-28; Defs.' Rep. at 25-26.) The Court disagrees.

The Right to Vote Clause provides that "[*e*]*very citizen* of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election.*" Utah Const. art. IV, § 2 (emphasis added).[27] Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government. *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).[28] In fact, it is said to be "more precious in a free country" than any other right. *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds*, 377 U.S. at 560). If the right "of having a voice in the election of those who

[27] The Court notes that neither party presented any arguments regarding the plain meaning of this clause, historical evidence regarding the drafting or adoption of this clause or discussed any particular test to be applied.

[28] "The right to vote and to actively participate in its processes is among the most precious of the privileges for which our democratic form of government was established. The history of the struggle of freedom-loving men to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon. But we re-affirm the desirability and the importance, not only of permitting citizens to vote but of encouraging them to do so." *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).

make the laws under which, as good citizens, we must live," is undermined, "[o]ther rights, even the most basic, are illusory. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right." *Id.*

Defendants argue that the Right to Vote Clause deals solely with voter qualifications, implying that it only applies when voter qualifications are at issue. While this clause includes qualifications required to exercise the right, the right to vote is nonetheless expressly guaranteed.

Defendants also assert that this clause guarantees only the right to physically cast a vote. Defendants cite no authority to support such a limited interpretation of this specific clause. To the contrary, when interpreting constitutional provisions, the Utah Supreme Court has stated that individual constitutional provisions

> cannot properly be regarded as something isolated and absolute but must be considered in the light of its background and the purpose it was designed to serve; and in relation to other fundamental rights of citizens set forth in the entire Constitution which are essential to the proper functioning of our democratic from of government. One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions.

Shields v. Toronto, 16 Utah 2d 61, 63, 395 P.2d 829, 830 (1964) (interpreting Article VI, Section 7 of the Utah Constitution in reference to the right to vote).[29] In interpreting this provision, the Court should consider the entire Utah Constitution and its purpose, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Association Clauses and the long line

[29] Notably, the *Shields* Court recognized the historical and "continuing expansion of the right of suffrage in this country." *Shields v. Toronto*, 16 Utah 2d 61, 66 n. 12, 395 P.2d 829, 833 n. 12 (1964). While discussing the right to vote in the context of voting "freely for the candidate of one's choice," the Court stated that voting "is of the essence of a democratic society, and any restrictions on that right strike at the essence of a representative government." *Id.* Every citizen should have a "right to a vote free of arbitrary impairment by state action." *Id.*

of cases generally discussing the "right to vote." The plane language of the Right to Vote clause guarantees the right. But, read in light of the entire Utah Constitution, the right to vote clearly guarantees more than the physical right to cast a ballot.

Utah law has recognized that the right to vote must be "meaningful." *Shields*, 395 P.2d at 832-33 (explaining "[t]he foundation and structure which give [our democratic system of government] life depend upon participation of the citizenry in all aspects of its operation."). The right must not be "unnecessarily abridged" or "diluted." *Gallivan*, 2002 UT 89, ¶ 72 (stating "'[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.'" (quoting *Reynolds*, 377 U.S. at 565-66, 84 S.Ct.). And the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 237-38 (Utah 1904). The goal of an election "is to ascertain the popular will, and not to thwart it," and "aid" in securing "a fair expression at the polls." *Id.*[30]

Here, Plaintiffs allege that the Legislature drew the 2021 Congressional Map in a way to render Plaintiffs' votes meaningless. While they still can engage in the act of voting, Plaintiffs' votes no longer have any effect. Specifically, Plaintiffs allege that the 2021 Congressional Plan "achieves this extreme partisan advantage for Republicans primarily by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to eliminate the strength of their

[30] There is only one Utah case specifically addressing the Right to Vote Clause. *See Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985). In *Dodge*, a prison inmate challenged a law requiring him to vote in the county in which he resided prior to incarceration rather than in the county in which he was incarcerated. Plaintiff alleged that his right to vote under the Right to Vote Clause was in effect denied. *Id.* at 272-73. In analyzing that claim, the Utah Supreme Court stated, "Dodge made no contention that his right to vote was improperly burdened, conditioned or diluted." *Id.* at 273. The implication is that a claim under the right to vote clause may include an allegation that the right was "improperly burdened, conditioned or diluted."

voting power." (Compl. ¶ 207.) The result is that the 2021 Congressional Plan "draw[s] district lines to predetermine winners and losers." (Compl. ¶ 306.) Their disfavored vote is meaningless, diluted, impaired and infringed due to the intentional partisan gerrymandering. (*Id.* ¶ 304-06.) In addition, because the election outcomes are now predetermined for the next ten years, the true public will cannot be ascertained and is effectively distorted. (*Id.* ¶ 305-09.) Plaintiffs also allege that this impairment serves no legitimate public interest.[31] (*Id.*) Assuming these facts in the Complaint to be true, the Court concludes that Plaintiffs have properly stated a claim under the Right to Vote Clause.

Defendants' Motion to Dismiss Count Four is therefore DENIED.

IV. Plaintiffs Fail to State a Claim Under Count Five the "Unauthorized Repeal of Proposition 4."

Finally, Defendants assert that the fifth claim should be dismissed because the Legislature's amendment or repeal of Proposition 4 does not violate the Inherent Political Powers and Initiative Clauses of Utah Constitution. The Court agrees.

Plaintiffs' fifth claim alleges that when the Legislature replaced the citizen-enacted Proposition 4 with SB 200, the Legislature infringed on the people's inherent political powers and initiative rights under the Utah Constitution. (Compl. ¶¶ 315-17). The Initiative Clause of the Utah Constitution states, in relevant part: "The legal voters of the state of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute." Utah Const. art. VI, § 1(2)(a)(i)(A). The Inherent Political Powers Clause provides that "All political power is inherent

[31] The Court notes that neither party has addressed the appropriate standard to be applied in this case, i.e., strict scrutiny or rational basis, for Plaintiffs' Right to Vote claim. However, reviewing Plaintiffs' Complaint, the Court concludes that Plaintiff has sufficiently pled a claim under either standard.

in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2. Plaintiffs argue that the Legislature violated these clauses by passing SB 200, effectively repealing Proposition 4, which had been put in place via citizen initiative.

The Utah Supreme Court has explained that "[u]nder [Article I, Section 2], upon which all our government is built, the people have the inherent authority to allocate governmental power in the bodies they establish by law." *Carter v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141. Under this authority, "the people of Utah divided their political power," vesting

> "The Legislative power of the State" in two bodies: (a) "the Legislature of the State of Utah," and (b) "the people of the State of Utah as provided in Subsection (2)." [Utah Const.] art. VI, § 1(1). On its face, article VI recognizes a single, undifferentiated "legislative power," vested both in the people and in the legislature. Nothing in the text or structure of article VI suggests any difference in the power vested simultaneously in the "Legislature" and "the people." *The initiative power of the people is thus parallel and coextensive with the power of the legislature.* This interpretation is reinforced by the history of the direct-democracy movement, by constitutional debates in states with constitutional provisions substantially similar to Utah's article VI, and by early judicial interpretations of those provisions.

Id. ¶ 22 (emphasis added). In further explaining this shared legislative power, the Utah Supreme Court has stated, "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069.

The Utah Constitution and Utah law unequivocally recognizes the importance of its citizens' right to initiate legislation to alter or reform their government. Utah Const. art. I, § 2; *Gallivan*, 2002 UT 89, ¶ 23; *Utahns For Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, ¶ 10. This is clear. The Constitution, however, does not restrict or limit, in any way, the Legislature's ability to amend or repeal citizen-initiated laws after they become effective.

Through their coequal power, both the Legislature and the people can enact, amend, and repeal legislation. The people can repeal legislation enacted by the Legislature through their referendum power, with some limitation. *See* Utah Const. art. VI, § (2)(a)(1)(B). The Utah Constitution, caselaw, and historical practice, however, shows that the Legislature can amend and repeal legislation enacted by citizen initiative, without limitation.

When we interpret the Utah Constitution, the starting point is the text itself. *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 19, 144 P.3d 1109 (internal quotation marks omitted). In evaluating legislative authority, the provisions in the Utah Constitution are construed as "limitations, rather than grants of power." *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955); *Shurtleff*, 2006 UT 51, ¶ 18 ("The Utah Constitution is not one of grant, but one of limitation."). Article VI of the Utah Constitution vests legislative authority in both the Legislature and the people. *See* Utah Const. art. VI, § 1(1). Notably, the text of article VI broadly confers legislative authority on the Legislature without any express limitation on the Legislature's ability to pass or repeal laws. *See id.* art. VI, § 1(a).

In contrast, the ability of the people to enact or repeal legislation, however, is specifically limited by the text of the Constitution.[32] *See id.* art. VI, § 1(b) (stating that "Legislative power" is "vested in ... the people of the State of Utah as provided in Subsection (2)"). In fact, subsection 2 of article VI explicitly restricts the people's referendum power—or the ability to repeal laws

[32] The citizens' right to legislate through the initiative process is also limited by the plain language of the Utah Constitution. *Gallivan v. Walker*, 2002 UT 89, ¶ 172, 54 P.3d 1069, 1118. Article VI, section (2)(a)(i)(A) states: "The legal voters of the State of Utah, in the numbers, *under the conditions, in the manner, and within the time provided by statute*, may initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, *as provided by statute.*" Utah Const. art. VI, § 2(a)(i)(A). Notably, it is the Legislature that establishes the statutory requirements to initiate, submit and vote on any citizen initiative. *See Sevier Power Co., LLC v. Bd. of Sevier Cty. Comm'rs*, 2008 UT 72, ¶ 10, 196 P.3d 583.

enacted by the Legislature—to laws that were passed with less than a 2/3 majority vote by the Legislature. *See id.* art. VI, § 2(a)(1)(B).

Given the absence of anything in the Utah Constitution that restricts the Legislature's ability to repeal laws enacted via initiative, there is a clear implication that the Legislature has broad authority to enact and repeal laws, including those enacted by citizen initiatives. Reading the Utah Constitution to limit the Legislature's authority to amend or repeal laws originally enacted via citizen initiative would require the Court to read something into the Constitution that is simply not there.[33] The Court declines to do so.

Moreover, Utah law also clearly indicates that the Legislature has power to amend and repeal laws that are passed via citizen initiative.[34] In explaining that the legislative powers of the Legislature and the people are coequal or "parallel," the Utah Supreme Court approvingly quoted the Oregon Supreme Court, which stated that "'[l]aws proposed and enacted by the people under the initiative . . . are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will.'" *Carter*, 2012 UT 2, ¶ 27 (quoting *Kadderly v.*

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[33] The Court further notes that Plaintiffs have not provided any facts from the historical record to suggest that such a restriction was intended. Rather, the historical practice and the caselaw indicate that such a restriction was not intended. In contrast to the Utah Constitution, the constitutions of ten other states expressly restrict their respective legislatures' authority to amend or repeal the statutes/law enacted from a successful citizen initiative. *See* Alaska (Alaska Const. art. XI, § 6); Arizona (Ariz. Const. art. IV, pt. 1, § 1(6)(B)-(C)); Arkansas (Ark. Const. art. V, § 1); California (Cal. Const. art. II, § 10); Michigan (Mich. Const. art. II, § 9; art. XII, § 2); Nebraska (Neb. Const. art. III, § 2); Nevada (Nev. Const. art. XIX, §§ 1-2); North Dakota (N.D. Const. art. III, § 8); Washington (Wash. Const. art. II, § 1); and Wyoming (Wyo. Const. art. III, § 52). Given the lack of any textual limitation, the history of the Legislature repealing citizen initiatives, and examples of other state constitutions that do contain express limits on their respective legislature's ability to make changes to citizen-initiated laws, it would clearly be improper for the Court to read such a limitation into Utah's Constitution.

[34] Utah law also specifically authorizes the Legislature to amend citizen-initiated or approved laws. Under Utah Code Ann. Section 20A-7-212(3)(b), "[t]he Legislature may amend any initiative approved by the people at any legislative session" and Subsection 20A-7-311(5)(b) provides that "[t]he Legislature may amend any laws approved by the people at any legislative session after the people approve the law." The Court agrees with Defendants that adopting Plaintiffs' argument *could* create certain practical challenges to the maintenance of the Utah Code in that the Legislature would be precluded from correcting typographical errors and making any changes, substantive or otherwise. Other than the authority provided in the above-cited statutes, there is no other process or procedure to manage changes to citizen-initiated laws.

City of Portland, 44 Or. 118, 74 P. 710, 720 (1903). Thus, the Utah Supreme Court has seemingly recognized that the Legislature may repeal initiative-enacted law.

Likewise, the Legislature's amendment or effective repeal of Proposition 4 / Title 20A, Chapter 19, Utah Independent Redistricting Commissions Standards Act is in line with historical practice. In 2018, Governor Herbert called a special session of the Utah Legislature to address citizen initiative Proposition 2, the Utah Medical Cannabis Act, the day before it was set to go into effect. *Grant v. Herbert*, 2019 UT 42, ¶ 5, 449 P.3d 122. The Legislature heavily amended the statute, changing many key aspects of the law. *Id.* In response, voters attempted to place the amended statute on the ballot through referendum but were not able to do so because the amendment had passed by a two-thirds vote in the Legislature, making it exempt from referendum. *Id.* ¶ 7. The Utah Supreme Court ultimately upheld Governor Herbert's decision to call the special legislative session which amended Proposition 2. *Id.* ¶¶ 21-24.

In view of the foregoing, including the text of the Utah Constitution, statutory language, the caselaw, and historical practice, the Legislature's exercise of its coequal legislative authority to repeal citizen initiatives does not violate the Citizen Initiative or Inherent Powers Clauses of the Utah Constitution. Therefore, even accepting the factual allegations as true, the Legislature did not act unconstitutionally by either substantially amending or effectively repealing Proposition 4. Plaintiffs' Fifth cause of action, therefore, does not state a valid claim for relief under Utah law. Accordingly, the Court GRANTS Defendants' Motion to Dismiss with respect to Count Five in the Complaint.

CONCLUSION

For the reasons stated above:

(1) The Court DENIES Defendants' Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

(2) The Court DENIES Defendants' Motion to Dismiss certain Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams.

(3) The Court DENIES Defendants' Motion to Dismiss Count One (Free Elections Clause), Count Two (Equal Protection Rights), Count Three (Free Speech and Association Rights), and Count Four (Affirmative Right to Vote) of Plaintiffs' Complaint.

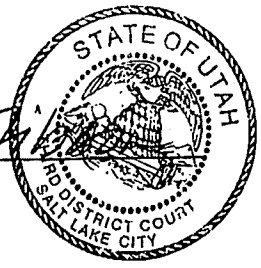
(4) The Court GRANTS Defendants' Motion as to Plaintiffs' Count Five. Therefore, Count Five, "Unauthorized Repeal of Proposition 4 in Violation of Utah Constitution's Citizen Lawmaking Authority to Alter or Reform Government" is DISMISSED, with prejudice.

DATED November 22, 2022.

BY THE COURT:

Dianna M. Gibson

DIANNA M. GIBSON
DISTRICT JUDGE



Appendix D

Szeliga v. Lamone,
Nos. C-02-CV-21-001816
& C-02-CV-21-001773
(Md. Cir. Ct., Anne Arundel Cty.
Mar. 25, 2022)

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

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

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

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

MEMORANDUM OPINION AND ORDER

Introduction

Partisan gerrymandering refers to the drawing of districting lines to favor the political party in power, and "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho v. Common Cause*, — U.S. —,—, 139 S. Ct. 2484, 2499 (2019).[1] *Rucho* is pivotal for the discussion of why this trial court and, potentially, the Court of Appeals[2] are

[1] Gerrymandering based on race is not an issue in this case, so that statutes such as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified, as amended, at 52 U.S.C. § 10101, *et seq.*), and cases solely addressing this conundrum are not implicated directly.

(continued . . .)

grappling with the issue of the constitutionality of the 2021 Congressional map, because the Supreme Court demurred in the case from addressing, on the basis of the "political question" doctrine, the lawfulness of partisan gerrymandering. *Id.* at —, 2506–07. Chief Justice Roberts, the author of *Rucho*, suggested, however, that, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at —, 2507.

