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SZELIGA V. LAMONE: AN END TO GERRYMANDERING IN MARYLAND—OR PERHAPS JUST A PAUSE

STEPHEN M. SHAPIRO*

INTRODUCTION

Federal litigation over Maryland’s 2011 congressional districts¹ failed to rein in partisan gerrymandering based on the U.S. Constitution.² Thus the Maryland General Assembly enacted a similar map in December 2021.³ But even though the U.S. Supreme Court barred federal courts from hearing partisan gerrymandering claims under the U.S. Constitution, the Court noted that partisan gerrymandering claims could still be brought in state courts under state law.⁴

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* J.D., The George Washington University Law School; M. Eng’g, Virginia Polytechnic Institute & State University; B.S.M.E. Tufts University. The author would like to recognize the Honorable Joseph M. Getty on his recent retirement from the Court of Appeals of Maryland. *See also* Tribute, *Tribute to Chief Judge Joseph M. Getty*, 82 MD. L. REV. 160 (2022). Chief Judge Getty has participated in almost every redistricting matter in Maryland in recent decades—as a legislator, litigant, counsel, amicus, or judge.

1. MD. DEP’T OF PLANNING, MARYLAND 2011 CONGRESSIONAL DISTRICTS (2016), <https://planning.maryland.gov/Redistricting/Documents/2010maps/Cong/Statewide.pdf>.

2. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (also deciding *Lamone v. Benisek*, No. 18-726, and holding “that partisan gerrymandering claims present political questions beyond the reach of the federal courts”). *Benisek* challenged Maryland’s 2011 congressional districts, *id.* at 2493, while *Rucho* similarly challenged North Carolina’s congressional districts, *id.* at 2491. The author was an original plaintiff in *Benisek* when he first filed that case in 2013. *See id.* at 2493; *see also* Shapiro v. McManus, 577 U.S. 39, 41–42 (2015).

3. *See* H.B. 1, Congressional Districting Plan, 2021 Gen. Assemb., Spec. Sess. (Md. 2021), <https://mgaleg.maryland.gov/mgawebbsite/Legislation/Details/hb0001?ys=2021S1&search=True> (introduced by request of the Legislative Redistricting Advisory Commission); *House Bill 1 Congressional Map*, MD. GEN. ASSEMB., <https://redistricting.mgaleg.maryland.gov/PlanViewer-HB1-Congressional/#MD-2020CONGRESSIONAL-OFFICIAL> (last visited July 12, 2022); MD. LEGIS. REDISTRICTING ADVISORY COMM’N, FINAL RECOMMENDED CONGRESSIONAL MAP (2021), <https://mgaleg.maryland.gov/Other/Redistricting/Final/webpage-final.pdf> (the Commission’s recommended map, which was enacted without change). Like the 2011 map, the December 2021 map comprised one Republican-leaning district, the First District, and seven Democratic-leaning districts. *See infra* Figure 2 (partisan & racial data for the December 2021 districts). *See generally* Jim Newell, *Democrats Could Have Gerrymandered Away a GOP Seat. Why Didn’t They?*, SLATE (Dec. 10, 2021, 12:31 PM), <https://slate.com/news-and-politics/2021/12/maryland-redistricting-democrats-gerrymandering-andy-harris.html> (providing political background on the development of the December 2021 congressional districts).

4. *Rucho*, 139 S. Ct. at 2507–08.

Two sets of Maryland voters filed such actions, challenging Maryland's December 2021 map as inconsistent with multiple provisions of Maryland's Constitution and Declaration of Rights.⁵ After a four-day trial,⁶ the Circuit Court for Anne Arundel County enjoined the use of the December 2021 map, and ordered the General Assembly to enact a remedial map with compact districts.⁷ The General Assembly complied with the court's order,⁸ and the parties agreed to drop appeals from the court's order as well as objections to the Assembly's remedial map.⁹ The settlement cleared the way for Maryland Governor Larry Hogan to sign the remedial map into law on April 4, 2022.¹⁰ The path forward would have been quite uncertain had the General Assembly failed to timely comply with the court's order, as the court stated at trial that it lacked authority to draw a remedial map itself.¹¹

While Maryland now has reasonably compact congressional districts for the 2022 elections, it is not clear how long thereafter the General Assembly will have to maintain them.¹² The U.S. Supreme Court will hear a case during

5. See Complaint for Declaratory Relief and Other Relief Regarding the Redistricting of Maryland's Congressional Districts, *Parrott v. Lamone*, No. C-02-CV-21-001773 (Md. Cir. Ct. Dec. 21, 2021) [hereinafter *Parrott* Complaint]; Complaint for Declaratory and Injunctive Relief, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022) [hereinafter *Szeliga* Complaint].

6. The court consolidated both actions for trial under No. C-02-CV-21-001816.

7. See Declaratory Judgment, Permanent Injunction, and Order of Remand at 3, *Szeliga*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022) [hereinafter *Szeliga* Declaratory Judgment].

8. See MD. DEP'T OF PLANNING, MARYLAND 2022 CONGRESSIONAL DISTRICTS (STATEWIDE) (2022), <https://planning.maryland.gov/Redistricting/Documents/2020Maps/Cong/2022-CongDist-SW.pdf>; MD. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S.B. 1012, 2022 Gen. Assemb., Reg. Sess. (2022), https://mgaleg.maryland.gov/2022RS/fnotes/bil_0002/sb1012.pdf. Senate Bill 1012, as passed, was contingent upon the Court of Appeals not reversing the Circuit Court of Maryland for Anne Arundel County's judgment. See also *infra* Figure 4 (partisan and racial data for the April 2022 districts).

9. See Order, *Lamone v. Szeliga*, Case No. COA-REG-0065-2021 (Md. Apr. 4, 2022); *Lamone*, 478 Md. 241, 273 A.3d 888 (2022); 'Tremendous Victory': Hogan Signs New Congressional Redistricting Map into Law After Appeal Dropped, WBAL-TV 11 BALT. (Apr. 4, 2022, 5:14 PM), <https://www.wbalTV.com/article/maryland-congressional-redistricting-map-appeal-withdrawn/39628879>.

10. S.J. Res. 2, 2022 Gen. Assemb., Reg. Sess. (Md. 2022).

11. This is the author's recollection of statements Judge Battaglia made from the bench on the first day of trial on March 15, 2022. See also *infra* note 154 (discussing *Getty v. Carroll County Board of Elections*, 399 Md. 710, 741, 926 A.2d 216, 235 (2007)).

12. The author, a registered Democratic voter in Maryland, has decidedly mixed feelings as to whether the General Assembly *should* limit gerrymandering as a matter of policy after *Rucho*. Under *Rucho*, other states may observe no limit unless their state law provides otherwise. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Thus, there is now no level nationwide playing field, and a state legislature that opts not to gerrymander its state's districts thereby opts to waive its power to influence the partisan control of the U.S. House of Representatives. Even if the compromise inherent in the April 4, 2022, map were not now required as a matter of law, the author would endorse it as a matter of policy—where the districts still afford Democrats an advantage, but not to the extent that Republican votes are invidiously diluted and the districts' representational function

its October 2022 Term that challenges a decision by the Supreme Court of North Carolina that its state constitution similarly limits partisan gerrymandering of congressional districts.¹³ The outcome may well bear on the continued viability of the reasoning in the circuit court’s opinion limiting partisan gerrymandering in Maryland.¹⁴

Part I discusses the causes of action raised by the parties under the Maryland Constitution and Declaration of Rights, their disposition by the court, and one further key provision of the Maryland Constitution, held to address congressional redistricting, that also supports the court’s judgment.¹⁵ Part II examines the authority of Maryland and federal courts to remedy a defective map by drawing a replacement. Part III notes some of the key issues currently before the Supreme Court in *Moore v. Harper*,¹⁶ and how their disposition may bear on the continued viability of *Szeliga v. Lamone*.¹⁷

I. CAUSES OF ACTION UNDER THE MARYLAND CONSTITUTION AND DECLARATION OF RIGHTS

The *Parrott v. Lamone*¹⁸ plaintiffs claimed that the December 2021 map violated Article III, Section 4 of the Maryland Constitution, as well as Article 7 of the Maryland Declaration of Rights.¹⁹ The *Szeliga* plaintiffs claimed that the December 2021 map violated Article I, Section 7 of the Maryland Constitution, as well as Articles 7, 24, and 40 of the Maryland Declaration of Rights.²⁰ While not addressed by the parties, Article III, Section 49 addresses congressional districting in parallel with Article I, Section 7.²¹

is damaged. Compare *infra* Figures 1 & 2 (showing the December 2021 districts and their partisan data), with *infra* Figures 3 & 4 (showing the April 2022 districts and their partisan data).

13. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), cert. granted sub nom., *Moore v. Harper*, No. 21-1271 (U.S. June 30, 2022).

14. *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022).

15. Article III, Section 49 of the Maryland Constitution authorizes the General Assembly to regulate elections. See *infra* Section I.A.2. Part I also suggests, in notes, that the generally-allowable 10% population variance for General Assembly districts is not a safe harbor, see *infra* note 52, that the definition of “contiguity” should be applied in a manner reflecting its purpose, see *infra* note 59, and that state courts have latitude in applying Supreme Court holdings on justiciability, although it is unclear whether a claim posing a nonjusticiable federal question is removable, see *infra* note 102.

16. No. 21-1271 (U.S. cert. granted June 30, 2022).

17. No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022).

18. No. C-02-CV-21-001773 (Md. Cir. Ct. Dec. 21, 2021).

19. *Parrott* Complaint, *supra* note 5, ¶¶ 86–108.

20. *Szeliga* Complaint, *supra* note 5, ¶¶ 59–82.

21. See *infra* Section I.A.2.

A. *Article I, Section 7 and Article III, Section 49 of the Maryland Constitution*

Article III, Section 49 of the Maryland Constitution is analogous to the Elections Clause of Article I, Section 4 of the Federal Constitution in that it broadly authorizes the General Assembly to set the “time, place and manner of holding elections in this State.” Article I, Section 7, which protects the “purity of elections,” can be considered a subset of Article III, Section 49. However, only Article I, Section 7 was raised as a basis of a claim in these proceedings, and the Court dismissed that claim prior to trial. In addition to discussing this claim in Section I.A.1, the Article will discuss the potential utility of Article III, Section 49, or both provisions together, in a claim against partisan gerrymandering in Section I.A.2. The federal Elections Clause assigns the General Assembly these same duties with respect to congressional elections, but it has been held not to authorize legislatures to “favor or disfavor a class of candidates.” However, the U.S. Supreme Court has also held that standards do not exist to allow federal courts to enforce this limitation in the context of congressional districts. While this path is currently closed to federal courts, it may be viable for Maryland courts.

1. *Consideration of Article I, Section 7 in the Szeliga Proceedings*

This Section addresses the *Szeliga* plaintiffs’ claim under Article I, Section 7, which was the only claim that the court dismissed prior to trial.

Article I, Section 7 of the Maryland Constitution reads: “The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.”²² The *Szeliga* plaintiffs interpreted this provision as requiring “the General Assembly to pass laws concerning elections that are fair and evenhanded, and that are designed to eliminate corruption.”²³ This interpretation views the General Assembly’s *duty* to enact relevant laws as also being a *limitation* on its power to enact laws inconsistent with that duty, such as a law that would contaminate the purity of elections.²⁴ The *Szeliga* plaintiffs further alleged that the cracking of Republican voters was neither fair nor evenhanded,²⁵ and that “[l]ike all extreme political gerrymanders

22. MD. CONST. art. I, § 7.

23. *Szeliga* Complaint, *supra* note 5, ¶ 66. *But see infra* notes 28, 35 and accompanying text (summarizing the State defendants’ arguments).

24. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 18, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022) [hereinafter *Szeliga* Plaintiffs’ Opposition] (citing *Socialist Workers Party v. Sec’y of State*, 317 N.W.2d 1, 11 (Mich. 1982)); *id.* at 19 (first citing *Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 696–97, 926 A.2d 199, 207–09 (2007); and then citing *Wells v. Kent Cnty. Bd. of Election Comm’rs*, 168 N.W.2d 222, 227 (Mich. 1969)).

25. *Szeliga* Complaint, *supra* note 5, ¶ 67.

before it, the [December] 2021 Plan amount[ed] to election rigging.”²⁶ Lastly, they contended that the December 2021 districts violated Article I, Section 7 of the Maryland Constitution by “undermin[ing] democracy” in that their design “ensur[ed] that the people cannot choose those who they want to govern them.”²⁷

The State defendants characterized Article I, Section 7 as enforcing a duty “to prescribe the mechanics of elections, and to embody those mechanics with protections against corruption or fraud” but not imposing any “restriction on the General Assembly’s authority.”²⁸

The court granted the defendants’ Motion to Dismiss with respect to the *Szeliga* plaintiffs’ Article I, Section 7 claim.²⁹

*2. Further Consideration of Article I, Section 7 and Article III, Section 49 Based on the U.S. Supreme Court’s Interpretation of the Elections Clause of the U.S. Constitution*³⁰

The U.S. Supreme Court has interpreted the Elections Clause in Article I, Section 4 of the U.S. Constitution as imposing a duty upon the General Assembly that is nearly identical to the Maryland Court of Appeals’ interpretation of Article I, Section 7 and Article III, Section 49 of the Maryland Constitution.³¹ Article III, Section 49 provides that “[t]he General Assembly shall have power to regulate by Law, not inconsistent with this Constitution, all matters which relate to the Judges of election, time, place and manner of holding elections in this State, and of making returns thereof.”³²

26. *Id.* ¶ 68.

