To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 10/10/2022

Case Briefing **[MARYLAND]**

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| **Citation** | * *Szeliga v. Lamone*, Nos. C-02-CV-21-001816, C-02-CV-21-001773, (Md. Cir. Ct. Mar. 25, 2022). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Senior Judge Lynne A. Battaglia (D) wrote the opinion.[[1]](#footnote-1) |
| **Procedural History** | * On 12/21/2021, the 1773 Plaintiffs (Parrot et al.) (Republicans) filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland's Congressional Districts.   + The 1773 Plaintiffs asked for a declaration that the 2021 Plan is unlawful, as well as a permanent injunction against its use in Congressional elections.   + Additionally, the 1773 Plaintiffs asked the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission, be used for the 2022 Congressional elections. * On 12/23/2021, the 1816 Plaintiffs (Szeliga et al.) filed their Complaint for Declaratory and Injunctive Relief.   + The 1816 Plaintiffs asked for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland's Declaration of Rights and Section 7 of Article I of the Maryland Constitution.     - Additionally, Plaintiffs sought to permanently enjoin the use of the 2021 Plan and asked for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map was prepared. * On 2/16/2022, the Court heard argument and held the matter sub curia; simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC's Motion to Intervene. * On 2/22/2022, the Court consolidated the two cases. * The court heard expert testimony from Sean Trende, Dr. Thomas L. Brunell, and John T. Willis, who claimed partisan gerrymandering, and Dr. Allan J. Lichtman, who claimed no partisan gerrymandering. *Id.* at 76–108.   + The trial judge gave great weight to the testimony and evidence presented and discussed by Sean Trende.     - “His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated.”   + Dr. Brunell's testimony was much less valuable and helpful to the trial judge, because to evaluate compactness, the efficiency gap, as presented, did not have the power that was portrayed in other cases.   + The opinion of Mr. Willis, while of interest to gain a perspective as to what legislators considered in 2002, 2012, and possibly in 2021, to draw the various Congressional boundaries, was not helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan.   + Trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. |
| **Disposition** | * Declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional.   + (Note: Although an appeal was later filed by the Maryland Attorney General, the legislative leaders “opted not to pursue the appeal in favor of [a] redrawn map.” The opinion remains persuasive, but nonbinding on future MD cases.)[[2]](#footnote-2) |
| **Facts** | * On 8/6/2015, Maryland Governor Larry Hogan signed an executive order which created the Maryland Redistricting Reform Commission.   + After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting.   + The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting Rights Act and other applicable federal laws.   + The Commission also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. * During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a process by which State legislative and congressional maps were created by an independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor.   + None of these bills was voted out of committee. * On 1/12/2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data.   + The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party.   + After receiving public input and deliberating, on 11/5/2021, the MCRC recommended a congressional redistricting map to Governor Hogan, who accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on 12/6/2021. * In 7/2021, following the 2020 decennial census, the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC") was formed.   + The LRAC was charged with redrawing Maryland's congressional and state legislative maps. * At the conclusion of public hearings, the Department of Legislative Services ("DLS") was directed to produce maps for the LRAC's consideration; on 11/9/2021, the LRAC issued four maps for public review and comment.   + On 11/23/2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan").     - Neither Republican member of the LRAC supported the 2021 Plan. * On 12/7/2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan.   + Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. * On 12/8/2021, the General Assembly enacted the 2021 Plan on a strict party-line vote, which Governor Hogan vetoed on 12/9/2021. * On 12/9/2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. |
| **Issue(s) or**  **Question(s)**  **Presented** | * Whether the 2021 Congressional Plan in Maryland was an "outlier," an extreme gerrymander that subordinated constitutional criteria to political considerations. |
| **The Rule(s)** | * Md. Const., art. III, § 4   + Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions. * Md. Const. Decl. of Rts. art. 7   + That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage. * Md. Const. Decl. of Rts. art. 24   + That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land. * Md. Const. Decl. of Rts. art. 40   + That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege. * Md. Const., art. I, § 7   + The General Assembly shall pass Laws necessary for the preservation of the purity of Elections. * MD’s Motion to Dismiss Standard of Review   + "Dismissal is proper only if the facts alleged fail to state a cause of action."   + Under Maryland Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." |
| **Holding(s)** | * The trial court held that the 2021 Congressional Plan in Maryland was an "outlier," an extreme gerrymander that subordinated constitutional criteria to political considerations. |