Background

Two consolidated cases in issue in the instant case are constitutional challenges to the Maryland Congressional Districting Plan enacted in 2021, hereinafter referred to as "the 2021 Plan." In their Complaint, the 1773 Plaintiffs[3] allege violations of Section 4 of Article III of the Maryland Constitution, which provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions[,]

(. . . continued)

[2] A direct appeal to the Court of Appeals is available pursuant to Section 12–203 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.), which provides:

> (a) *In general.* — A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:
>
> (1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;
>
> (2) on the request of a party or sua sponte, the chief administrative judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and
>
> (3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.
>
> (b) *Expedited appeal.* — The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a)(3) of this section as expeditiously as the circumstances require.

[3] The named Plaintiffs in the consolidated action, Case No. C-02-CV-21-001773, are Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor; hereinafter "the 1773 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

MD. CONST. art. III, § 4, as well as Article 7 of the Maryland Declaration of Rights, which declares:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

MD. CONST. DECL. OF RTS. art. 7. The 1816 Plaintiffs[4] also allege violations of Article 7, but also add Article 24 of the Declaration of Rights, which provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land[,]

MD. CONST. DECL. OF RTS. art. 24, as well as Article 40, which declares:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege[,]

MD. CONST. DECL. OF RTS. art. 40, and Section 7 of Article I of the Maryland Constitution, which provides:

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

MD. CONST. art. I, § 7.

[4] The named Plaintiffs in Case No. C-02-CV-21-001816 are Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell; hereinafter "the 1816 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

Defendants in both actions are Linda H. Lamone, the Maryland State Administrator of Elections; William G. Voelp, the Chairman of the Maryland State Board of Elections; and the Maryland State Board of Elections, which is identified as the administrative agency charged with "ensur[ing] compliance with the requirements of Maryland and federal election laws by all persons involved in the election process."[5]

Case No. C-02-CV-21-001816

On December 23, 2021, the 1816 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On January 20, 2022, the Democratic Congressional Campaign Committee ("DCCC") filed a Motion to Intervene in the matter, along with its proposed Answer to the Plaintiffs' Complaint. On February 2, 2022, the Defendants filed their Motion to Dismiss or, in the Alternative, for Summary Judgment.[6] The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 3, 2022 and subsequently filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on February 11, 2022. In the meantime, the Defendants also filed their response to the DCCC's Motion to Intervene. The Court heard argument on the Defendants' Motion to Dismiss on February 16, 2022 and held the matter *sub curia*. Simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC's Motion to Intervene.

Several days later, on February 22, 2022, the Court issued a Consolidation Order, which consolidated Case No. C-02-CV-21-001816 with another similar case, Case No. C-02-CV-

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

[6] It should be noted that the Defendants have asserted that both Case No. C-02-CV-21-001816 and Case No. C-02-CV-21-001773 are non-justiciable "political questions." The Defendants, however, conceded that should the standards in Article III, Section 4 apply to Congressional redistricting, the matter is justiciable.

21001773, and identified Case No. C-02-CV-21-001816 as the "lead" case. On the same day, the Court denied three requests for special admission of out-of-state attorneys on behalf of the DCCC. On February 23, 2022, the Court ultimately issued its Order disposing of the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismissed Count II: Violation of Purity of Elections, with prejudice. The counts that remained included Counts I, III, and IV of the 1816 Complaint, which involved violations of Articles 7 (Free Elections), 24 (Equal Protection), and 40 (Freedom of Speech) of the Maryland Declaration of Rights, respectively. The 1816 Plaintiffs ask for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland's Declaration of Rights and Section 7 of Article I of the Maryland Constitution. Additionally, Plaintiffs seek to permanently enjoin the use of the 2021 Plan and ask for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map is prepared.

Case No. C-02-CV-21-001773

On December 21, 2021, the 1773 Plaintiffs filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland's Congressional Districts. On January 20, 2022, the DCCC filed a Motion to Intervene in the matter, along with its proposed Motion to Dismiss the Plaintiffs' Complaint. The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 4, 2022. Subsequently, on February 11, 2022, the Plaintiffs filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, in related Case No. C-02-CV-21-001816. On February 15, 2022, the DCCC filed its Reply in Support of its Motion to Intervene. Several days later, on February 19, 2022, the Defendants filed a Motion to Dismiss the Complaint. The Plaintiffs filed their Opposition to the Motion to

Dismiss on February 20, 2022. On February 22, 2022, the Court issued a Consolidation Order (referenced above) and denied the DCCC's Motion to Intervene and the three requests for special admission of out-of-state attorneys on behalf of the DCCC. A hearing on the Defendants' Motion to Dismiss took place on February 23, 2022. Under this Court's February 23rd Order, which dismissed Count II of the 1816 Complaint, both counts in the 1773 Complaint remained.

The 1773 Plaintiffs ask for a declaration that the 2021 Plan is unlawful, as well as a permanent injunction against its use in Congressional elections. Additionally, the 1773 Plaintiffs ask the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission,[7] be used for the 2022 Congressional elections.

The parties submitted proposed findings of fact prior to trial on March 11, 2022. Simultaneously, the 1816 and 1773 Plaintiffs submitted a Joint Motion in Limine as to exclude portions of testimony from Defendants' experts, Dr. Allan J. Lichtman and Mr. John T. Willis. During the first day of trial on March 15, 2022, the parties submitted Stipulations of Fact and the Court admitted the stipulations as Exhibit 1. The Court then placed, on the record, an agreement between the parties about relevant judicial admissions by the Defendants relative to the Defendants' Answer. On the last day of trial on March 18, 2022, the State submitted a stipulation

[7] The Maryland Citizens Redistricting Commission was established by Governor Lawrence J. Hogan, Jr., in January of 2021. Exec. Order No. 01.01.2021.02 (Jan. 12, 2021). The Commission, pursuant to the Order, was tasked with preparing plans for the state's Congressional districts and its state legislative districts, which would be submitted by the Governor to the General Assembly. *Id.* The Commission submitted its Final Report to the Governor in January 2022. *Final Report of the Maryland Citizens Redistricting Commission*, MD. CITIZENS REDISTRICTING COMM'N (Jan. 2022), https://perma.cc/UUX5-6J72.

that the 2021 Plan did, in fact, pair Congressmen Andy Harris and Congressmen Kweisi Mfume in the same district – the Seventh Congressional District.[8]

With respect to the Plaintiffs' Motion in Limine, which raised the issue of a *Daubert* challenge as well as alleged late disclosure by the Defendants' experts as to various opinions, the trial judge heard argument during trial and ruled that the allegations regarding late disclosure were denied. With respect to the *Daubert* motion regarding the States' expert witnesses, it was eventually withdrawn by the Plaintiffs on March 18, 2022.

In addition, the Defendants moved to strike three questions asked by the trial judge of Dr. Thomas L. Brunell, after cross examination and before re-direct and re-cross examination, and the responses thereto. After a hearing in open court on March 18, 2022, the judge denied the motion to strike the three questions of Dr. Brunell and his responses thereto.

The Motion to Dismiss

In evaluating the Constitutional claims posited in Case Nos. C-02-CV-21-001816 and C02-CV-21-001773, the trial court has been guided in its efforts by the words of Chief Judge Robert M. Bell, when he wrote in 2002, that courts "do not tread unreservedly into this 'political thicket'; rather, we proceed in the knowledge that judicial intervention . . . is wholly unavoidable." *In re Legislative Districting of State*, 370 Md. 312, 353 (2002). Chief Judge Bell recognized that when the political branches of government are exercising their duty to prepare a lawful redistricting plan, politics and political decisions will impact the process. *Id.* at 354; *id.* at 321 ("[I]n preparing the redistricting lines . . . the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they

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

may pursue a wide range of objectives[.]"). Yet, the consideration of political objectives "does not necessarily render the process, or the result of the process, unconstitutional; rather, that will be the result only when the product of the politics or the political considerations runs afoul of constitutional mandates." *Id.* (internal citations omitted).

In considering whether the various counts of the Complaints survived the Motion to Dismiss, the trial court applied the following standard of review[9]:

"Dismissal is proper only if the facts alleged fail to state a cause of action." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). Under Maryland Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." In considering a motion to dismiss for failure to state a cause of action pursuant to Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993); *Odyniec v. Schneider*, 322 Md. 520, 525 (1991). Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999).

> "[I]n considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." Mere conclusory charges that are not factual allegations may not be considered. Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, "[t]here is ... a big difference between that which is necessary to prove the [commission] and that which is necessary merely to allege [its commission][.]"

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[9] The trial court did not apply the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), commonly referred to as "the *Twombly-Iqbal* standard," which may be considered a more intense standard of review. The State disavowed that it was positing its application.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 121-22 (2007) (quoting *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. 754, 768, 770 (1986)) (alterations in original).

There are no provisions in the Maryland Constitution explicitly addressing Congressional districting. The only statutes in Maryland that bear on Congressional redistricting include Section 8–701 through 8–709 of the Election Law Article of the Maryland Code. Section 8–701 states that Maryland's population count is to be used to create Congressional districts, that the State of Maryland shall be divided into eight Congressional districts, and that the description of Congressional districts include certain boundaries and geographic references.[10] Sections 8–702 through 8–709 identify the respective counties included within each of the eight Congressional districts according to the current Congressional map in effect.[11] None of the statutory provisions includes standards or criteria by which Congressional districting maps must be drawn.[12]

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[10] Section 8-701 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.) provides:

> (c) *Boundaries and geographic references.* — (1) The descriptions of congressional districts in this subtitle include the references indicated.
>
> (2) (i) The references to:
>
> 1. election districts and wards are to the geographical boundaries of the election districts and wards as they existed on April 1, 2020; and
>
> 2. precincts are to the geographical boundaries of the precincts as reviewed and certified by the local boards or their designees, before they were reported to the U.S. Bureau of the Census as part of the 2020 census redistricting data program and as those precinct lines are specifically indicated in the P.L. 94-171 data or shown on the P.L. 94171 census block maps provided by the U.S. Bureau of the Census and as reviewed and corrected by the Maryland Department of Planning.
>
> (ii) Where precincts are split between congressional districts, census tract and block numbers, as indicated in P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and referred to in this subtitle, are used to define the boundaries of congressional districts.

[11] MD. CODE ANN., ELEC. LAW §§ 8-701 through 8-709.

[12] During the hearing on the State's Motion to Dismiss, the Court asked the parties to provide supplemental briefings regarding the significance, or not, of two historical laws, which prescribed the application of the (continued . . .)

In ruling on the Defendants' Motion to Dismiss the Complaints, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the 1773 Complaint stated a claim upon which relief can be granted. Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred. The standards of Article III, Section 4 are applicable to the evaluation of the 2021 Plan based upon the interpretation of the Section's language, purpose, and legislative intent.

With respect to the 1773 Complaint and the 1816 Complaint, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that can reasonably be drawn

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(. . . continued)
"constitution and laws of this state for the election of delegates to the house of delegates," to Congressional elections. The first law, enacted in 1788, in relevant part, provided:

> And be it enacted, That the election of representatives for this state, to serve in the congress of the United States, shall be made by the citizens of this state qualified to vote for members of the house of delegates, on the first Wednesday of January next, at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of delegates[.]

1788 Laws of Maryland, Chapter X, Section III (Vol. 204, p. 318). The second law, enacted in 1843, provided:

> Sec. 5. And be it enacted, That the regular election of representatives to Congress from this State, shall be made by the citizens of this State, qualified to vote for members to the House of delegates, and each citizen entitled as aforesaid, shall vote by ballot, on the first Wednesday in October, in the year eighteen hundred and forty-five, and on the same day in every second year thereafter, at the places in the city of Baltimore, and in the city of Annapolis, and in the several counties, and Howard District of this State, as prescribed by the constitution and laws of this State, for the election of members to the house of delegates.
>
> 1843 Laws of Maryland, Chapter XVI, Section 5 (Vol. 595, p. 13).

The parties' responses, collectively, indicated that they ascribed little or no significance to the language, which suggested that the first Congressional elections in Maryland were conducted via the application of election rules prescribed, in part, in the State Constitution.

therefrom and determined that the strictures of Article III, Section 4 are, alternatively, applicable to the 2021 Plan because of the free elections clause, MD. CONST. DECL. OF RTS. art. 7, as well as with respect to the 1816 Complaint, the equal protection clause, MD. CONST. DECL. OF RTS. art. 24; each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan.[13]

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[13] The trial court ultimately dismissed with prejudice Section 7 of Article I of the Maryland Constitution. Article I, Section 7 provides that, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." The 1816 Plaintiffs argued that this provision was violated because the General Assembly failed to pass laws concerning elections that are fair and even-handed, and that are designed to eliminate corruption. *1816 Compl.* ¶ 66. The State took the position that Section 7 of Article 1 was not intended to restrain acts of the General Assembly, but rather, that the provision acted as "an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud." *1816 Mot. Dismiss* at 31.

The term "purity" in the Section is undefined and therefore, ambiguous. No case referring to the Section has defined what purity means. *Cnty. Council for Montgomery Cnty. v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975); *Anderson v. Baker*, 23 Md. 531 (1865) (concurring opinion); *see also Hanrahan v. Alterman*, 41 Md. App. 71 (1979); *Hennegan v. Geartner*, 186 Md. 551 (1946); *Smith v. Higinbothom*, 187 Md. 115 (1946); *Kenneweg v. Allegany Cnty. Comm'rs*, 102 Md. 119 (1905). When asked at oral argument to give the term a meaning applicable to elections, Counsel for the 1773 Plaintiffs could only say "purity means purity."

The phrase "purity" of elections was added to the Maryland Constitution of 1864, where the explicit language directed the General Assembly to preserve the "purity of elections." MD. CONST. of 1864, art. III, § 41 (directing the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters"). The provision focused on voter registration, with the purpose of excluding ineligible voters from the election process.

The language of what is now Article I, Section 7, has changed since its enactment in the Maryland Constitution of 1864. Article III, § 41 of the Constitution of 1864, in whole, directed the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient, and to make effective the provisions of the Constitution disfranchising certain persons, or disqualifying them from holding office." Article III, § 41, was renumbered in the 1867 amendment, to Article III, Section 42, which provided, [t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. of 1867, art. III, § 42. Article III, § 42, was, again, renumbered and amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978, to Article I, § 7, which now provides, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. art. 1, § 7.

Cases interpreting Article I, Section 7, have applied the Section to the registration of voters, *Anderson*, 23 Md. at 586 (concurring opinion), improper financial campaigns contributions, *Cnty. Council for Montgomery Cnty.*, 274 Md. at 60–65; *see also Higinbothom*, 187 Md. at 130 ("The Corrupt Practices Act is a remedial measure and should be liberally construed in the public interest to carry out its purpose of preserving the purity of elections.").

From its legislative history, the language of "purity of elections" referred to questions involving the *individual* candidate and the *individual* voter. The only assumption tendered by the 1816 Plaintiffs to support that partisan gerrymandering affected the "purity" of elections was that such gerrymandering was *ipso facto* corrupt.

(continued . . .)

With respect to the 1816 Complaint, alternatively, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the Complaint stated a cause of action under each of the equal protection clause, MD. CONST. DECL. OF RTS. art. 24, and the free speech clause, MD. CONST. DECL. OF RTS. art. 40, which subjects the 2021 Plan to strict scrutiny by this Court.

Alternatively, with respect to the 1773 and 1816 Complaints, this Court assumed the truth of all the well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that both Complaints stated a cause of action under the entirety of the Maryland Constitution and Declaration of Rights to determine the lawfulness of the 2021 Plan.

The Provisions in the Maryland Constitution and Declaration of Rights

In reviewing whether political considerations have run afoul of constitutional mandates in the instant case, we must undertake the task of constitutional interpretation. "Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it." *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013) (citing *Fish Mkt. Nominee Corp. V. G.A.A., Inc.*, 337 Md. 1, 8–9 (1994)). We first look to the natural and ordinary meaning of the provision's language. *Id.* If the provision is clear and unambiguous, the Court will not infer the meaning from sources outside the Constitution itself. *Id.* "[O]ccasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language," including "archival legislative history." *Phillips v. State*, 451 Md. 180, 196–97 (2017). Archival legislative history

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

includes legislative journals, committee reports, fiscal notes, amendments accepted or rejected, the text and fate of similar measures presented in earlier sessions, testimony and comments offered to the committees that considered the bill, and debate on the floor of the two Houses (or the Convention). *State v. Phillips*, 457 Md. 481, 488 (2018).