27. *Id.* ¶ 69.

28. Memorandum in Support of Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 35, *Szeliga*, No. C-02-CV-21-001816 [hereinafter *Szeliga* Memo. in Support of MTD] (citing *Cnty. Council for Montgomery Cnty. v. Montgomery Ass’n, Inc.*, 274 Md. 52, 60–65, 333 A.2d 596, 600–03 (1975)).

29. Order at 2, *Szeliga*, No. C-02-CV-21-001816 [hereinafter *Szeliga* Order on MTD] (dismissing the Article I, Section 7 claim with prejudice). This Order did not dismiss any of the other claims asserted by the *Szeliga* Plaintiffs or the *Parrott* Plaintiffs. *Id.*; see also *Szeliga*, No. C-02-CV-21-001816, at 11 n.13 (providing the court’s reasoning for dismissing the Article I, Section 7 claim).

30. The plaintiffs did not raise claims under Article III, Section 49 of the Maryland Constitution.

31. Compare *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (holding that the Elections Clause affords state legislatures “authority to provide a complete code for congressional elections . . . to enforce the fundamental right involved”), with *Cnty. Council for Montgomery Cnty. v. Montgomery Ass’n*, 274 Md. 52, 60–61, 333 A.2d 596, 600–01 (1975) (recognizing that the current Article I, Section 7, and Article III, Section 49 “demonstrate that . . . the regulation of elections would be the province of the State Legislature,” for which “[t]he General Assembly has responded . . . by enacting a comprehensive State Election Code . . . covering every aspect of the electoral process in Maryland” including the “establishment of United States Congressional Districts”).

32. MD. CONST. art. III, § 49.

The Supreme Court has further interpreted the Elections Clause as forbidding statutes crafted to favor or disfavor a political party or candidate.³³ Thus the Elections Clause imposes upon the General Assembly both a duty—to enact regulations that enable the voters to choose their representatives, and a limitation—not to assume a proactive role in making these choices. The duty is similar to the one imposed by Article I, Section 7 of the Maryland Constitution, as suggested by the State defendants, as well as by Article III, Section 49. The limitation is similar to the one implied by Article I, Section 7 of the Maryland Constitution, as suggested by the *Szeliga* plaintiffs, as well as by Article III, Section 49.³⁴ The Maryland Court of Appeals has not considered whether Article I, Section 7 or Article III, Section 49 incorporate a limitation similar to that under the Elections Clause.³⁵ Under *Rucho v. Common Cause*,³⁶ the extent of any limit on partisan favoritism under the Elections Clause is currently undefined by any standard, and thus unenforceable, at least by federal courts, with respect to the design of congressional districts.³⁷ But the Maryland provisions may well be more susceptible to a judicially enforceable limit.³⁸

The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”³⁹ The U.S. Supreme Court in *Smiley v. Holm*⁴⁰ stated that:

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.⁴¹

33. See *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (“[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995)).

34. See *infra* text accompanying notes 39–50.

35. See *Szeliga* Memo. in Support of MTD, *supra* note 28, at 35.

36. 139 S. Ct. 2484 (2019).

37. *Id.* at 2506 (concluding “that neither § 2 nor § 4 of Article I ‘provides a judicially enforceable limit . . . when districting’” (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004))).

38. See *infra* Section I.B. for a discussion of Article III, Section 4 of the Maryland Constitution.

39. U.S. CONST. art. I, § 4, cl.1.

40. 285 U.S. 355 (1932).

41. *Id.* at 366.

Thus, the Court in *Smiley* viewed the federal Elections Clause as assigning the state legislatures the duty, and corresponding authority, to establish the logistics necessary for voters to exercise their representational rights. *Smiley* did not address whether the Elections Clause confers authority to determine these logistics so as to influence election outcomes. As will soon be discussed, those cases arose sixty years later.

The Supreme Court's view of the federal Elections Clause in *Smiley* closely tracks the Maryland Court of Appeals' discussion of Article I, Section 7 and Article III, Section 49 of the Maryland Constitution in *County Council for Montgomery County v. Montgomery Association*⁴²:

These provisions demonstrate that the framers of our Constitution contemplated that the regulation of elections would be the province of the State Legislature. The General Assembly has responded to these constitutional directives by enacting a comprehensive State Election Code which is contained in Article 33 of the Annotated Code of Maryland.

Article 33 contains detailed provisions covering every aspect of the electoral process in Maryland. Among other things provided for by the Election Code are administrative supervision of election procedures, location of polling places, creation of precinct boundaries, . . . registration of voters and absentee registration, use of paper ballots, use and operation of voting machines, . . . tabulation of votes, . . . resolution of contested elections, presidential electors, dates of election for United States Senators and Representatives, *establishment of United States Congressional Districts*, regulation of referenda, . . . and . . . a Fair Campaign Financing Fund.⁴³

The Maryland Court of Appeals in *County Council* viewed these provisions of the Maryland Constitution as applying a similar if not identical duty upon the General Assembly as does the federal Elections Clause as viewed in *Smiley*. However, the Maryland duty covers all elections, specifically including congressional elections, while the federal Elections Clause covers only congressional elections. And with respect to congressional elections, the scope of the Maryland duty as interpreted in *County Council*, appears consistent with the scope of the federally imposed duty as interpreted in *Smiley*. *County Council* expressly refers to the scope as a "directive" to the legislature, while *Smiley* refers to it as an "authority." But the presence of both a duty and the authority to carry out that duty are at least

42. 274 Md. 52, 333 A.2d 596 (1975).

43. *Id.* at 60–61, 333 A.2d at 601 (footnote omitted) (emphasis added); *see also* Recent Decision, *County Council v. Montgomery Association, Inc.*, 274 Md. 52, 333 A.2d 596 (1975), 35 MD. L. REV. 543, 544 (1976).

implied in each decision. Twenty years after *County Council*, the U.S. Supreme Court had occasion to take up the limitation question.

In *Cook v. Gralike*,⁴⁴ the Supreme Court reaffirmed that “the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”⁴⁵ *Gralike* struck down a ballot design imposed by a recent Missouri constitutional amendment to disfavor candidates taking a policy position opposed to term limits.⁴⁶ As Chief Justice Rehnquist noted in his concurring opinion, “[t]he result [was] that the State inject[ed] itself into the election process at an absolutely critical point—the composition of the ballot, which [was] the last thing the voter [saw] before he ma[de] his choice—and [did] so in a way that [was] not neutral as to issues or candidates.”⁴⁷

In *Rucho v. Common Cause*, the Supreme Court reached a conclusion that differed from that in *Gralike*, holding that the Elections Clause did *not* afford a discernible limit on the extent of partisanship permissible in the design of congressional districts.⁴⁸ However, the Court in *Rucho* further noted that a *state* provision, such as one prohibiting districts “drawn with the intent to favor or disfavor a political party,” *would* be judicially enforceable.⁴⁹

Just as the Maryland Court of Appeals in *County Council* interpreted Maryland’s Constitution to include a duty similar to that which the U.S. Supreme Court found within the Elections Clause in *Smiley*, the Court of Appeals could similarly find the Maryland provisions to include a limitation similar to that subsequently found by the U.S. Supreme Court in *U.S. Term Limits* and *Gralike*. Thus, Article I, Section 7 and Article III, Section 49 of

44. 531 U.S. 510 (2001).

45. *Id.* at 523 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995)).

46. *Id.* at 524–26.

47. *Id.* at 532 (Rehnquist, C.J., concurring in judgment).

48. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). *Rucho* does not discuss *Gralike*, which ostensibly remains good law. Considering the two cases together, the Court’s current guidance is that state statutes regulating elections may generally not favor or disfavor parties or candidates—but the design of congressional districts is an exception, where such partisanship is not limited by the U.S. Constitution. *See also infra* note 50 and accompanying text (discussing the use of Article III, Section 4 of the Maryland Constitution as a standard for enforcing Article I, Sections 2 and 4 of the U.S. Constitution).

49. *Rucho*, 139 S. Ct. at 2507 (quoting *id.* at 2524 n.6 (Kagan, J., dissenting)). Thus, while the Court in *Rucho* did not discuss *Gralike*, it nevertheless used a phrase from *Gralike*—describing what the Elections Clause does not generally permit, to describe what a hypothetical provision of state law could forbid as to congressional districts. *Gralike*, 531 U.S. at 523. The only apparent difference is that the Election Clause limitation in *Gralike* is implied—and at least in part reinforced by the First Amendment, *see id.* at 530 (Rehnquist, C.J., concurring in judgment), and by Article I, Section 2, *see id.* at 528 (Kennedy, J., concurring) (citing *U.S. Term Limits*, 514 U.S. at 842 (Kennedy, J., concurring)), while the hypothetical limitation envisioned in *Rucho* would be expressly stated.

the Maryland Constitution could be interpreted to afford the General Assembly both a duty and a limitation of authority similar to those afforded by the Elections Clause of the U.S. Constitution. And while the U.S. Supreme Court has thus far declined to extend this limitation to cover the design of congressional districts, the Maryland Court of Appeals could find that such a limitation from within the comparable Maryland constitutional provisions can be judicially applied to the design of congressional districts.⁵⁰

B. Article III, Section 4 of the Maryland Constitution

The *Parrott* plaintiffs claimed that the December 2021 congressional districts violated Article III, Section 4 of the Maryland Constitution.⁵¹ This provision states that “[e]ach legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due

50. See *infra* note 102 and accompanying text discussing that state courts are not bound by U.S. Supreme Court holdings as to political questions when interpreting or applying similar state constitutional provisions, and perhaps not even when interpreting the same federal provision. Following the example set by the trial court in *Szeliga*, a Maryland court could draw the line at the point where partisan favoritism results in districts that fail the compactness and adjoining territory requirements that apply to state legislative districts under Article III, Section 4. *Cf.* *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 10–11 (Md. Cir. Ct. Mar. 25, 2022) (determining that similar provisions of the Maryland Constitution and Declaration of Rights “provide a nexus to Article III, Section 4” which can serve as a standard for enforcing those provisions); *id.* at 21–23 (citing *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 142, 144, 150, 832 A.2d 214, 223–24, 224–25, 227 (2003)). Grounds for finding such a nexus here are even stronger when paired with Article I, Section 2 of the U.S. Constitution, which focuses on representational rights. *See* U.S. CONST. art. I, § 2. While these representational rights have most notably included the right to vote for members of Congress, *see, e.g., U.S. Term Limits*, 514 U.S. at 820–21, they encompass further important aspects of representation, such as how district designs may support or detract from effective representation. *Cf.* *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019) (Alito, J., dissenting) (describing the impact of a district’s design on representation); *In re Legis. Districting of State*, 299 Md. 658, 689, 475 A.2d 428, 444 (1984) (citing *Schrage v. State Bd. of Elections*, 430 N.E.2d 483, 489 (Ill. 1981), where the Supreme Court of Illinois found that a noncompact design “significantly impedes” representation)). While the U.S. Supreme Court has not found Article I, Sections 2 and 4 to afford a judicially enforceable standard themselves, *see Rucho*, 139 S. Ct. at 2506 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004)), Article III, Section 4 of the Maryland Constitution could similarly serve as a standard to judicially enforce Article I, Sections 2 and 4 of the federal Constitution within Maryland. *See* Plaintiffs’ Supplemental Memorandum at 2, *Szeliga*, No. C-02-CV-21-001816 [hereinafter *Szeliga* Plaintiffs’ Supplemental Motion] (citing *In re Legis. Districting of State*, 299 Md. at 676 n.9, 475 A.2d at 437 n.9); *see also* *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 367, 371 (1990) (explaining that federal law is a fully integrated part of each state’s own law); *Lamb v. Hammond*, 308 Md. 286, 304, 518 A.2d 1057, 1066 (1987) (finding the legislature has no “power[] to act arbitrarily or capriciously”); *Scholle v. State*, 90 Md. 729, 740, 46 A. 326, 327 (1900) (rejecting a discriminatory statute “founded upon no reason having relation to the subject” (citing *State v. Pennoyer*, 18 A. 878 (N.H. 1889))).

