

IN THE COURT OF APPEALS OF
OF MARYLAND

IN THE MATTER OF
2022 LEGISLATIVE
DISTRICTING OF THE STATE

COA-MISC-0025-2021

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MAGISTRATE

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PETITIONERS' EXCEPTIONS

Petitioners have asserted constitutional challenges under Article III, § 4 of Maryland's Constitution to certain legislative districts enacted as part of the Legislative Districting Plan of 2022 (the "Plan"). On April 4, 2022, the Special Magistrate issued a Report (the "Report") recommending that the Court deny Petitioners' challenges to the Plan.

Petitioners respectfully submit the following exceptions to the Report:

1. The Report erroneously recommends denying Petitioners' challenges under Article III, § 4 of Maryland's Constitution to Districts 12, 21, 22, 23, 24, 33, and 47. Petitioners presented compelling evidence that these districts are not compact and that partisan political considerations led to District 33's final shape. Respondent, in turn, failed to meet its burden of presenting sufficient evidence rebutting these claims. The Report misapplied the burden of proof applicable to Petitioners' claims and reached a conclusion contrary to governing legal principles.
2. The Report failed to address Petitioners' challenges to District 27. Petitioners presented compelling evidence that District 27 violates Article III, § 4's requirements that legislative districts consist of adjoining territory and give due regard for natural boundaries and

the boundaries of political subdivisions. Respondent failed to present sufficient evidence rebutting these challenges.

Petitioners also respectfully submit the following exception to a discovery order issued by the Special Magistrate:

3. The Special Magistrate erred when he ruled that the doctrine of legislative privilege barred Petitioners from conducting discovery regarding why the challenged districts were drawn as they were.

Petitioners respectfully request that the Court: (1) sustain Petitioners' exceptions; (2) find that Districts 12, 21, 22, 23, 24, 27, 33, and 47 fail to meet the requirements of Article III, § 4 of Maryland's Constitution; and (3) find that the doctrine of legislative privilege does not bar Petitioners from conducting discovery regarding why the challenged districts were drawn as they were.

STATEMENT OF THE FACTS

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. (Joint Stip. ¶ 6.)

The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members

of Maryland's General Assembly. 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. (*Id.* ¶ 7.)

On January 7, 2022, after conducting public hearings across the State, the LRAC adopted the Plan. Both Republican members of the LRAC opposed the Plan. (*Id.* ¶ 10.)

As detailed in the Argument Section below, the Plan created numerous legislative districts that violate the requirements of Article III, § 4 of Maryland's Constitution. Specifically, Districts 12, 21, 22, 23, 24, 33, and 47 violate Article III, § 4's mandate that all legislative districts shall be compact. Additionally, District 27 violates Article III, § 4's mandates that all legislative districts be contiguous and give due regard for natural boundaries and the boundaries of political subdivisions.

On January 12, 2022, the Plan was submitted to the General Assembly as Senate Joint Resolution No. 2 and House Joint Resolution No. 2. (*Id.* ¶ 11.) On January 27, 2022, the General Assembly enacted the Plan into law. All 32 Democratic members of Maryland's Senate voted in favor of the Plan. All 14 Republican members of the Maryland Senate present voted in opposition to the

Plan.¹ In the House of Delegates, 95 of the 96 Democratic members of the House of Delegates present voted in favor of the Plan.² All 42 Republican members of the House of Delegates voted in opposition to the Plan. (*Id.* ¶ 12.)

On February 10, 2022, Petitioners filed challenges to numerous legislative districts enacted under the Plan. Among others, Petitioners challenged Districts 12, 21, 22, 23, 24, 27, 33, and 47 because, as explained above, those districts violated various requirements of Article III, § 4 of the Maryland Constitution. Petitioners further alleged that political considerations trumped constitutional requirements in the creation of these districts.³

After Respondent filed a motion to dismiss and the Special Magistrate issued a scheduling order, Petitioners and Respondent engaged in a cooperative exchange of discovery. During that process, Petitioners sought

¹ One Republican member of the Senate was absent (excused) at the time of the vote. (Joint Stip. ¶ 12 n.1.)

² Three Democratic members of the House of Delegates were absent (excused) at the time of the vote. One Democratic member of the House of Delegates cast no vote. (Joint Stip. ¶ 12 n.2.)

³ Petitioners also challenged Districts 7, 9, 25, 31, and 42. Based on information learned in discovery, and a discovery ruling issued by the Special Magistrate on the issue of legislative privilege, which is discussed in detail below and which materially limited Petitioners' ability to prove certain of their claims, Petitioners did not present evidence concerning these districts during the evidentiary hearing before the Special Magistrate.

discovery from Respondent necessary to establish their claims that partisan political considerations played a leading role in the creation of certain legislative districts under the Plan. Specifically Petitioners sought discovery concerning: (1) who was responsible for the actual drawing or construction of the specific legislative districts Petitioners challenged; (2) if a computer program was used, what criteria was the program instructed to use to draw the legislative districts Petitioners challenged; (3) who provided instructions to the actual map drawer(s) regarding what factors or other criteria were to be used in drawing the legislative districts Petitioners challenged; and (4) what specific instructions were given to the map drawer(s) regarding the various legislative districts Petitioners challenged. (Am. Order of the Special Mag. Regarding Discovery at 4-5.) Respondent refused to provide this information to Petitioners, claiming that the information was protected from disclosure by legislative privilege. (*Id.*)

Petitioners and Respondent presented their dispute concerning the applicability of legislative privilege to Petitioners' requested discovery to the Special Magistrate. The Special Magistrate ultimately sided with Respondent, finding that legislative privilege barred Petitioners from seeking the above discovery. (*Id.* at 9.) The Special Magistrate's ruling thus denied Petitioners access to critical evidence supporting their claims that partisan political

considerations played a leading role in the creation of certain legislative districts under the Plan.

On March 23 and 24, 2022, the Special Magistrate held an evidentiary hearing concerning Petitioners' challenges to the Plan (as well as challenges presented by other petitioners). During that hearing, Petitioners called four witnesses and introduced 18 exhibits (not including the parties' joint stipulation) in support of their challenges. (*See generally* <https://mdcourts.gov/coappeals/highlightedcases#2022districting>.) Even without access to the discovery Respondent withheld under a claim of legislative privilege, Petitioners presented compelling evidence (set forth in detail in the Argument Section below) concerning the ways in which Districts 12, 21, 22, 23, 24, 27, 33, and 47 violated Article III, § 4 of Maryland's Constitution. Specifically, Petitioners' evidence demonstrated that: (1) Districts 12, 21, 22, 23, 24, 33, and 47 were not compact and that partisan political consideration played a leading role in the creation of District 33; and (2) District 27 was not contiguous and during its creation due regard was not given for natural boundaries or the boundaries of political subdivisions. Respondent failed to present sufficient rebuttal evidence to any of these claims.

On April 4, 2022, the Special Magistrate issued the Report. Despite the extensive evidence Petitioners presented and Respondent's failure to present sufficient rebuttal evidence, the Report recommended that the Court deny

Petitioners' challenges. (Report at 26-27.) The Report based its recommendation on the following brief analysis:

The evidentiary hearing focused almost entirely on one aspect of redistricting – that the districts be “compact.” It is clearly an important element and, in some instances, may be dispositive because of its nexus to gerrymandering. But it is not the only element, and historically has been regarded as being subject to other considerations – predominantly equality of population, the Federal Voting Rights Act and other supervening Federal requirements, contiguity, and, although on its own not a Constitutional consideration, trying to keep people in their home districts where they are closer to the local needs and politics. Thus, in *Matter of Legislative Districting*, 370 Md. 312, 361 (2002) – the case in which the Court of Appeals drew the redistricting plan – the Court acknowledged:

“that the redistricting process is a political exercise for determination by the legislature and, therefore, that the presumption of validity accorded districting plans applied with equal force to the resolution of a compactness challenge [citing *In re Legislative Districting, supra*, 299 Md. 681, 688]. Thus, we instructed, ‘the function of the courts is limited to assessing whether the principles underlying the compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations, and not to insist that the most geometrically compact district be drawn.’”

