

IN THE MATTER OF  
2012 LEGISLATIVE  
DISTRICTING OF THE STATE

IN THE  
COURT OF APPEALS  
OF MARYLAND

September Term, 2012

VARIOUS PETITIONS

Misc. Nos. 3, 4, and 5

**DECLARATION OF BRUCE E. CAIN**

I, Bruce E. Cain, being competent to testify, hereby affirm under the penalties of perjury and upon my personal knowledge as follows:

1. I am the Heller Professor of Political Science at UC Berkeley and the Executive Director of the UC Washington Center. I have written a book on redistricting (*The Reapportionment Puzzle*), co-authored another (*Congressional Redistricting*) and co-edited a third (*Party Lines*). I have also written numerous articles and book chapters about the Voting Rights Act, racial and ethnic politics, and voting behavior as well as redistricting. I have worked as a redistricting consultant for local and state governments and served as Court Master for a three judge district panel in Arizona in 2002. I have attached a copy of my c.v.

2. Maryland’s Enacted Plan must meet both federal and state requirements. As with Congressional lines, this means that the 47 Senate and 141 House of Delegate District boundaries must be equally populated and comply with the Voting Rights Act §2. However, in addition, Article III § 4 of Maryland’s constitution requires that “each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population” and that “due

regard shall be given to natural boundaries and the boundaries of political subdivisions.” I have reviewed the Enacted Plan as it applies to both the State Senate and the House of Delegates as proposed by the Governor and adopted by the Maryland state legislature. I believe that it comports very well with both state and federal law. In the sections that follow, I will review its compliance with federal criteria first and then with Maryland’s state requirements.

3. While the principle of “one person, one vote” applies to elected districts at all levels of U.S. government, it is applied more flexibly to state legislatures than the U.S. Congress. This is because the Congressional standard derives from Article I § 2, the Apportionment Clause, while the state legislative requirement evolved under the Equal Protection Clause of the Fourteenth Amendment. Congressional lines must adhere to strict population equality, but the Court allows state legislative district populations to vary between plus or minus 5% from the ideal population for a total of 10% (see *Brown v Thomson* 462 U.S. 835, 842-43 (1983)). The ideal population for a State Senate District and triple member House of Delegate Seat using Maryland’s Adjusted 2010 Census figures is 122,813. Under the Enacted Plan, the smallest Senate seat population is 117,105 and the largest is 128,611. The percentage deviations from the ideal population range from minus 4.6% to plus 4.6%. The House of Delegates contains single, double and triple member configurations. The ideal population for the single member seats is 40,938, the double member seat is 81,875 and the triple member seat is 122,813. The triple member districts are a subset of the Senate districts and thus fall within that range. The single member seats range in population from 39,212 to 42,862 and their deviations from the ideal population from minus 4.2% to plus 4.7%. The double member seats range from 78,020 to 85,707 and their deviations from the ideal population range from minus 4.7% to plus 4.7%. In short, all the populations are within the legally prescribed plus or minus 5% range.

4. The Houser Petitioners claim there is systematic bias against rural and Republican seats in the district population deviations. To begin with, their distinction between urban and rural counties is misleadingly simplistic as many of the rural counties they refer to have heavy urban concentrations. The Maryland Planning Department has a chart on its website entitled *Maryland’s Urban and Rural Population by Jurisdiction*. It shows, for example, that Charles County has an urban population of 70.4% and Wicomico County has an urban population of 74.2%. Indeed, there are only three Maryland counties where the percentage of urban population as classified by the Census Bureau is below 40%: Garrett, Kent and Caroline counties. Given the pervasive mixture of urban and rural

characteristics throughout Maryland, one cannot look at county level urban-rural classifications as a valid measure of rural and urban populations.

5. Moreover, a closer examination of the district population deviations in the Enacted Plan reveals that the primary variation is between minority areas protected by the Voting Rights Act and those that are not, not between Democratic and Republican or urban and rural populations. There is an average difference in population of almost 6,000 voters between the majority African-American Voting Age Population (“VAP”) districts (118,796) versus the other seats (124,191) in the State Senate Districts. There is a similar pattern in the majority African-American VAP versus other seats in the triple member (123,763 v. 118,346), double member (82,935 v. 79,933) and single member (41,702 v. 40,794).