51. *Parrott* Complaint, *supra* note 5, ¶¶ 92–98, 104–08; Plaintiffs’ Opposition to Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 15, *Parrott v. Lamone*, No. C-02-CV-001773 (Md. Cir. Ct. Mar. 25, 2022) [hereinafter *Parrott* Plaintiffs’ Opposition] (disagreeing with cases limiting Article III, Section 4 of the Maryland Constitution to General Assembly districts).

regard shall be given to natural boundaries and the boundaries of political subdivisions.”⁵² The *Szeliga* plaintiffs, while not directly claiming a violation of Article III, Section 4, suggested that this provision could serve as a standard for limiting gerrymandering under other provisions.⁵³ While

52. MD. CONST. art. III, § 4. The districts varied in population by no more than one resident, avoiding any need to justify a variance. *See also infra* note 63 and accompanying text (addressing compactness). Separately, while the allowable population variance for state legislative districts was not at issue in this case, it has been a matter of significant longstanding controversy. *Compare* *Legis. Redistricting Cases*, 331 Md. 574, 597, 629 A.2d 646, 657 (1993) (establishing a variance up to 10% as essentially a safe harbor), *with id.* at 632–34, 629 A.2d at 675–76 (Eldridge, J., dissenting) (“The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.” (quoting *Brown v. Thomson*, 462 U.S. 835, 845–46 (1983))), *and* *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (arguing that a variance below 10% is subject to challenge as being made for an illegitimate purpose). The Court of Appeals did not revisit the issue in 2002. *See In re Legis. Districting of the State*, 370 Md. 312, 338, 805 A.2d 292, 307 (2002) (citing *Legis. Redistricting Cases*, 331 Md. at 597, 629 A.2d at 676) (recounting the Special Master’s review); *id.* at 338 n.20, 629 A.2d at 307 n.20 (noting that population issues about the challenged map were moot as the court was ordering the map redrawn for other reasons).

The issue provoked significant discussion in 2013, after the Special Master applied a standard that allowed for challenging a variance under 10% upon showing that the variance was “deliberately created in furtherance of intentional impermissible racial, political, or regional discrimination” *In re 2012 Legis. Districting of the State*, 436 Md. 121, 164, 80 A.3d 1073, 1098 (2013); *see also id.* at 176, 179, 80 A.3d at 1104, 1106 (applying *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (2004)). The State objected to the standard as deviating from the near “safe haven” standard established in 1992, *see id.* at 165–66, 80 A.3d at 1098–99 (citing *Legis. Redistricting Cases*, 331 Md. at 594–95, 597, 629 A.2d at 656, 657), and the challengers there objected to the Special Master’s standard as insufficiently open to challenge, *see id.* at 167, 80 A.3d at 1099 (first citing *Brown*, 462 U.S. at 843–44; and then citing *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). The Court of Appeals rejected the exceptions of both the State and the challenger, finding that the challengers met neither the standard adopted by the Court of Appeals in 1993 used by the Special Master, nor the one the challengers proffered. *See id.* at 169, 80 A.3d at 1100–01 (citing *Legis. Redistricting Cases*, 331 Md. at 597, 629 A.2d at 657); *id.* at 169–76, 80 A.3d at 1101–05 (comparing the evidence proffered by the challengers there with that proffered in *Larios*); *id.* at 179, 80 A.3d at 1106–07 (quoting *Roman*, 377 U.S. at 710). However, the Court of Appeals did not clarify the proper standard for challenging variances under 10% going forward.

The author respectfully suggests that future challengers must only show that a variance of “less than 10% reflects the predominance of illegitimate reapportionment factors rather than . . . legitimate considerations.” *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 259 (2016) (internal quotation marks omitted); *id.* at 264 (citing *Cox*, 542 U.S. at 949); *Raleigh Wake Citizens Ass’n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 341–42 (4th Cir. 2016) (quoting *Harris*, 578 U.S. at 259, 264). Relatedly, multimember districts are a specific context where the U.S. Supreme Court has suggested that partisan gerrymandering may violate the federal Equal Protection Clause. *See Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (“[M]ultimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.”); *see also infra* note 146 (noting that court-drawn plans should generally refrain from incorporating multimember districts).

53. *Szeliga* Plaintiffs’ Supplemental Motion, *supra* note 50, at 2 (quoting *In re Legis. Districting of State*, 299 Md. at 676 n.9, 475 A.2d at 437 n.9).

accepting that this provision was intended to limit gerrymandering,⁵⁴ the defendants contended that the textual reference to “legislative” districts limits its applicability to districts for the General Assembly, rendering it inapplicable to congressional districts.⁵⁵

The court disagreed, and found that legislative districts, as used in Article III, Section 4, includes congressional districts.⁵⁶ The court further found that Article III, Section 4 may serve as a standard to evaluate alleged violations of Articles 7 and 24 of the Maryland Declaration of Rights since each of those provisions “implicate the use of the Section 4 criteria.”⁵⁷

The court concluded, based largely on trial testimony and exhibits, that the December 2021 congressional districts violated Article III, Section 4.⁵⁸ The court found that the districts were contiguous,⁵⁹ but that they were not

54. *Szeliga* Memo. in Support of MTD, *supra* note 28, at 11–13.

55. *Id.* at 17–18 (citing *Olson v. O’Malley*, Civ. No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012)).

56. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 20 (Md. Cir. Ct. Mar. 25, 2022).

57. *Id.* at 21; *see also id.* at 21–23 (explaining the “methodology of drawing a nexus between a ‘standards’ clause and its facilitating constitutional provision” (citing *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 832 A.2d 214 (2003))); *id.* at 23 n.25 (discussing *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737 (Pa. 2018), a case that used a similar nexus to evaluate congressional districts under Pennsylvania’s Constitution and Declaration of Rights).

58. *Id.* at 88–93.

59. *Id.* at 88. *But cf. infra* note 77 (limiting contiguous General Assembly districts from crossing the Chesapeake Bay); *Elections Reapportionment and Redistricting—General Assembly—A District Intersected by Navigable Water Does Not Violate the Requirement of Contiguity*, 85 Md. Op. Att’y Gen. 183, 183 (2000) (“[C]ontiguity is not interrupted by navigable water, regardless of whether the water is spanned by a bridge or tunnel or is crossed by a ferry. However, a district that crossed the Chesapeake Bay to include portions of its western and eastern shores might be subject to challenge.”).

The current definitions for contiguity leave room for determining that several of the December 2021 districts were not of sufficiently adjoining territory to meet the requirement of Article III, Section 4 of the Maryland Constitution. “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.” *In re Legis. Districting of State*, 299 Md. 658, 675–76, 475 A.2d 428, 437 (1984) (first citing *Schneider v. Rockefeller*, 293 N.E.2d 67 (N.Y. 1972); and then citing *Sherill v. O’Brien* (*In re Sherill*), 81 N.E. 124 (N.Y. 1907)). The terms “adjoining territory” and “contiguous territory” have been interpreted as interchangeable. *Id.* at 674–75, 475 A.2d 436 (citing *Reynolds v. Sims*, 377 U.S. 533, 578–79 (1964)); *see also Johnson v. State*, 366 S.W.3d 11, 31 (Mo. 2012) (“The plain and ordinary meaning of ‘contiguous’ is provided by the dictionary definition of ‘touching or connected throughout.’” (quoting *Contiguous*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 492 (1993))). A typical test for such “contiguity requires every part of a district to be reachable from every other part without leaving the district or crossing its boundary.” *Parella v. Montalbano*, 899 A.2d 1226, 1253 (R.I. 2006) (citing *Hickel v. Se. Conference*, 846 P.2d 38, 45 (Alaska 1992)). However, this test may not suffice to confirm compliance with the definition in *In re Legislative Districting of State*, where it is met through a feature such as a narrow orifice or rope that serves no legitimate representational purpose but to enable the district to pass the travel test. 299 Md. at 675–76, 475 A.2d at 437.

compact,⁶⁰ and failed to reflect due regard for the boundaries of political subdivisions.⁶¹

In evaluating compactness, the court's task was not to apply a geometric standard, but rather to determine whether the General Assembly "fairly considered and applied" compactness principles "in light of all of the [other related] constitutional requirements."⁶² To this end, the court highlighted analysis by the plaintiffs' expert establishing the December 2021 maps' poor scores on four metrics typically used to measure compactness relative to the scores for earlier Maryland congressional districts as well as those for districts in other states.⁶³ With respect to the results calculated for each of those four metrics, the court found it:

"Generally, courts disfavor finding one territory to be contiguous to another territory when the only link between the two is a narrow corridor. Courts have repeatedly held that when the only purpose the corridor serves is to create the requisite contiguity, such a subterfuge cannot [prevail]." *Griffin v. City of Robards*, 990 S.W.2d 634, 640 (Ky. 1999) (citations omitted) (considering contiguity in the context of municipal annexation); *see also In re Apportionment L. Appearing as Senate Joint Resol. 1 E*, 1982 Special Apportionment Session: Constitutionality Vel Non, 414 So.2d 1040, 1051 (Fla. 1982) ("[L]ands that mutually touch only at a common corner or right angle cannot be regarded as 'contiguous' within the proper meaning of the word *when applying it in establishing house or senate districts*." (emphasis added) (citing *Jaffrey v. McGough*, 7 So. 333, 334 (Ala. 1890))). *But cf. Jaffrey*, 7 So. at 334 (describing permissible designs for a homestead stating: "[L]ike the cloud described by Hamlet to Polonius, it might just as well be 'in the shape of a camel,' a 'weasel,' or a 'whale'"). Arguably, from the perspective of a resident in the middle of such a narrow corridor, that district might better support representation if it were wholly noncontiguous—without the corridor. In such a district, as with several of the December 2021 districts, there may well be "division between one part of a district's territory and the rest of the district; in other words . . . territory separated by other territory" but for the narrow channel or orifice. *In re Legis. Districting of State*, 229 Md. at 675–76, 475 A.2d at 437. "Contiguous" territory excludes "territory [that is merely] nearby, in the neighborhood or [in the] locality of" other territory of a district. *In re Sherrill*, 81 N.E. at 131.

Multiple districts in the December 2021 plan comprised territory that was not even close to being "nearby" or in the "locality of" other territory in the district—and would fall under this exclusion. In the above cases that apply "contiguity" beyond its dictionary definition, the purpose of the described shape or area is clearly a factor; such interpretations incorporate both definition and application. It is not clear whether the interpretation of Judge Battaglia in *Szeliga* is limited to geometry, along the lines of *Johnson* and *Parella*, or whether it includes contiguity's representational purpose, akin to *Griffin*. The latter is more plausible. *See State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 61, 76 A.3d 1110, 1128 (2013) ("[I]n cases involving voting rights . . . we construe . . . relevant constitutional provisions in relation to their purpose of providing and encouraging the fair and free exercise of the elective franchise." (emphasis added) (citing *Kemp v. Owens*, 76 Md. 235, 241, 24 A. 606, 608 (1892))). In any event, the author would recommend that Maryland courts interpret "adjoining territory" consistent with *Griffin* as quoted above.

60. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 88–90 (Md. Cir. Ct. Mar. 25, 2022).

61. *Id.* at 90–92 (focusing on the high number of splits of counties among districts in the December 2021 plan).

62. *Id.* at 88, 89 (quoting *In re Legis. Districting of the State*, 370 Md. 312, 416, 805 A.2d 292, 353–54 (2002)); *see also In re Legis. Districting of the State*, 370 Md. at 416, 805 A.2d at 353–54 (citing *Legis. Redistricting Cases*, 331 Md. 574, 590–91, 629 A.2d 646, 654 (1993)).

63. *Szeliga*, No. C-02-CV-21-001816, at 89.

[N]otable that the 2021 Plan reflects compact scores that range from [(1)] a “limited” number of state maps worse than Maryland, to [(2)] only six other maps with worse scores, to [(3)] the worst Inverse Schwartzberg score in the last fifty years in the United States, to [(4)] “very poorly relative to anything drawn in the last fifty years in the United States.”⁶⁴

The court also found it important that among 95,000 maps meeting comparable constitutional and Voting Rights Act requirements that were simulated and analyzed by the plaintiffs’ expert, “only one map had a Gerrymandering Index larger than the 2021 Plan.”⁶⁵ Accordingly, the court found that “the notion that the 2021 Plan is compact is empirically extraordinarily unlikely.”⁶⁶

The court focused on the division of counties among multiple districts in evaluating the December 2021 Plan’s regard for political boundaries.⁶⁷ The court’s emphasis on the number of these “county splits” reflected the key roles of counties in Maryland.⁶⁸ Upon considering that the 2021 Plan resulted in 17 county splits, compared to 21 such splits in the 2002 and 2011 Plans,⁶⁹ the court still found that “fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed,”⁷⁰ recalling that the Court of Appeals similarly rejected the General Assembly districts enacted in 2002 for excessive subdivision crossings.⁷¹

While the cases relied upon by the court clearly lay out the significant roles of Maryland’s counties within the state government,⁷² many of these

64. *Id.*

65. *Id.* Voting Rights Act (“VRA”) districts, intended to elect Representatives to the U.S. House of Representatives reflecting the choice of minority voters, have been particularly subject to such abuse, such as where “ropes” connect the bulk of such districts with distant Republican areas intended to be an impotent minority of those districts. *See Senate Floor Actions (3/29/2022)*, MD. SENATE, at 47:50–48:10 (Mar. 29, 2022) (statement of Sen. Robert G. Cassilly), <https://mgaleg.maryland.gov/mgaweb/FloorActions/Media/senate-56-> (“[The Voting Rights Act] was never intended as a sword to allow the majority party to use that as a subterfuge to deprive the minority party of a fair say in democracy.”).