There has been no unanswered assertion here that the LRAC Plan is in violation of the equality of population requirement or the Voting Rights Act. A comparison of the current plan with the one it replaces shows that an attempt was made to keep voters in their current districts, with which they are familiar, and to avoid crossing political or natural boundary

lines except when required to achieve or maintain population equality. Suggestions in the petitions that political considerations played a role were all on “information and belief” and were not supported by any compelling evidence.

(*Id.*)

ARGUMENT

I. The Requirements of Article III, § 4

Article III, § 4 of Maryland’s Constitution provides: “Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.” These requirements are mandatory. *In re Legislative Districting of the State*, 370 Md. 312, 356 (2002). They “cannot be subordinated to justifications not mandated by the Federal or State Constitutions.” *In re 2012 Legislative Districting of the State*, 436 Md. 121, 135 (2013).

Thus, while numerous factors not listed in Article III, § 4 may be considered when drawing legislative districts, the mandates of Article III, § 4 must be met. As this Court has explained:

But 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.

In re Legislative Districting of the State, 370 Md. at 370.

The requirements of Article III, § 4 are mandatory because they protect important interests. “[T]he contiguity and compactness requirements, and particularly the latter, are intended to prevent political gerrymandering.” *In re Legislative Districting of State*, 299 Md. 658, 675 (1982). “The contiguity requirement mandates that there be no division between one part of a district’s territory and the rest of the district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory.” *Id.* at 675-76. Compactness requires “a close union of territory (conducive to constituent-representative communication).” *Id.* at 688.

The “due regard” requirement is “integrally related to the compactness and contiguity requirements” and is intended “to preserve those fixed and known features which enable voters to maintain an orientation to their own territorial areas.” *Id.* at 681. The “due regard” requirement also recognizes the critical role that Maryland’s counties play in the governance of the State.

In re Legislative Districting of the State, 370 Md. at 357-60. In sum, the “due regard provision works to preserve local political interests, insofar as it ensures geographically concurrent political representation, and acts as a deterrent to the gerrymandering of legislative districts.” *In re 2012 Legislative Districting of the State*, 436 Md. at 152.

Critically for purposes of these exceptions, once a petitioner presents “compelling evidence” in support of a challenge under Article III, § 4, “the State has the burden of producing sufficient evidence to show that the districts are contiguous and compact, and that due regard was given to natural and political subdivision boundaries.” *Id.* at 137-38. Additionally, while it is not necessary “that the most geometrically compact district be drawn,” the State must show that “the principles underlying compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations.” *In re Legislative Districting of the State*, 370 Md. at 361.

II. Specific Exceptions to the Report

A. Exception 1

At the evidentiary hearing, Petitioners presented compelling evidence that Districts 12, 21, 22, 23, 24, 33, and 47 are not compact. In light of just how non-compact these districts are, it is clear that the constitutional requirement of compactness was not fairly considered or applied in their creation. Respondent, moreover, failed to present sufficient evidence to rebut

these challenges. The Report nonetheless recommended denying Petitioners claims. In doing so, the Report misapplied the applicable burden of proof and reached a conclusion contrary to governing legal principles.

- 1. Petitioners' Compelling Evidence of Lack of Compactness**

- a. Recognized Compactness Measurements**

The Report correctly summarized the importance of compactness in redistricting:

Compactness has become a central issue in redistricting because the lack of it is regarded as evidence of impermissible gerrymandering, which itself has become much more of a central legal (not just political) issue in redistricting. With that new significance has come a bevy of experts, mostly from academia, with varying ways of statistically measuring compactness that have been accepted by the courts in redistricting cases.

(Report at 4.)

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

The first three metrics are based on comparing a drawn electoral district to a circle, which is the most compact shape. The Reock score looks at the ratio of the area of the district to the area of the smallest circle that would enclose the

district (also known as a “minimum bounding circle”). A “perfect” Reock score is 1, while a zero is a theoretical perfectly non-compact district. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:34:00-1:37:40; Pet. Ex. 14A.)⁴

The Polsby-Popper score looks at the ratio of the area of a district to the area of a circle that has the same perimeter as the district. A “perfect” Polsby-Popper score is 1, while a theoretical perfectly non-compact district would score a zero. In a state like Maryland with jagged coastlines and inlets, the Polsby-Popper scores will naturally be lower than in other similarly situated states. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:37:45-1:39:00; Pet. Ex. 14B.)

The Inverse Schwartzberg score takes the perimeter of the district and compares it to the perimeter (circumference) of a circle that has the same area as the district. By taking the inverse (dividing the number “1” by this score), the scores are, like the above scores, scaled from 0 to 1, with 1 representing a perfectly compact district. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:39:05-1:40:00; Pet. Ex. 14C.)

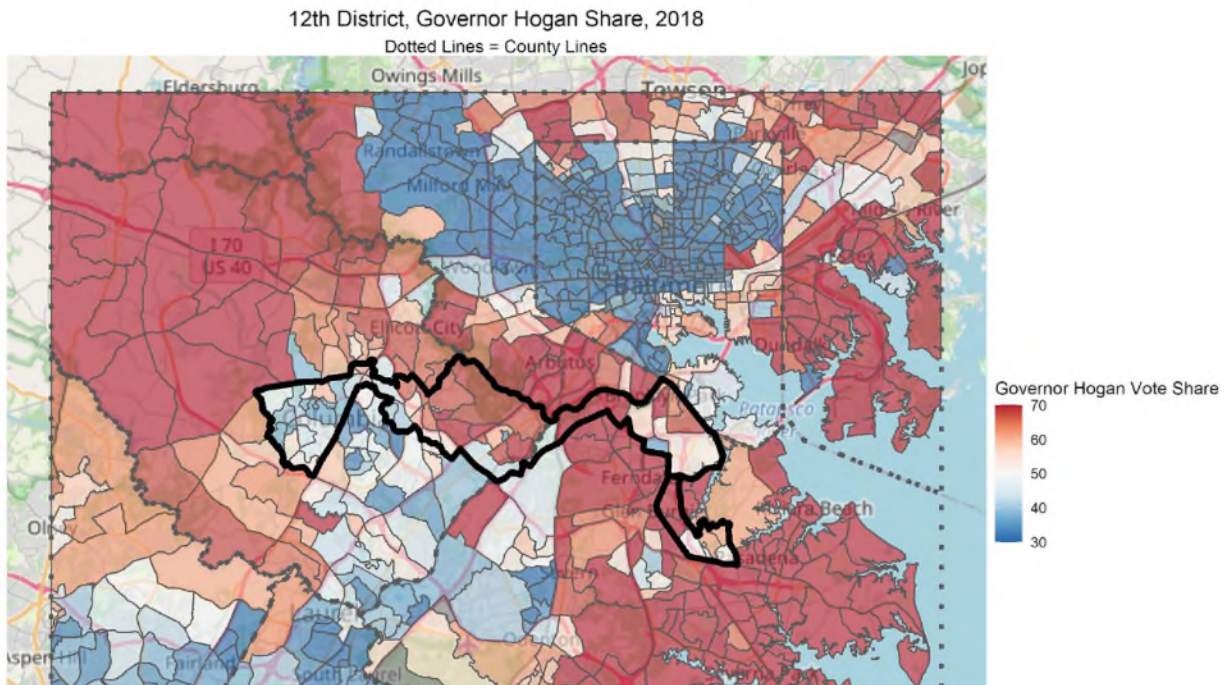
The final measure of compactness introduced by Petitioners is the Convex Hull score. It is similar to the Reock score except that it uses the minimum bounding *polygon* instead of the minimum bounding *circle*. By