6. To begin with, I note that these allowable population differences are quite small in terms of likely voters, especially in the cases of the single and double member Delegate districts. Discounting for non-voters, they are unlikely to affect electoral outcomes in any meaningful way. Secondly, given the history of past census efforts, there was ample reason to suspect that the racial and ethnic minority areas would be under-counted and justification for compensating for this with the population variances. The Census Bureau’s May 2 Memorandum confirms that suspicion. The areas of highest racial minority population concentrations had the highest estimated undercount: Baltimore City (2.14 %) and Prince George’s County (2.3%). The State was mindful of Voting Rights Act related numerical benchmarks (e.g. creating 50% Black voting age population districts). Achieving those benchmarks while paying due regard to geographical (e.g. county borders) and reasonable compactness constraints (as mandated by the Voting rights act) often leads to stretching the minority population efficiently while staying within the total population deviation guidelines. Thirdly, the precedent for the current pattern of lower population deviations for minority areas was set by the Court of Appeals in its 2002 Maryland redistricting map. The average population for majority African-American State Senate Districts in the 2002 plan was 109,293 and for all others 113,609. The same point is clear from maps 1 through 4, which are included in the appendix to this affidavit. They map the population deviations for House and Delegate and State Senate districts for both the 2002 and 2012 plans. The patterns of allowable deviations from the ideal population are visibly quite similar. Since the State’s 2012 Enacted Plan was building on the principles of the Court’s plan last time, the similarity is not surprising. Lastly, allowing slightly lower district populations in heavily concentrated racial minority areas in order to attain representation diversity while paying due regard to state criteria is justifiable given that racial minority populations statewide are projected to grow faster than

Maryland's non-white population. Maryland's Department of Planning projects that the white population will shrink over the decade from 3,359,284 to 3,311,925 while the nonwhite population in many areas will grow from 2,414,268 to 2,904,231.

7. Once the majority minority districts are accounted for, there is no partisan pattern in the population deviations of the districts in the Enacted Plan. This can be seen in Figures 1 and 2, which plot the percent deviation from the ideal population against the percent registered Democrat for the all the State Senate seats (Figure 1) and then the *majority nonwhite* VAP State Senate seats: in short, leaving out the majority minority districts. A strong relationship indicating bias against the Republicans would align along the diagonal from the upper left hand corner to the lower right in Figure 2. The correlation is weak to begin with, but once the majority minority districts are taken out of the sample, there is no apparent relationship between the population deviations and Democratic registration as there would be if there was purely partisan discrimination.

8. Maryland is not covered by §5 of the Voting Rights Act, but all U.S. states must comply with §2. At the Congressional level, the African-American but not the Latino or Asian-American populations satisfied the first prong of the Gingles criteria—i.e. that a racial or ethnic minority must be sufficiently large and compact such that it would constitute a majority of voting age population of a proposed district. Similarly, I determined that African-Americans but not Latinos and Asian-Americans satisfied the first Gingles precondition for Senate seats as created by the Enacted Plan. However, Latinos in addition to African-Americans met the first Gingles precondition for a single member House of Delegate seat, but Asian-Americans still did not. After an extensive analysis of races at several levels of Maryland government over the last decade, I determined that African-Americans and Latinos as separate groups (but not as a formal coalition together) met the threshold for a cohesive group, the second Gingles prong. The level of apparent racial bloc voting by non-Hispanic White voters varied significantly by particular contest, with some contests displaying little or no racial bloc voting. It seems prudent nonetheless to keep the majority African-American seats in those areas where there are reasonably compact concentrations.

9. Apart from the majority black and Latino VAP legislative districts, minority political influence is enhanced through majority minority VAP and influence districts (i.e. significant but less than 50% VAP concentrations) although the latter is not required by the Voting Rights Act and the former is only required if the groups meet the Gingles preconditions. For the purposes of this analysis, I define

influence seats as having minority group VAP concentration of between 20% and 49%. Reviewing the impact of the Enacted Plan, I have concluded the following about each of the minority groups.

10. The Enacted Plan increases the number of majority African-American VAP Senate seats from 11 to 12. In addition, there are 11 African American influence Senate seats, including 7 that are between 20-29% and 4 that are between 30-39% African-American VAP. The Enacted Plan creates 37 majority African American VAP House of Delegates seats. In addition, there are 34 other influence Delegate districts, including 23 that are 20-29% African American VAP and 11 that are 30-39%.