| **Rationale** | * While there are no provisions in the Maryland Constitution explicitly addressing Congressional districting,[[3]](#footnote-3) Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred.   + Alternatively, the strictures of Article III, Section 4 are . . . applicable to the 2021 Plan because of the free elections clause as well as the equal protection clause, which each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan. * Court rejected Defendants’ claim and ruled that the term “legislative districts” includes Congressional districts, noting that the Legislature was “keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts” during the 1969 and 1972 amendments to art. III § 4. [*See* Arguments of Parties, Defendants section *infra*.] * With respect to the use of a capital "L" in "Legislature," in the Free Elections Clause, as reflecting only a reference to the state legislature, the State's contention is belied by its own language.   + Article 7, as it was originally adopted in 1776, was meant to secure a right of participation; the language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. * “Our jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State.”   + The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in *Green Party*.[[4]](#footnote-4)   + Plaintiffs have clearly stated a cause of action under the Free Elections Clause and survive the Motion to Dismiss. * The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights.   + In *Green Party*, a nexus between the Equal Protection Clause and a voting standards clause was established. * Court rejected the Defendants’ claims that the rights provided by the Maryland Constitution were “coextensive” with rights provided in the Fourteenth Amendment, because Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter.   + While Article 40 of Maryland's Declaration of Rights has been generally regarded as coextensive with the First Amendment, the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation.   + The Court of Appeals has not shied away from "departing from the United States Supreme Court's analysis of the parallel federal right" when necessary "[to] ensure[] that the rights provided by Maryland law are fully protected."   + When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right.     - As a result, this Court, under Article 40, will apply strict scrutiny to the 2021 Plan. * Popular sovereignty dictates that the "Government" of the people which "derives from them," is properly channeled when our democratic process functions to reflect the will of the people.   + Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people.   + The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland.   + The judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in Article III, Section 4 of the Maryland Constitution and by the avoidance of extreme partisan gerrymandering. * After consideration of the evidence and testimony, the trial judge agreed that there was a substantial deviation from "compactness" as well as a failure to give "due regard" to "the boundaries of political subdivisions" as required by Article III, Section 4.   + With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.   + With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at trial, proved that the 2021 Plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria," accomplished by the party in power, to suppress the voice of Republican voters.   + Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan, and the State has not provided a "compelling state interest" to rationalize the adverse effect.   + The same rationale holds true for the violation of Article 40 of the Maryland Declaration of Rights, the Free Speech Article, which requires a "strict scrutiny" analysis because a fundamental right is implicated, a citizen's right to vote.   + The 2021 Congressional Plan is unconstitutional, and subverts that will of those governed. |
| **Arguments of Parties** | * Plaintiffs   + Assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term "legislative district" corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural boundaries of political subdivisions.   + Assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan "unlawfully seeks to predetermine outcomes in Maryland's congressional districts."     - They also allege that the 2021 Plan violates Article 7, because it is not based upon "well-established traditions in Maryland for forming congressional districts[,]" including compactness, adjoining territory, and respect for natural and political boundaries.   + Assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote.     - Specifically, these Plaintiffs assert that the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their Congressional representatives.   + Allege that the 2021 Plan violates Article 40 by "burdening protected speech based on political viewpoint."   + Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature.     - They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland's Government and its Constitution were founded. * Defendants   + Claim that the text of Article III, Section 4, is limited to State legislative districting because the term "legislative districts" refers "unambiguously to State legislative districts" whenever it appears in other provisions of the Constitution, and that when Congress is referred to the "c" is capitalized.     - Argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted.   + Argue that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections.     - The State observes that the capitalization of "L" in "Legislature," is a direct reference to the General Assembly.     - Assert that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, "for which the State is powerless to control the frequency."   + Assert that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment in *Rucho*.     - The State posits that the scope of equal protection in Maryland is the same as, that which is embodied in the federal constitution in the Fourteenth Amendment.   + Argue in their Motion to Dismiss that the Plaintiffs' claims under Article 40 purport to "parrot" free speech claims that are the same as those offered under the First Amendment to the United States Constitution, which the Supreme Court has rejected in the redistricting context. *Rucho*.     - Assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed.   + Posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland.     - Argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting.       * Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. |
| **Notes/**  **Reactions** | * N/a. |

1. The political party designation of the judge was obtained via Google desktop searches, which may not be entirely accurate. [↑](#footnote-ref-1)
2. *See* Bennett Leckrone, *Maryland Congressional Redistricting Whirlwind Comes To A Close*, Maryland Matters (Apr. 4, 2022), <https://www.marylandmatters.org/2022/04/04/hogan-to-sign-redrawn-congressional-map-appeal-on-earlier-map-to-be-withdrawn/>. *See also* Bennet Leckrone, *What’s in Store for Future Congressional Redistricting Cycles in Maryland?*, Maryland Matters (Apr. 21, 2022), <https://www.marylandmatters.org/2022/04/21/whats-in-store-for-future-congressional-redistricting-cycles-in-maryland/>. [↑](#footnote-ref-2)
3. The only statutes in Maryland that bear on Congressional redistricting include Section 8-701 through 8-709 of the Election Law Article of the Maryland Code, which do not include standards or criteria by which Congressional districting maps must be drawn. [↑](#footnote-ref-3)
4. *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), concerned an attempt by the Green Party to get candidate on the ballot for election to Congress, in the state's first congressional district. [↑](#footnote-ref-4)