66. *Szeliga*, No. C-02-CV-21-001816, at 90.

67. *Id.* at 90–92.

68. *Id.* at 90–91 (first quoting *Md. Comm. for Fair Representation v. Tawes (Tawes II)*, 229 Md. 406, 411–12, 184 A.2d 715, 717–18 (1962); and then quoting *Legis. Redistricting Cases*, 331 Md. 574, 620–21, 629 A.2d 646, 669–70 (1993) (Eldridge, J., dissenting)).

69. *Id.* at 90.

70. *Id.* at 91.

71. *See id.* at 91–92 (quoting *In re Legis. Districting of the State*, 370 Md. 312, 368, 805 A.2d 292, 325–26 (2002)).

72. *Id.* at 90–91 (first quoting *Md. Comm. for Fair Representation*, 229 Md. at 411–12, 184 A.2d at 717–18; and then quoting *Legis. Redistricting Cases*, 331 Md. at 620–21, 629 A.2d at 669–70 (Eldridge, J., dissenting)).

roles are less relevant or inapplicable to the federal government.⁷³ Further, the equal population requirement applies much more strictly to the larger congressional districts than to the smaller state legislative districts that may have a variance up to 10 percent.⁷⁴ Thus, the extent of the “regard” that is “due” to avoid crossing county boundaries in the course of drawing congressional districts ought to be somewhat less than the extent that is “due” for drawing state legislative districts.⁷⁵

Similarly, with respect to natural boundaries,⁷⁶ the greater size of congressional districts augurs for greater latitude in crossing natural boundaries—particularly the Chesapeake Bay.⁷⁷ Since the Eastern Shore counties together do not contain a sufficient number of residents for a congressional district,⁷⁸ the remaining population for that district must come from the Western Shore—from among counties north of the bay, those west of the Bay Bridge, or both.⁷⁹ Article III, Section 4 should not be read so narrowly as to limit this choice to the northern counties.

73. *E.g., id.* at 90 (“[The counties] have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State.” (quoting *Md. Comm. for Fair Representation*, 229 Md. at 411–12, 184 A.2d at 717–18)); *id.* at 91 (“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. . . . [Further,] many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties.” (quoting *Legis. Redistricting Cases*, 331 Md. at 620–21, 629 A.2d at 669–70)).

74. *See also supra* note 52 (discussing the variance for state legislative districts). Compare *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758, 762–65 (2012) (allowing a 0.79% variance among congressional districts to avoid splitting a county), with *Legis. Redistricting Cases*, 331 Md. at 597, 629 A.2d at 657 (allowing up to a 10% variance among state legislative districts as “prima facie immaterial”).

75. Even so, the author takes no issue with the court’s finding that the county splits among the December 2021 districts reflected insufficient regard for the boundaries of political subdivisions.

76. The court made no finding as to the sufficiency of regard for natural boundaries.

77. *But cf. In re Legis. Districting of the State*, 370 Md. 312, 343–44, 805 A.2d 292, 310 (2002) (reviewing the debates on the development of Article III, Section 4 of the Maryland Constitution that settled on an interpretation of “contiguous” that would exclude a Senate or Delegate district crossing the Chesapeake Bay).

78. See “Congressional District 01” in *2022 Maryland Congressional Districts*, MD. DEP’T OF PLANNING, <https://planning.maryland.gov/Redistricting/Pages/2020/congDist.aspx> (last visited Aug. 9, 2022).

79. *See id.* (showing that all of Harford County and part of Baltimore County, containing 55,051 residents, were combined with the Eastern Shore counties to form a full congressional district).

C. Article 7 of the Maryland Declaration of Rights

Both the *Szeliga* and the *Parrott* plaintiffs claimed that the December 2021 congressional districts violated Article 7 of the Maryland Declaration of Rights.⁸⁰ Article 7 provides:

That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, *elections ought to be free and frequent*; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.⁸¹

The *Szeliga* plaintiffs argued that:

Article 7 . . . provides the citizens of Maryland . . . with a right to an equally effective power to select the congressional representative of their choice, and bars the State from creating congressional districts that ensure the election of candidates from one political party and/or diluting the votes of citizens on the basis of political affiliation and viewpoint.⁸²

They further argued that Article 7 should be read to prohibit partisan gerrymandering in light of the Court of Appeals' direction that "[h]owever ambiguously or obscurely statutes or constitutions may be phrased, it would not be just to give them a construction in hostility to the principles on which free governments are founded."⁸³ They also noted that the Supreme Courts of Pennsylvania and North Carolina have recently interpreted similar provisions of their states constitutions to prohibit partisan gerrymandering,⁸⁴ with the Supreme Court of Pennsylvania confirming injury to both the right of free elections and the right of suffrage.⁸⁵ Lastly, the *Szeliga* Plaintiffs argued that by predetermining the election outcomes through district designs,

80. *Szeliga* Complaint, *supra* note 5, ¶¶ 59–64; *Parrott* Complaint, *supra* note 5, ¶¶ 86–91, 99–103.

81. MD. CONST. Declaration of Rts., art. 7 (emphasis added).

82. *Szeliga* Complaint, *supra* note 5, ¶ 62.

83. *Szeliga* Plaintiffs' Opposition, *supra* note 24, at 15 (emphasis omitted) (quoting *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 61, 76 A.3d 1110, 1128 (2013)).

84. *Id.* at 13 (first citing *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (“[T]he 2011 Plan subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage, and, thus, violates the Free and Equal Elections Clause of the Pennsylvania Constitution.”); and then citing *Harper v. Hall*, 867 S.E.2d 554, 556 (N.C. 2022) (“[C]laims asserting that congressional . . . districting plans enacted by the General Assembly are unlawful partisan gerrymanders that violate the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the Declaration of Rights . . . of the North Carolina Constitution are . . . justiciable in North Carolina courts.”).

85. *Id.* at 14 (“[S]ophisticated gerrymandering and partisan dilution of votes is not ‘free and equal,’ . . . [but] in fact . . . ‘prevent[s] the free exercise of the right of suffrage.’” (quoting *League of Women Voters*, 178 A.3d at 821)). On February 14, 2022, the Supreme Court of North Carolina issued its opinion in *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.*, *Moore v. Harper*, No. 21-1271 (U.S. June 30, 2022).

the December 2021 districts violated Article 7 by effectively limiting their choices in voting for congressional candidates.⁸⁶

The *Parrott* plaintiffs also relied on *State Board of Elections v. Snyder ex rel. Snyder*⁸⁷: “[A]s made clear by Article 7 . . . the [right to vote] is one of, if not, the most important and fundamental right[s] granted to Maryland citizens”⁸⁸ They also quoted the earlier (1892) appearance of the same language the *Szeliga* plaintiffs quoted from *Snyder*,⁸⁹ and similarly discussed the recent cases in Pennsylvania and North Carolina.⁹⁰

The Defendants argued that Article 7 does not apply to congressional elections,⁹¹ and that it does not, in any event, afford protection against partisan gerrymandering.⁹²

The court rejected the defendants’ contention that Article 7 was limited in scope to elections for the General Assembly,⁹³ and found that the plaintiffs had stated a claim under Article 7.⁹⁴ The court found that the evidence at trial “proved that the 2021 Plan was drawn with ‘partisanship as a predominant intent, to the exclusion of traditional redistricting criteria,’ accomplished by the party in power, to suppress the voice of Republican voters,”⁹⁵ and thus it violated Article 7 “in its own right and as a nexus to the standards of Article III, Section 4.”⁹⁶

D. Article 24 of the Maryland Declaration of Rights

The *Szeliga* plaintiffs claimed that the December 2021 districts violated Article 24 of the Maryland Declaration of Rights “by diluting the weight of

86. *Szeliga* Plaintiffs’ Opposition, *supra* note 24, at 17 (citing *Munsell v. Hennegan*, 182 Md. 15, 22, 31 A.2d 640, 643–44 (1943)).

87. 435 Md. 30, 76 A.3d 1110 (2013).

88. *Parrott* Plaintiffs’ Opposition, *supra* note 51, at 7–8 (alteration in original) (internal quotations omitted) (quoting *Snyder*, 435 Md. at 61, 76 A.3d 1110, 1128 (2013)).

89. *Id.* at 8 (quoting *Kemp v. Owens*, 76 Md. 235, 241, 24 A. 606, 608 (1892) (Bryan, J., concurring)).

90. *Id.* at 9–10 (first citing *League of Women Voters*, 178 A.3d at 804; and then citing *Harper*, 867 S.E.2d at 557).

91. *Szeliga* Memo. in Support of MTD, *supra* note 28, at 24–27 (construing the text of Article 7 of the Maryland Declaration of Rights).

92. *Id.* at 27–30 (first citing *Burruss v. Bd. of Cnty. Comm’rs of Frederick Cnty.*, 427 Md. 231, 264, 46 A.3d 1182, 1201 (2012) (providing the process for analyzing constitutional challenges in the elections context); and then citing *Suessman v. Lamone*, 383 Md. 697, 731–33, 862 A.2d 1, 21–22 (2004) (holding that Article 7 does not protect the right of unaffiliated voters to vote in party primary elections)).

93. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 25 (Md. Cir. Ct. Mar. 25, 2022).

94. *Id.* at 27–28 (first citing *Jackson v. Norris*, 173 Md. 579, 596, 603, 195 A. 576, 584–85, 588 (1937); and then citing *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 150, 832 A.2d 214, 227–28 (2003)).

95. *Id.* at 93.

96. *Id.*

their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their congressional representatives.”⁹⁷ Article 24 provides “[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”⁹⁸

The *Szeliga* plaintiffs noted that Article 24 has been held to incorporate the right of Equal Protection.⁹⁹ However, a Maryland constitutional provision may not “always be interpreted or applied in the same manner as its federal counterpart,”¹⁰⁰ and “a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.”¹⁰¹ Therefore, Maryland courts are “not bound to follow the Supreme Court’s conclusion regarding the justiciability of equal protection and free speech challenges to partisan gerrymandering in federal courts” when interpreting and applying the Maryland counterparts.¹⁰²

97. *Szeliga* Complaint, *supra* note 5, ¶ 72. The *Parrott* Plaintiffs did not raise a claim under Article 24.

98. MD. CONST. Decl. of Rts., art. 24.

99. See *Szeliga* Plaintiffs’ Opposition, *supra* note 24, at 20 n.6 (citing *Md. Green Party*, 377 Md. at 157, 832 A.2d at 231–32).

100. *Id.* at 21 (emphasis omitted) (quoting *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002)).

101. *Id.* (internal quotations omitted) (quoting *Md. Green Party*, 377 Md. at 158, 832 A.2d at 231); see also *id.* (quoting *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550, 62 A.3d 123, 131–32 (2013)).

102. *Id.* at 22 (referring to the Supreme Court’s holding in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019)). Unlike the Supreme Court’s interpretation of provisions of the U.S. Constitution, it is arguable that Maryland courts are not bound to follow the Supreme Court’s justiciability holdings with respect to those federal provisions; an interpretation by a Maryland court would not conflict with a U.S. Supreme Court interpretation where the Supreme Court has declined to provide one. See Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681, 704 n.161 (2021) (“As matters stand, state courts may determine federal constitutional questions even though Supreme Court review is blocked on such justiciability grounds as lack of standing, mootness, or political question doctrine.” (quoting 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4015 (3d ed. 2019))). *But see* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 493 (2017) (“Because [the Supreme Court’s political question] doctrine is one of federal law, state courts are required to apply it.”); *but cf. id.* at 497 n.205 (“[S]tate courts are not bound by . . . federal rules of justiciability even when they . . . are called upon to interpret the Constitution” (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989))). While this quote from *ASARCO* suggests that state courts might not be bound to follow the Supreme Court’s political question determinations, Professor Harrison noted that “[t]he *ASARCO* Court had no occasion to consider whether any federal non-jurisdictional principles of justiciability might apply in state court.” *Id.*; *cf.* Elizabeth Earle Beske, *Political Question Disconnects*, 67 AM. U. L. REV. F. 35, 45 (2018) (“[T]his Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot” (quoting *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring in the judgment))). Professor Beske then noted that some states derive their own political question doctrines from their own constitutions, of which several, including Maryland, apply the federal standards set in *Baker v. Carr*, 369 U.S. 186, 217 (1962). See

The defendants countered that *Rucho* precludes Maryland courts from evaluating political gerrymanders under Article 24 since the Supreme Court, in evaluating the Equal Protection Claim in *Rucho*, rejected the test proposed there and stated that “securing partisan advantage” is “permissible” and thus it “does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’”¹⁰³ The

id. at 45 n.93 (citing *Smigiel v. Franchot*, 410 Md. 302, 324–25, 978 A.2d 687, 701 (2009)). A Maryland court could still apply a provision of the U.S. Constitution on the merits, even after the Supreme Court declines to do so for lack of standards, if the Maryland court identifies a suitable standard that was not explicitly rejected by the Supreme Court. In some instances, the Maryland court may have such standards available from the Maryland Constitution. *See supra* notes 48, 50, 54, and 57 and accompanying text.