⁴ Recordings of the evidentiary hearing before the Special Magistrate are available at <https://www.courts.state.md.us/coappeals/highlightedcases>.

allowing for shapes other than a circle to be the benchmark, the Convex Hull score recognizes that compactness can come in many forms other than a perfect circle. Like the other scores, a 1 is the most compact district and a zero is a theoretical non-compact district. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:40:00-1:43:00; Pet. Ex. 14D.)

b. District 12

District 12 stretches from southcentral Howard County in the west and, through several twists and turns, ends in Glen Burnie and Marley Heights in Anne Arundel County in the east. A simple eye test reveals that it is not compact under any reasonable meaning of the word:



(Pet. Ex. 12, at 6.)

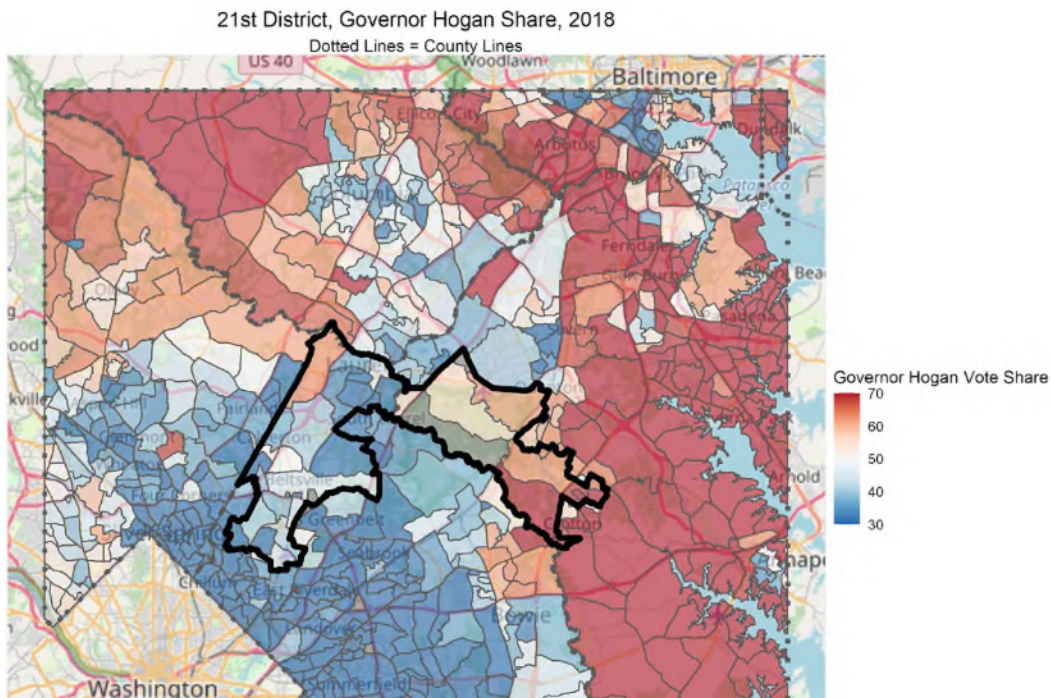
District 12's scores under the Reock (.138), Polsby-Popper (.110), Inverse Schwartzberg (.332), and Convex Hull (.433) metrics confirm the eye test. (Pet. Ex. 3, 4, 5, 6.) Indeed, when District 12's scores are compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that District 12 is not compact:

- District 12's Reock score of 0.138 is a lower score than 98% of other legislative districts enacted around the country from 2002-2020. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:53:10; Pet. Ex. 7.)
- District 12's Polsby-Popper score of 0.110 is lower than 96% of other legislative districts enacted around the country from 2002-2020. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:55:30; Pet. Ex. 8.)
- District 12's Inverse Schwartzberg Score of 0.332 is lower than 96% of the legislative districts enacted around the country from 2002-2020. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:04:45; Pet. Ex. 9.)
- District 12's Convex Hull score of 0.434 is lower than 98% of the legislative districts enacted around the country from 2002-2020. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:06:50; Pet. Ex. 10.)
- Of the 13,473 districts that have been drawn around the country over the past two decades, 13,378 have scored better than District 12 on at least one compactness metric. In other words, almost every district drawn over the past 20 years has at least some aspect of compactness

that exceeds the qualities of District 12. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:13:45-2:14:05; Pet. Ex. 11.)

c. District 21

District 21 is shaped like a boomerang laying across Prince George’s County and Anne Arundel County. It includes the College Park area in the southwest, Laurel and Maryland City in the north, and a divided Crofton in the southeast. Like District 12, District 21’s lack of compactness is clear:



(Pet. Ex. 12, at 9.)

District 21’s obvious lack of compactness is confirmed by its scores under the Reock (.288), Polsby-Popper (.125), Inverse Schwartzberg (.354), and Convex Hull (.504) metrics. (Pet. Ex. 3, 4, 5, 6.) And like District 12, when compared to other state legislative districts enacted over the past two

redistricting cycles from around the country, it is clear that District 21 is not compact:

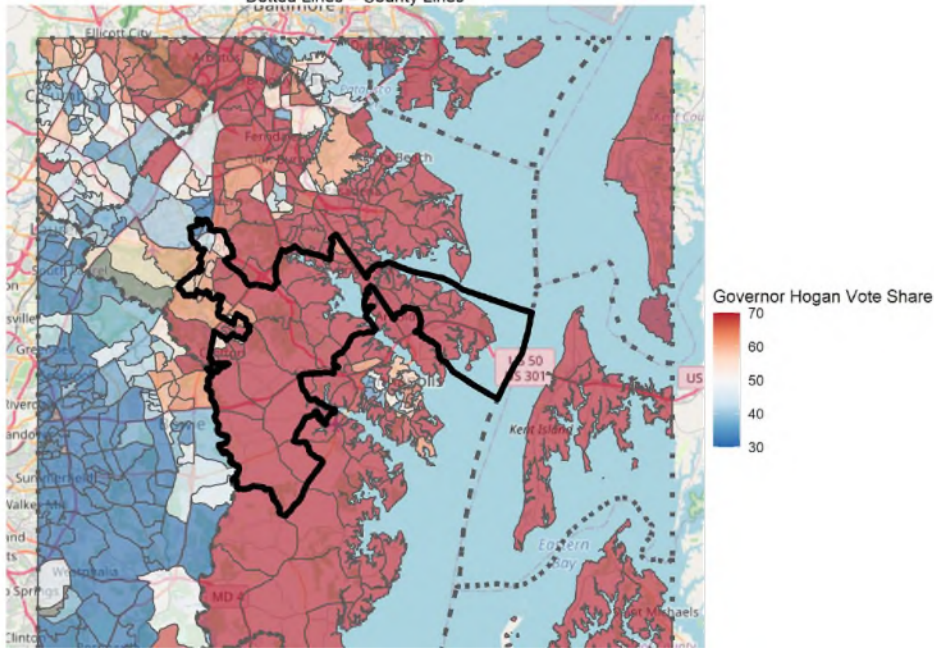
- In the past two redistricting cycles, 94% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 21. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:56:00; Pet. Ex. 8.)
- In the past two redistricting cycles, 94% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 21. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:04:50; Pet. Ex. 9.)
- In the past two redistricting cycles, 96% of the legislative districts enacted around the country have higher Convex Hull scores than District 21. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:07:15; Pet. Ex. 10.)
- Only 2.41% of all legislative districts enacted around the country perform worse on all compactness metrics than does District 21. (Pet. Ex. 11.)

d. District 33

District 33 is yet another legislative district with a shape that defies easy description:

33rd District, Governor Hogan Share, 2018

Dotted Lines = County Lines



(Pet. Ex. 12, at 26.)

