

IN THE COURT OF APPEALS  
OF MARYLAND  
(Sept. Term 2021)

IN THE MATTER OF  
2022 LEGISLATIVE  
DISTRICTING OF THE STATE  
OF MARYLAND

MISC. NO. 26

**PETITIONERS:**

**BRENDA THAIM  
WAYNE HARTMAN  
PATRICIA SHOEMAKER**

**PETITIONERS' EXCEPTIONS TO REPORT OF THE SPECIAL MAGISTRATE  
AND MEMORANDUM IN SUPPORT THEREOF**

Petitioners Brenda Thiam, Wayne Hartman and Patricia Shoemaker, pursuant to the Order of this Court of April 4, 2022, hereby submit the within Exceptions to Report of the Special Magistrate and Memorandum in Support Thereof as follows:

**EXCEPTIONS TO SPECIAL  
MAGISTRATE CONCLUSIONS  
REGARDING MISC. NO. 26**

1. Pages 27 -30 of the Special Magistrate's Report summarizes the Petitioners' claims in Misc. No. 26. The first paragraph of page 28 states that although the Petitioners "objection is directed to the *mixing* of single-member and multi-member districts, their solution is to have **only** 'uniformly sized single-member districts' for the House of

Delegates....” (emphasis in original Report).

The Petition’s Prayer for Relief (b), and the averments of ¶ 2 express a preference for “uniform single member House of Delegates districts” but that certainly is not the “only” relief requested. Prayer (c) of the Petition in Misc. No. 26 requests alternatively that if the General Assembly fails to prepare a new districting plan complying with the Court’s Order that the Court may direct a “special magistrate” or “Court-ordered expert” to prepare a plan “in any other method or manner deemed appropriate by this Court”. This could include a map which conceivably, where circumstances demonstrate a compelling state interest, include one of more multi-member districts where so justified.<sup>1</sup> There has been no such compelling state interest shown in the record in this case.

2. The first full paragraph on page 29 of the Report states that “[t]o abolish” multi-member districts “would be to declare part of the Maryland Constitution unconstitutional. That has been done before, and that is what it would take to abolish multi-member districts **as requested by petitioners**”. (emphasis supplied).

This again misstates the relief which the Misc. No. 26 Petitioners have requested in their Petition. Prayer (a) asks the court to “[d]etermine and declare that the Plan is unconstitutional and invalid” under provisions of the Maryland Declaration of Rights (“Declaration”) and the Maryland Constitution (“Constitution”). But it says nothing about

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<sup>1</sup> See *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (Supreme Court of North Carolina, 2002) “In our view, use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest.” 355 N.C. at 380 – 381.

this Court abolishing anything other than the LRAC Plan Map.

3. In the last two paragraphs of page 29 the Report discusses another issue raised by Petitioners, that of the disproportionate and uneven voting strength of individual voters depending on whether they reside in a single-member, two-member or three-member House of Delegates district. The Special Magistrate stated “[t]he issue has been raised, and it is a fair one that deserves attention”. Petitioners absolutely agree with the Magistrate’s statement.

Petitioners emphatically disagree with the Special Magistrate’s conclusion that “time”, effort in establishing a new Plan and other inconveniences are a “problem” that justify the Court not providing relief for a recognized problem involving “one of, if not the most important” fundamental Constitutional rights<sup>2</sup> and instead “kicking the can down the road” until the next redistricting cycle ten years from now. The perceived logistical inconveniences, the prospect of creating “as much mischief as it resolves” and other cited complications are speculation and don’t have any basis in the record in these proceedings.

Further, the Report’s conclusion that “[t]o strike down” Maryland Constitution Art. III, § 3, which has been in existence “for 50 years” will be a necessary part of granting relief sought by the Petitioners herein is not correct and again doesn’t accurately reflect the relief requested by the Misc. No. 26 Petitioners. Petitioners do not agree that preparing a new redistricting plan will be the herculean task which the Report fears. Some effort will

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<sup>2</sup> *Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2004). See also, *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 161 (2001); *Board of Supervisors of Elections v. Goodsell*, 284 Md. 279, 289 (1978).

no doubt be involved. The rights asserted herein by Petitioners arise from constitutional provisions basically unchanged since 1776. Petitioners and other citizens of Maryland deserve better than to allow those rights to be neglected for an additional decade in hopes legislators might then be inclined to provide relief instead of the Court doing so now. The General Assembly hasn't done so for the last 50 years.