The rules of statutory construction are well known. Yet, when applying the rules of statutory construction to the interpretation of constitutional provisions, the approach is more nuanced. That approach was described in *Johns Hopkins Univ. v. Williams*, 199 Md. 382 (1952):

> [C]ourts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to the people, and the history of the growth or evolution of the particular provision under consideration. In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.

Id. at 386–87.

To construe a constitution, "a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth." *Snyder ex rel. Snyder*, 435 Md. at 55 (quoting *Bernstein v. State*, 422 Md. 36, 56 (2011)). Similarly, we do not read the constitution as a series of independent parts; rather, constitutional provisions are construed as part of the constitution as a whole. *Id.* Further, if a constitutional provision has been amended, the amendments "bear on the proper construction of the provision as it currently exists," and in such a situation, 'the intent of the amenders … may become paramount." *Norino Properties, LLC v. Balsamo*, 253 Md. App. 226, (2021) (quoting *Phillips*, 457 Md. at 489). We keep in mind that the courts shall construe a constitutional provision in such a manner that accomplishes in our modern society the purpose for which the provisions were adopted by the drafter, and in doing so, the provisions "will be

given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee." *Bernstein v. State*, 422 Md. 36, 57 (2011) (quoting *Johns Hopkins Univ.*, 199 Md. at 386).

We recognize that "a legislative districting plan is entitled to a presumption of validity" but "that the presumption "may be overcome when compelling evidence demonstrates that the plan has subordinated mandatory constitutional requirements to substantial improper alternative considerations."" *In re Legislative Districting of State*, 370 Md. at 373 (quoting *Legislative Redistricting Cases*, 331 Md. 574, 614 (1993)).

Article III, Section 4 of the Maryland Constitution

Article III, Section 4 of the Maryland Constitution provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

MD. CONST. art. III, § 4. The 1773 Plaintiffs assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term "legislative district" corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural boundaries of political subdivisions. The 1773 Plaintiffs allege the new Congressional districts under the 2021 Plan violate the requirements of Article III, Section 4. *1773 Compl.* ¶¶ 93– 97.[14]

Defendants claim that the text of Article III, Section 4, is limited to State legislative districting because the term "legislative districts" refers "unambiguously to State legislative districts" whenever it appears in other provisions of the Constitution, and that when Congress is referred to the "c" is capitalized. *1773 Defs.' Mot. Dismiss* at 2. The Defendants argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted. *1816 Defs.' Mot. Dismiss* at 19–22.

[14] The 1816 Plaintiffs do not assert a claim under Article III, Section 4, of the Maryland Constitution. *1816 Opp'n Mot. Dismiss* at 10 n.3.

The term "legislative district" is the gravamen of analysis. There is no definition of the term "legislative district" in the Maryland Constitution or Declaration of Rights. Absent a definition, in light of the differing ways the term could be applied, *i.e.*, as State legislative districts and/or Congressional districts, the language is ambiguous.[15]

The "compactness" requirement was added to then extant Article III, Section 4, by the General Assembly in 1969 and ratified by the voters in 1970 (the "1970 Amendment"), as part of a series of amendments to the entirety of Article III. *See* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970 (proposing the repeal of MD. CONST., art. III, §§ 2, 4, 5, and 6, and replacement with new §§ 2 through 6). Its framers recognized that "compactness requirement in state constitutions is intended to prevent political gerrymandering." *Matter of Legislative Districting of State* ("*1984 Legislative Districting*"), 299 Md. 658, 687 (1984). Prior to this amendment, Article III, Section 4 required districts to be "as near as may be, of equal population" and "always consist of contiguous territory," and only applied to the "existing Legislative Districts of the City of Baltimore." MD. CONST. art. III, § 4 (1969).[16]

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[15] The State has posited the importance of the exclusion of the word "Congress" in Article III, Section 4 to specifically include reference to Congressional districts. Neither the word Congress nor State, General Assembly, Senate, or House of Delegates appears in Article III, Section 4, unlike other Constitutional provisions or importantly, in Section 4 itself. *See, e.g.*, MD. CONST. art. I, § 6 (using the term "Congress"); art. III, § 10 (using the term "Congress"); art. IV, § 5 (using the term "Congress"); art. XI-A, § 1 (using the term "congressional election"); art. XVII, § 1 (using the term "congressional elections"); art. III, § 3 (using the terms "State," "Senate" and "House of Delegates"); art. III, § 5 (using the terms "State," "General Assembly," "Senate," and "House of Delegates"); art. III, § 6 (using the terms "General Assembly" and "delegate"); art. III, § 13(b) (using the terms "Legislative" and "Delegate district"); and art. XIV, § 2 (using the terms "General Assembly," and "Legislative District of the City of Baltimore").

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

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The present complete version of Article III, Section 4 was enacted in 1972 and ratified by the voters on November 7, 1972. In enacting the present version in 1972, the General Assembly "is presumed to have full knowledge of prior and existing law on the subject of a statute it passes." *Id.*; *see also Bowers v. State*, 283 Md. 115, 127 (1978) ("[T]he Legislature is presumed to have had full knowledge and information as to prior and existing law on the subject of a statute it has enacted."); *Harden v. Mass Transit Admin.*, 277 Md. 399, 406-07 (1976) ("The General Assembly is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.").[17] With respect to this knowledge, it is clear that they were aware of

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into districts). The "contiguity" or "equal population" requirements of the early Article III, § 4, did not apply to any "legislative district" outside of Baltimore City.

[17] The State agreed during oral argument on the Motion to Dismiss that cases of the Supreme Court in the 1960s regarding redistricting informed the adoption of the present version of Article III, Section 4:

> THE COURT: In doing research on Article III, Section 4, of the Maryland Constitution, it has come to the Court's attention that one of the reasons for enacting this provision was the Legislature's knowledge—which we presume—of the Supreme Court's cases. That is my understanding, is it yours?
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> MR. TRENTO, ON BEHALF OF THE STATE: Yes, Your Honor, the Supreme Court's cases were in the front and center of the minds of the 1967 Constitutional Convention. In that Convention, the sweep of amendments to Article III, Sections 3 through 6, were expressly undertaken to address the Supreme Court jurisprudence from the 1960s.

Mot. Dismiss Hearing, 02/23/2022. In the 1967 Constitutional Convention, the Supreme Court cases referencing legislative redistricting were prominent. The delegates in the Proceedings and the Debates of the 1967 Constitutional Convention referenced prior Supreme Court jurisprudence on numerous occasions: *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 3255; 104 MD. STATE ARCHIVES 2267, 10853. During the 1967 Constitutional Convention, Delegate John W. White, in response to a question regarding his intent regarding a provision stated:

> DELEGATE WHITE: What I am trying to do is to have all of Maryland line up with the position of the Supreme Court of the United States, which has said that one person should have one vote.

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

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Baker v. Carr, 369 U.S. 186 (1962), involving state legislative districts,[18] as well as *Wesberry v. Sanders*, 376 U.S. 1 (1964), a Congressional districting case.[19]

With reference to Supreme Court jurisprudence that is the context of the 1967 to 1972 Amendments to Article III, Section 4, one early case—*Baker v. Carr*—involved the apportionment of the Tennessee legislature. The federal district court dismissed the complaint in apparent reliance on the legal process theory of political justiciability, but the Supreme Court reversed. *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). Importantly, the Supreme Court's decision only dealt with procedural issues: jurisdiction, standing, and justiciability. *Baker*, 369 U.S. at 198–237. It held by a 6–2 vote that the court had jurisdiction, plaintiffs had standing, and the challenge to apportionment did not present a nonjusticiable "political question." *Id.* at 204, 206, 209.

The Supreme Court, thereafter, confronted the apportionment of Congressional districts in *Wesberry v. Sanders* in 1964 and held that Congressional apportionment cases were justiciable, noting that there is nothing providing "support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6–7. The Court ultimately applied the "one-person, one-vote" rule to apportionment of

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https://perma.cc/JG3T-KV3J (last visited March 23, 2022). During the Proceedings and Debates of the 1967 Constitutional Convention, the delegates proposed constitutional amendments regarding Congressional districting, however, the amendments failed subsequent enactment and were, ultimately, not included in the adopted 1970 and 1972 versions of Article III, Section 4.

[18] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 499.

[19] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES 10863–64.

Congressional districts, explaining that "the [Constitutional] command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in a Congressional election is to be worth as much as another's." *Id.* at 7–8. The Court believed that "a vote worth more in one district that in another would run . . . counter to our fundamental ideas of democratic government." *Id.* at 8. The opinion rested on the interpretation of the Elections Clause in Article I, Section 4 of the Constitution. *Id.* at 6–7.

On April 7, 1969, another Congressional districting case was decided. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), a decision involving Congressional districting in Missouri, the Supreme Court held that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530–31.

The context, therefore, of the 1967 through 1972 amending process of Article III, Section 4, was the Supreme Court cases in which state legislative districts, but also Congressional districts, were decided.

The State posits, however, that the Legislature really intended on omitting Congressional districts in the later versions of Article III, Section 4 enacted in 1969 and 1972 because an earlier version from 1967 of Section 4 included a specific reference to Congressional districts, *see* PROPOSED CONST. OF 1967–68, §§ 3.05, 3.07, 3.08, 605 MD. STATE ARCHIVES 9–10, and another section that had a specific reference to the State, *see* PROPOSED CONST. OF 1967–68, § 3.04, 605 MD. STATE ARCHIVES 9. The failed passage of the earlier draft Constitution, which included these phrases, however, does not have any bearing on the analysis of what the Legislature

intended in adopting the 1970 or 1972 versions of Article III, Section 4, because "[f]ailed efforts to amend a proposed bill, however, are not conclusive proof usually of legislative will. . . . This is because there can be a myriad of reasons that could explain the Legislature's decision not to incorporate a proposed amendment." *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 87 (2015). Most importantly, "[i]f the framers desired" to exclude Congressional redistricting from Article III, Section 4, "they knew how to do so." *Schisler v. State*, 394 Md. 519, 594–95 (2006).[20]

The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result, "legislative districts" includes Congressional districts. A claim, thus, has been stated under Article III, Section 4.

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[20] Interestingly, the early language in a bill introduced in 1972 included the words Senators and Delegates to alter Article III, Section 4:

> Each legislative district shall consist of adjoining territory and shall be compact in form. The ratio of the number of Senators to population shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.

Amendments to Maryland Constitutions, 380 MD. STATE ARCHIVES, 489. The final adopted version contained no mention of, nor reference to, "Senator" or "Delegate."

Nexus Between Articles 7 and 24 of the Declaration of Rights and Article III, Section 4 of the Constitution

The standards of Article III, Section 4 are also applicable on an alternate basis, to evaluate the constitutionality of the 2021 Plan because the Free Elections Clause, Article 7 of the Maryland Declaration of Rights, which has been alleged in the 1773 and 1816 Complaints, as well as the Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, as averred in the 1816 Complaint, each implicate the use of the Section 4 criteria. Assuming either clause is applicable,[21] its application to the lawfulness of the 2021 Plan can only be made manifest by use of the standards in Article III, Section 4.

The methodology of drawing a nexus between a "standards" clause and its facilitating constitutional provision is exactly what Judge John C. Eldridge, writing on behalf of the Court, did in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), between the Free Elections Clause and Section 1 of Article I of the Constitution[22] as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.[23]

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

[22] Article I, Section 1 of the Maryland Constitution, provides:

> All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

[23] Article I, Section 2 of the Maryland Constitution, provides:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter

(continued . . .)

Green Party involved the constitutional validity of various provisions of the Election Code which governed the method by which a party, other than a "principal political party," could nominate a candidate for a Congressional seat. *Id.* at 140. The Green Party, however, had been notified that the name of its candidate could not be placed on the ballot because the Board of Elections was unable to verify a number of signatures on the nominating petition and, as a result, the petition contained less than the number required to vote. *Id.* at 137. The Board posited a number of reasons for denying the adequacy of the number of signatures, but the seminal reason addressed in the opinion was that many of the petition signatures were those who appeared on an inactive voter registry, which did not qualify them to sign a petition as a "registered voter" pursuant to Section 1–101(gg) of the Election Code.

In addressing whether the Free Elections Clause was violated by the provision regarding an inactive voter registry, Judge Eldridge applied the standards in Article I, Section 2 of the Constitution, which, he explained, "contemplates a *single* registry for a particular area, containing the names of *all* qualified voters[.]" *Id.* at 142. (italics in original). Remarking that the statute created a class of "second class" citizens comprised of inactive voters, Judge Eldridge determined that Article 7 had been violated. *Id.* at 150. In so doing, his determination was premised on a line of cases in which adherence with the strictures of the Free Elections Clause was informed by standards set forth in Constitutional Clauses. *Id.* at 144 (citing *Gisriel v. Ocean*

(. . . continued)

> held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

City Bd. of Supervisors of Elections, 345 Md. 477 (1997) (rejecting provision in an Ocean City Charter that failure to vote in two previous elections rendered a person unqualified to vote in municipal elections, based on Sections 1 and 4 of Article of the Constitution and Article 7 of the Declaration of Rights); *State Admin. Bd. of Election Laws v. Bd. of Supervisors of Balt. City*, 342 Md. 586 (1996) (holding that "having voted frequently in the past is not a qualification for voting," under Article I, Section 1 of the Constitution and Article 7 of the Declaration of Rights); *Jackson v. Norris*, 173 Md. 579 (1937) (recognizing nexus between the Free Elections Clause and the mandate in Section 1 of Article 1 of the Constitution, that "elections shall be by ballot")). Judge Eldridge also utilized the standards in Section 1 of Article I to determine that a registry of inactive voters was "flatly inconsistent" with Article 24 of the Declaration of Rights, the Equal Protection Clause.[24] *Id.* at 150.

It is clear, then, that our Free Elections Clause, as well as the Equal Protection Clause implicate the use of standards contained in the Constitution in order to determine a violation of each. So is the case in their application in the instant case, in which implementation of their provisions can be determined in reference to Article III, Section 4.[25]

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[24] As discussed, *infra*, Judge Eldridge also utilized the Equal Protection Clause, Article 24, to evaluate whether the requirement that the Green Party, as a non-principle party, was constitutionally required to submit not only 10,000 signatures on a petition to be recognized as a political party and then provide a second petition to nominate its candidate.

[25] The Supreme Court of Pennsylvania, in *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1 (2018), utilized a framework similar to that implemented in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), when it looked to standards delineated in Article 2, Section 16 of its Constitution – defining criteria to be used in drawing state legislative districts – in order to measure Congressional District Plan, which had been enacted by its Legislature, complied with the Free Elections Clause contained in Pennsylvania's Declaration of Rights.

Article 7 of the Maryland Declaration of Rights

Article 7 of the Maryland Declaration of Rights, entitled "Elections to be free and frequent; right of suffrage," provides:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The 1816 Plaintiffs assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan "unlawfully seeks to predetermine outcomes in Maryland's congressional districts." They also allege that the 2021 Plan violates Article 7, because it is not based upon "well-established traditions in Maryland for forming congressional districts[,]" including compactness, adjoining territory, and respect for natural and political boundaries. They specifically allege that the boundary of the First Congressional District, which they aver is the only district in which a Republican is the incumbent, was redrawn "to make even that district a likely Democratic seat." As a result, they allege that "the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice," have been deprived of their right to elections, which are "free." They contend that Article 7 "prohibits the State from rigging elections in favor of one political party[,]" and conclude that, "any election that is poisoned by political gerrymandering and the intentional dilution of votes on a partisan basis is not free."

The 1773 Plaintiffs assert that the 2021 Plan "subordinate[s]" the requirement, under Article 7 of the Declaration of Rights, that elections be "free and frequent" to "improper considerations," namely the manipulation of Congressional district boundaries so that they will

be unable "to cast a meaningful and effective vote for the candidates they prefer." Additionally, these Plaintiffs allege that Congressional district boundaries that are not based on criteria, such as compactness and the minimization of crossing political boundaries, result in elections that are inherently not "free" and, therefore, violate Article 7.

The State, conversely, argued that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections. The State observes that the capitalization of "L" in "Legislature," is a direct reference to the General Assembly. Additionally, the State asserts that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, "for which the State is powerless to control the frequency."