Two further issues may limit the practical justiciability of questions that may be deemed political for lack of standards under federal law, but perhaps not under Maryland law: One is the prospective removal of such claims to federal court, and the other is the availability of judicial remedies under Maryland law. A defendant may remove a civil action filed in a Maryland court to the federal district court if the federal court has “original jurisdiction” of the matter. 28 U.S.C. § 1441. As relevant here, the federal district courts have such jurisdiction “of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. If a federal district court retains “original jurisdiction” of a civil action that poses a nonjusticiable political question under federal law, despite not having “jurisdiction” to decide the question, then the action would likely be removed—and then promptly dismissed for lack of jurisdiction. While it seems counterintuitive that a federal court might hold jurisdiction only for the purpose of dismissing such an action, it is not at all clear whether the lack of jurisdiction to decide a political question also deprives a federal district court of “original jurisdiction,” thus precluding removal. *See Harrison, supra* (asserting that lack of jurisdiction to decide a political question does not defeat subject matter jurisdiction); *Dodson, supra* (suggesting that political question doctrine should be detached from Article III); *see also Harrison, supra*, at 490 (implying that courts should dismiss political questions for failure to state a claim *upon which relief can be granted*, under Federal Rule of Civil Procedure 12(b)(6), rather than to dismiss for lack of jurisdiction (citing *Mass. State Grange v. Benton*, 272 U.S. 525, 528 (1926))); *cf. Dodson, supra*, at 735 (suggesting that a state law claim that is justiciable under state law would be dismissed if removed to federal court and found nonjusticiable under federal law). *But see Harrison, supra*, at 509 n.244 (allowing for instances where the presence of a political question may defeat standing, and thus subject matter jurisdiction); *Beske, supra*, at 45–46 (noting the “disconnect” unearthed by Professor Harrison as to what the Supreme Court has said and done on the issue); *Dodson, supra*, at 703 (distinguishing nonjusticiable cases, including *Rucho*, that have been dismissed for lack of jurisdiction); Richard H. Fallon Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1494 (2020) (noting “misconceptions that have grown up around the Supreme Court’s insistence that political question determinations are jurisdictional”). Following on these professors’ observations, the federal courts, including the Supreme Court, might also see an incentive to dismiss partisan gerrymandering challenges for lack of subject-matter jurisdiction in order to avoid mandatory review of substantial claims by three-judge district courts. *See* 28 U.S.C. § 2284; *Shapiro v. McManus*, 577 U.S. 39 (2015) (holding that a single-judge district court may not dismiss an action falling under 28 U.S.C. § 2284 for failure to state a claim; author was the lead petitioner in this case). *See infra* Part II on the availability of remedies under Maryland law.

103. *Szeliga* Memo. in Support of MTD, *supra* note 28, at 39–40 (citing *Rucho*, 139 S. Ct. at 2502–03). The Court of Appeals’ allowance for partisan advantage in *In re Legislative Districting* is perhaps more relevant to the applicability of Article 24, a Maryland constitutional provision, than is *Rucho*. *See In re Legis. Districting of the State*, 370 Md. 312, 321–22, 805 A.2d 292, 297 (2002) (citing MD. CONST. art. III, § 4) (“That [a legislative district map] may have been formulated in an attempt to . . . help or injure incumbents or political parties . . . will not affect its validity.”). *But*

defendants further argued that the Supreme Court’s interpretation of the federal Equal Protection Clause in the context of partisan gerrymandering should guide the interpretation of Article 24.¹⁰⁴

The court disagreed that the protections of Article 24 are limited to those of the federal Equal Protection Clause.¹⁰⁵ The court further found that it could enforce those protections in the gerrymandering context through standards supplied from other constitutional provisions,¹⁰⁶ as well as by applying strict scrutiny to impermissible disparate treatment.¹⁰⁷ The court went on to find that testimony at trial established “that Republican voters and candidates [were] substantially adversely impacted by the [December] 2021 Plan,”¹⁰⁸ and that the defendants failed to provide “a ‘compelling state interest’ to rationalize the adverse effect.”¹⁰⁹

E. Article 40 of the Maryland Declaration of Rights

The second clause of Article 40 of the Maryland Declaration of Rights provides for the freedom of speech, similar to the First Amendment of the U.S. Constitution. Article 40 provides “[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.”¹¹⁰ The *Szeliga* plaintiffs claimed that the December 2021 districts violated their Article 40 rights by benefiting Democratic voters and burdening them and other Republican voters because of their voting history, party affiliation, and expression of their political

while several plaintiffs there raised claims under Article 24, *see* 370 Md. at 330, 331, 334, app. at 401, 445, 805 A.2d 302, 303, 304–05, app. at 345, 370–71, neither the Special Master nor the Court of Appeals provided an analysis of them, *see* 370 Md. at 337 n.18, app. at 445–46, 805 A.2d 306 n.18, app. at 371.

104. *Szeliga* Memo. in Support of MTD, *supra* note 28, at 41 (citing *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 780–81 (1983)).

105. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 30 (Md. Cir. Ct. Mar. 25, 2022) (citing *Att’y Gen. of Md. v. Waldron*, 289 Md. 683, 704, 715, 426 A.2d 929, 941, 947 (1981)); *id.* at 30 (citing *Md. Aggregates Ass’n v. State*, 337 Md. 658, 671 n.8, 655 A.2d 886, 893 n.8 (1995)).

106. *Id.* at 33–34 (quoting *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 143, 832 A.2d 214, 223 (2003)); *see also supra* Section I.B.

107. *Id.* at 34 (citing *Md. Green Party*, 377 Md. at 152–53, 156–57, 159, 163, 832 A.2d at 228–29, 231–32, 232–33, 235). “When the State’s classification is asserted to infringe on a fundamental right or interest, the Court should analyze the matter according to a ‘strict scrutiny’ standard. In order for a statute or regulation to withstand equal protection scrutiny under the strict scrutiny standard, the State must show that the law is ‘necessary to promote a compelling governmental interest.’” *Md. Green Party*, 377 Md. at 165–66, 832 A.2d at 236–37 (Harrell, J., concurring) (citations omitted) (quoting *Waldron*, 289 Md. at 705–06, 706, 426 A.2d at 941, 941–42).

108. *Szeliga*, No. C-02-CV-21-001816, at 93.

109. *Id.*

110. MD. CONST. Decl. of Rts., art. 40.

views.¹¹¹ They further claimed that this treatment was not only discriminatory but also retaliatory—intentionally punishing them and other Republicans on account of their votes and protected political speech.¹¹² The *Szeliga* plaintiffs’ arguments using the free speech provisions of Article 40 paralleled their points on equal protection.¹¹³

The defendants argued that the Supreme Court’s opinion in *Rucho* precluded the plaintiffs’ Article 40 claim.¹¹⁴ They noted that the Supreme Court in *Rucho* found that the challenged maps there imposed “no restrictions on speech, association, or any other First Amendment activities.”¹¹⁵ That Court rejected the tests used by the lower courts because “if any ‘intent’ to burden individuals based on their voting history or party affiliation were sufficient to meet the first prong, then ‘any level of partisanship in districting would constitute an infringement of their First Amendment rights.’”¹¹⁶ Defendants further argued that “[a]lthough the Court of Appeals ‘has sometimes held out the possibility that Article 40 could be construed differently from the First Amendment in some circumstances, the Court has generally regarded the protections afforded by Article 40 as “coextensive” with those under the First Amendment.’”¹¹⁷

The court sided with the *Szeliga* plaintiffs, and found that the map impermissibly discriminated against them for their political views—using an analysis similar to that of Chief Justice Rehnquist in his concurrence in *Gralike*. The court noted that the Court of Appeals does not always interpret and apply Article 40 identically to how the Supreme Court interprets and applies the First Amendment,¹¹⁸ and that the Court of Appeals departs from federal interpretations as needed to ensure that rights under the Maryland counterpart provisions “are fully protected.”¹¹⁹ The court found that the specific rights alleged to be infringed were “fundamental,” thus making any

111. *Szeliga* Complaint, *supra* note 5, ¶¶ 79, 80. The *Parrott* Plaintiffs did not raise a claim under Article 40. *See also* Cook v. Gralike, 531 U.S. 510, 531–32 (2001) (Rehnquist, C.J., concurring in judgment) (finding that the ballot language disfavoring *Gralike* violated the First Amendment as it “discriminates on the basis of viewpoint because only those candidates who fail to conform to the State’s position receive derogatory labels”).

112. *Id.* ¶ 81.

113. *See Szeliga* Plaintiffs’ Opposition, *supra* note 24, at 20–24; *see also supra* notes 99–102 and accompanying text.

114. *Szeliga* Memo. in Support of MTD, *supra* note 28, at 40 (citing *Rucho* v. Common Cause, 139 S. Ct. 2484, 2504–05 (2019)).

115. *Id.* (quoting *Rucho*, 139 S. Ct. at 2504).

116. *Id.*

117. *Id.* at 41 (quoting *Clear Channel Outdoor, Inc. v. Dir., Dep’t of Fin. of Balt. City*, 472 Md. 444, 457, 247 A.3d 740, 747 (2021)).

118. *Szeliga* v. Lamone, No. C-02-CV-21-001816, at 37 (Md. Cir. Ct. Mar. 25, 2022) (quoting *State v. Brookins*, 380 Md. 345, 350 n.2, 844 A.2d 1162, 1165 n.2 (2004)).

119. *Id.* at 37–38 (quoting *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550, 62 A.3d 123, 132 (2013)).

proven infringement subject to strict scrutiny.¹²⁰ Upon considering the evidence offered at trial, the court concluded that:

In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.¹²¹

The court summarized its conclusions by declaring that “[t]he [December] 2021 Congressional Plan is unconstitutional, and subverts that will of those governed.”¹²² The court adjudged the December 2021 plan to be “in violation of the Maryland Constitution and Declaration of Rights” as it was “not consistent” with Article III, Section 4 of the Maryland Constitution, and “violative” of Articles 7, 24, and 40 of the Maryland Declaration of Rights.¹²³ Accordingly, the court enjoined the use of the December 2021 districts for any election, and remanded the December 2021 Plan “to the General Assembly to develop a new Congressional Plan that comports with Article III, Section 4 of the Maryland Constitution and the Voting Rights Act” within five days.¹²⁴

II. REMEDIATING THE DECEMBER 2021 MAP

Section II.A. of this Part discusses the General Assembly’s enactment of a new map to comply with the trial court’s order, and the parties’ acceptance of the new map and their agreement to drop the appeal and cross-appeal from the trial court’s judgment. Section II.B. discusses the hypothetical situation that might have arisen had the General Assembly not opted not to timely comply with the trial court’s order and produce a compliant map. Unlike a federal district court, which has well-settled authority to remediate an impermissible map as a matter of last resort before an imminent election, it is less clear whether Maryland trial or appellate courts hold similar authority. Where a Maryland court does not have or otherwise declines to exercise such authority, remediation of a map that is found impermissible under Maryland law could well fall to the federal courts.

120. *Id.* at 38 (citing *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 641, 458 A.2d 758, 781 (1983)).

121. *Id.* at 93–94.

122. *Id.* at 94.

123. *Szeliga* Declaratory Judgment, *supra* note 7, at 2–3.

124. *Id.* at 3.

A. The April 2022 Map

After the court issued its order directing the General Assembly to enact a remedial map within five days, the General Assembly met that deadline and enacted a new map on March 30, 2022.¹²⁵ However, the State defendants filed Notices of Appeal,¹²⁶ and the bill enacting the new map stated that “[i]f the Circuit Court’s judgment that [the December 2021 plan] is unconstitutional is not upheld on appeal, or if the appeal is not otherwise dismissed, then this Act shall be void and of no further effect.”¹²⁷ The parties entered into negotiations and reached agreement among themselves and with the Governor. The appeals were dismissed, and with that contingency removed, the Governor signed the legislation enacting the April 2022 map into law.¹²⁸ Maryland’s 2022 congressional elections are now being conducted with districts under the April 2022 Plan that are noticeably more compact and contiguous than those under the short-lived December 2021 Plan.¹²⁹

125. See *SB 1012*, MD. GEN. ASSEMB. (July 8, 2022, 3:11 PM), <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/Sb1012>; see also *supra* note 8.