4. Petitioners disagree with the recommendation of the Report of the Special Magistrate that their Petition No. 26 be “**DENIED**” for the reasons stated above and as set forth in the Memorandum in Support of these Exceptions.

5. Petitioners disagree with this Court's Order of March 11, 2022 denying discovery requests proposed to Respondents by Petitioners in Misc. No. 25 and joined by Petitioners herein. The facts requested by Petitioners go to the heart of certain critical issues involved herein, were within the sole possession of Respondents, were material and perhaps would have been dispositive of certain claims. Petitioners were denied discovery outright without alternatives of *in limine* Orders or other customary protective orders limiting use of the matters to be discovered.

#### **MEMORANDUM OF LAW IN SUPPORT OF EXCEPTIONS**

Petitioners hereby incorporate by reference as if fully set forth herewith the argument set forth in Petitioners' Memorandum of Law and Response to Respondents' Motion to Dismiss filed in this case on March 22, 2022, in support of the Exceptions herein. Petitioners' supplement those arguments with the following:

## STRICT SCRUTINY

The LRAC Plan, subjects some Maryland voters and not others to different proportionate voting strength, unequal representation, different levels of constituent services, etc. merely because of which side of an arbitrarily established voting district or sub-district boundary line they live on. The LRAC Plan includes no rational explanation of why they were placed in a single member, two member or three member House of Delegates district. The LRAC Plan's disparate impact on voters in the exercise of a fundamental right must be judged by the strict scrutiny standard of review. *Board of Supervisors of Elections v. Goodsell*, 284 Md. 279, 289 (1978).<sup>3</sup>

## ARGUMENT

Petitioners challenge the LRAC Plan's mixture of single member and multi-member Delegate districts as an infringement of their rights under the Declaration, including Articles 7 (Free Elections), 24 (Equal Protection/Due Process) and 40 (Free Expression) and Art. 1, § 7 of the Constitution. Respondents assert that because the mixed district practice is permitted by the language of Constitution Art. III, § 3, the LRAC Plan's use of this method is permissible irrespective of its impact on rights of Petitioners under other provisions of the Declaration and Constitution including those referred to above. The effect is to render nugatory<sup>4</sup> any other protections of the Declaration and Constitution

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<sup>3</sup> See also *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 161 (2001) and *Nader for President 2004 v. Md. State Bd. of Elections*, *supra*, 399 Md. at 699 (2007).

<sup>4</sup> "...laws regarding the same subject are to be read and harmonized together in order to avoid leaving the provision at issue ineffective, duplicative, or nugatory." *State Bd. of Elections v. Snyder*, 435 Md. 30, 54 (2013)

which may conflict with Art. III, §3.

This sets the stage for resolving what appears to be a conflict between constitutional provisions unless the Court construes them contextually as a whole so that they can co-exist complementarily. “The Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument.” *Anderson v. Baker*, 23 Md. 531, 612-613 (1865).

To be clear, the Petitioners herein do not seek a declaration by this Court that any of the heretofore mentioned provisions of the Constitution or Declaration be declared invalid or unconstitutional. They ask instead that the Court declare that the LRAC Plan violates their rights under the Constitution and Declaration and the development, by the General Assembly or otherwise, of a new map which is not violative of those rights.

Unreasonable regulations affecting voter choice and proportionate voting equality affect the fundamental right to vote and must be subjected to the Court’s strict scrutiny. *Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2004). Further, the disparity of treatment and voting inequality created by the LRAC Plan’s use of a mix of single and multi-member districts implicates the equal protection clause of Declaration, Art. 24 also requiring strict scrutiny by this Court.