With respect to the use of a capital "L" in "Legislature," in the Free Elections Clause, as reflecting only a reference to the state legislature, the State's contention is belied by its own language. Article 7, as it was originally adopted in 1776, was meant to secure a right of participation:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. The reference to "Legislature," then, refers to the only entity for which there was any accountability through suffrage.

The purpose of the Free Elections Clause relative to partisanship, as alleged in the complaints, heretofore has not been the subject of judicial scrutiny. During the Constitutional Convention of 1864, however, proposals to amend Article I of the Constitution, to create a registry of voters whereby voters would be required to pledge a loyalty oath as a prerequisite to voting were hotly debated and the effect of "partisan oppression" on free elections was explored. Proponents of the amendments sought to exclude supporters of the Confederacy, who, by the terms of the oath, would be disqualified from voting. *Proceedings and Debates of the 1864 Constitutional Convention*, Volume 1 at 1332. Those opposed to the loyalty oath argued that it would be counter to the purpose of "free elections." *Id.* at 1332. One delegate noted that the loyalty oath presupposed that,

> there are now in the State of Maryland enjoying the right of suffrage under the present constitution, ten distinct classes of persons who deserve to be disfranchised from hereafter exercising that right. They . . . are to be under a government by others, in which they are to have no voice, in which they are not to be allowed to participate in any shape or form.

Id. In the same debate, another delegate, Mr. Fendall Marbury, decried the imposition of a loyalty oath as a means of oppression, in contravention to the right to participate in free elections:

> The right of free election lies at the very foundation of republican government. It is the very essence of the constitution. To violate that right, and much more to transfer it to any other set of men, is a step leading immediately to the dissolution of all government. The people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government. By constitutional provisions and legislative enactments, they have sought to provide against every conceivable effort that might be made to suppress the voice of the people. They have spurned the idea of excluding any one on account of his religious or political opinions. Is it not unwise and impolitic to depart from this established policy of the State, by introducing words into our

> constitution which are calculated to revive and foster that spirit of crimination and recrimination already existing to an alarming extent between parties in this State? The word loyal has come to be, of late, a word susceptible of such various construction, and has so often been prostituted by the minions of power, to accomplish partizan ends. That to incorporate it into the constitution would be nothing more nor less than creating an engine of oppression, to be used by whatever party might hold for a time the reins of power.

Id. at 1334. Thus, inhibiting the creation of an "engine of oppression" "to accomplish party ends" by "whatever party might hold for a time the reins of power" to "suppress the voice of the people" was a purpose of the Free Elections Clause.

Our jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State. In *Jackson v. Norris*, 173 Md. 579 (1937), the Court of Appeals considered whether automated voting machines, which used ballots that restricted the choice of voters to candidates whose names were printed on the ballot, violated the Free Elections Clause. In resolving the applicability of the Free Elections Clause, the Court explained that legislative acts that were "a material impairment of an elector's right to vote[,]" were to be deemed unconstitutional. *Id.* at 585. The Court held that the ballots were violative of the Free Elections Clause, because they constrained the ability of voters to cast their vote for the candidate of their choice and, by extension infringed upon voters' right to participate in free elections. *Id.* at 603.

The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in *Green Party*, 377 Md. at 127, which concerned an attempt by the Green Party to get a candidate on the ballot for election to Congress, in the state's first congressional district, as discussed, *supra*. In that case, Article 7 was held to protect the right of all qualified voters within the state to sign nominating petitions in support of minor party

candidates for office, regardless of whether they had been classified as "inactive voters." In this regard, the decision in *Green Party* recognized that the Free Elections Clause afforded a greater protection of the citizens of Maryland in a Congressional election context, than is provided under the Federal Constitution, in the First, Fifth, Ninth, and Fourteenth Amendments, which also had been alleged in the Complaint. *Green Party*, 377 Md. at 150.[26]

Clearly, the 1773 and 1816 Complaints, with respect to Article 7 of the Declaration of Rights, the Free Elections Clause, have stated a cause of action and survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

[26] In interpreting similar phraseology that "Elections shall be free and equal," the Supreme Court of Pennsylvania, in *League of Women Voters of Pa.*, determined that the state's Free Elections Clause required that "each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives." 645 Pa. at 117. The Court concluded that, in order to comply with the strictures of the Free Elections Clause, Congressional district maps be drawn in order to "provide[] the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.*

Article 24 of the Maryland Declaration of Rights, Equal Protection

Article 24 of the Maryland Declaration of Rights, entitled "Due process," provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Although Article 24 does not contain language of "equal protection," the Court of Appeals has long held that "equal protection" is embodied in it: "we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. *Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Bd. of Supervisors of Elections of Prince George's Cnty. v. Goodsell*, 284 Md. 279, 293 n.7 (1979) ("[W]e have regularly proceeded upon the assumption that the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights.").

The 1816 Plaintiffs assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote. Specifically, these Plaintiffs assert that the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their Congressional representatives. These Plaintiffs add that the 2021 Plan unconstitutionally degrades Plaintiffs' influence on the political process and infringes on their fundamental right to have their votes count fully. The State, in response, asserts that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment

in *Rucho*. The State posits, though, that the scope of equal protection in Maryland is the same as that which is embodied in the federal constitution in the Fourteenth Amendment.

The essence of equal protection is that "all persons who are in like circumstances are treated the same under the laws." *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983). The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights. In this regard, we need only look at various cases of the Court of Appeals in which the Court was clear that Article 24 and the equal protection clause of the Fourteenth Amendment are "independent and capable of divergent application." *Waldron*, 289 Md. at 704; *see also Md. Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 671 n.8 (1995) (explaining the relationship between applications of equal protection guarantees under the Fourteenth Amendment and Article 24 of the Declaration of Rights); *Verzi v. Balt. Cnty.*, 333 Md. 411, 417 (1994) (stating that "'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'" (quoting *Waldron*, 289 Md. at 715)); *Hornbeck*, 295 Md. at 640 (stating that "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other.").

Notably, in *In re 2012 Legislative Districting*, 436 Md. 121 (2013), Chief Judge M. Bell, writing for the Court of Appeals, assumed that Article 24 could embody a greater right than is afforded under the Fourteenth Amendment when he said: "The potential violation of Article 24 of the Maryland Declaration of Rights is not discussed at length in this case because the petitioners do not assert any greater right under Article 24 than is accorded under both the

Federal right and the population equality provision of Article III, § 4 of the Maryland Constitution." *Id.* at 159 n.25.

The State, however, during argument regarding the Motion to Dismiss, attempted to distinguish what the Court of Appeals said in Footnote 25 in the 2012 redistricting case, by urging that the pivotal quote was addressing only a racial gerrymandering issue, rather than partisan gerrymandering. It is notable, however, that in deriving the notion that Article 24 could embody a greater breadth of protection than is afforded by the Fourteenth Amendment, the Court of Appeals cited to *Md. Aggregates Ass'n*, *supra*, (quoting *Murphy v. Edmonds*, 325 Md. 342, 354–55 (1992)), neither of which involved any racial differentiation.

Obviously, it cannot be lost to anyone that Article 24 was assumed to be applicable in a redistricting context in the 2012 redistricting case. *Id.* Article 24, moreover, has also been applied in various election and voting right contexts prior to 2012. *See Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2007) (Presidential elections); *DuBois v. City of College Park*, 286 Md. 677 (1980) (election for City Council); *Goodsell*, 284 Md. at 281 (election for County Executive).

Moreover, in *Green Party*, which is of particular significance to the instant case, Judge John C. Eldridge, writing for the Court, addressed whether a statutory scheme comported with equal protection under Article 24 and analyzed the issue using two distinct approaches, both of which are applicable in the instant case.

In 2000, the Maryland Green Party sought to place its candidate on the ballot for the U.S. House of Representatives seat in Maryland's first congressional district. *Green Party*, 377 Md. at 136. The Green Party needed initially to be recognized as a political party within the state,

which, pursuant to Section 4–102 of the Election Code, required it to submit a petition to the State Board of Elections that included "the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the 1st day of the month in which the petition is submitted." *Id.* at 135–36. In August of 2000, the Green Party's petition was accepted, and it became "a statutorily-recognized 'political party[.]'" *Id.* at 135 n.3 (quoting Section 1–101(aa) of the Election Code).

In order to nominate a candidate, however, the Green Party was then required to submit a second petition to the Board of Elections, which, pursuant to Section 5–703(e) of the Election Code, was to be accompanied by signatures of "not less 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought[.]" *Id.* at 137 n.6. "On August 7, 2000, the [Green Party] submitted a timely nominating petition containing 4,214 signatures of voters purporting to be registered in Maryland's first congressional district," *id.* at 137, but the petition was rejected by the Board of Elections. Alleging that "it could verify only 3,081 valid signatures, fewer than the 3,411 required by Maryland's 1% nomination petition requirement," the Board reasoned that "many signatures were 'inactive' voters" and ineligible to sign nominating petitions. *Id.* The basis for the Board's rationale was that, under the provisions of Section 3–504 of Election Code, if a sample ballot, which "the local boards customarily mail out . . . to registered voters prior to an election[,]" were "returned by the postal service" and the voter then "fail[ed] to respond to [a] confirmation notice," the voter's name would be placed on "the 'inactive voter' registration list." *Id.* at 147. Persons on the inactive voter list, pursuant to Sections 3–504(f)(4) of the Election Code, would "not be counted as part of the registry [of voters]," and under Section 3–504(f)(5), their

signatures were not to "be counted . . . for official administrative purposes as petition signature verification[.]" *Id.* at 150.

In addressing the constitutionality of Section 3–504 of the Election Code, which established an inactive voter registry, which essentially disenfranchised voters, Judge Eldridge applied the standards of Section 2 of Article I of the Constitution, which required:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

In applying the standards of Section 2, Judge Eldridge declared Section 3–504 of the Election Code unconstitutional, because that Section "create[d] a group of 'second-class citizens' comprised of persons who are 'inactive' voters and thus not eligible to sign petitions[,]" and was "flatly inconsistent with Article 24 of the Declaration of Rights. *Id.* at 150. In explaining how the inactive voter list failed to comport with the Constitutional standards, Judge Eldridge explained that Section 2 of Article I, which instructs the General Assembly to create a uniform registry of voters,

> contemplates a single registry for a particular area containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for inactive voters, and no authority to decree that an "inactive" voter is not a "registered voter" with the rights of a registered voter.

Id. at 143. A nexus between the Equal Protection Clause and a standards clause, therefore, was established.

Judge Eldridge, thereafter, explored another methodology to apply equal protection to evaluate Green Party's claim that the required submission of two petitions in order to nominate its candidate violated Article 24, because it treated principal political parties differently from minor political parties. *Id.* at 159. The Green Party had argued that "once a group has submitted the required 10,000 signatures to receive official recognition as a political party , . . . no further showing of support should be necessary for the name of a minor political party's candidate to be on the ballot." *Id.* at 153. The Board of Elections countered that the second petition was necessary to ensure that a minor party had "a significant modicum of public support," in order to prevent "frivolous" candidates from appearing on ballots. *Id.* at 153–54.

In addressing the question, Judge Eldridge approached the issue through the strict scrutiny lens and required the State to present a compelling interest. In so doing, he determined that the requirement that the Green Party submit one petition to form a political party and then a second petition to nominate a candidate, "discriminates against minor political parties in violation of the equal protection component of Article 24[.]" *Id.* at 156–57. Having identified the two-petition requirement as discriminatory, Judge Eldridge considered "the extent and nature of the impact on voters, examined in a realistic light," in order to determine the appropriate standard of review of the five-year registration requirement. *Id.* at 163 (quoting *Goodsell*, 284 Md. at 288). He then determined that, "the double petitioning requirement set forth by the Maryland Election Code denies ballot access to a significant number of minor political party candidates. On that basis, the challenged statutory provisions' impact on voters is substantial." *Id.*

Clearly, the 1816 Complaint, with respect to the equal protection principles embodied within Article 24 of the Declaration of Rights, has stated a cause of action to survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

Article 40 of the Maryland Declaration of Rights

The 1816 Plaintiffs' cause of action under Article 40 of the Maryland Declaration of Rights survived the Motion to Dismiss. Article 40, which pertains to freedom of speech and freedom of the press, provides:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

MD. CONST. DECL. OF RTS. art. 40.

In their Complaint, the 1816 Plaintiffs allege that the 2021 Plan violates Article 40 by "burdening protected speech based on political viewpoint." Specifically, they allege, the 2021 Plan benefits certain preferred speakers (Democratic voters), while targeting certain disfavored voters (e.g., Republican voters, including Plaintiffs) because of disagreement on the part of the 2021 Plan's drafters with views Republicans express when they vote. *1816 Compl.* at ¶ 79. Plaintiffs aver that the 2021 Plan subjects Republican voters, including them, to disfavored treatment by "cracking"[27] them into specific congressional districts to dilute Republican votes and ensure that they are not able to elect a candidate who shares their views. *1816 Compl.* at ¶ 80. Therefore, Plaintiffs contend that the 2021 Plan has the effect of suppressing their political views and expressions and retaliates against them based on their political speech. *Id.* at ¶ 81.

Defendants argued in their Motion to Dismiss that the Plaintiffs' claims under Article 40 purport to "parrot" free speech claims that are the same as those offered under the First Amendment to the United States Constitution, which the Supreme Court has rejected in the

[27] "A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others." *Rucho v. Common Cause*, ____ U.S. ____, ____, 139 S. Ct. 2484, 2492 (2019).

redistricting context. *See Rucho*, 139 S. Ct. at 2506–07. Defendants further assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed. *1816 Mot. Dismiss* at 3; *see generally 1816 Mot. Dismiss*, Section III.C.

Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter. Article 40 of Maryland's Declaration of Rights has been generally regarded as coextensive with the First Amendment, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002) ("Many provisions of the Maryland Constitution . . . do have counterparts in the United States Constitution. We have often commented that such state constitutional provisions are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or generally should be interpreted in the same manner as federal provisions. Nevertheless, we have also emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart."); *see also State v. Brookins*, 380 Md. 345, 350 n. 2 (2004) ("While Article 40 is often treated *in pari materia* with the First Amendment, and while the legal effect of the two provisions is substantially the same, that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart." (citing *Dua*, 370 Md. at 621)). The Court of Appeals has not shied away from "departing from the United States Supreme Court's

analysis of the parallel federal right" when necessary "[to] ensure[] that the rights provided by Maryland law are fully protected." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013).

A violation of the free speech provision of Article 40 is implicated when there is interference with a citizen's right to vote, which is a fundamental right. *Hornbeck*, 295 Md. at 641 (explaining that the right to vote is a fundamental right). We apply strict scrutiny when a legislative enactment infringes upon or interferes with personal rights or interests deemed to be "fundamental." *Id.* at 641. When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right. As a result, this Court, under Article 40, will apply strict scrutiny to the 2021 Plan.

Fundamental Principles Underlying the Maryland Constitution and the Declaration of Rights

The final basis upon which the Plaintiffs have stated a cause of action on which relief can be granted is through the lens of the entirety of our Constitution and Declaration of Rights, which provides a framework to determine the lawfulness of the 2021 Plan based upon their fundamental principles.[28] *Snyder ex rel. Snyder*, 435 Md. at 55 ("In construing a constitution, we have stated 'that a constitution is to be interpreted by the spirit which vivifies[.]'" (quoting *Bernstein*, 422 Md. at 56)).

Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature. *1816 Compl.* ¶ 2 ("Indeed, the 2021 Plan defies the fundamental democratic principle that voters should choose their representatives, not the other way around."). They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland's Government and its Constitution were founded.