126. See Order, *Lamone v. Szeliga*, Case No. COA-REG-0065-2021 (Md. Apr. 1, 2022), <https://mdcourts.gov/sites/default/files/import/coappeals/highlightedcases/lamone/20220401order.pdf>. The *Szeliga* Plaintiffs filed cross-appeals. See *id.* The parties filed notices in both the Maryland Court of Appeals and the Maryland Court of Special Appeals in light of uncertainty as to which court had appellate jurisdiction from the Circuit Court of Maryland for Anne Arundel County. The Memorandum Opinion and Order stated that an appeal from the Circuit Court would be taken directly to the Court of Appeals under Section 12-203 of the Election Law Article. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 1–2 n.2 (Md. Cir. Ct. Mar. 25, 2022). Section 12-203(a)(3) of the Election Law Article requires such appeals to be taken within five days of a circuit court’s decision. See MD. CODE ANN., ELEC. LAW § 12-203(a)(3) (2022). However, Title 12 is titled “Contested Elections” and Subtitle 2, “Judicial Review of Elections,” “applies to an issue arising in an election conducted under this article.” *Id.* § 12-201. Thus, there was uncertainty as to whether Section 12-203 was applicable, and so the parties filed appeals in both the Court of Appeals and the Court of Special Appeals to be certain of having filed in the right court. See Order, *Szeliga*, Case No. COA-REG-0065-2021. The Court of Appeals removed any uncertainty by exercising its discretion to take an appeal directly, see MD. R. 8-301(a)(4), and set the matter for briefing and argument on April 12, 2022. See Order at 3, *Szeliga*, Case No. COA-REG-0065-2021.

127. Congressional Districting Plan, 2022 Md. Laws, ch. 16, § 4 (2022).

128. See *supra* note 9 and accompanying text.

129. Interestingly, while the April 2022 maps are far more rational from a geographic perspective, the partisan make-up of the districts did not change significantly. Compare *infra* Figure 1 (map for the December 2021 Plan), and Figure 2 (partisan and racial data for the December 2021 Plan), with *infra* Figure 3 (map for the April 2022 Plan), and Figure 4 (partisan and racial data for the April 2022 Plan). The Sixth District is now nearly evenly split, and the First District is more firmly Republican than in the December 2021 Plan, with the partisan make-up of the remaining districts largely unchanged. While Republican members of the General Assembly still criticized the April 2022 districts as a partisan gerrymander, they appear to meet the Article III, Section 4 standard set out by the court, even though the court declined to approve the April 2022 Plan since the Governor had not yet signed into law at the time of the court’s review. See Order, *Szeliga*, No. C-02-CV-21-001816 (issuing an order on April 1, 2022, denying approval of the April 2022 Plan to avoid issuing an advisory opinion); see also ‘*Tremendous Victory*’, *supra* note 9. The *Szeliga* plaintiffs did raise an objection to the Second District crossing into Baltimore City at the April 1, 2022, hearing noted in the Order. See Order, *Szeliga*, No. C-02-CV-21-001816.

B. If the General Assembly Had Not Enacted the April 2022 Map: The Authority of Maryland Courts to Draw a Remedial Congressional Map

Fortunately, the General Assembly complied with the court's order. But what if the General Assembly had not timely complied?

It is well-settled that a federal district court has authority to fix a congressional map that is defective under federal law, and the U.S. Supreme Court has provided those courts guidance on how to complete this task.¹³⁰ The author filed an amicus curiae brief to provide the court with prospective maps for replacing the December 2021 Plan consistent with this guidance in *Perry v. Perez*.¹³¹ But on the first day of trial, the court stated that she did not have authority to impose a remedial map under Maryland law.¹³²

Maryland's precedents on judicial authority to remedy an unconstitutional redistricting map are in the context of General Assembly districts.¹³³

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not

130. See, e.g., *Perry v. Perez*, 565 U.S. 388, 393 (2012) (“[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying a state plan—even one that was itself unenforceable—to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.” (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997))); *id.* at 394 (“[T]he [enacted] state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court’s own preferences.”).

131. 565 U.S. 388, 393 (2012); see also Brief of Amicus Curiae Stephen M. Shapiro, *Szeliga*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022). The options provided in that brief “uncracked” plaintiffs who were “cracked” in their December 2021 districts. Unfortunately, the author did not specifically design those options to comply with Article III, Section 4 of the Maryland Constitution, as the court had not yet established those provisions as the standard marking the outer bounds of permissible gerrymandering. Even so, it is interesting that several of the districts in those options bear a striking resemblance to the districts enacted three weeks later in the April 2022 Plan.

132. The court referred to an earlier discussion of this authority in a matter decided while she was sitting on the Court of Appeals. It might well have been *Getty v. Carroll County Board of Elections*, 399 Md. 710, 741, 926 A.2d 216, 235 (2007) (holding that a trial court could not draw a county’s initial county commission districts, even upon the legislature’s failure to do so). See *infra* notes 154–159 discussing *Getty*. Judge Battaglia also sat on the Court of Appeals when it decided legislative redistricting cases in 2013 and 2002. See *infra* note 133 (citing those cases).

133. See *In re* 2012 Legis. Districting of the State, 436 Md. 121, 80 A.3d 1073 (2013); *In re* Legis. Districting of the State, 370 Md. 312, 805 A.2d 292 (2002); Legis. Redistricting Cases, 331 Md. 574, 629 A.2d 646 (1993); *In re* Legis. Districting of State, 299 Md. 658, 475 A.2d 428 (1984); *In re* Legis. Districting of the State, 271 Md. 320, 317 A.2d 477 (1974); Md. Comm. for Fair Representation v. Tawes (*Tawes II*), 229 Md. 406, 184 A.2d 715 (1962), *rev’d* 377 U.S. 656 (1964); Md. Comm. for Fair Representation v. Tawes (*Tawes I*), 228 Md. 412, 180 A.2d 656 (1962). See also *supra* note 132 on circuit court authority to draw an initial set of local districts.

consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.¹³⁴

The Court of Appeals in *Maryland Committee for Fair Representation v. Tawes (Tawes I)*¹³⁵ decided that the Circuit Court of Maryland for Anne Arundel County should hear a challenge to the General Assembly's county-based representation, as provided by the 1867 Maryland Constitution, in the wake of *Baker v. Carr*.¹³⁶ As relevant here, the Court of Appeals determined that the malapportionment challenge there was justiciable,¹³⁷ and that the circuit court could declare the then-existing constitutional provisions on apportionment unconstitutional under the federal Fourteenth Amendment and enjoin their further use,¹³⁸ but that the circuit court had no power to direct the General Assembly to enact a new apportionment provision.¹³⁹ Despite *Baker*, the dissent found the matter nonjusticiable in Maryland courts, arguing that Maryland courts lack jurisdiction in light of Article 8 of the Declaration of Rights and the "wider" "rule of judicial abstention."¹⁴⁰ Article 8 provides "[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."¹⁴¹

The Court of Appeals has subsequently struck down enacted General Assembly redistricting plans and imposed remedial plans in 1974 and 2002.¹⁴² Upon finding that the Governor failed to hold required public

134. MD. CONST. art. III, § 5; cf. MD. CODE ANN., CTS. & JUD. PROC. § 1-501 (jurisdiction of Circuit Courts).

135. 228 Md. 412, 180 A.2d 656 (1962).

136. See *id.* at 418–19, 180 A.2d at 659 (citing *Baker v. Carr*, 369 U.S. 186 (1962)); *id.* at 436, 180 A.2d at 669 (remanding the case to the circuit court, sitting in equity, for trial); *Tawes II*, 229 Md. at 409–10, 184 A.2d at 716 (summarizing prior case history). Maryland's current constitutional provisions on legislative redistricting and judicial review thereof in Article III, Section 5 were established after this case. The circuit court oversaw a limited transition of the House of Delegates to population-based representation, but declined to impose such changes for the Maryland Senate. See *id.* at 410, 416, 184 A.2d at 717, 720. A divided Court of Appeals affirmed, see *id.* at 417, 184 A.2d at 721; *id.* at 422, 184 A.2d at 723–24 (Brune, C.J., dissenting), but the U.S. Supreme Court reversed. See *Md. Comm. for Fair Representation*, 377 U.S. at 676 (reaffirming that both houses of a bicameral state legislature must be apportioned by population).

137. *Tawes I*, 228 Md. at 433, 180 A.2d at 667.

138. *Id.* at 437, 440, 180 A.2d at 669–71.

139. *Id.* at 440, 180 A.2d at 671.

140. *Id.* at 446, 180 A.2d at 674–75 (Henderson, J., dissenting). Judge Henderson also noted that under applicable English common law, "judges do not make law but discover it," explaining that interpretations must therefore relate back to when the interpreted provision was written. *Id.* at 444, 180 A.2d at 673 (citing MD. CONST. Decl. of Rts., art. 5).

141. MD. CONST. Decl. of Rts., art. 8.

142. See generally *In re Legis. Districting of the State*, 271 Md. 320, 317 A.2d 477 (1974); *In re Legis. Districting of the State*, 370 Md. 312, 805 A.2d 292 (2002).

hearings prior to issuing his 1973 Plan,¹⁴³ the Court of Appeals, *using the Governor's Plan as a starting point*, directed a Special Master to suggest modifications to the Plan indicated from consideration of public comments and challenges to the Plan.¹⁴⁴ In 2002, the Court of Appeals found that the Governor's Plan failed to comply with Article III, Section 4 of the Maryland Constitution,¹⁴⁵ and, *starting from a clean slate*, directed its technical consultants

to prepare a plan that, *without regard to political considerations*, complied with federal law, including the Voting Rights Act, and met the Maryland constitutional requirements of substantial equality of population, compactness, and contiguity, and contained as few breaches of natural and political subdivision boundaries as possible. *Of particular consequence to our disregard of political considerations, we directed that the portion of the redistricting software program that identified the location of the residences of incumbent state legislators be disabled for purposes of the Court's work in developing a constitutional plan.*¹⁴⁶

While the Court of Appeals meant well when it declared that it “may not take into account the same political considerations as the Governor and the Legislature,”¹⁴⁷ I would agree with Judge Raker that “[t]he decision not to consider incumbency, regionalism, or communities of interest [was] itself a political decision.”¹⁴⁸ The revisions made by the Court of Appeals had the

143. *In re Legis. Districting of the State*, 271 Md. at 322, 317 A.2d at 478.

144. *Id.* at 322–23, 317 A.2d at 478–79. The Special Master also invited exceptions and held a hearing on his preliminary recommendations before submitting a Final Report. *Id.* at 323, 317 A.2d at 479.

145. *In re Legis. Districting of the State*, 370 Md. at 318, 805 A.2d at 295.

146. *Id.* at 319 n.2, 805 A.2d at 295 n.2 (emphasis added); *id.* at 323, 805 A.2d at 298. The Court of Appeals should have also directed the consultants to avoid multimember districts except where the Court might have found them particularly warranted. *See Connor v. Finch*, 431 U.S. 407, 415 (1977) (requiring a court to “articulate a ‘singular combination of unique factors’ that justifies” multimember districts in a court-drawn map (quoting *Mahan v. Howell*, 410 U.S. 315, 333 (1973))). The 2002 court-revised map left the sitting Speaker of the Maryland House of Delegates with a far less politically-viable district, a major factor in his defeat at the next election. *See 2002 Gubernatorial Election*, MD. STATE BD. OF ELECTIONS (Dec. 2, 2002, 2:24 PM), https://elections.maryland.gov/elections/2002/results/g_house_of_delegate.html (showing that Delegate Casper R. Taylor, Jr. lost his election by less than one percent of the vote). The author's impression is that the impacts from having made such major changes to the 2002 enacted map have left the Court of Appeals more reticent in reviewing subsequent challenges. It is not clear whether the best process is for the Court to keep original jurisdiction, essentially exercised by an adjunct special magistrate in the first instance, or if starting in the circuit court would allow the Court of Appeals to act in its typical appellate role without an overall loss of timeliness in resolving these often-urgent challenges to finality. MD. CONST. art. III, § 5 (jurisdiction to hear legislative districting challenges); *see also id.* art. IV, §§ 20, 22 (jurisdiction of circuit courts, and in banc, three-judge, circuit courts).

147. *In re Legis. Districting of the State*, 370 Md. at 323, 805 A.2d at 298.

148. *Id.* at 377, 805 A.2d at 331 (Raker, J., dissenting).

effect of vitiating the political decisions made by the Governor and Legislature—even to the extent that those decisions could have been incorporated consistent with the overarching constitutional requirements. In this regard, the Court of Appeals disregarded its earlier precedent.¹⁴⁹ Judge Raker objected to the majority’s finding that the enacted plan violated the Maryland Constitution,¹⁵⁰ to the majority’s method of remediating the enacted plan by replacing it completely,¹⁵¹ and for not first giving the political branches guidance with an opportunity to enact a remedial plan.¹⁵² In the context of remediating congressional districts, a court must start with the defective plan since “[i]t provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court’s own preferences.”¹⁵³ But that presumes that the court has authority to remediate in the first place.