District 33's scores under the Polsby-Popper (.140), Inverse Schwartzberg (.374), and Convex Hull (.568) metrics (Pet. Ex. 4, 5, 6) do not compare favorably to other state legislative districts enacted over the past two redistricting cycles around the country:

- In the past two redistricting cycles, 93% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 33. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:56:20; Pet. Ex. 8.)
- In the past two redistricting cycles, 92% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 33. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:05:10; Pet. Ex. 9.)

- In the past two redistricting cycles, 91% of the legislative districts enacted around the country have higher Convex Hull scores than District 33. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:07:25; Pet. Ex. 10.)
- Only 4.71% of all legislative districts enacted around the country perform worse on all compactness metrics than does District 33. (Pet. Ex. 11.)

Petitioners also presented substantial evidence regarding why District 33 is not compact. Simply put, partisan political considerations played a leading role in the creation of District 33 and trumped the requirements of Article III, § 4 in arriving at District 33's final shape.

First, the boundary of District 33 and District 31 was drawn in a surgical way to remove from District 33 the neighborhood of a sitting Republican Delegate. Rachel Munoz, a Republican member of the House of Delegates who currently represents District 33, lives in the Cypress Point neighborhood in Severna Park. (Mar. 23, 2022 Evid. Hrg., Part 2, at 40:15; *see also* Pet. Ex. 15.) That small neighborhood was carefully drawn out of District 33 and placed into District 31, just on the other side of the border District 33 shares with District 31. (Mar. 23, 2022 Evid. Hrg., Part 2, at 41:40-45:35; Pet. Ex. 17A-17B.) Indeed, the map drawers had to create an irregular outgrowth from the core of District 31 to capture Delegate Munoz's neighborhood. (*Id.*) The precise manner in which Delegate Munoz's neighborhood was drawn out of District 33 was clearly

not an accident or coincidence. It was done for partisan purposes—to remove a sitting Republican Delegate from District 33, which currently is represented by two Republican Delegates, one Democratic Delegate, and a Republican Senator. (Mar. 23, 2022 Evid. Hrg., Part 2, at 41:00.)

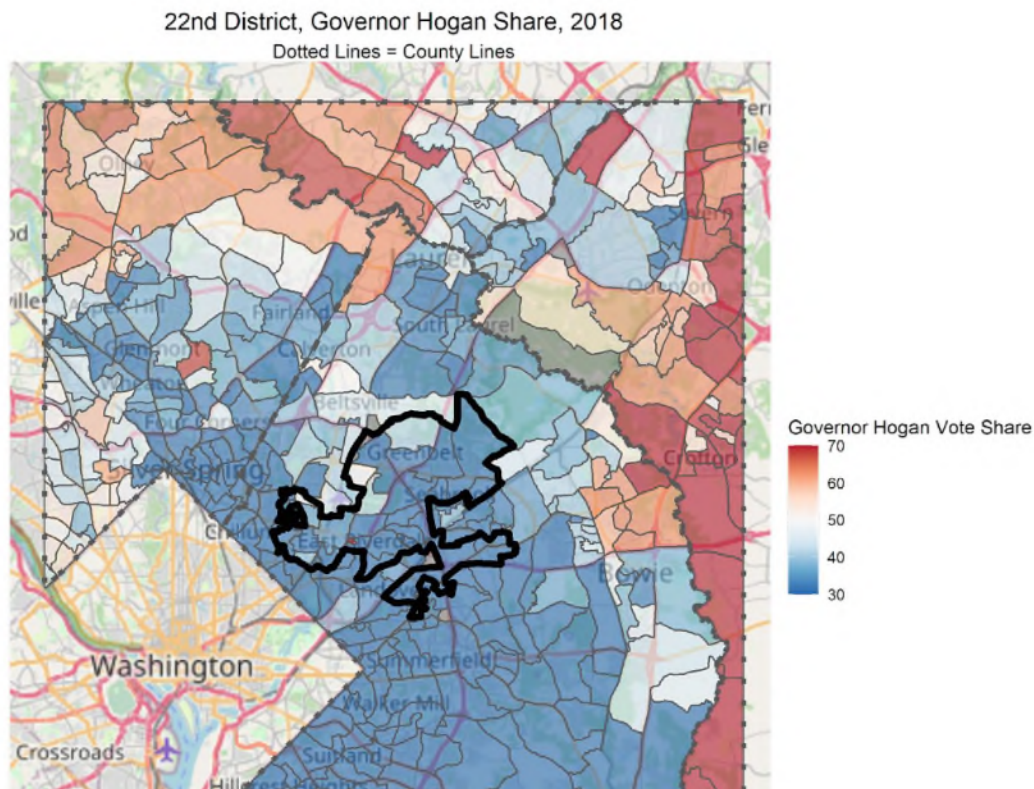
As Delegate Nicholaus R. Kipke testified during the evidentiary hearing, moreover, significant changes were made to the geography of Districts 31 and 33 during this most recent round of redistricting. (Mar. 23, 2022 Evid. Hrg., Part 2, at 27:00-35:00; Pet. Ex. 15, 16.) These changes have fundamentally altered the political make-up of District 33 in favor of Democratic candidates. Specifically:

- The changes to District 33 have resulted in the removal of Republican areas of Anne Arundel County from District 33 and the insertion into District 33 of Democratic areas of Anne Arundel County. For example, in 13 of the 23 precincts or partial precincts moved out of District 33, registered Republican voters outnumber registered Democratic voters. (Pet. Ex. 20.) In 11 of the 12 precincts or partial precincts that were moved into District 33, Democratic voters outnumber registered Republican voters. (*Id.*; *see also* Mar. 23, 2022 Evid. Hrg., Part 2, at 32:45-45:00; Pet. Ex. 12, at 26-27.)
- In total, the movement of people into and out of District 33 has resulted in a net swing of about 3,500 more registered Democrats in

District 33. (See Pet. Ex. 20.) Through the redrawing of District 33, Democratic registered voter numbers in District 33 have increased from approximately 38% to approximately 41%, while Republican voter registration numbers have decreased from approximately 38% to approximately 35%. (See Joint Stip. ¶ 15 & Ex. F.)