In response, Defendants posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland. *1816 Mot. Dismiss* at 3. As a result, Defendants

[28] *Whittington v. Polk*, 1 H. & J. 236, 241 (Md. Gen. 1802), in dictum, established in Maryland the idea of judicial review – that the courts are the primary interpreters and enforcers of the constitution. The General Court of Maryland explained that if an act of the Legislature is repugnant to the constitution, the courts have the power, and it is their duty, so to declare it. *Id.* The General Court realized that the "power of determining finally on the validity of the acts of the legislature cannot reside with the legislature . . . [because] they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other." *Id.* at 243.

argue that Plaintiffs cannot seek relief under the Maryland Constitution or Declaration of Rights. *Id.* at 45. Instead, the State argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting. *Id.* Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. *Id.*

The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland. The courts understood this rule of construction early on, explaining that "[t]he Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument." *Anderson v. Baker*, 23 Md. 531, 612–13 (1865). Specifically, the court in *Anderson* explained that, "[t]he Declaration of Rights is an enumeration of abstract principles, (or designed to be so,) and the Constitution the practical application of those principles, modified by the exigencies of the time or circumstances of the country." *Id.* at 627; *see also Bandel v. Isaac*, 13 Md. 202, 202–03 (1859) ("In construing a constitution, the courts must consider the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it[.]"); *and Whittington v. Polk*, 1 H & J 236, 242 (1802) (stating that, "[t]he bill of rights and form of government compose the constitution of Maryland").

More recently, the Court of Appeals has confirmed this rule of construction. In *State v. Smith*, 305 Md. 489 (1986), the court reiterated that it "bear[s] in mind that the Declaration of Rights is not to be construed by itself, according to its literal meaning; it and the Constitution compose our form of government, and they must be interpreted as one instrument." *Id.* at 511

(explaining that the Declaration of Rights announces principles on which the form of government, established by the Constitution, is based).

While it is established that the Declaration of Rights and Constitution, together, form the organic law of our State, *Whittington*, 1 H & J at 242, the analysis then requires a review of the text, nature, and history of both documents. The text of the Maryland Constitution recognizes that "all Government of right originates from the people . . . and [is] instituted solely for the good of the whole; and [that citizens] have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient." MD. CONST. DECL. OF RTS. art. 1. Its purpose "is to declare general rules and principles and leave to the Legislature the duty of preserving or enforcing them, by appropriate legislation and penalties." *Bandel*, 13 Md. at 203. Moreover, it is well understood that the rights secured under the Maryland Declaration of Rights are regarded as very precious ones, to be safeguarded by the courts with all the power and authority at their command. *Bass v. State*, 182 Md. 496, 502 (1943). The framers ensured that the Declaration of Rights would be regarded as precious by enacting subsequent constitutional provisions to safeguard those rights. In that vein, the foundational significance of the right of suffrage is memorialized in the first Article of the Constitution, which pertains to the "Elective Franchise," MD. CONST. art. I, and Article I of the Declaration of Rights, which locates the source of all "Government" in the people. MD. CONST. DECL. OF RTS. art. 1.

Popular sovereignty dictates that the "Government" of the people which "derives from them," is properly channeled when our democratic process functions to reflect the will of the people. Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing

legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people. MD. CONST. DECL. OF RTS. arts. 1, 7. Specifically, recognizing that the government is for the people and by the people, Article I of the Constitution describes the process of electing persons to represent them in government, which is also embodied in the principles expressed through the Free Elections Clause in Article 7.

Under the principle of popular sovereignty, we bear in mind that the Constitution as a whole "is the fundamental, extraordinary act by which the people establish the procedure and mechanism of their government." *Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Att'y Gen.*, 246 Md. 417, 429 (1967); *Whittington*, 1 H & J at 242 ("This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.").

The second principle—avoiding extravagant or undue extension of power by the Legislature—was an important limitation on the Legislature, the only entity for which the Maryland citizens could vote in 1776. It is stated that "[t]he Declaration of Rights is a guide to the several departments of government, in questions of doubt as to the meaning of the Constitution, and "a guard against any extravagant or undue extension of power[.]" *Anderson*, 23 Md. at 628. The limitation on "extravagant or undue extension of power" is coextensive with the principle of popular sovereignty. For this purpose, "courts have [the] power and duty to determine [the] constitutionality of legislation." *Curran v. Price*, 334 Md. 149, 159 (1994).

In Maryland, we have long understood that "[t]he elective franchise is the highest right of the citizen, and the spirit of our institution requires that every opportunity should be afforded to its fair and free exercise." *Kemp v. Owens*, 76 Md. 235, 241 (1892). In *Kemp*, the Court of Appeals characterized the right to vote as "one of the primal rights of citizenship," *id.*, as it did in *Nader for President 2004*: "the right of suffrage" guaranteed by our Constitution "is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society." 399 Md. at 686. To safeguard the Legislature from exerting extravagant or undue extension of power, each citizen of this State is afforded the opportunity to vote and hold the Legislature accountable. MD. CONST. DECL. OF RTS. arts. 7, 24, 40. Similarly, the judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in Article III, Section 4 of the Maryland Constitution and by the avoidance of extreme partisan gerrymandering.

Therefore, assuming the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom, the Plaintiffs have stated a cause of action under the fundamental principles of the Maryland Constitution and Declaration of Rights of popular sovereignty and avoiding extravagant and undue exercise of power by the Legislature.

Findings of Fact

Stipulations and Judicial Admissions[29]

1. Plaintiffs are qualified, registered voters in Maryland.

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

2. Plaintiffs in *Szeliga v. Lamone* ("No. 1816") are:

a. Kathryn Szeliga is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Ms. Szeliga currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2011. She is a Republican elected official who represents Maryland citizens in Baltimore and Hartford Counties. She resides in District 7 of the 2021 Plan.

b. Christopher T. Adams is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Mr. Adams currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2015. Mr. Adams is a Republican elected official who represents Maryland citizens in Caroline, Dorchester, Talbot, and Wicomico Counties. He resides in District 1 of the 2021 Plan.

c. James Warner is a citizen of the United States and a resident of and registered voter in Maryland. Mr. Warner is a decorated combat veteran and former prisoner of war. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

d. Martin Lewis is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for

Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

e. Janet Moye Cornick is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 3 of the 2021 Plan.

f. Ricky Agyekum is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 4 of the 2021 Plan.

g. Maria Isabel Icaza is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 5 of the 2021 Plan.

h. Luanne Ruddell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She currently serves as Chair of the Garrett County Republican Central Committee and President of the Garrett County Republican Women's Club. Additionally, she serves on the Rules Committee for the Maryland Republican Party and is a member of the Maryland Republican Women and the National Republican Women's organizations. She resides in District 6 of the 2021 Plan.

i. Michelle Kordell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 8 of the 2021 Plan.

3. Plaintiffs in *Parrott v. Lamone* ("No. 1773") are:

a. Plaintiff Neil Parrott is a citizen of Maryland, is registered to vote as a Republican, and resides in the Sixth Congressional District of the new Plan. Mr. Parrott has registered to run for Congress in 2022 in that district. Mr. Parrott is currently a member of the Maryland House of Delegates.

b. Plaintiff Ray Serrano is a citizen of Maryland, is registered to vote as a Republican, and resides in the Third Congressional District of the new Plan.

c. Plaintiff Carol Swigar is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

d. Plaintiff Douglas Raaum is a citizen of Maryland, is registered to vote as aRepublican, and resides in the First Congressional District of the new Plan.

e. Plaintiff Ronald Shapiro is a citizen of Maryland, is registered to vote as a Republican, and resides in the Second Congressional District of the new Plan.

f. Plaintiff Deanna Mobley is a citizen of Maryland, is registered to vote as aRepublican, and resides in the Fourth Congressional District of the new Plan.

g. Plaintiff Glen Glass is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

h. Plaintiff Allen Furth is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

i. Plaintiff Jeff Warner is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan. Mr. Warner intends to run for Congress in 2022 in that district.

j. Plaintiff Jim Nealis is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fifth Congressional District of the new Plan.

k. Plaintiff Dr. Antonio Campbell is a citizen of Maryland, is registered to voteas a Republican, and resides in the Seventh Congressional District of the new Plan.

l. Plaintiff Sallie Taylor is a citizen of Maryland, is registered to vote as a Republican, and resides in the Eight Congressional District of the new Plan.

4. Linda H. Lamone is the Maryland State Administrator of Elections.

5. William G. Voelp is the chairman of the Maryland State Board of Elections.

6. The Maryland State Board of Elections is charged with ensuring compliance with the Election Law Article of the Maryland Code and any applicable federal law by all persons involved in the election process. It is the State agency responsible for administering state and federal elections in the State Maryland.

7. Every 10 years, states redraw legislative and congressional district lines following completion of the decennial United States census. Redistricting is necessary to ensure that districts are equally populated and may also be required to comply with other applicable federal and state constitutions and voting laws.

8. The United States Constitution provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. It also states that, "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The United States Constitution thus assigns to state legislatures primary responsibility for apportionment of their federal congressional districts, but this responsibility may be supplanted or confined by Congress at any time.

9. Maryland has eight congressional districts.

10. The General Assembly enacts maps for these districts by ordinary statute. While the General Assembly's congressional maps are subject to gubernatorial veto, the General Assembly can, as with any ordinary statute, override a veto.

11. In 2011, following the 2010 decennial census, Maryland's General Assembly undertook to redraw the lines of Maryland's eight congressional districts.

12. To carry out the redistricting process, then-Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") in July 2011 by Executive Order. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.

13. To carry out the redistricting process, Governor O'Malley appointed the GRAC to hold public hearings and recommended a redistricting plan. As part of a collaborative approach to developing a congressional map in 2011, Governor O'Malley asked Rep. Steny Hoyer to propose a consensus congressional map among Maryland's congressional delegation.

14. Democratic members of Maryland's congressional delegation, including Representative Hoyer, were involved in developing a consensus map to provide Governor O'Malley in order to assist with the process of developing a new congressional map for Maryland.

15. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City.

16. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. The GRAC also solicited public comment on the proposed congressional plan that it adopted.

17. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0.

18. GRAC adopted a proposed congressional redistricting plan and made public its proposed plan on October 4, 2011. No Republican member of the GRAC voted for the congressional redistricting plan that was adopted.

19. The GRAC plan altered the boundaries of district 6 by removing territory in, among other counties, Frederick County, and adding territory in Montgomery County.

20. On October 15, 2011, Governor O'Malley announced that he was submitting a plan that was substantially similar to the plan approved by the GRAC to the General Assembly.

21. One perceived consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from District 6.

22. On October 17, 2011, the Senate President introduced the Governor's proposal as Senate Bill 1 at a special session and it was signed into law on October 20, 2011 with only minor

adjustments (the "2011 Plan"). No Republican member of the General Assembly voted in favor of the 2011 Plan.

23. The 2011 Plan was petitioned to referendum by Maryland voters at the general election of November 6, 2012, pursuant to Article XVI of the Maryland Constitution.

24. On September 6, 2012, the Circuit Court for Anne Arundel County rejected contentions that the ballot language for the referendum question was misleading or insufficiently infmmative. *See Parrott, et al. v. McDonough, et al.*, No. 02-C-12-172298 (Cir. Ct. for Anne Arundel Cnty.) (the "Referendum Litigation"). On September 7, 2012, the Court of Appeals denied a petition for certiorari by the plaintiffs in that case.

25. The 2011 Plan was approved by the voters in that referendum. The language of the question on the ballot for the referendum stated:

> *Question 5*
> *Referendum Petition*
> *(Ch. 1 of the 2011 Special Session)*
> *Congressional Districting Plan*
>
> Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.
>
> **For the Referred Law**
> _ **Against the Referred Law**

26. On July 23, 2014, the Court of Special Appeals affirmed the ruling of the Circuit Court in the Referendum Litigation in an unpublished opinion. *See Parrott, et al. v. McDonough, et al.*, No. 1445, Sept. Tenn 2012 (Md. App. July 23, 2014). A true and

accurate copy of the unpublished opinion in that case is attached hereto as Exhibit XII.[30] On October 22, 2014, the Court of Appeals denied a petition for certiorari by the appellants in that case. *See Parrott, et al. v. McDonough, et al.*, No. 382, Sept. Tenn 2014 (Md. Oct. 22, 2014).

27. Republican Roscoe G. Bartlett won election as United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

28. Democrats Goodloe E. Byron (1970-1976) and Beverly Byron (1978-1990) won election United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over their respective Republican challenger: 1970 (3.3%); 1972 (29.4%); 1974 (41.6%); 1976 (41.6%); 1978 (79.4%); 1980 (39.8%); 1982 (48.8%); 1984(30.2%); 1986(44.4%); 1988(50.7%); 1990(30.7%). *See Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

29. The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections. Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. The margins of vict01y for the Democrat in District 6 (John Delaney from 2012-2016; David Trone in 2018-2020) have been: 2012 (20.9%); 2014 (1.5%); 2016 (15.9%); 2018 (21.0%);

[30] The identification of exhibits attached to this Court's Opinion has been changed from alphabetical identifications, which were previously labeled by the parties in these stipulations, to roman numeral identifications, so as to avoid any confusion between the exhibits admitted at trial and the exhibits attached to this Opinion.

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

30. Maryland Governor Larry Hogan signed an executive order on August 6, 2015, which created the Maryland Redistricting Refo1m Commission. A true and accurate copy of the August 6, 2015 executive order is attached hereto as Exhibit I.

31. The Commission was comprised of seven members appointed by the (Republican) Governor, two members appointed by the (Republican) minority leaders in the Maryland Legislature, and two members appointed by the (Democratic) majority leaders in the Maryland Legislature. The Governor's appointees consisted of three Republicans, three Democrats, and one not affiliated with any party. The Legislature's appointments consisted of two Democrats and two Republicans.

32. After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting. The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting Rights Act and other applicable federal laws. The Commission also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. A true and accurate copy of the Commission's Final Report is attached hereto as Exhibit X.

33. During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a processes by which State legislative and congressional maps were created in the first instance by a purportedly independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor. These bills were House Bill 458 and Senate Bill 380 introduced in the 2016 regular session of the General Assembly, House Bill 385 and Senate Bill 252 introduced in the 2017 regular session, House Bill 356 and Senate Bill 307 in the 2018 regular session, House Bills 43 and 44 and Senate Bills 90 and 91 in the 2019 regular session, and House Bills 43 and 90 and Senate Bills 266 and 284 in the 2020 regular session. None of these bills was voted out of committee.

34. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data. The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party. Governor Hogan's Executive Order directed the MCRC to prepare maps that, among other things: respect natural boundaries and the geographic integrity and continuity of any municipal corporation, county, or other political subdivision to the extent practicable; and be geographically compact and include nearby areas of population to the extent practicable. A true and accurate copy of the January 12, 2021 Executive Order is attached heretoas Exhibit XI.

35. Over the course of the following months, the MCRC held over 30 public meetingswith a total of more than 4,000 attendees from around the State. The Commission

provided a public online application portal for citizens to prepare and submit maps, and it received a total of 86 maps for consideration.

36. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a congressional redistricting map to Governor Hogan.

37. On November 5, 2021, Governor Hogan accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on December 6, 2021.

38. In July 2021, following the 2020 decennial census, Bill Ferguson, President of the Maryland Senate, and Adrienne A. Jones, Speaker of the Maryland House of Delegates, formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). The LRAC was charged with redrawing Maryland's congressional and state legislative maps.

39. The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members of Maryland's General Assembly. Two Republicans, Senator Bryan W. Simonaire and Delegate Jason C. Buckel, also, were appointed to the LRAC by Senator Ferguson and Delegate Jones. Karl S. Aro, who is not a member of Maryland's General Assembly, was appointed as Chair of the LRAC by Senator Ferguson and Delegate Jones. Mr. Aro previously served as Executive Director of the non-partisan Department of Legislative Services for 18 years until his retirement in 2015, and was appointed by the Court of Appeals to assist in preparing a remedial redistricting plan that complied with state and federal law in 2002.

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

41. One of the themes that emerged from the public testimony and comments was that Maryland's citizens wanted congressional maps that were not gerrymandered. Other citizens indicated in these comments or public testimony that they did not want to be moved from their current districts. Still others advocated for the creation of majority-Democratic districts in every district of the State. And others requested that districts be drawn so as to eliminate the likelihood that a current incumbent might be reelected.

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

43. On November 9, 2021, the LRAC issued four maps for public review and comment.

44. In a cover message releasing the maps, Chair Aro wrote: "These Congressional map concepts below reflect much of the specific testimony we've heard, and to the extent practicable, keep Marylanders in their existing districts. Portions of these districts have remained intact for at least 30 years and reflect a commitment to following the Voting Rights Act, protecting existing communities of interest, and utilizing existing natural and political boundaries. It is our sincere intention to dramatically improve upon our current map while keeping many of the bonds that have been forged over 30 years or more of shared representation and coordination."