In light of the foregoing, it is clear that the Court of Appeals has jurisdiction to remediate an enacted but impermissible map for General Assembly districts if the political branches are unable to do so, even if the remediation process may be unsettled. It then follows that a Maryland circuit court would hold equivalent authority to impose appropriate relief for other types of districts.¹⁵⁴ But there are two theories why the circuit court might not

149. See *supra* notes 143–144 and accompanying text. The revisions were also inconsistent with the Supreme Court’s remedial guidance to federal district courts in *Perry v. Perez*, 565 U.S. 388, 393 (2012), and *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). See *supra* note 133 (describing the guidance in those cases in a manner similar to the process laid out in *In re Legis. Districting of the State*, 271 Md. at 322–23, 317 A.2d at 477–78, as described in the text accompanying notes 146–147).

150. See *In re Legis. Districting of the State*, 370 Md. at 376, 805 A.2d at 330; *id.* at 397–98, 805 A.2d at 343 (citing *Beaubien v. Ryan*, 762 N.E.2d 501, 505, 507 (Ill. 2001)).

151. See *id.* at 377–78, 805 A.2d at 331.

152. *Id.* at 395–99, 805 A.2d at 342–44 (quoting MD. CONST. Decl. of Rts., art. 8).

153. *Perry*, 565 U.S. at 394. “This Court has observed before that ‘faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying’ a state plan—even one that was itself unenforceable—to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.” *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)); see also U.S. CONST., art. I, § 4 (assigning state legislatures the duty to regulate congressional elections).

154. It would be incongruous for a court to have jurisdiction to hear a case but not to order fully-appropriate relief. *But see* *Getty v. Carroll Cnty. Bd. of Elections*, 399 Md. 710, 741, 926 A.2d 216, 235 (2007) (rejecting the authority of a circuit court to draw an initial district map for county commission districts, saying: “To be sure, the Circuit Court, as a trial court, not being accorded any authority, either by Constitutional provision or through statutory law, has no jurisdiction to create district lines.”). Most other states that have considered the issue have decided that the state court holds such authority. See, e.g., *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 823–24 (Pa. 2018) (citing cases); *Johnson v. Wis. Elections Comm’n*, 971 N.W.2d 402, 406 (Wis. 2022); *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 599, 601 (Fla. 2012) (citing express constitutional authority); *Perry v. Del Rio*, 67 S.W.3d 85, 93 (Tex. 2001). *But see* OHIO CONST. art. XIX, § 03 (affording the Ohio Supreme Court original jurisdiction to review

have such authority. First, if a “congressional district” is a form of “legislative district” for which jurisdiction to hear challenges and grant appropriate relief lies in the Court of Appeals.¹⁵⁵ Second, the potentially greater conflict with Article 8 of the Declaration of Rights, in part due to the fully legislative nature of congressional districts compared to General Assembly districts, and in part due to the lack of an express provision for circuit courts, or for any Maryland court, to hear and address challenges to congressional districts.¹⁵⁶ The first theory seems unavailing, as Article III, Section 5 appears limited in scope to General Assembly districts,¹⁵⁷ but the second is more compelling in light of *Getty*. From a procedural perspective, a lack of authority to remediate an impermissible congressional map within the Maryland judiciary could become extremely awkward. If a Maryland court could enjoin but not ultimately fix an impermissible map, the Maryland proceedings could conclude with the state having no permissible districts. Then the parties, or even other Maryland voters not party to the challenge, would have grounds to file a complaint as to the state’s lack of congressional districts in the federal district court. The federal court would then have the duty to revise the enacted map in order to make it permissible under federal and Maryland law so that the elections for Maryland’s members of Congress could proceed.¹⁵⁸ Perhaps such a scenario augers against extending *Getty* to

congressional maps but not to remediate them); *Mauldin v. Branch*, 866 So. 2d 429, 433–34 (Miss. 2003) (holding the state’s chancery courts have no jurisdiction as to redistricting); *id.* at 436–38 (McRae, P.J., dissenting); *id.* at 443–44 (holding that the state’s circuit courts have jurisdiction even if the chancery courts would not).

155. See MD. CONST. art. III, § 5. It is unlikely the Court of Appeals’ jurisdiction here extends to congressional districts since the “legislative districts” addressed in this section are those for the General Assembly. See *id.*

156. See *Getty*, 399 Md. at 741, 926 A.2d at 235. Compare MD. CONST. art. III, § 5 (authorizing the Governor to set the bounds of legislative districts, but permitting the State House and Senate to agree on an alternate plan, and affording the Court of Appeals with original jurisdiction to hear legal challenges to such plans and grant appropriate relief), with U.S. CONST. art. I, § 4 (authorizing state legislatures to set the regulations for congressional elections, including the bounds of congressional districts, but permitting Congress to enact overriding regulations). But see *Getty*, 399 Md. at 731–32, 926 A.2d at 229 (prescribing a firm but not inflexible application of Article 8 of the Maryland Declaration of Rights). A conflict with Article 8 would apply equally to the Court of Appeals and the circuit courts unless the Court of Appeals’ authority in Article III, Section 5 extends to resolving disputes as to congressional districting. See MD. CONST. art. III, § 5; MD. CONST., Decl. of Rts., art. 8; see also *supra* notes 140, 141–142, 154–155 and accompanying text.

157. The court in *Szeliga* would presumably have had to dismiss the complaints if it had determined that Article III, Section 5 applied to challenges of congressional districts. But cf. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at 20 (Md. Cir. Ct. Mar. 25, 2022) (interpreting “legislative districts” in Article III, Section 4 of the Maryland Constitution to include congressional districts).

158. A similar scenario involving state legislative districts actually took place in Ohio in 2022. See *State ex rel. Demora v. LaRose*, 2022-Ohio-2173, ¶¶ 5–17, 2022 WL 2285935, at *1–*4 (Ohio June 24, 2022); Brief for the United States as Amicus Curiae Supporting Respondents at 32, *Moore v. Harper*, No. 21-1271 (U.S. Oct. 26, 2022), 2022 WL 16556220; see also *Perez*, 565 U.S. at 391–92 (citing *Connor v. Finch*, 431 U.S. 407, 414–15 (1977)). While the federal district court would

interpret Article 8 so as to preclude a circuit court from rectifying an impermissible congressional map, and thus requiring the federal courts to complete the remedy of a violation of Maryland law.¹⁵⁹

III. WILL *SZELIGA V. LAMONE* REMAIN VIABLE AFTER *MOORE V. HARPER*?

The representational gains afforded by *Szeliga v. Lamone* have been significant, but it is not clear how long they will last. Aside from the fact that *Szeliga*, absent an affirmance by the appellate courts, has no precedential value and limited persuasive authority,¹⁶⁰ a state court judgment that limited partisan gerrymandering under similar provisions of North Carolina’s Constitution and Declaration of Rights is about to be reviewed by the U.S. Supreme Court.¹⁶¹

The question presented is:

Whether a State’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,” and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.¹⁶²

likely start with the impermissible enacted map, it is not entirely clear whether the district court would start with the enacted map or the prior map. *See id.* at 392. Perhaps a more awkward scenario would occur if the plaintiffs appeal the insufficient remedy to the Court of Appeals, which would either draw a remedial map or decide that it also lacks such authority. *See also Mauldin*, 866 So. 2d at 436 (decrying the “default” and punt to the federal courts under state law).

159. *Getty* found that the appropriate remedy, in light of the General Assembly’s failure to enact *initial* districts for electing Carroll County Commissioners, was to maintain an at-large election. *Getty*, 399 Md. at 745, 926 A.2d at 237. Such a default solution is unavailable for congressional districts, *see* 2 U.S.C. § 2c (requiring congressional elections to be by district), or even for *existing* state or local districts, *see* Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections, 827 F.3d 333, 340 (4th Cir. 2016) (requiring school board and county government districts to have equal populations).

160. *See* *Montgomery Park, LLC v. Md. Dep’t of Gen. Servs.*, 254 Md. App. 73, 103 n.7, 270 A.3d 993, 1010 n.7 (2022) (“Circuit court opinions aren’t prohibited strictly by Maryland Rule 1-104, which prohibits citation to unreported opinions of this Court or the Court of Appeals, so we deny the motion [to strike them]. Even so, . . . those opinions lack any precedential value . . .”); *Pro. Bail Bonds v. State*, 185 Md. App. 226, 242, 968 A.2d 1136, 1145 (2009) (“The Circuit Court case has no precedential value and *this Court is without the Montgomery County Judge’s rationale.*” (emphasis added)); *cf.* *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 359–60, 214 A.3d 521, 533 (2019) (“Although unreported opinions of our intermediate appellate court have no precedential value and do not constitute persuasive authority, we highlight this case merely to develop the history and varying perspectives . . .”).

161. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.*, *Moore v. Harper*, No. 21-1271 (U.S. June 30, 2022).

162. Question Presented, *Moore v. Harper*, No. 21-1271 (U.S. June 30, 2022) (alterations in original) (citation omitted) (quoting U.S. CONST. art. I, § 4, cl. 1), <https://www.supremecourt.gov/qp/21-01271qp.pdf>.

This question presented contains several critical fairly included questions. The first is whether the U.S. Supreme Court has jurisdiction to review the judgment of the Supreme Court of North Carolina.¹⁶³ If the Court determines that it has jurisdiction, it will then have to decide whether state legislatures are subject to any limitations within their state constitutions in carrying out their duties under the Elections Clause—i.e., the Independent State Legislature Theory, which posits that state legislatures are only subject to provisions of the federal Constitution when enacting statutes pursuant to the Elections Clause.¹⁶⁴ If provisions of a state’s constitution do apply, the Court will need to determine its standard for reviewing the Supreme Court of North Carolina’s interpretation of the North Carolina Constitution and Declaration of Rights.¹⁶⁵ The upcoming decision in *Moore* may well be influenced by the concurring opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, in *Bush v. Gore*,¹⁶⁶ which found that the Florida Supreme Court impermissibly altered the elections statutes enacted by the Florida legislature.¹⁶⁷

The decision will ostensibly have a positive impact on *Szeliga* if the North Carolina judgment is affirmed. If the Supreme Court adopts some version of the Independent State Legislature Theory,¹⁶⁸ *Szeliga* could be completely upended. If the judgment below is reversed by a holding that the

163. See 28 U.S.C. § 1257(a) (“Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.”). The author has filed a brief arguing that the Court lacks jurisdiction under this provision as petitioners have not suffered such an injury since partisan favoritism is not authorized under the Elections Clause. See Brief of Amicus Curiae Stephen M. Shapiro in Support of Respondents at 4–17, *Moore v. Harper*, No. 21-1271 (U.S. Oct. 24, 2022), 2022 WL 14871924, at *4–*17.

164. See Saul Zipkin, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 351–52 (2003); Brief of the National Republican Redistricting Trust as Amicus Curiae in Support of Petitioners at 7–12, *Moore v. Harper*, No. 21-1271 (U.S. Apr. 20, 2022), 2022 WL 1214894, at *7–*12.

165. Under the Court’s longstanding precedents, it affirms a state court interpretation of state law, even if it results in a federal constitutional injury, unless it is “without any fair or substantial support.” *Wolfe v. North Carolina*, 364 U.S. 177, 185–86 (1960) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958); *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958); and *Ward v. Bd. of Cnty. Comm’rs*, 253 U.S. 17, 22 (1920)); *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). Note that this highly permissive standard is only for upholding a state high court’s *interpretation* of state law. It is not the standard for determining whether a state law itself may be permissible under federal law. Surprisingly, the petitioners’ merits briefs has perhaps abandoned their contention, implied in the question presented, that the judgment below lacked substantial support. See *generally* Brief for Petitioners, *Moore v. Harper*, No. 21-1271 (U.S. Aug. 29, 2022), 2022 WL 4084287 (failing to expressly attack the state court’s interpretation of state law). Thus, the Court may have no cause to review the judgment below if it rejects the petitioners’ Independent State Legislature Theory.

166. 531 U.S. 98 (2000).

167. *Id.* at 111 (Rehnquist, C.J., concurring).

168. See *supra* note 167 and associated text.

Supreme Court of North Carolina misinterpreted or misapplied specific provisions of the North Carolina Constitution, then the impact on *Szeliga* may turn on the similarities and differences between the provisions at issue and the analyses of the courts. For example, while the court below in *Harper* also mandated that North Carolina’s congressional districts must meet the compactness requirements for its legislative districts,¹⁶⁹ those remedial requirements were not incorporated into that court’s discussion of a justiciable standard.¹⁷⁰

CONCLUSION

Szeliga v. Lamone has, at least for the moment, succeeded in limiting partisan gerrymandering at the point where it would degrade effective representation through noncontiguous or noncompact districts.¹⁷¹ Political incentives to test *Szeliga* may increase if the U.S. House of Representatives has a Republican majority after the 2022 elections, or if the holdings in *Szeliga* are compromised by the upcoming U.S. Supreme Court decision in *Moore*.