“Our cases hold that...a law which operates upon some persons or corporations, and not upon others like situated or circumstanced, or in the same class, is invalid. (citations deleted)

...‘Strict scrutiny’ is required of a legislative classification when it...deprives, infringes upon or interferes with personal rights or interests deemed to be ‘fundamental’ (citation deleted) laws which are subject to this rigorous standard violate the equal protection guarantee unless the state can demonstrate that the statute is necessary to promote a compelling governmental interest. (citation

deleted)”. *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 160-161(2001).

The practical effect of adopting Respondents’ argument that Art. III, § 3’s language authorizing a mixture of single member and multi-member Delegate districts is dispositive of the constitutional question posed herein is to render inscrutable the legislature’s arbitrary, unprincipled mix of districts created without any standards or guidance in face of other constitutional challenges. It elevates the ability of the General Assembly to exercise unbridled discretion under Constitution Art. III, § 3 as superior to the constitutional rights of voters and citizens of Maryland seeking to exercise their right to free elections on an equal footing with every other voter.

Such an approach is also contrary to guidance of this Court to interpret constitutional provisions as a whole and not in isolation.

“In construing a constitution, we have stated ‘that a constitution is to be interpreted by the spirit which vivifies, and not b[y] the letter which killeth.’ (*citations deleted*) We similarly do not read the Constitution as a series of independent parts. (*citations deleted*) Just as a statute is read in the context of a regulatory scheme, this Court construes constitutional provisions as part of the Constitution as a whole. See *State v. Jarrett*, 17 Md. 309, 328 (1861) (‘[i]n construing a Constitution, it must be taken as a whole, and every part of it, as far as possible, interpreted in reference to the general and prevailing principle.’).” *State Bd. of Elections v. Snyder*, 435 Md. 30, 55 (2013).

In pertinent part, Constitution Art. III, § 3, provides for the legislature’s creation of legislative districts from which citizens will elect one senator and three delegates. It states:

“Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.”

Notably, there are no standards mentioned for when three single-member districts are appropriate, or when a single three delegate district best achieves constitutional aims, etc. When viewed in isolation Constitution Art. III, §3 allows the legislature to cloak itself with impunity while making arbitrary or politically motivated decisions in their unfettered discretion.

Article III, § 4 limits the broad authority of § 3 in establishing districts (and by extension, subdistricts) requiring that they be “compact in form,... of substantially equal population” and that “[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions.” Clearly the language of Constitution Art. III, § 3 is not intended to be a “blank check” in the hands of the legislature. Also significantly, LRAC and the General Assembly offered no explanation of the circumstances, principles or standards they utilized in developing and approving the LRAC Plan including the mixture of single and multi-member districts.

The actual language of Constitution Art. III, § 3 itself demonstrates that the discretion to use a mixture of single and multi-member districts is not absolute. The phrase “nothing herein shall prohibit the subdivision of any one or more of the legislative districts...” is obviously not an “affirmative constitutional mandate”<sup>5</sup> that the legislature create a mixture of single member and multi-member districts in an unprincipled, arbitrary way.

Petitioners assert that the Supreme Court of North Carolina’s opinion in

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<sup>5</sup> See *Stephenson v. Bartlett*, 355 N.C. 354, 379 (2002)



*Stephenson v. Bartlett*, 355 N.C. 354 (2002) is instructive and persuasive authority for this Court’s resolution of the purported conflict between Constitution Art. III, § 3 and the provisions of the Declaration and Constitution relied upon by Petitioners.

The Supreme Court of North Carolina’s opinion from February of this year in *Harper v. Hall*, 2022-NCSC-17 (2022) demonstrated striking similarities between the origins and scope of North Carolina’s free election clause adopted within months of Maryland’s Declaration of Rights including what is now Declaration Art. 7. This case was evaluated in these Petitioners Memorandum of Law and Response to Respondents Motion to Dismiss previously filed herein. That portion of the Memorandum is incorporated by reference herewith.

*Stephenson v. Bartlett* involved allegedly conflicting provisions of the North Carolina Constitution appearing to be that State’s corollaries to Declaration Articles 7 and 24 and Constitution Art. III, § 3.

In *Stephenson*, the Court discussed application of a strict scrutiny standard in evaluating the constitutional provisions.