11. Latinos do not yet have sufficient population in a reasonably compact area to satisfy the first Gingles precondition for a State Senate district. However, the Enacted Plan provides for 5 Hispanic VAP influence Senate seats: 4 between 20-29% and 1 between 30-39% Hispanic VAP. In the House of Delegates, the Enacted Plan creates Maryland's first majority Hispanic VAP district 47B (60.5% Hispanic VAP). In addition, there are a total of 12 Hispanic influence Delegate seats between 20-29% Hispanic VAP.

12. Asian-Americans do not satisfy the first Gingles prong for either the Senate or House of Delegates. The Enacted Plan nonetheless was able to create 1 Asian-American VAP influence seat for the Senate and 4 for the House of Delegates (all between 20-29% Asian-American VAP).

13. As a reflection of Maryland's growing racial and ethnic diversity, the Enacted Plan contains 5 majority minority Senate VAP districts in addition to the 12 majority African American VAP districts. At the House of Delegates level, there are 5 three member and 1 single member majority minority VAP districts.

14. In short, the district architecture of the State's Enacted Plan for both Houses of the Maryland State Legislature reflects and responds to the state's increasingly diverse racial and ethnic population mix. The Enacted Plan certainly meets the letter and spirit of the Voting Rights Act. The new 44<sup>th</sup> District, for instance, maintains African-American representation in the face of population decline in Baltimore City by uniting African-American adjacent neighborhoods across the city/county border. Petitioners Delores Kelley and James Brochin argue that this district violated the state requirement of due regard for jurisdictional boundaries when it drew Legislative District 44. But it is very clear that the State's intent was to ensure fairness and greater representation to the African-American population by uniting adjoining African-American neighborhoods in Baltimore City and

Baltimore County. This properly reflects the priority of federal over state redistricting criteria.

15. Maryland’s Constitution requires that in addition to being equally populated, its state legislative districts must be contiguous and compact, and show due regard for natural boundaries and the boundaries of political subdivisions. In general, I note that the Enacted Plan built upon the solid foundation established by the Court as it drew the boundaries in the previous decade. In several important instances, the Enacted Plan exceeds the Court’s benchmark standards from the previous decade.

16. To understand and apply the “due regard” provision of Art. III, §4, I reviewed the Court of Appeals of Maryland’s most recent redistricting decision, *In the Matter of Legislative Redistricting*, 370 Md. 312 (2002). In that case, the Court reviewed the recent history of the interpretation of the provision. The Court’s opinion recounts that in 1992 there were “eighteen shared senatorial districts.” *Id.* at 364. The Court reviewing that plan cautioned that the plan came “perilously close to running afoul of” the due regard provision.” *Id.* at 363 (quoting *Legislative Redistricting Cases*, 331 Md. 574, 614 (1993)). The 2002 legislative redistricting plan enacted by the General Assembly had “twenty-two inter-jurisdictional, or shared, senatorial districts, an increase of four.” *Id.* at 364. The Court rejected the 2002 plan, finding that “[t]here is simply an excessive number of political subdivision crossings.” *Id.* at 368. As a result, the Court of Appeals drew its own legislative redistricting plan which had fourteen “shared senatorial districts.” *Id.* at 375.<sup>1</sup>

17. Using the Court’s methodology of counting shared senatorial districts, I have reviewed Maryland’s 2012 Enacted Plan and determined that it easily satisfies the constitutional standards developed by the Court. The Enacted Plan has 13 shared senatorial districts—one fewer than in the Court’s own 2002 plan:

<u>District</u>	<u>Counties Affected</u>
District 1	Washington/Allegany
District 4	Carroll/Frederick

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<sup>1</sup> It is important to recognize that a judicial drawn map is subject to more rigorous application of constitutional standards as a legislatively-drawn map may take into account traditional redistricting goals including partisan aims and protection of incumbents, while a judicially-drawn plan may not. *Id.* at 354 (“It is different, however, when the judiciary is required to undertake to promulgate a districting plan. In that circumstance, politics or political considerations have no role to play”).