45. On November 23, 2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan"). Neither Republican member of the LRAC supported the 2021 Plan.

46. On November 23, 2021, by a strict party-line vote, the LRAC chose a final map to submit to the General Assembly for approval, referred to as the 2021 Plan. Neither Republican

member of the LRAC supported the 2021 Plan. Senator Simonaire uttered the statement during the LRAC hearing on November 23, 2021, "[o]nce again, I've seen politics overshadow the will of the people."

47. A true and accurate copy of the 2021 Plan is attached as Exhibit I.

48. On December 7, 2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan. Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. No Republican member voted against the amendment.

49. On December 8, 2021, the General Assembly enacted the 2021 Plan. One Democratic member voted against the 2021 Plan. No Republican member voted to approve the 2021 Plan.

50. On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. Not a single Republican member of the General Assembly voted to approve the 2021 Plan.

51. According to the Princeton Gerrymandering Project, Democrats now have an estimated vote-share advantage in every single Maryland congressional district.

52. On December 9, 2021, Governor Hogan vetoed the 2021 Plan.

53. On December 9, 2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. One Democratic member of the General Assembly voted against overriding Governor Hogan's veto, while no Republican member of the General Assembly voted in favor of override.

54. After passage of the 2021 Plan, Senator Ferguson and Delegate Jones issued a joint statement emphasizing that the 2021 Plan "keep[s] a significant portion of Marylanders in their current districts, ensuring continuity of representation."

55. Under Maryland's 2021 adopted congressional plan, portions of Anne Arundel County are in Districts 1, 2, and 4, and that District 1 includes population residing on the Eastern Shore and in Anne Arundel County.

56. Under Maryland's 2021 adopted congressional plan, portions of Baltimore City are in Districts 2, 3, and 7.

57. Under Maryland's 2021 adopted congressional plan, portions of Baltimore County are in Districts 2, 3, and 7.

58. Under Maryland's 2021 adopted congressional plan, portions of Montgomery County are in Districts 3, 4, 6, and 8.

59. Under Maryland's 2021 adopted congressional plan, nine counties have population assigned to more than one congressional district.

60. Congressmen Andy Harris, who currently represents the First Congressional District under the Enacted Plan and represented the First Congressional District under the 2011 Plan, was in the Seventh Congressional District, which is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressmen Harris registered to vote at a residence in Cambridge, Maryland, in the First Congressional District, which is on the Eastern Shore at a residence or place where Congressmen Harris has owned since 2009.

61. Exhibit II reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit II are a true and accurate representation of data derived from government sources.

62. Exhibit III reports the adjusted population of Maryland's eight congressional districts following the 2020 census under the 2011 Plan and under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit III are a true and accurate representation of data derived from government sources.

63. Exhibit IV reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit IV are a true and accurate representation of data derived from government sources.

64. Exhibit V reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit V are a true and accurate representation of data derived from government sources.

65. Exhibit VI reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2020. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VI are a true and accurate representation of data derived from government sources.

66. Exhibit VII reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VII are a true and accurate representation of data derived from government sources.

67. Exhibit VIII depicts Maryland's eight congressional districts under the 2011 Plan. The parties stipulate that the matters of fact asserted, stated or depicted in Exhibit VIII are a true and accurate representation of data derived from government sources.

Findings Derived by the Trial Judge from Testimony and Other Evidence Adduced at Trial

Mr. Sean Trende

68. Mr. Sean Trende testified and was qualified as an expert witness in political science, including elections, redistricting, including congressional redistricting, drawing redistricting maps, and analyzing redistricting.

69. Mr. Trende was asked to analyze the Congressional districts adopted by the Maryland Legislature in the recent rounds of redistricting and opine as to whether traditional redistricting criteria was [subordinated] for partisan considerations.[31]

70. Mr. Trende's opinions and conclusions were rendered to a reasonable degree of scientific certainty typical to his field.

71. In deriving his opinions, Mr. Trende conducted a three-part analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness

[31] The transcript stated, "whether traditional redistricting criteria was coordinated for partisan considerations," however, the trial judge recalls the correct verbiage was "whether traditional redistricting criteria was *subordinated* for partisan considerations." March 15, 2022, A.M. Tr. 45: 2–7.

of the maps with a comparison to other maps that had been drawn both in Maryland and across the country; he then examined the number of county splits, "the number of times the counties were split up by the maps" and finally, he then conducted a "qualitative assessment" to see how precincts were divided.

72. In the first part, Mr. Trende conducted a simulation analysis. In doing so, he "used the same techniques that were used in Ohio and in North Carolina" and "similar to that which has been used in Pennsylvania." The purpose of Mr. Trende's analysis was to analyze "partisan bias of the Maryland 2021 congressional districts."

73. Mr. Trende's methodology relied on "shape files."

74. In analyzing the shape files, he used "widely used statistical programming software called R."

75. Mr. Trende also conducted an analysis of the county splits for Maryland utilizing the "R" software.

76. Based upon his analysis of the county splits, referring to Exhibit 2-A, Mr. Trende found that the 1972 Congressional map included 8 splits.

77. In 1982, there were 10 county splits in the Congressional map.

78. In 1992, there were 13 county splits in the Congressional map.

79. In 2002, there were 21 county splits in the Congressional map.

80. In 2012, there were 21 county splits in the Congressional map.

81. In the 2021 Plan, there are 17 county splits.

82. The 2021 Plan has a historically high number of county splits compared to other Congressional plans, except the 2011 Map.

83. Mr. Trende testified that "you really only need 7 county splits in a map with 8 districts."

84. With respect to "compactness" of the 2021 Plan, Mr. Trende used four of the "most common compactness metrics": the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score; the lower the score the less compact a Congressional plan is.

85. The four scores were presented to strengthen his presentation as well as to present a different "aspect" of compactness.

86. Exhibits 4-A, 4-B, 4-C, and 4-D reflect the bases for Mr. Trende's compactness analyses, which included scores for all of Maryland's congressional districts dating back to 1788.

87. Exhibit 5 reflects the analysis of the four scores using a scale of 0 to 1, where "1 is a perfectly compact district, and 0 is a perfectly non-compact score."

88. There is no "magic number" that reflects whether a district is not compact. Comparisons to historical data supported Mr. Trende's conclusion that the 2021 Plan is "an outlier."

89. Based upon Mr. Trende's testimony, the Court finds that for "much of Maryland's history, including for a large portion of the post-*Baker v. Carr* history, Maryland had reasonably compact districts that showed a similar degree of compactness from cycle to cycle."

90. The Court also finds, based upon Mr. Trende's analysis that by Maryland's historic standards, the 2021 Congressional lines are "quite non-compact" regardless of which of the four metrics is used or analyzed.

91. Mr. Trende also analyzed the 2021 Plan with reference to every district in the United States going back to 1972, which is represented by Exhibits 6-A, 6-B, 6-C, and 6-D.

92. Mr. Trende testified that there are a limited number of maps for other states that have lower Reock scores than the 2021 Plan (*see* Exhibit 6-A).

93. Mr. Trende also testified with reference to Exhibit 6-B that there are only "six maps that have ever been drawn in the last 50 years with worse average Polsby-Popper scores than the current Maryland maps."

94. Mr. Trende further testified with reference to Exhibit 6-C that the 2021 Plan reflects one of the "worst Inverse Schwartzberg score[] in the last 50 years in the United States."

95. With reference to Exhibit 6-D, Mr. Trende testified that it scored, under the Convex Hull analysis, "very poorly relative to anything that's been drawn in the United States in the last 50 years."

96. Mr. Trende testified relative to compactness in the 2002 and 2012 Congressional plans in comparison to the 2021 Plan and concluded that the 2021 Plan is not compact.

97. Mr. Trende testified that relative to Exhibits 7-A, 7-B, 7-C, and 7-D, that the first Congressional district under the 2021 Plan "lower[ed] the Republican vote share in the First" and "[left] the democratic districts or precincts on the bay." He concluded that the "Democrats have an increased chance of winning this district in a normal or good democratic year."

98. As to Exhibits 8-A, 8-B, 8-C, and 8-D, he concluded that "almost all of the Republican precincts were placed into District 3 or District 7," while "[a]lmost all of the democratic precincts were placed into District 1."

99. Mr. Trende then presented a simulation approach to redistricting utilizing "R" software. The simulation package was dependent on the work of Dr. Imai using an approach that samples maps drawn without respect to politics. In each of Mr. Trende's simulations he used 250,000 maps all suppressing politics and utilizing two minority/majority districts mandated by the Voting Rights Act; he discarded duplicative maps and arrived at between 30,000 to 90,000 maps to be sampled for each simulation.

100. He then fed various "political data" into the program to measure partisanship.

101. Mr. Trende's simulations relied upon the correlations between vote shares and Presidential data, because he testified that Presidential data is the most predictive in analyzing election outcomes. Mr. Trende further testified that he used other elections at the Presidential, senatorial, and gubernatorial levels to check his simulation results.

102. In the first set of 250,000 maps, Mr. Trende depended upon population parity or equality and contiguity as well as a "very, very light compactness parameter." Other traditional redistricting criteria was not considered.

103. The second set of 250,000 maps depended on a "modest compactness criteria," "drawing without any political information."

104. The third set of 250,000 maps added respect for county subdivisions.

105. The three analyses are represented in Exhibits 9-A, 9-B, and 9-C.

106. In every one of the maps from which Mr. Trende drew his opinions, there are at least "two majority/minority districts to comport with the Voting Rights Act."

107. With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that

were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that "it is exceedingly unlikely that if you were drawing by chance, you would end up with a map where President Joe Biden carried all eight districts."

108. With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was "an extremely improbable outcome if you really were drawing – just caring about traditional redistricting criteria and weren't subordinating those considerations for partisanship."

109. With respect to Exhibit 9-C, which reflects maps drawn with consideration of population equality, contiguity, compactness, and respect for county lines, Mr. Trende testified that "you almost never produce eight districts that Joe Biden carries." Specifically, Mr. Trende found that of the 95,000 maps that survived the initial sort, 134 of them, or .14%, produced eight districts that President Biden won.

110. Mr. Trende then presented data dependent on box plots, which are reflected in Exhibits 10-A, 10-B, 10-C, 10-D, and 10-E. On the basis of his box plot analysis, Mr. Trende concluded that, "[p]olitics almost certainly played a role" in the 2021 Plan. He also concluded that, "there is a pattern that appears again and again and again, which is heavily democratic districts are made more Republican but still safely democratic. And that, in turn, allows otherwise Republican competitive districts to be drawn out of that Republican competitive range into an area where Democrats are almost guaranteed to have seven districts, have a great shot at winning that eighth District [that being, the First Congressional District]."

111. With respect to his final analysis, he utilized a "Gerrymandering Index," which is "a number that summarizes, on average, how far the deviations are from what . . . would [be] expect[ed] for a map drawn without respect to politics."

112. Mr. Trende relied Dr. Imai's work in his paper on the Sequential Monte Carlo methods.[32]

113. Exhibits 11-A, 11-B, and 11-C, illustrate Mr. Trende's conclusions with respect to the Gerrymandering Index. Lower scores are indicative of greater gerrymandering.

114. Mr. Trende concludes that the 2021 Plan is an outlier with respect to the Gerrymandering Index. In fact, he concludes with respect to Exhibit 11-A, which included considerations regarding contiguity and equal population, that "it's exceedingly unlikely" that a map would result that would have a larger Gerrymandering Index, because there were only 97 maps of the 31, 316 maps that were consulted that would have a larger gerrymandering index.

115. With respect to Exhibit 11-B in which compact districts are drawn, Mr. Trende concluded that there were only 102 maps with larger gerrymandering indexes than the 2021 Plan: "[i]t's exceedingly unlikely if you were really drawing without respect to partisanship, just trying to draw compact maps that are contiguous and equipopulous, its exceedingly unlikely you would get something like this."

116. The final Gerrymandering Index Exhibit, 11-C, reflects compact plans that are contiguous and of equal population and respect county lines (with due consideration to the Voting Rights Act: two majority/minority districts).

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[32] Kosuke Imai & Cory McCartan, *Sequential Monte Carlo for Sampling Balanced and Compact Redistricting Plans*, HARV. UNIV. 6–17 (Aug. 10, 2021), available at: https://perma.cc/Z2DT-A2RW.

117. On the basis of Exhibit 11-C, Mr. Trende concludes that the 2021 Plan is a "gross outlier," such that of the 95,000 maps under considerations, only one map had a Gerrymandering Index larger than the 2021 Plan.

118. Utilizing the Gerrymandering Index, Mr. Trende concluded that "it's just extraordinarily unlikely you would get a map that looks like the enacted plan."

119. Mr. Trende ultimately concluded that "the far more likely thing that we would accept in social science is given all this data is that partisan considerations predominated in the drawing of this map and that as was the case in Pennsylvania, North Carolina, and Ohio and other states where this type of analysis was conducted, traditional redistricting criteria were subordinated to these partisan considerations."

120. Mr. Trende also concluded that the 2021 Plan has a very high Gerrymandering Index and the same pattern of districts being drawn up in heavily Republican areas made more Democratic, as well as districts drawn down into the Democratic areas made more Republican, even when three majority/minority districts under the Voting Rights Act are conceded in the 2021 Plan.

121. Ultimately, Mr. Trende concludes that the 2021 Plan was drawn with partisanship as a predominant intent, to the exclusion of traditional redistricting criteria.

122. Mr. Trende had no opinion with respect to the Maryland Citizens Redistricting Commission ("MCRC") Plan.

123. Mr. Trende's simulations did not account for communities of interest and "double bunking of incumbents" into a single district.

124. Mr. Trende did not consider in his simulations the effect of Governor Hogan's victories in 2014 and 2018.

125. Mr. Trende did not account for unusually strong Congressional candidates running in an election using the 2021 Plan.

126. Mr. Trende used voting patterns rather than registration patterns in his analyses of the 2021 Plan.

127. Mr. Trende testified that the absolute minimum number of county splits in a map with eight congressional districts is seven splits.

128. Mr. Trende, when asked to defined an "outlier," explained that it "means a map that would have a less than 5% chance of being drawn without respect to politics" and that with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier."

129. Mr. Trende testified within his expertise to a reasonable degree of scientific, professional certainty, that under any definition of extreme gerrymandering, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme."

130. Mr. Trende further opined that the 2021 Plan reflects "the surgical carving out of Republican and Democratic precincts" and that "there are a lot of individual things that tell an extreme-gerrymandering story," and "when you put them all together, it's just really hard to deny it."

131. Mr. Trende further stated that the 2021 Plan was drawn "with an intent to hurt the Republican party's chances of letting anyone in Congress."

132. Mr. Trende testified that the 2021 Plan "dilutes and diminishes the ability of Republicans to elect candidates of choice."

133. Mr. Trende also testified that among the implications of an extreme partisan gerrymandering, that it "becomes harder for political parties to recruit candidates to run for office, because who wants to raise all that money and then be guaranteed to lose in your district."

134. Mr. Trende did not conduct an efficiency gap analysis in this case.

Dr. Thomas L. Brunell

135. Dr. Brunell testified and was qualified as an expert in political science, including partisan gerrymandering, identifying partisan gerrymandering, and redistricting.

136. Dr. Brunell was asked to examine two Congressional districting maps for the State of Maryland: the 2021 Plan and the MCRC Plan and compare them using metrics for partisan gerrymandering.

137. In his comparison, he looked at city and county splits and compared the outcomes to proportionality regarding the relationship between the statewide vote for each party and the total number of seats in Congress for each party. He also looked at compactness and calculated the efficiency gap regarding statewide elections during the last ten years for both the 2021 Plan and the MCRC Plan.

138. Dr. Brunell testified that the MCRC Map is more compact on average than the eight districts for the 2021 Plan. He testified that the average compactness score using the Polsby-Popper index was lower for the 2021 Plan than the MCRC Plan. Dr. Brunnell also

concluded that in comparison to 29 states, the 2021 Plan had a Reock score that was higher than only two other states, Illinois and Idaho. He also concluded that only Illinois and Oregon had a lower Polsby-Popper score than Maryland with respect to the 2021 Plan.