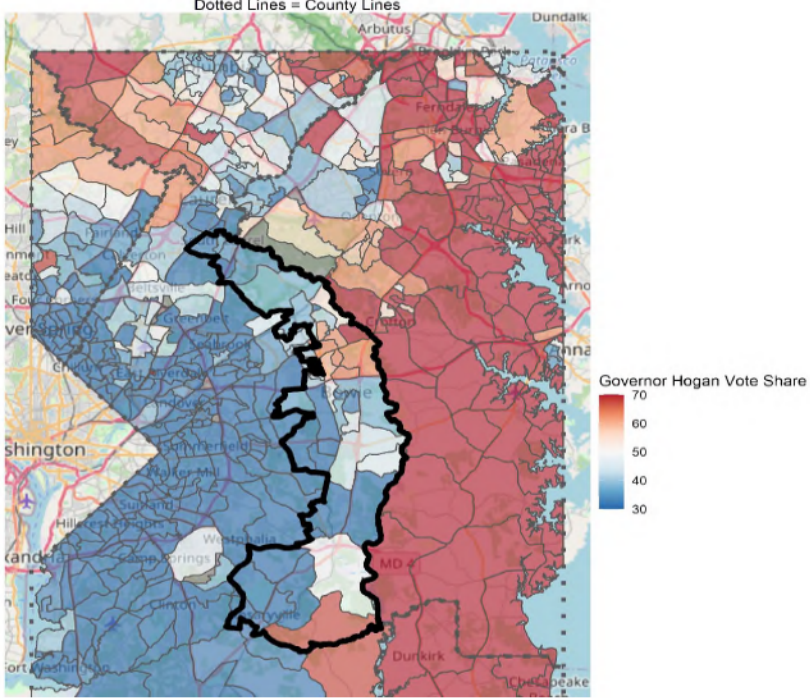
e. Districts 22, 23, 24, and 47

Districts 22, 23, 24, and 47 are all located in Prince George's County. A simple look at these districts reveals that they are not compact:



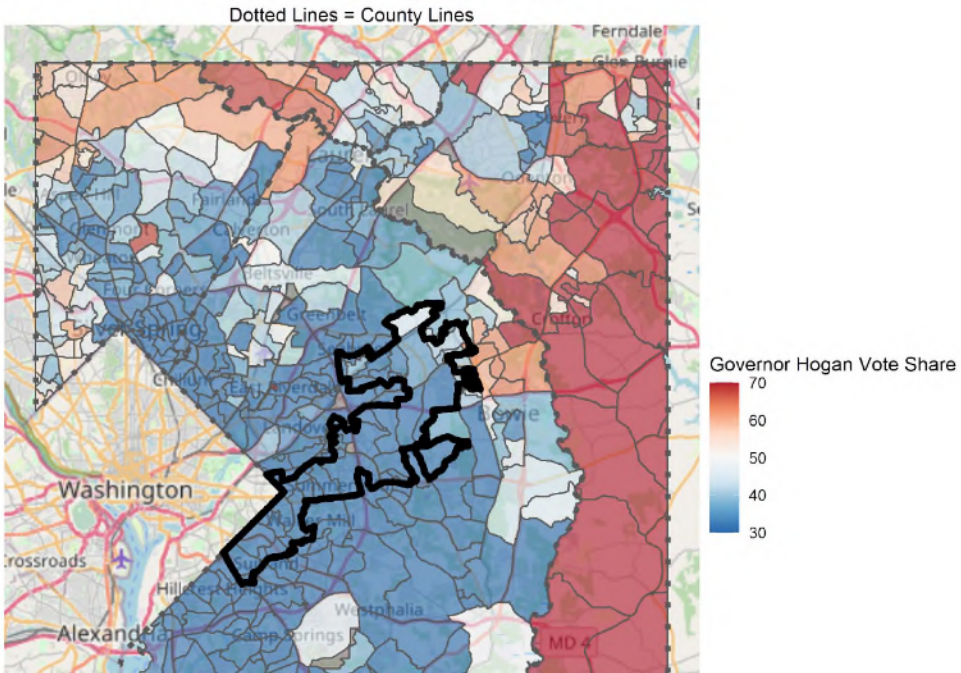
(Pet. Ex. 12, at 12.)

23rd District, Governor Hogan Share, 2018



(Pet. Ex. 12, at 15.)

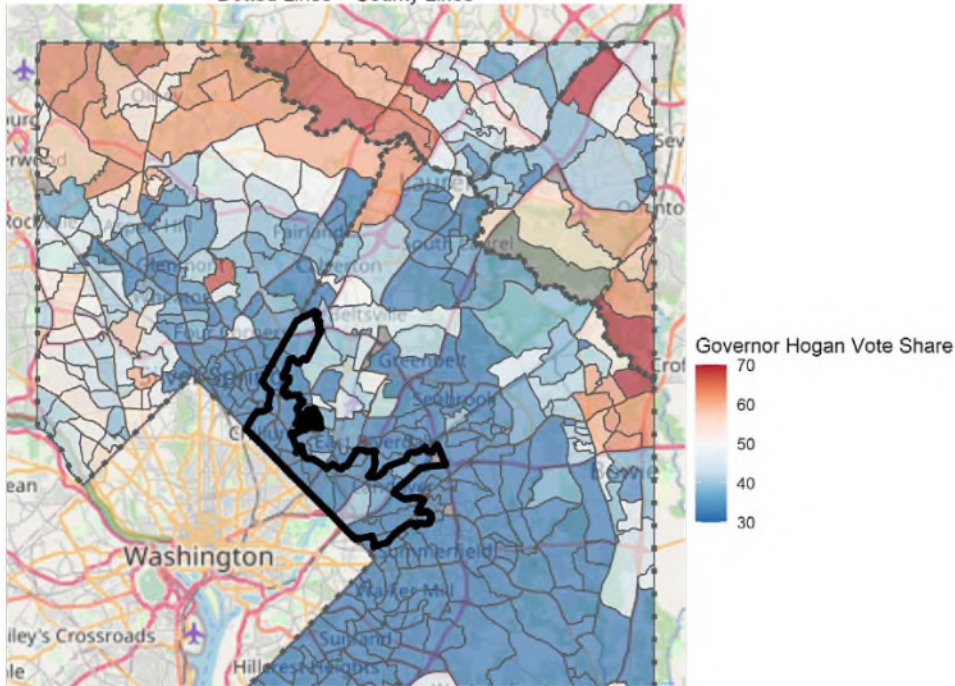
24th District, Governor Hogan Share, 2018



(Pet. Ex. 12, at 18.)

47th District, Governor Hogan Share, 2018

Dotted Lines = County Lines



(Pet. Ex. 12, at 29.)

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

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

(Pet. Ex. 3, 4, 5, 6.)

When compared to other state legislative districts enacted over the past two redistricting cycles from around the country, it is clear that Districts 22, 23, 24, and 47 are not compact:

- In the past two redistricting cycles, 91% of the legislative districts enacted around the country have higher Reock scores than District 24. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:53:30; Pet. Ex. 7.)
- In the past two redistricting cycles, 95% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 22; 93% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 23; 98% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 24; and 94% of the legislative districts enacted around the country have higher Polsby-Popper scores than District 47. (Mar. 23, 2022 Evid. Hrg., Part 1, at 1:55:45, 1:56:15, 1:55:00, and 1:56:10; Pet. Ex. 8.)
- In the past two redistricting cycles, 95% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 22; 93% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 23; 98% of the legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 24; and 94% of the

legislative districts enacted around the country have higher Inverse Schwartzberg scores than District 47. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:04:45, 2:05:10, 2:04:19, and 2:05:05; Pet. Ex. 9.)

- In the past two redistricting cycles, 93% of the legislative districts enacted around the country have higher Convex Hull scores than District 23; 90% of the legislative districts enacted around the country have higher Convex Hull scores than District 24; and 97% of the legislative districts enacted around the country have higher Convex Hull scores than District 47. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:07:20, 2:07:30, 2:07:10; Pet. Ex. 10.)
- In the past two redistricting cycles, only 4.12% of all legislative districts enacted around the country perform worse on all compactness metrics than does District 22; only 2.82% of all legislative districts enacted around the country perform worse on all compactness metrics than does District 23; only 1.08% of all legislative districts enacted around the country perform worse on all compactness metrics than does District 24; and only 1.95% of all legislative districts enacted around the country perform worse on all compactness metrics than does District 47. (Pet. Ex. 11.)