This Article offers some insights as to how the holdings in *Szeliga* might be bolstered, such as with Article III, Section 49, or refined, such as through a stricter interpretation of “adjoining territory” but a more lenient interpretation of “due regard” for political and natural boundaries of congressional districts. It also suggests that future population variances in districts for state and local offices merit greater scrutiny, particularly where

169. Order at ¶ 8, *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. 2022) (citing N.C. CONST. art. II, §§ 3, 5). The trial court interpreted the Order at paragraph 6, 867 S.E.2d at 557, to also require that the remedial map meet partisan parity metrics, and further modified the remedial map enacted by the legislature to increase its compactness as well as the number of Democratic-leaning seats. See Order on Remedial Plans ¶¶ 34–35, 67–68, *N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct. Feb. 23, 2022). Compare N.C. GEN. ASSEMB., S.L. 2022-3 CONGRESS, S.B. 745, 2021 Gen. Assemb., Reg. Sess. (N.C. 2022), <https://webservices.ncleg.gov/ViewBillDocument/2021/53780/0/SL%202022-3%20-%2019%20x%2036%20Map> (enacted remedial map), with *Interim Congressional*, N.C. GEN. ASSEMB. (Feb. 23, 2022), https://www.ncleg.gov/Files/GIS/Plans_Main/Congress_2022_Court/2022%20Interim%20Congressional%20-%2011%20x%2017%20Map.pdf (interim map ordered by the Superior Court of North Carolina for Wake County in *Harper v. Hall*, No. 21CVS015426, 2022 WL 2610499 (N.C. Super. Ct. Feb. 23, 2022), *aff’d* 867 S.E.2d 554 (N.C. 2022), *cert. granted sub nom.*, *Moore v. Harper*, No. 21-1271 (U.S. June 30, 2022)). The best interpretation of the Order and Opinion may be a key factor in the U.S. Supreme Court’s disposition of the case.

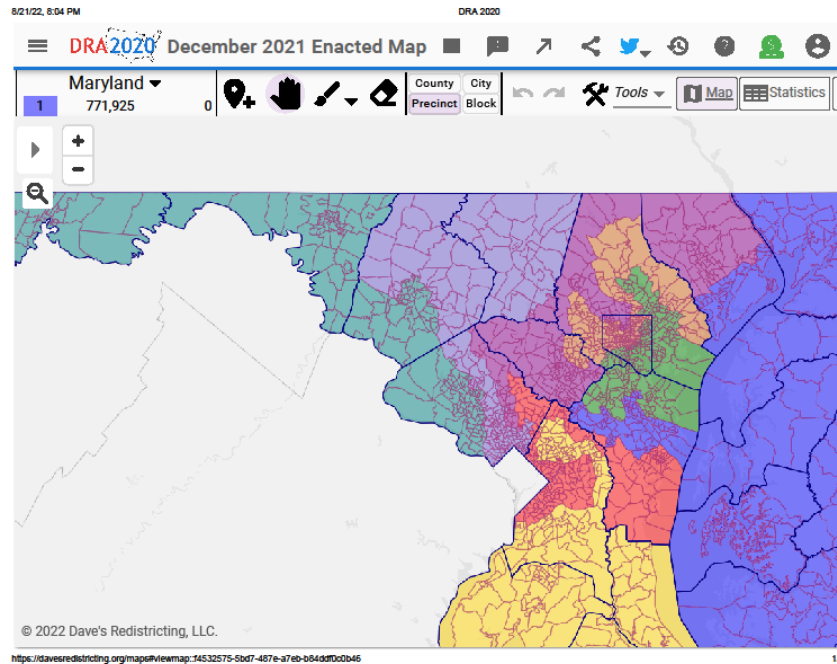
170. *Harper*, 868 S.E.2d at 547–49.

171. Judge Battaglia commended the efforts of counsel for the *Szeliga* and Parrott plaintiffs and for State defendants, and described the trial as a great experience for her law clerks. As a recent law clerk (in another court), the author strongly agrees.

such variances may favor or disfavor political parties in the context of multimember districts. Beyond judicial action, it would be helpful for the General Assembly to propose constitutional amendments expressly applying Article III, Section 4 to congressional districts, and to afford Maryland courts express authority to amend an enacted district map, as a last resort, in order to rectify impermissible features to the extent necessary to cure the deficiency.

APPENDIX

Figure 1
December 2021 Enacted Congressional Districts¹⁷²



172. *December 2021 Enacted Map*, DAVE'S REDISTRICTING, <https://davesredistricting.org/maps#viewmap:f4532575-5bd7-487e-a7eb-b84ddf0c0b46> (last visited Oct. 7, 2022). Reprinted with permission of Dave's Redistricting App ("DRA"). The map was created by the author using the "Dave's Redistricting App" loaded with census block data representing the December 2021 districts downloaded from the census block equivalency file for the Legislative Redistricting Advisory Commission's "Final Recommended Congressional District Map" on the General Assembly's web site. Prior election data on DRA is primarily from the Voting and Election Science Team ("VEST") hosted by Harvard University. *See About DRA*, DAVE'S REDISTRICTING, <https://davesredistricting.org/maps#aboutus> (last visited Mar. 6, 2022); *Voting and Election Science Team*, HARV. DATAVERSE, <https://dataverse.harvard.edu/dataverse/electionscience> (last visited Sept. 28, 2022); *LRAC Final Recommended Congressional District Map*, MD. LEGIS. REDISTRICTING ADVISORY COMM'N, *supra* note 3; *see also supra* note 3 (for the same map on the Maryland General Assembly's web site and the accompanying 2021 bill).

Figure 2
Partisan & Racial Data for the December 2021 Enacted Congressional Districts¹⁷³

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December 2021 Enacted Map

Map Statistics Analyze Comp

| ID | Population | | Race | | Partisan Lean | | | Demographics (2019) | | | | | |
|--------------|----------------|--------------|---------------|---------------|---------------|----------------|---------------|---------------------|---------------|---------------|--------------|-------|-------|
| | Total | +/- | Dem | Rep | Dem | Rep | Oth | Total | White | Minority | Hispanic | Black | Asian |
| Un | 0 | | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% | 0 | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% |
| 1 | 771,925 | 0.00% | 43.85% | 53.15% | 2.99% | 603,769 | 69.56% | 30.44% | 5.68% | 19.54% | 3.43% | | |
| 2 | 771,925 | 0.00% | 53.28% | 43.53% | 3.20% | 601,414 | 55.96% | 44.04% | 8.96% | 27.52% | 5.87% | | |
| 3 | 771,926 | 0.00% | 54.81% | 41.81% | 3.38% | 597,091 | 60.37% | 39.63% | 8.71% | 18.43% | 11.14% | | |
| 4 | 771,926 | 0.00% | 60.41% | 17.42% | 2.17% | 598,156 | 20.10% | 79.90% | 17.83% | 57.34% | 4.87% | | |
| 5 | 771,925 | 0.00% | 66.14% | 31.31% | 2.55% | 599,707 | 38.28% | 61.72% | 10.78% | 44.11% | 6.05% | | |
| 6 | 771,925 | 0.00% | 54.99% | 42.01% | 3.00% | 602,679 | 59.22% | 40.78% | 11.99% | 14.44% | 13.05% | | |
| 7 | 771,926 | 0.00% | 71.96% | 25.14% | 2.89% | 613,219 | 34.71% | 65.29% | 4.04% | 52.64% | 8.05% | | |
| 8 | 771,925 | 0.00% | 60.27% | 36.69% | 3.03% | 599,167 | 60.89% | 39.11% | 13.98% | 13.71% | 10.11% | | |
| Total | 771,853 | 0.00% | 60.58% | 34.78% | 2.92% | 607,808 | 41.67% | 58.33% | 16.22% | 31.81% | 7.85% | | |

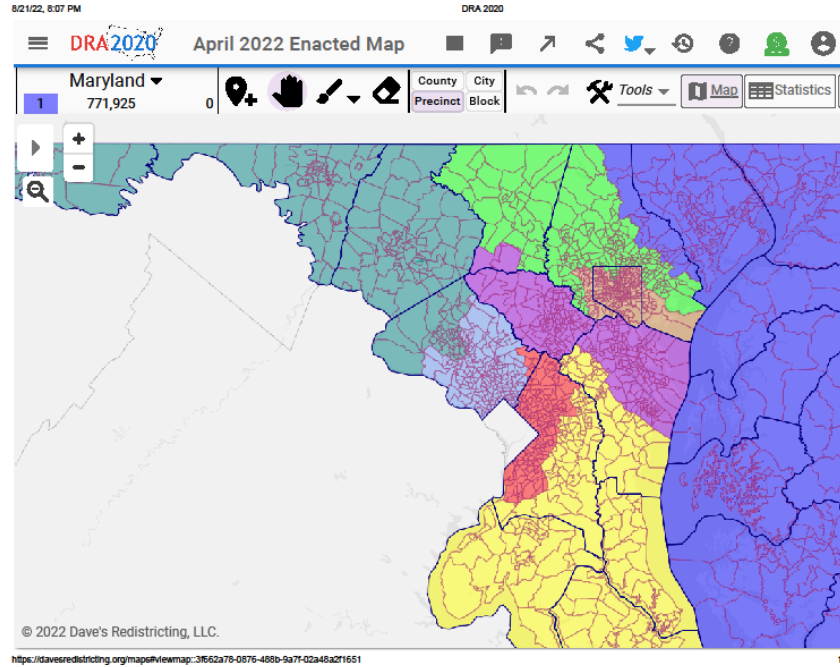
Notes

- The 0% population deviation is within the 0.75% threshold tolerated by the courts.
- No districts lean Republican, seven lean Democratic, and one falls in the 45–55% competitive range.
- There are three majority-minority districts.

<https://davesredistricting.org/maps#stats:f4532575-5bd7-487e-a7eb-b84ddf0c0b46> 1/1

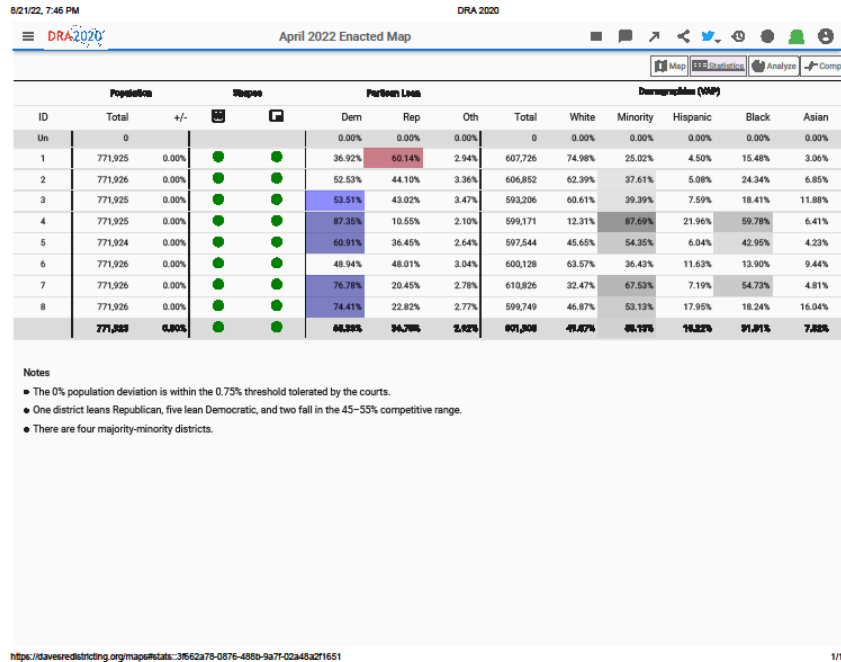
173. *December 2021 Enacted Map: “Statistics” Tab, DAVE’S REDISTRICTING*, <https://davesredistricting.org/maps#viewmap:f4532575-5bd7-487e-a7eb-b84ddf0c0b46> (last visited Oct. 7, 2022). Reprinted with permission of DRA. See *supra* note 172 for further information and credits on DRA.

Figure 3
April 2022 Enacted Congressional Districts¹⁷⁴



174. *April 2022 Enacted Map: "Map" Tab*, DAVE'S REDISTRICTING, <https://davesredistricting.org/maps#viewmap::3f662a78-0876-488b-9a7f-02a48a2f1651> (last visited Oct. 7, 2022). Reprinted with permission of DRA. Census block data downloaded from "Congressional Districts Block Equivalency Files," is available at *2022 Maryland Congressional Districts*, *supra* note 78. See also *supra* note 172 (for further information and credits on Dave's Redistricting App); *supra* note 8 (for the same map, on the Maryland Department of Planning web site).

Figure 4
Partisan & Racial Data for the April 2022 Enacted Congressional Districts¹⁷⁵



175. April 2022 Enacted Map: “Statistics” Tab, DAVE’S REDISTRICTING, <https://davesredistricting.org/maps#viewmap::3f662a78-0876-488b-9a7f-02a48a2f1651> (last visited Oct. 7, 2022). Reprinted with permission of DRA. See *supra* note 167 for further information and credits on DRA.