139. Dr. Brunell utilized the actual number of voters in his analysis rather than voter registration.

140. Dr. Brunell testified that with respect to the 2016 Presidential election, similar to the 2012 Presidential election, the Democratic candidate received 64% of the statewide vote in Maryland and the Democrats carried seven of the eight Congressional districts in Maryland under the 2021 Plan. Using the 2020 Presidential data in evaluating the 2021 Plan, Democrats would carry all eight of the Congressional districts under the 2021 Plan. Using the 2012 Senate candidate data in evaluating the 2021 Plan, the Democrats would carry all eight Congressional districts. Using the 2016 Senate elections in evaluating the 2021 Plan, he testified that the Democrats would carry seven of the eight districts. Using the 2018 Senate elections data, the Democrats under the 2021 Plan would carry all eight districts. Using the 2014 and 2018 gubernatorial elections, he concluded that the Democrats would carry three of the eight seats in the Congressional elections under the 2021 Plan.

141. Dr. Brunell conducted an efficiency test to determine wasted votes, *i.e.*, those cast for the losing party and those cast for the winning party above the number of votes necessary to win.

142. In order to determine the efficiency gap, he added all the wasted votes for both parties in the same district to get a measure of who is wasting more votes at a higher rate.

143. A lower number of votes wasted reflects less likelihood of partisan gerrymandering.

144. Dr. Brunell testified that just considering the efficiency gap would not be enough to find that a map is gerrymandered. Dr. Brunell testified that one would need to look at "the totality of the circumstances, use different measures, different metrics, to see if they're telling you the same thing [or] different things."

145. Dr. Brunell testified that by using an efficiency gap measure, there was a bias in favor of the Republicans in the MCRC Plan, although that bias was not significant.

146. Dr. Brunell testified that there were many more county segments and county splits in the 2021 Plan than in the MCRC Plan.

147. Dr. Brunell testified that redrawing electoral districts "is a complex process with dozens of competing factors that need to be taken into account, . . . like compactness, contiguity, where incumbents live, national boundaries, municipal boundaries, county boundaries, and preserving the core confirmed districts."

148. Dr. Brunell only considered compactness of the districts in his analysis of the 2021 Plan.

149. Dr. Brunell did not take into consideration in his analysis the Voting Rights Act or incumbency bias. He testified he did assume population equality and contiguity having been met in the 2021 Plan.

Mr. John T. Willis

150. Mr. Willis testified and was qualified as an expert in Maryland political and election history and Maryland redistricting, including Congressional redistricting.

151. Mr. Willis was asked to evaluate the 2021 Plan and determine if it was consistent with redistricting in the course of Maryland history and to give his opinion as to its validity and whether it was based on reasonable factors.

152. Mr. Willis opined that Maryland's population over time has changed with an east-to-west migration, "in significant numbers."

153. Mr. Willis referred to a series of Maryland maps reflecting population migration every 50 years from 1800 to 2000, admitted into evidence as Exhibit H.

154. Exhibit H had been prepared by Mr. Willis in anticipation of the 2001 redistricting process.

155. Exhibit H shows population migration to the west in Maryland and towards the suburbs of the District of Columbia.

156. Mr. Willis testified regarding Defendants' Exhibit I, admitted into evidence, which reflects concentrations of population during the Fall of 2010.

157. He testified almost 70% of the Maryland population is "in a central core, which is roughly I-95 and the Beltway."

158. Mr. Willis also testified that geography impacts the redistricting process as well as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, and migration patterns.

159. With respect to Defendants' Exhibit J, Mr. Willis testified regarding the population changes from 2010 to 2020.

160. Mr. Willis further testified that each district in the 2021 Plan had to have a target population of 771,925.

161. Mr. Willis further testified that in Congressional redistricting the General Assembly starts with the map in existence to avoid disturbing existing governmental relationships.

162. Exhibit K includes all of the Congressional redistricting maps from 1789 to the present 2021 Plan, which includes a set of 17 maps. The last map—map 17—Mr. Willis testified that the district lines in the First District appeared to be based on reasonable factors and are consistent with the historical district lines enacted in Maryland. As the basis for his opinion, Mr. Willis explained that there has always been a population deficit in the First District which requires the boundary to cross over the Chesapeake Bay or to cross north over the Susquehanna River in Harford County and that there have been more crossings over the Chesapeake Bay historically than into Harford County.

163. Mr. Willis further testified regarding regional and county-based population changes over the decades in Maryland since 1790, on a decade basis, reflected in Exhibit L. He testified that the district lines in the Second Congressional District appear to be based upon reasonable factors and are consistent with historical district lines enacted in Maryland and reflects migration patterns relative to Baltimore City.

164. Mr. Willis further testified about the district lines for the Third Congressional District, which he opined were based on reasonable factors and consistent with historical district lines enacted in Maryland.

165. With respect to the liens of the Fourth Congressional District, Mr. Willis testified that the district lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. He testified that the Fourth District is also what is known as a "Voting Rights Act District."

166. With respect to the district lines of the Fifth Congressional District, he opined that the lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. The district lines are also based on major employment centers and major public institutions.

167. With respect to the district lines of the Sixth Congressional District, following the Potomac River, Mr. Willis testified that the lines reflect commercial and family connections tying the area together since the State was founded. On that basis, he testified that the lines of the Sixth District appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

168. Mr. Willis testified that the Seventh Congressional District is another "Voting Rights Act district."

169. Mr. Willis then testified about the Eighth Congressional District, the lines of which appear to be based on reasonable factors and consistent with historical district lines enacted in Maryland. Mr. Willis attributes the lines to traffic patterns along what is basically State Route 97.

170. He finally testified that the all the district lines as they are drawn in the 2021 Plan appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

171. Mr. Willis testified that for every election prior to 2002 in Congressional District 2, a Republican candidate won the Congressional seat. A Republican candidate also won every election in Congress in District 8 from 1992 to 2000, that being Congresswoman Constance Morella. Thereafter, from 2002 to 2010, no Republican candidate won a Congressional election in District 8. He then testified that in District 2, a Democratic candidate has won the Congressional election every single year since the 2002 map was drawn, *i.e.*, Congressman C.A. Dutch Ruppersberger.

172. Mr. Willis further testified with respect to the First Congressional District that as a result of a Federal Court decision, District 1 included all of the Eastern Shore and Cecil County as well as St. Mary's County, Calvert County, and part of Anne Arundel County.

173. As a result of the redistricting plan from 2002 to 2010, District 1 was drawn a different way, which included all of the Eastern Shore counties and an area across the Bay Bridge into Anne Arundel County, as well as parts of Harford and Baltimore County.

174. Mr. Willis characterized the Congressional map from 2002 to 2010 as "fraught with politics to favor some candidates over another."

175. He testified that since the Federal Court ordered the drawing of the Congressional districts in Maryland, the First Congressional District has crossed the Chesapeake Bay in southern Maryland, has crossed the Chesapeake Bay in northern Maryland, as well as crossed parts of Cecil, Harford, Baltimore, and Carroll County.

176. Mr. Willis testified that from the 1842 until the 2012 Congressional maps, Frederick County was linked in its entirety with the westernmost counties of Maryland, as well as in the Federal District Court redistricting map.

177. During the Court's questioning, Mr. Willis testified that the biggest "driver" in the redistricting process is populations shifts with gains in population in places like Prince George's County for example, and loss of population, for example, in Baltimore City.

178. He also testified about other factors affecting the redistricting process such as "transportation patterns," preservation of land, federal installations, state institutions, major employment centers, prior history, election history, as well as ballot questions that "show voter attitude." He further testified that incumbency protection might be a factor as well as political considerations.

Dr. Allan J. Lichtman

179. Dr. Allan J. Lichtman testified and was qualified as an expert in statistical historical methodology, American political history, American politics, voting rights, and partisan redistricting.

180. Dr. Lichtman testified that "politics inevitably comes into play" in the redistricting process and that the balance in democratic government is "between political values and other considerations" to include "public policy, preserving the cores of existing districts, avoiding the pairing of incumbents, looking at communities of interest, shapes of the districts, and a balance between political considerations."

181. Dr. Lichtman testified that, "[w]hen you're involved with legislative bodies, it's inevitably a process of negotiation, log rolling, compromise."

182. Dr. Lichtman denied as unrealistic comparing the 2021 Plan with "ensembles of plans with zero – the politics totally taken out."

183. Dr. Lichtman's test of the 2021 Plan, according to his testimony, evaluates whether the 2021 Plan was "a partisan gerrymander based on the balance of party power in the state." His conclusions were that the likely partisan alignment of the 2021 Plan was "status quo, 7 likely Democratic wins, 1 likely Republican win"; that there could be Democratic districts in jeopardy in 2022 because "2022 is a midterm with a Democratic President." In doing his analysis, he looked at other states which were "actually mostly Republican states, where the lead party got 60% or more of the Presidential vote," which he termed are "unbalanced political states." According to Dr. Lichtman, he looked at "gerrymandering" in multiple ways, "all based on real-world considerations, not the formation of abstract models."

184. Using an "S-curve" representation in Exhibit N, he determined that a party with 60% of the vote-share would win all of the Congressional districts. He continued in his testimony to discuss how he determined that the Democratic advantage under the 2021 Plan was likely a 7-to-1 advantage based upon the Cook's Partisan Voter Index ("PVI"), referring to Exhibit R.

185. Dr. Lichtman posited through Exhibit T that traditionally there are many midterm losses by the party of the President.

186. Dr. Lichtman testified that the Democrats could have drawn a stronger First Congressional District for themselves in the 2021 Map than they did to ensure a Republican defeat.

187. Dr. Lichtman testified pursuant to Exhibit U that the Democratic advantage in Maryland in federal elections is in the mid to upper 60% range so that the Democratic seat-share in a "fair" plan would exceed 80% of the seats.

188. With reference to Exhibit V, Dr. Lichtman presented a "trend line" from which he concluded that Maryland's enacted plan was not a partisan gerrymander because a 7-to-1 seat share was not commensurate with the Presidential vote for the Democratic party in 2020. He concluded that based on the trend line, "you would expect Maryland to be close to 100% of the [Congressional] seats."

189. Utilizing Exhibit W, he testified regarding "unbalanced states" in which the lead party secured more than 64.2% of the vote in the 2020 Presidential election. He included that the Democrats were performing below expectation in terms of its share of Congressional seats.

190. Dr. Lichtman testified that, in his opinion, "empirically, Maryland's Congressional seat allocation under the 2021 Plan is exactly what you would expect, assuming a 7-to-1 seat share."

191. He also testified that the Governor's plan, otherwise referred to as the MCRC Plan, is indicative of a gerrymander by "packing Democrats." He also concluded it was a gerrymander because it paired two or more incumbents of the opposition party, which he believed to be indicative of a gerrymander as reflected by Exhibit Z.

192. He testified that when you pair incumbents, "you are forcing them to rescramble and figure out how to rearrange their next election."

193. He also testified that the MCRC Plan also "dismantled the core of the existing districts and disrupted incumbency advantage again and the balance between representatives and the represented," referring to Exhibit AA.

194. Referring to Exhibit AB, he concluded that the MCRC Plan unduly packed Democrats, because in the MCRC Plan, there would be six Democratic districts over 70% and four Democratic districts close to or over 80%.

195. He testified further that the MCRC Plan is a "packed gerrymander." He testified that the Governor's Commission developing the plan was "extraordinarily under representative of Democrats" and that the Commission was appointed by a partisan elected official. He also testified that the Governor's instructions in developing the plan helps explain "why it turns out to be a Republican-packed gerrymander and a paired gerrymander"; "no attention was given to incumbency whatsoever." Instructions included considerations to include compactness and political subdivisions which he concludes "automatically" plays into, what he calls, partisan clustering. He also testified that the Governor's Secretary of Planning, Edward Johnson, sat in on deliberations while "there was no comparable Democratic representative sitting in."

196. Dr. Lichtman was critical of every one of Mr. Trende's simulation analyses because each one presumed "zero politics." Dr. Lichtman opined that "when state legislative body creates a plan, political considerations are one element to be balanced with a whole host of other elements and the process of negotiation, bartering, and trading that goes on in the legislative process and a demonstration that politics is not zero, is by not any stretch equivalent to a demonstration that the plan is a partisan gerrymander." He continued in his criticism of Mr. Trende's analysis that Mr. Trende did not provide "an absolute standard" and no comparative state-to-state standard. He testified in criticism of Mr. Trende's simulations not only based on "zero politics," but also because Mr. Trende's simulations did not consider "where to place historic landmarks, historic buildings, deciding how to deal with parks or airports or large open

spaces of water." He concluded that Mr. Trende's analysis was deficient because "you can't measure gerrymandering relative to zero politics, you can't measure gerrymandering without a standard, and you can't measure gerrymandering when comparing it to unrealistic simulated plans that don't consider much of the factors that routinely go into redistricting."

197. Dr. Lichtman attributed the problems of Republicans across the Congressional districts "not [to] the plan," but rather "the problem is that they are simply not getting enough votes, an absolutely critical distinction in assessing a gerrymander," based upon his review of Governor Hogan's two victories in 2014 and 2018 and the Republican vote-share in the 2014 Attorney General's race.

198. Dr. Lichtman concluded, in criticism of Mr. Trende's simulation analyses, that, "[a] supposed neutral plan based upon zero politics and supposedly neutral principles when applied in the real world into a place like Maryland, in fact, as demonstrated by this chart, produces extreme packing to the detriment of Democratic voters in the State of Maryland. Votes are extremely wasted for Democrats in at least half and maybe even more than half of the districts."

199. Dr. Lichtman, with respect to the 2021 Plan, does not dispute Mr. Trende's use of the four scores beginning with the Reock score, but opines that the scores of compactness reflect an improvement in compactness from the 2012 plan to the 2021 Plan. He then explains that the county splits decreased from the 2012 plan to the 2021 Plan, specifically, from 21 to 17 splits in the latter.

200. Dr. Lichtman further concluded, using the PVI, that the 2021 Plan "may not even be 7–1 in the real world." It may be "6–2, or even 5–3."

201. Dr. Lichtman later concludes that the very structure of the 2021 Plan "pretty much assures that Republicans are going to win two districts and that Democrats have wasted huge numbers of votes in the other districts."

202. In criticizing Dr. Brunell's analysis, he concludes that the 2021 Plan is not a gerrymander "just like [the] 2002 and 2012 plans were not gerrymanders."

203. Ultimately, Dr. Lichtman testified that "through multiple analyses -- affirmative analyses in [his] own report and scrutiny of the analyses of experts for the plaintiffs, it's clear that the Democrats did not operate to create a partisan gerrymander in their favor," and that "[t]he Governor's Commission plan is a partisan gerrymander that favors Republicans."

204. On cross-examination, Dr. Lichtman testified that non-compactness of Congressional districts could be, and it could not be, an indicator of partisan gerrymandering and concluded that "certainly nothing about compactness or municipal splits or county splits proves that a plan is not fair on a partisan basis, but they can be indicators."

205. On cross-examination, Dr. Lichtman acknowledged that for the past ten years, even when a midterm election occurred during the Democratic presidency of Barack Obama, the Maryland Delegation has been 7–1 Democratic/Republican, so that the Democrats did not lose any seats in any midterm elections, and prior to that, for a number of years, the outcome of Maryland's Congressional elections had been 6–2 Democratic/Republican, year after year.

206. Dr. Lichtman, during cross-examination, further stated that he had "checked the addresses of the incumbents to make sure there was not an unfair double bunking, which [Mr. Trende] meant the pairing of incumbents in the same districts" and indicated that he did not see any pairings in the 2021 Plan.

207. Dr. Lichtman, during cross-examination, concluded that if the General Assembly was "intent upon destroying a Republican district, they could have done so and didn't," which he concludes was a deliberate decision by Democratic leaders, including the Senate President, Bill Ferguson." He further concluded that the General Assembly "created a district that Andy Harris is overwhelmingly likely to win in the crucial first election under the redistricting plan."

208. Finally, Dr. Lichtman stated that he had not seen evidence that the General Assembly bumped "Andy Harris into the Seventh District with Kweisi Mfume."

209. On cross-examination, Dr. Lichtman reiterated that Mr. Trende's simulations "do not account for all traditional redistricting ideas. A whole host of them – and we've gone over that numerous times – are left out," and that Mr. Trende's simulation resulted in an "extraordinarily high degree of packing, which wastes large numbers of Democratic votes to the detriment of Democrats in Maryland."