2. Respondent Presented Insufficient Rebuttal Evidence

Respondent failed to present sufficient evidence rebutting this compelling evidence that Districts 12, 21, 22, 23, 24, 33, and 47 are not compact. Indeed, Respondent's expert conceded on cross-examination that he could not testify that the challenged districts were compact. (Mar. 24, 2022 Evid. Hrg. at 58:40-1:00:55.) Respondent, moreover, presented no evidence that compactness was fairly considered or applied in the creation of these challenged districts.

The only evidence Respondent submitted to establish the compactness of these districts was a faulty comparison between the challenged districts and the *least* compact district under an alternative redistricting plan submitted by the Maryland Citizens Redistricting Commission (the "MCRC Plan"). Specifically, Respondent introduced evidence that most of the challenged districts were more compact under the Reock and Pollsby-Popper scores than the least compact district under the MCRC Plan. This comparison fails for at least two reasons.

First, the least compact district under the MCRC Plan—District 1—is located in the western Maryland panhandle. (See Report, Appx. II, at 42.) As Petitioners' expert witness explained—and Respondent's expert conceded on cross-examination—the geography of that part of the State prevents the

creation of a compact legislative district. (Mar. 23, 2022 Evid. Hrg., Part 1, at 2:10:00-2:10:40; March 24, 2022 Evid. Hrg., 1:01:25-1:02:05.) Districts 12, 21, 22, 23, 24, 33, and 47 are located in the center of the State, and thus do not have a geographical excuse for their lack of compactness.

Second, Districts 12, 21, 22, 23, 24, 33, and 47 actually have comparable Pollsby-Popper scores to the MCRC Plan's District 1; in fact, several of the challenged districts score *worse* (*i.e.*, are less compact) under the Pollsby-Popper test than District 1 under the MCRC Plan. (Resp. Ex. Y.) This fact further highlights just how non-compact the challenged districts are: they even score worse under the Pollsby-Popper test than a district that cannot be compact due to its geography.

3. The Report Misapplied the Burden of Proof and Reached a Conclusion Contrary to Governing Legal Principles

In its analysis of Petitioners' challenges, the Report misapplied the applicable burden of proof and reached a conclusion contrary to several governing legal principles.

First, the Report did not apply the proper burden of proof. Once Petitioners presented the above compelling evidence concerning the lack of compactness of Districts 12, 21, 22, 23, 24, 33, and 47, Respondent had to present "sufficient evidence" to show that the districts are compact, *In re 2012 Legislative Districting of the State*, 436 Md. at 137-38, and that "the principles

underlying compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations,” *In re Legislative Districting of the State*, 370 Md. at 361. As explained above, Respondent did not; in fact, Respondent presented no evidence that compactness was even considered during the creation of the challenged districts. The Report, moreover, made no finding that Districts 12, 21, 22, 23, 24, 33, and 47 are compact, or that compactness was considered in the creation of these districts. In recommending that the Court deny Petitioners’ compactness challenges, the Report thus did not hold Respondent to its evidentiary burden. *See id.* at 373 (“While we recognize that a legislative districting plan is entitled to a presumption of validity, we also have stated that the presumption may be overcome ... when, having been allocated the burden of proof, the State fails to carry it.”).

Second, the Report failed to analyze the challenged districts and apply the requisite burden of proof on a district-by-district basis. Instead, the Report made a generalized finding that “an attempt was made to keep voters in their current districts, with which they are familiar, and to avoid crossing political or natural boundary lines except when required to achieve or maintain population equality.” (Report at 26.) By its terms, however, Article III, § 4 applies to “*Each* legislative district.” Article III, § 4 thus requires an individualized analysis of each challenged district to ensure compliance with

constitutional mandates. Indeed, in 2012, the Court specifically rejected a holistic analysis like the one the Report adopted here. *In re 2012 Legislative Redistricting of the State*, 436 Md. at 152-55.

Third, the Report does not treat the compactness requirement of Article III, § 4 as mandatory. Rather, the Report concluded that compactness was merely one of several factors that the General Assembly could consider when creating legislative districts. (Report at 26.) The language of the Constitution does not support this approach. Article III, § 4 states that legislative districts “*shall* ... be compact in form.” This Court has agreed, repeatedly explaining that the requirements of Article III, § 4 are mandatory. *See, e.g., In re Legislative Districting of the State*, 370 Md. at 356, 370-71; *see also In re 2012 Legislative Districting of the State*, 436 Md. at 135.

Finally, the Report appears to posit that a non-constitutional consideration—keeping citizens in their current districts—was something the General Assembly could consider in lieu of making districts compact. (Report at 26.) Respondent, however, presented no evidence that keeping citizens in their current districts was a factor considered in the creation of the Plan. This Court has clearly held, moreover, that non-constitutional considerations, like keeping citizens in their current districts, cannot trump constitutional requirements. *In re Legislative Districting of the State*, 370 Md. at 370; *see also In re 2012 Legislative Districting of the State*, 436 Md. at 135. In fact, this

Court has specifically held that “preservation of the core of existing districts” is not a constitutional requirement and cannot excuse a constitutional violation. *In re Legislative Districting of the State*, 370 Md. at 373-74. As the Court has explained, to allow non-constitutional considerations to prevail over constitutional requirements would cause an amendment of the Constitution:

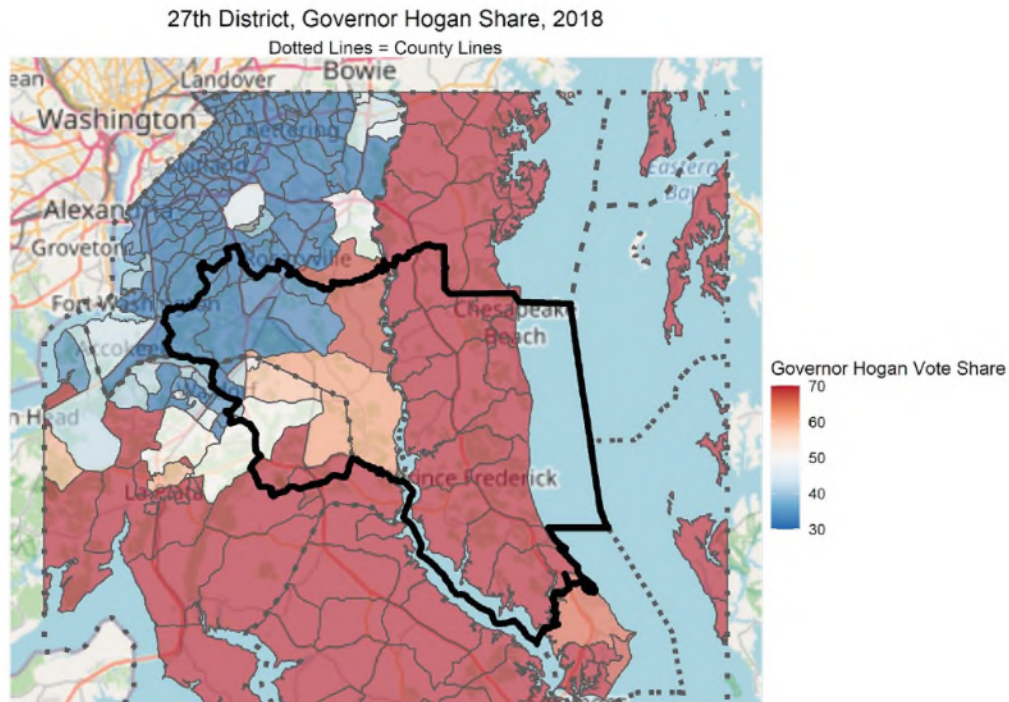
[A]ccepting a “rational goal” as a basis for avoiding a clear requirement under [Article III, § 4] is to allow a constitutional mandate to be overridden by a non-constitutional one. Indeed, to interpret this constitutional provision as to subjugate it or any of its component constitutional requirements to lesser principles and non-constitutional considerations or factors would be to amend the constitution without the involvement of the most critical players: the State’s citizens. This we cannot, and are not willing, to do.