“Under strict scrutiny, a challenged governmental action is unconstitutional if the state cannot establish that it is narrowly tailored to advance a compelling governmental interest....The classification of voters into both single member and multi-member districts within plaintiffs’ proposed remedial plans necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard.” *Stephenson v. Bartlett, supra*, 355 N.C. at 377-378.

Thereafter, the *Stephenson* Court went on to analyze whether state constitutional provisions authorizing a mixture of single member and multi-member districts within the same redistricting plan violates the North Carolina Constitution’s equal protection clause

In language echoing this Court’s own statements about interpreting multiple constitutional provisions, the Court said;

“We recognize that a constitution cannot be in violation of itself (citation deleted), and that all constitutional provisions must be read *in pari materia* (citations deleted)...These rules of construction require us to construe Article II, § 3(1) and 5(1) in conjunction with Article I, § 19 in such a manner as to avoid internal textual conflict.” *Stephenson, ibid*, 355 N.C. at 388.

The Court then set about reconciling the alleged conflict between those constitutional provisions.

“Accordingly,..., we hold that the language quoted above purporting to allow multi-member districts is effective only within a limited context. We conclude that, while instructive as to how multi-member districts may be used compatibly with “one person, one vote” principles, Article II, § 3(1) and 5(1) are not affirmative constitutional mandates and do not authorize use of both single member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equally voting power.” *Stephenson, ibid*, 355 N.C. at 379.

The *Stephenson* Court concluded, “in our view, use of *both* single member and multi-member districts within the same redistricting plan violates the equal protection clause of the state constitution unless it is established that inclusion of multi-member districts advances a compelling state interest.” *Stephenson, ibid*, 355 N.C. at 380-381.

*Stephenson v. Bartlett* did not invalidate any of the purportedly conflicting constitutional provisions involved. It applied accepted principles of statutory interpretation to those provisions to achieve a workable, complimentary resolution. This is what Petitioners in Misc. No. 26 have asked for since filing their Petition on February 10, 2022.

Contrary to the conclusion of the Special Magistrate’s Report, Petitioners do not

seek to invalidate anything other than the LRAC Redistricting Plan. The constitutional provisions implicated in this case can remain as they are, although as the Special Magistrate noted, some amendments may be prudent and desirable. The Special Magistrate recognized the impact on “voting equality” and “proportionate voting strength of each voter” which can vary among voters in their respective districts even though the voters reside “two blocks away” from each other. The Special Magistrate recognized that this issue “is a fair one that deserves attention.” As has been demonstrated, the issue can be accorded appropriate “attention” and a remedy without invalidating or striking down Constitution Art. III, § 3.

Petitioners assert that the crafting of a remedy would not be as onerous as the Special Magistrate fears. Attached as Appendix II to the Report of the Special Magistrate is the document “Final Report of the Maryland Citizens Redistricting Commission, January 2022.” At page 10 of that Report was the Commission’s proposed map of House of Delegates Districts, including a proliferation of single member districts throughout much of the State. There are some multi-member districts created in portions of Montgomery, Prince George’s, Howard and Baltimore Counties and Baltimore City.

The Special Magistrate’s logistical fears could be addressed by utilizing the Commission’s map as a starting point and creating single-member districts from those above-referenced multi-member districts based on population distribution, compactness and other constitutional considerations. Or, alternatively, another map passing constitutional muster could be used as a starting point with multi-member districts similarly apportioned into single-member districts. If the State can demonstrate a

compelling State interest requiring one or more multi-member districts as an exception to the rule, those multi-member districts will arguably be able to survive any strict scrutiny review challenge on constitutional grounds.

The Special Magistrate identified these mixed districts as a problem that deserves attention. What the issue, the Petitioners and other residents of the State don't deserve is for the Court to ignore this reality.

### **CONCLUSION**

The Petitioners request this Court grant the relief prayed in their Petition.

Respectfully submitted,

*/s/ David K. Bowersox*

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### **Certificate of Service**

I hereby certify that on this 8th day of April, 2022, the foregoing Petitioners' Exceptions to Report of the Special Magistrate and Memorandum in Support thereof was filed and served electronically by the MDEC system or by email on all the persons entitled to service:

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