<u>District</u>	<u>Counties Affected</u>
District 7	Baltimore/Harford
District 9	Carroll/Howard
District 12	Baltimore/Howard
District 21	Anne Arundel/Prince George's
District 27	Prince George's/Calvert/Charles
District 29	Calvert/St. Mary's
District 35	Cecil/Harford
District 36	Kent/Cecil
District 37	Caroline/Dorchester
District 38	Worcester/Wicomico
District 44	Baltimore City/Baltimore County

18. Another way of counting the border crossings is to take the Court's 2002 map, with its 14 boundary crossings, and identify the changes made in drawing the Maryland's 2012 Legislative map. Here are those changes:

<u>District</u>	<u>Counties Affected</u>	<u>Action</u>
District 3	Frederick/Washington	Removed
District 5	Baltimore/Carroll	Removed
District 27	Charles/Prince George's	Added
District 29	Charles/St. Mary's	Removed
District 34	Harford/Cecil	Removed
District 35	Harford/Cecil	Added
District 44	Baltimore City/Baltimore County	Added

Thus, Maryland's 2012 Enacted Plan has one fewer border crossing than the Court's 2002 map.

19. Although the Court has never described standards for crossings of municipal borders, the State's 2012 Enacted Plan gave great deference to these borders as well, reducing the total number of municipal boundary crossings and specifically reuniting certain municipalities.

<b>Municipalities Split in both 2002 and 2012</b>	<b>Municipalities Split in 2002 but not in 2012</b>	<b>Municipalities split in 2012 but not 2002</b>
Cambridge	Aberdeen	
Cumberland	Berwyn Heights	
East New Market	College Park	
Hurlock	Denton	
Hyattsville	District Heights	
Leonardtown	Frederick	
Salisbury	Gaithersburg	
	Greenbelt	
	Hagerstown	
	New Carrollton	
	North East	
	Perryville	
	Port Deposit	
	Riverdale Park	

20. Thus, the 2012 Enacted Plan reduces the total number of divided municipalities from 21 to 7 without creating a single new divided municipality. Some of these were indeed difficult. For example, the Enacted Plan keeps the entire City of Elkton in District 36 and the entire City of Glenarden in District 24. Despite its growth, the entire City of College Park is moved into District 21. The Town of Mt. Airy is kept whole in District 4 (despite that Mt. Airy is itself divided by the Frederick/Carroll County boundary). The City of Aberdeen is kept whole even though the City's odd border causes an odd, dog-shaped border intrusion between Districts 34A and 35B. The Town of Morningside, despite its bizarre shape is kept in a single district (and that accounts for some of District 24's odd borders).

21. The due regard clause, like all redistricting criteria, is necessarily an aggregate guideline: in other words, because trade-offs between the integrity of any given city or county line and other federal and state criteria are inevitable, a plan must be judged by its overall effects, not by any specific instance of a divided local jurisdiction. Petitioners Howard et al. believe that the Enacted Plan "was drawn with little regard to boundaries of political subdivisions" as required by the Maryland Constitution because some district boundaries cross the Carroll county boundaries. Of course, numerous Maryland cities and counties have enough

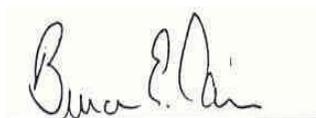
population to constitute one or more self-contained seats, but the important point is that it is not possible to draw districts lines without splitting some communities due to the constraints of population equality and meeting other federal and state criteria. Petitioners Kelley and Brochin make a similar complaint about the Baltimore City and County border, disregarding the obvious point that the Enacted Plan was attempting to preserve an important racial community of interest and to comply with the Voting Rights Act. There is no reason to privilege Carroll or Baltimore counties over other counties in the state. The proper measure of good faith and due regard is the overall impact of the plan, not the impact on any given jurisdiction. From that perspective, the Enacted Plan has equaled or exceeded the court's effort ten years ago with respect to jurisdictional splits.