Id. at 373.

B. Exception 2

At the hearing, Petitioners presented compelling evidence that District 27 violates Article III, § 4’s requirements that legislative districts consist of adjoining territory and give due regard for natural boundaries and the boundaries of political subdivisions. Petitioners thus argued at the hearing (and in their Petition) that District 27 was unconstitutional. The Report did not address this evidence or these arguments.

District 27 is located in Southern Maryland:

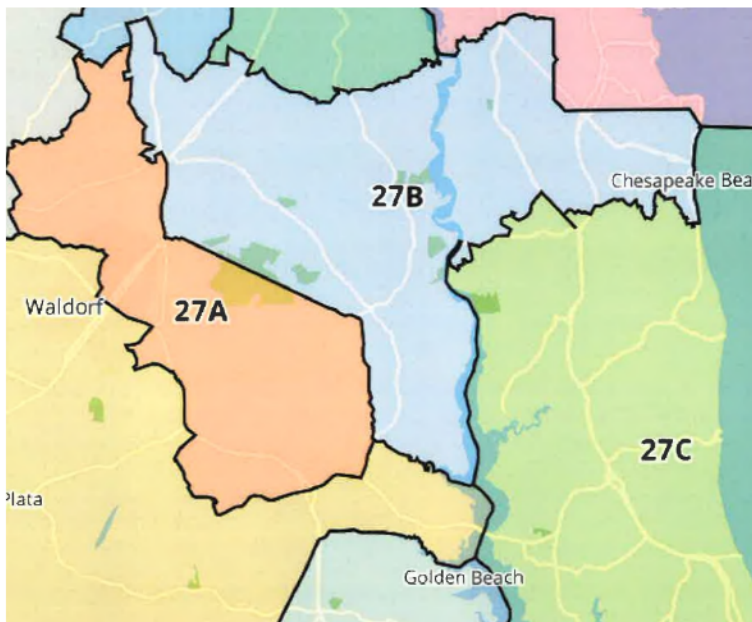


(Pet. Ex. 12, at 23.)

Petitioners' evidence concerning District 27 demonstrated the following:

First, District 27 does not consist of adjoining territory and fails to give due regard for an important natural boundary. Specifically, District 27 crosses the Patuxent River to combine Calvert, Charles, and Prince George's Counties into one legislative district. House District 27B is divided between Prince George's and Calvert Counties by a stretch of the Patuxent River that has no bridge crossings. (Pet. Ex. 18A, 18B; Mar. 23, 2022 Evid. Hrg., Part 2, at 9:30-14:15.) For a resident of House District 27B in Calvert County to visit a resident of House District 27B in Prince George's County, the Calvert County resident would have to drive about 35-40 minutes to find a bridge crossing in another legislative district and/or county. (Mar. 23, 2022 Evid. Hrg., Part 2, at

10:20-10:30.) There also is no bridge across the Patuxent River connecting House District 27C with the western half of Senate District 27. (Pet. Ex. 18C, 18D, 18E; Mar. 23, 2022 Evid. Hrg., Part 2, at 12:00-13:30.) In short, the eastern half of District 27 (comprised of part of House District 27B and all of House District 27C) is entirely separated from the western half of District 27 by a river with no bridge crossings.



(Pet. Ex. 18A; see also Pet. Ex. 18B, 18C, 18D, 18E; Mar. 23, 2022 Evid. Hrg., Part 2, at 12:00-13:30.)

Second, District 27 does not give due regard for political subdivisions. District 27 crosses the borders of and includes within its geographic footprint *three* counties: Calvert, Charles, and Prince George’s. (Mar. 23, 2022 Evid. Hrg., Part 2, at 6:00; Joint Stip. Ex. C, K-12.) It even cuts off a small part of southern Calvert County, putting that part of the county into a different

legislative district than the rest. (Joint Stip. Ex. C, K-12.) Calvert County is a peninsula county that has nearly enough residents for an entire Senate District. (Mar. 23, 2022 Evid. Hrg., Part 2, at 15:00-16:00.) There is simply no good reason—and Respondent has pointed to none—that a legislative district in a relatively well populated area of the State needs to: (1) cross into three separate counties; and (2) not include the entirety of any of those three counties within its geographic footprint.

As Delegate Mark N. Fisher testified at the evidentiary hearing, these unnecessary county line crossings have an important practical impact on the residents of Calvert County. (Mar. 23, 2022 Evid. Hrg., Part 2, at 7:40-8:40.) Specifically, all of the individuals representing Calvert County in the General Assembly, with the exception of one Delegate from House District 27C, come from other counties. Thus, whenever Calvert County’s commissioners—Calvert County is a county commissioner form of government—need to request that Calvert County’s representatives pursue legislation that applies only to Calvert County, they must make that request primarily to representatives from other counties. (*Id.*)

Delegate Fisher’s testimony echoes this Court’s explanation as to the importance of legislative districts respecting county lines:

Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, the 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. 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. Many of Maryland's counties have not established local legislative bodies. [F]or these “non-home rule” counties, the Maryland General Assembly is the local legislature. In practice, members of the General Assembly from such county (the county delegation) decide upon the legislation for the county and are the de facto local legislature. Home rule counties under Art. XI-A of the Constitution, which have local legislative bodies, may enact laws on subjects enumerated in the Express Powers Act, and in Art. 4, § 6, of the Code of Public Local Laws of Maryland. On subjects not covered by these grants of express powers, however, the county delegation in the General Assembly serves as the legislative body even for a home rule county. In addition, the General Assembly regularly makes exceptions to and variations in public general laws on a county-by-county basis. In addition, the State's annual Budget frequently makes appropriations on a county-by-county basis.

In re Legislative Districting of the State, 370 Md. at 358-60 (internal citations and quotation marks omitted).

If District 27 meets Article III, § 4's requirements of contiguity, due regard for natural boundaries, and due regard for the boundaries of political subdivisions, it is unclear that any legislative district could be drawn that does not meet the requirements. In other words, if those requirements of Article III, § 4 mean anything, District 27 violates them.

C. Exception 3

As explained above, prior to the evidentiary hearing, Petitioners sought the following discovery from Respondent concerning their claims that partisan political considerations played a central role on in the creation of certain legislative districts under the Plan: (1) who was responsible for the actual drawing or construction of the specific legislative districts Petitioners challenged; (2) if a computer program was used, what criteria was the program instructed to use to draw the legislative districts Petitioners challenged; (3) who provided instructions to the actual map drawer(s) regarding what factors or other criteria were to be used in drawing the legislative districts Petitioners challenged; and (4) what specific instructions were given to the map drawer(s) regarding the various legislative districts Petitioners challenged. (Am. Order of the Special Mag. Regarding Discovery at 4-5.) As also explained above, the Special Magistrate denied Petitioners discovery requests based on the doctrine of legislative privilege. (*Id.* at 9.) The Special Magistrate erred.