210. In response to questioning from the Court, based on his opinion to a reasonable degree of professional certainty as to whether the 2021 Plan comports with Article III, Section 4, of the Maryland Constitution, Dr. Lichtman testified that the 2021 Plan comported with Article III, Section 4 because the drafters "actually made the districts substantially more compact than they had been in 2012 and equally compact as they had been in 2002." In providing that opinion relative to compactness, Dr. Lichtman testified that "instead of distorting compactness and violating Section 4, they made their district substantially more compact and in line with what compactness had been over long periods of time." Dr. Lichtman acknowledged that historical compactness is not necessarily the measure of Article III, Section 4 compactness and reiterated that there is no objective standard by which to judge any of the measures utilized by Mr. Trende.

He reiterated that he was "not aware of any study which establishes, on an objective scientific basis, a line you can draw in one or more compactness measures, which would distinguish between compact and noncompact."

211. In response to the question of whether in his opinion, to a reasonable degree of professional, scientific certainty that the standards of due regard shall be given to the natural boundaries and the boundaries of political subdivisions was met, he acknowledged that he had not done any of his own individual research. He opined, however, that "there has not been the presentation of proof by plaintiffs' experts that it doesn't comply." He reiterated "Plaintiffs did not prove that the 2021 Plan violates the Constitution."

212. Dr. Lichtman opined that Article 7 of the Declaration of Rights, dealing with free and frequent elections, Article 24 of the Declaration of Rights, entitled Due Process, as well Article 40, the free speech clause, would not apply to districting because "none of them mentioned districting or anything like that." He further opined that the free and frequent elections clause "clearly was designed for legislative elections" and that based upon his delineation of its history, that the free speech clause did not apply at all.

213. Dr. Lichtman further opined that he did not think that Article III, Section 4 or any of the provisions in the Maryland Constitution or Declaration of Rights applied to Congressional gerrymandering, nevertheless, even assuming were the standards to apply, partisan considerations would not predominate.

Application of the Law to the Findings of Fact

Applying the law to the findings of fact adduced during a trial with a "battle of the experts" initially requires a trial judge to transparently reflect what weight was given to a particular opinion or sets of opinions and why. Each expert in the instant case was qualified as an expert in particular areas. The qualification of each witness, however, was only the beginning of the analysis.

Whether the expert's testimony was reliable and helpful to the trier of fact and law, the trial judge herein, informs the weight to be afforded to each of the opinions. Obviously, the newly adopted *Daubert* standard, under *Rochkind v. Stevenson*, 471 Md. 1 (2020), was a point of discussion with respect to the opinions of Mr. Willis and Dr. Lichtman, but that challenge was withdrawn in the end by the Plaintiffs, and the State did not mount a *Daubert* challenge at all. Beyond *Daubert*, then, the weight given to an expert's opinion depends on many factors including, as well as irrespective, of their qualifications, but based upon a consideration of all of the other evidence in the case, under Maryland Rule 5–702.

In the present case, the trial judge gave great weight to the testimony and evidence presented by and discussed by Sean Trende. His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated. He used multifaceted analyses in his studies of compactness and splits of counties and acknowledged the data that he did not consider, such as voter registration patterns, might have yielded additional data, although the reliance on such data had not been studied. He readily acknowledged that he was not yet a PhD, although that title was soon to come, and that he was being paid for his work by the Plaintiffs.

Importantly, although he testified that he was on the Republican side of a number of redistricting cases in which Republican plans had been challenged—*Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658 (N.C. Super. July 08, 2013); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681 (S.D. Ohio 2018), *vacated sub nom. Ohio A. Philip Randolph Inst. v. Obhof*, 802 F. App'x 185 (6th Cir. 2020); *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, --- N.E.3d ---, 2022-Ohio-789 (2022)—he apparently learned what would be helpful to a court in evaluating a Congressional redistricting plan, because he clearly relied on methodologies that were persuasive in North Carolina, *Harper v. Hall*, 2022-NCSC-17, 868 S.E.2d 499 (2022), and Pennsylvania, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018).

The impeachment of Mr. Trende's presentation undertaken by Dr. Lichtman was unavailing, in large part, because of the bias that Dr. Lichtman portrayed against simulated maps utilizing "zero politics" and county splits that "happened" to be less in number than what had occurred in a map that had been the subject of criticism in 2012 at the Federal District Court level but not addressed in *Rucho* in 2019. Mr. Trende's presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.

Dr. Brunell's testimony and evidence in support was much less valuable and helpful to the trial judge, because to evaluate compactness, the efficiency gap, as presented, did not have the power that was portrayed in other cases. *See e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) (finding that around 75% of historical efficiency

gaps around the country were between -10% and 10%, and only around 4% had an efficiency gap greater than 20% in either direction, and therefore, noting that several of Ohio's prior elections had efficiency gaps indicative of a plan that was a "historical outlier," including an efficiency gap of -22.4% in its 2012 election and an efficiency gap of -20% in its 2018 election, compared to efficiency gaps in 2014 and 2016 that were -9% and -8.7%, respectively). Dr. Brunell's presentation was murky and lacking in sufficient detail. He made no attempt to establish the interaction of an efficiency gap analysis with other types of testing for compactness and certainly, no basis to believe that allocating Republicans two of eight Congressional seats is appropriate, let alone reliable or valid.

The opinions of Mr. Willis, while of interest, to gain a perspective as to what legislators considered in 2002, 2012, and possibly may have considered in 2021 to draw the various Congressional boundaries, such as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, major employment centers, preservation of land, political considerations, and migration patterns, may in fact be "reasonable," but not, in any way, helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan. As Chief Judge Robert M. Bell from the Maryland Court of Appeals, in 2002 in *In re Legislative Districting of State*, eloquently stated in opinion regarding the influence of such criteria on Constitutional redistricting standards:

> Instead, however, the Legislature chose to mandate only that legislative districts consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. That was a fundamental and deliberate political decision that, upon ratification by the People, became part of the organic

> law of the State. Along with the applicable federal requirements, adherence to those standards is the essential prerequisite of any redistricting plan.
>
> That is not to say that, in preparing the redistricting plans, the political branches, the Governor and General Assembly, may consider only the stated constitutional factors. On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives. Thus, so long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity.
>
> On the other hand, notwithstanding that there is necessary flexibility in how the constitutional criteria are applied – the districts need not be exactly equal in population or perfectly compact and they are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity – those non-constitutional criteria cannot override the constitutional ones.

370 Md. at 321–22.

Finally, this trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. Dr. Lichtman's presentation was dismissive of empirical studies presented by Mr. Trende because of their "zero politics" and disavowed their use because of their lack of absolute standards or comparative standards to guide what an outlier is. Juxtaposed against Mr. Trende's use of reliable valid measures that have been accepted in other state courts, such as simulations in North Carolina and Pennsylvania, Dr. Lichtman's own data urged the "realities" of Maryland politics, as he used a "predictive" model to address alleged Democratic concerns about losing not only one, but two or three seats in the midterm election in 2022, because of having a Democratic President in power; in fact the realities of Maryland politics, in the last ten years, under Republican as well as Democratic Presidents, as well as a Republican Governor, have been that the Congressional delegation has stayed essentially the same—7 Democrats to 1 Republican.

Dr. Lichtman's denial of the fact that the 2021 Plan, as enacted, actually "pitted" Congressman Andy Harris against Congressman Kweisi Mfume in the Seventh Congressional District when the 2021 Plan did so, reflects a lack of thoughtfulness and deliberativeness that a trial judge would expect of experts. The fact that only a short period of time was afforded for the development of Dr. Lichtman's report does not excuse that it would have taken a review of the 2021 Plan as enacted in December of 2021, rather than in February of 2022, to know that Congressman Harris had to move to Cambridge to reside in the First Congressional District to avoid being "paired" in the 2021 Plan with a Democratic Congressional incumbent in the Seventh Congressional District.

Finally, although a cold record does not always reflect the nuances of a witness's demeanor, it is apparent from the words Dr. Lichtman used that he was dismissive of the use of a normative or legal framework to evaluate the "structure," as he called it, of redistricting. He began his discussion by referring to legal "machinations" in referring to his testimony discussing a challenge by the plaintiffs in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) against the redistricting plan of Pennsylvania for Congress, and ended with what amounted to a refrain of an "apologist" of the work of politicians.

There is no question that map-making is an extremely difficult task, but like most of the complexities of the modern world, justifications of map-making must be evaluated by the application of principles—here, the organic law of our State, its Constitution and Declaration of Rights.

Analysis and Conclusion

Application of the legal tenets that survived the Motion to Dismiss, as articulated heretofore, to the Joint Stipulations, Judicial Admissions and the stipulation orally presented by the State at the end of the trial, with consideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an "outlier," an extreme gerrymander that subordinates constitutional criteria to political considerations. In concluding that the 2021 Congressional Plan is unconstitutional under Article III, Section 4, either on its face or through a nexus to the Free Elections Clause, MD. CONST. DECL. OF RTS. art. 7, the trial judge recognized that the 2021 Plan embodies population equality as well as contiguity, as Dr. Brunell acknowledged. The substantial deviation from "compactness" as well as the failure to give "due regard" to "the boundaries of political subdivisions" as required by Article III, Section 4, are the bases for the constitutional failings of the 2021 Plan, which has been challenged in its entirety.

In evaluating the criteria of compactness required under Article III, Section 4, it is axiomatic that it and contiguity, but particularly compactness, "are intended to prevent political gerrymandering." *1984 Legislative Districting*, 299 Md. at 675 (citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87 (1981); *Preisler v. Doherty*, 365 Mo. 460 (1955); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Opinion to the Governor*, 101 R.I. 203 (1966)). With respect to compactness, while it is true that our cases do not "insist that the most geometrically compact district be drawn," *In re Legislative Districting of State*, 370 Md. at 361, we recognized that compactness must be evaluated by a court in light of all of the constitutional requirements to

determine if all of them "have been fairly considered and applied in view of all relevant considerations." *Id.* at 416.

The task of evaluating whether "compactness" and other constitutional requirements have been fairly considered by the Legislature is informed by the various analyses performed by Mr. Trende. Initially, by application of each of the four "most common compactness metrics," *i.e.*, the Reock score; the Polsby-Poppper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 Plan are "quite non-compact" compared to prior Maryland Congressional maps and to other Congressional maps in other states based upon a comparison of the scores achieved with reference to the four metrics. It is notable that the 2021 Plan reflects compact scores that range from a "limited" number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to "very poorly relative to anything drawn in the last fifty years in the United States."

The simulations conducted by Mr. Trende, of the type already accepted in North Carolina and Pennsylvania, when infused with the same constitutional criteria as embodied in Article III, Section 4 and allowing for two Voter Rights districts, result in only .14% or 134 maps of the 95,000 reflected produce a victory for President Biden in all eight Congressional districts in Maryland, based upon predictive Presidential votes, as acknowledged by the experts. Importantly, Exhibit 11-C, the Gerrymandering Index exhibit, which embodies all of the constitutional mandates and two Voting Rights districts, reflects that the 2021 Congressional Plan is a "gross outlier", as Mr. Trende opined, "such that of the 95,000 maps under consideration, only one map had a Gerrymandering Index larger than the 2021 Plan. It is

extraordinarily unlikely that a map that looks like the 2021 Plan could be produced without extreme partisan gerrymandering." As a result, the notion that the 2021 Plan is compact is empirically extraordinarily unlikely, a conclusion that utilizes comparative metrics and data throughout the various states. The notion that a plan must pass an absolute standard, as Dr. Lichtman suggested, is without merit, for the test is whether the constitutional conditions, especially compactness, are met.

With respect to county splits, it is clear that the number of crossings over county lines are 17 in the 2021 Plan, which is a historically "high number" of splits since 1972, only less than the 21 splits in 2002 and 2012. The importance of the due regard to political subdivisions language is a reflection of the importance of counties in Maryland, as recognized in *Md. Comm. for Fair Representation v. Tawes*, 229 Md. 406 (1962):

> The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire . . . Indeed, Kent County had been established by Claiborne before the landing of the Marylanders . . . We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. . . . While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

Id. at 411–12. In dissent in *Legislative Redistricting Cases*, 331 Md. 574 (1993), Judge Eldridge reiterated the pivotal governing function of counties:

> Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, "[t]he counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union."
>
> The Maryland Constitution itself recognizes the critical importance of counties in the very structure of our government. See, e.g., Art. I, § 5; Art. III, §§ 45, 54; Art. IV, §§ 14, 19, 20, 21, 25, 26, 40, 41, 41B, 44, 45; Art. V, §§ 7, 11, 12; Art. VII, § 1; Art. XI; Art. XI–A; Art. XI–B; Art. XI–C; Art. XI–D; Art. XI–F; Art. XIV, § 2; Art. XV, § 2; Art. XVI, §§ 3, 4, 5; Art. XVII, §§ 1, 2, 3, 5, 6. After the State as a whole, the counties are the basic governing units in our political system. Maryland government is organized on a county-by-county basis. Numerous services and responsibilities are now, and historically have been, organized at the county level.
>
> The boundaries of political subdivisions are a significant concern in legislative redistricting for another reason: in Maryland, as in other States, many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties. *See Reynolds v. Sims*, 377 U.S. 533, 580–[]81, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506, 538 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions").

Id. at 620–21.

Due regard for political subdivision lines is a mandatory consideration in evaluating compliance with constitutional redistricting, as Chief Judge Bell noted in the 2002 Legislative districting case, *In re Legislative Districting of State*, 370 Md. at 356, such that fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed. To say that the 2021 Plan is four splits better than the 2002 and 2012 Plans (which have never been examined in a State court, let alone sanctioned), and so must be lawful, is a fictitious narrative, because it is inherently invalid; in 2002, Chief Judge Bell, writing on behalf of the Court, rejected similar justifications offered by the experts on behalf of the Defendants in this case. "There is simply an excessive number of political subdivision crossings in this redistricting plan .

. . ." The State has failed to meet its burden to rebut the proof adduced that the constitutional mandate that due regard to political subdivision lines was violated in the 2021 Plan.

To the extent that Dr. Lichtman and Mr. Willis discussed and prioritized a myriad of considerations that Dr. Lichtman called "political" and Mr. Willis called "reasonable factors," would require that this Court accept their implicit bias that constitutional mandates can be subordinated to politics and/or "reasonable factors." Again, Chief Judge Bell, more eloquently and precedentially than this judge could, addressed the same justifications offered by the State, then and now, when in 2002, he said,

> [b]ut neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution "trumps" political considerations. Politics or non-constitutional considerations never "trump" constitutional requirements.

Id. at 370.

Mr. Trende's analysis of the 2021 Plan with respect to its extreme nature and its status as an "outlier" reflects the realities of the 2021 Plan: an "outlier means a map that would have a less than five percent chance . . . of being drawn without respect to politics" and with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier," therefore, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know,

with compactness and respect for county lines, .00001 percent. That's extreme." This trial judge agrees; the 2021 Plan is an outlier and a product of extreme partisan gerrymandering.

With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.

With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at trial, proved that the 2021 Plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria," *Findings of Fact*, *supra*, ¶ 121, accomplished by the party in power, to suppress the voice of Republican voters. The right for all votes of political participation in Congressional elections, as protected by Article 7, was violated by the 2021 Plan in its own right and as a nexus to the standards of Article III, Section 4.

Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan. The application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the State presented under a "compelling interest" standard. It is clear from Mr. Trende's testimony that Republican voters and candidates are substantially adversely impacted by the 2021 Plan. The State has not provided a "compelling state interest" to rationalize the adverse effect.

Alternatively, the same rationale holds true for the violation of Article 40 of the Maryland Declaration of Rights, the Free Speech Article, which requires a "strict scrutiny" analysis because a fundamental right is implicated, a citizen's right to vote. In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted

and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.

Finally, with respect to the evaluation of the 2021 Plan through the lens of the Constitution and Declaration of Rights, it is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those governing reside. The 2021 Congressional Plan is unconstitutional, and subverts that will of those governed.

As a result, this Court will enter declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional. A separate declaratory judgment will be entered as of today's date.

3/25/2022
Date

LYNNE A. BATTAGLIA
Senior Judge

CERTIFICATE OF SERVICE

I, Constance Van Kley, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 11-29-2023:

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