22. Mapping the Senate and House of delegate district boundaries, I found that the boundaries were indeed contiguous. The two most common compactness scores are the Polsby-Popper (i.e. a measure of the smoothness of the boundary) and Roeck (i.e. a measure of elongation and dispersion) measures respectively. Higher scores indicate more compactness. The new mean scores for the State Senate lines (PP=.18, R=.37) are comparable to the Court's 2002 scores (PP=.22, R= .37). The same is true for the House of Delegates. The Enacted Plan mean scores are (PP=.18, R=.37) and the Court's 2002 scores were (PP=.22, R= .38). These differences are trivial. The mean compactness scores for the Maryland's Enacted Plan are well within a standard deviation of the Court's 2002 scores, which means that the differences are not statistically significant.

23. In sum, the State's Enacted Plan builds upon the baseline districts established by the Court last decade to accommodate growth and populations shifts. The Enacted Plan meets the federal equal population requirements, increases opportunities for ethnic and racial representation, and complies with the State's Constitutional requirements of compactness, contiguity and due regard for political subdivision boundaries. Maryland's Enacted Plan compares very favorably with the good government efforts of the courts and citizen commissions in other states.

24. I declare that the contents of the foregoing paper, its attachments and appendices, are true and accurate.

Executed on June 5, 2012.

A handwritten signature in black ink, appearing to read "Bruce E. Cain", is written on a light-colored rectangular background.

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Bruce E. Cain

Figure 1

SCATTERPLOT OF POPULATION DEVIATIONS BY PERCENT DEMOCRATIC  
REGISTRATION

ALL SENATE DISTRICTS

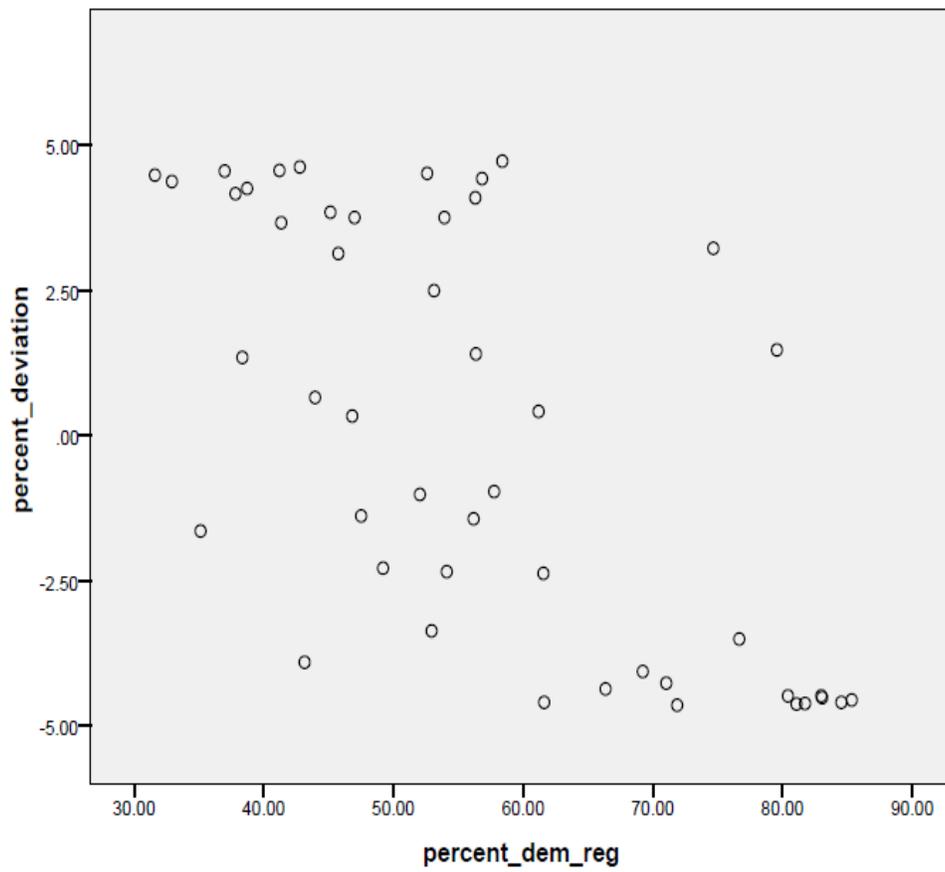


FIGURE 2

SCATTERPLOT OF POPULATION DEVIATIONS BY PERCENT DEMOCRATIC  
REGISTRATION

(MAJORITY NONWHITE SENATE DISTRICTS ONLY)