Legislative privilege derives from the English Bill of Rights of 1689 and the protections of Article 10 of Maryland’s Declaration of Rights (“freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature”) and Article III, § 18 of Maryland’s Constitution (“[n]o Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate”). *See Montgomery County v. Schooley*, 97 Md. App. 107, 113-14 (1993). The purpose of the privilege is to protect the “legislative function” and allow it to “be performed independently without fear of outside interference.” *Id.* at 116. Due to common origins, Maryland’s legislative privilege is read *in pari materia* with the federal legislative privilege. *See id.* at 114.

Although broad, the privilege is not absolute—particularly when applied to legislative staff members, officers, or other employees of the legislative body.⁵ *Floyd v. Baltimore City Council*, 241 Md. App. 199, 213 (2019). Moreover, legislative privilege “does not ... necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy.” *Marylanders for Fair*

⁵ In their brief regarding the issue of legislative privilege and during oral argument before the Special Magistrate, Petitioners made clear that their discovery requests could be satisfied without testimony from any member of the General Assembly. (*See Am. Order of the Special Mag. Regarding Discovery at 5-6.*)

Representation, Inc. v. Schaefer, 144 F.R.D. 292, 304 (D. Md. 1992) (Op. of Murnaghan, J., & Motz, J.). This is particularly true in the unique context of legislative redistricting, which “is not a routine exercise of [legislative] power” and “involves the establishment of the electoral structure by which the legislative body becomes duly constituted.” *Id.* In other words, legislative privilege should be viewed differently and applied less strictly in the context of legislative redistricting. *See id.*

Thus, when deciding whether legislative privilege bars discovery in a redistricting challenge, courts have balanced the discovery sought and the interests at stake against the possible chilling effect the discovery will have on legislative action. *See Benisek v. Lamone*, 241 F. Supp. 3d 566, 574 (D. Md. 2017); *see also S.C. State Conf. of the NAACP v. McMaster*, 2022 U.S. Dist. LEXIS 24094, at *15 (D.S.C. Feb. 10, 2022) (collecting cases). “This balancing inquiry ensures that legislative privilege, like all evidentiary privileges, applies ‘only to the very limited extent that . . . a public good transcend[s] the normally predominant principle of utilizing all rational means for ascertaining truth.’” *Benisek*, 241 F. Supp. 3d at 574.

In *Benisek*, a three-judge panel of the United States District Court for the District of Maryland found that legislative privilege did not prevent discovery in a redistricting case. There, the plaintiffs challenged the constitutionality of Maryland’s congressional redistricting plan and sought

discovery from members of the legislative committee responsible for creating the plan. Like Petitioners here, the plaintiffs sought discovery concerning the intent and motivations of the legislators for drawing the lines of a congressional districts as they did. *Id.* at 571. The State opposed the discovery, claiming legislative privilege. *Id.* at 572. The three-judge panel applied a five-factor test, rejected the legislative privilege defense, and concluded that discovery could be had. *Id.* at 575-77.

The five factors the *Benisek* court considered were: (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation;⁶ (4) the role of the State, as opposed to individual legislators, in the litigation; and (5) the extent to which discovery would impede legislative action. *Id.* at 575.⁷ Just as in *Benisek*, application of these five factors indicates that the Court should authorize the limited discovery Petitioners sought:

⁶ In *Benisek*, the court noted that the first three factors “aim to capture the *federal* interests at stake.” 241 F. Supp. 3d at 575 (emphasis added). But *Benisek* should not be limited to a claim under federal law. First, the federal interests *Benisek* identified—“courts are more likely to require disclosure of communications that are highly relevant, difficult to obtain elsewhere, and will assist in the enforcement of public rights”—are also State interests. Second, as explained above, the federal legislative privilege and State legislative privilege are read *in pari materia*.

⁷ The Special Magistrate declined to follow *Benisek*, in part, because *Benisek* was vacated by *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The judgment vacated by *Rucho*, however, was the final judgment in *Benisek* that the General Assembly violated the United States Constitution by engaging in a partisan gerrymander to create Maryland’s Sixth Congressional District. Specifically,

- Relevance of the Evidence. As explained above, the requirements of Article III, § 4 may not be trumped by political considerations. *In re Legislative Districting of the State*, 370 Md. at 370. Petitioners alleged that political considerations trumped constitutional requirements in the drawing of the legislative districts Petitioners challenged. (*E.g.*, Petition ¶¶ 29, 33, 42, 47, 68.) The specific factors and considerations used in the drawing of those legislative districts—the discovery Petitioners sought—was therefore directly relevant to Petitioners’ claims.
- Availability of Other Evidence. Petitioners had no access to the specific factors and considerations applied in constructing the districts they challenged. While there was publicly available information concerning the enactment of the Plan, Petitioners were unable to locate publicly available testimony or statements concerning the specific factors and considerations the map drawers used or were instructed to use to create the districts Petitioners challenged.

in *Rucho*, the Supreme Court held that claims of partisan gerrymandering are not justiciable in federal court. *Id.* at 2506-07. The Supreme Court in *Rucho* did not consider the *Benisek* court’s decision concerning legislative privilege. Other federal courts cited above, moreover, also have applied a test similar to the one applied in *Benisek* to determine whether legislative privilege applies in the redistricting context.

- Seriousness of the Litigation. Petitioners have alleged that the law dictating how Maryland voters select their legislative representatives is unconstitutional. This litigation thus involves a challenge to a law directly impacting a foundational aspect of State government. “[F]ew issues could be more serious to preserving our system of representative democracy.” *Benisek*, 241 F. Supp. 3d at 576.
- Role of the State/Individual Legislators. The rationale of *Benisek* applies equally here: “When individual legislators are the targets of litigation, the possibility of their suffering individualized consequences can significantly increase the need for legislative privilege. But here, the witnesses have no personal stake in the litigation and face no direct adverse consequence if the plaintiffs prevail.” *Id.* Petitioners “have brought their suit not against individual state legislators but against [the state redistricting plan], and the adverse impact on the individual legislators is minimal.” *Id.*
- Impede State Legislative Action. As the *Benisek* court noted, there is some force to the argument that protecting discussion or deliberations about the reasons and intent behind a legislative enactment is a central concern of legislative privilege. As the *Benisek* court also noted, however, such evidence is the most probative of unconstitutional or non-constitutional considerations. *Id.* at 576-77.

And in this case it was even more critical because it was the only direct evidence Petitioners could obtain regarding whether non-constitutional considerations trumped constitutional requirements in the creation of the legislative districts Petitioners challenged.

CONCLUSION

For the above reasons, the Court should: (1) sustain Petitioners' exceptions; (2) find that Districts 12, 21, 22, 23, 24, 27, 33, and 47 fail to meet the requirements of Article III, § 4 of Maryland's Constitution; and (3) find that the doctrine of legislative privilege does not bar Petitioners from conducting discovery regarding why the challenged districts were drawn as they were.

Date: April 8, 2022

Respectfully submitted,

/s/ Strider L. Dickson

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CERTIFICATE OF SERVICE

I certify that on April 8, 2022, the foregoing Exceptions to the Report of the Special Magistrate was filed and served via the Court's MDEC system. A copy of the foregoing also was sent to the parties in Misc. Nos. 24, 26, and 27 by electronic mail.

/s/ Strider L. Dickson _____
Strider L. Dickson