IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

BALTIMORE COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, Plaintiffs, v. BALTIMORE COUNTY, MARYLAND, *et al.*, Defendants.	Civil Action No. LKG-21-03232

PLAINTIFFS' RESPONSE TO DEFENDANT BALTIMORE COUNTY'S NOTICE OF "SUPPLEMENTAL" AUTHORITY (ECF 42) AND UNTIMELY DECLARATIONS (ECF 45)

Since Plaintiffs filed their February 7, 2022, reply in support of the motion for preliminary injunction (ECF 39), Baltimore County has made two unauthorized filings seeking to introduce new, previously unbriefed issues.[1] Neither filing diminishes Plaintiffs' overwhelming showing of likelihood of success on the merits and the other equities that compel emergency injunctive relief. In brief, (i) the cited Supreme Court stay is not proper "supplemental" authority given that it is not a merits decision (and by its own terms has no precedential effect), six Justices agree it did not change Voting Rights Act law, and it addresses an election schedule in Alabama significantly shorter than Maryland's, and (ii) the self-serving declarations submitted by three members of the

[1] Local Rule 105.2(a) prohibits unauthorized surreplies. Local Rule 105.2(b) prohibits filings after 4 p.m. on the afternoon before the last business day before a hearing – i.e., 4 p.m. on Friday, February 11. The County violated this rule with its supplemental declarations, filed Friday after 9 p.m. In accordance with the Local Rule, Plaintiffs seek leave to file this response to the County's improper filing.

Baltimore County Council — purportedly under cover of "legislative immunity" to preclude challenge — do not address the key issues that this Court must decide under the Voting Rights Act, implicitly support Plaintiffs' factual assertions by not contesting them, and in some ways directly reinforce Plaintiffs' proof. In addition, on Friday, the Maryland Court of Appeals issued two orders extending Maryland's February 22, 2022, candidate filing deadlines by a month to allow that Court to resolve other redistricting disputes.[2] This ensures that the County and other stakeholders will have ample time to adjust to any remedial measures this Court directs.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). Baltimore County's Hail Mary attempt to use the *Milligan* order and a handful of self-serving declarations to delay or deter this Court from preliminarily enjoining the County's racially discriminatory redistricting plan should be rejected.

I. RESPONSE TO THE COUNTY'S NOTICE OF "SUPPLEMENTAL" AUTHORITY

A. The stay in *Milligan* does not alter binding and long-standing Section 2 law.

At the outset, Plaintiffs emphasize that the *Milligan* stay is a simple order with no majority opinion or explanation; it has no binding effect on this or any other court. "Orders granting stays are not precedential decisions. Like most other judicial orders of one or two sentences, they do not extend beyond the case in which they are entered." *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1301 (11th Cir. 2007) (*per curiam*). *See also Wicker v. McCotter*, 798 F.2d 155, 157-58

[2] *In re 2022 Legislative Redistricting of the State*, Md. Misc. Nos. 21, 24, 25, 26, 27, Sept. Term 2021, available at https://www.courts.state.md.us/sites/default/files/import/coappeals/highlightedcases/2022districting/20220211consolidationorder.pdf and *Prince George's Cnty v. Thurston*, No. 405, Sept. Term 2021, available at https://www.courts.state.md.us/sites/default/files/import/coappeals/highlightedcases/princegeorgesvthurston/20220211grantorder.pdf . (Attached as Exhibits 1 and 2).

(5th Cir. 1986) (lower courts must continue to follow precedent even where the Supreme Court grants *certiorari* and stays unless the Supreme Court says otherwise). And certainly a *concurrence* to a stay order cannot be considered binding or authoritative in any sense, nor should it invite speculation as to what the Supreme Court *might* eventually decide in a completely different matter.[3] Rather, the Supreme Court has strongly counseled against attempts to read between the lines of its cursory rulings in search of phantom holdings, admonishing lower courts that the power to overturn standing precedent and make new law is reserved for the Justices. *E.g., Agostini v. Felton,* 521 U.S. 203, 237 (1997); *Thurston Motor Lines, Inc., v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("only the [Supreme] Court may overrule one of its precedents"). There are numerous cases in which the Supreme Court has issued a stay on a lower court injunction, only to deny certiorari or to subsequently affirm.[4] Justice Kavanaugh forecast this very possibility in his *Milligan* concurrence: "*The stay order does not make or signal any change to voting rights law.*" ECF 41-1 (slip op.) at 2 (emphasis added).

B. The materially different circumstances here render *Milligan* irrelevant.

Even if the *Agostini* principle and Justice Kavanaugh's own disclaiming language in *Milligan* could permit a court to read the concurrence as establishing a new legal standard for

[3] Justice Kavanaugh's non-precedential concurrence to a one-paragraph stay order, signed by less than a quarter of the Court, does not change the law in any respect. The other three Justices who voted for a stay in *Milligan* issued no opinion, so we cannot even know whether Justice Kavanaugh's was the narrower (and thus controlling) view. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[4] *See, e.g., McQuigg v. Bostic*, 135 S. Ct. 32 (2014) (staying Fourth Circuit decision in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), enjoining Virginia's same-sex marriage prohibition), *cert. denied sub nom Rainey v. Bostic*, 135 S. Ct. 286 (2014); *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (staying lower court decision invalidating Utah's same sex marriage law), *cert. denied* 135 S. Ct. 265 (2014).

issuing injunctive relief in election cases — and they cannot properly be read as such — injunctive relief *is* appropriate here.

Justice Kavanaugh outlined four equitable considerations that might guide a court in applying *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*) ("the *Purcell* principle"):

a) The underlying merits are entirely clear-cut in favor of the plaintiff;

b) The plaintiff would suffer irreparable harm absent an injunction;

c) The plaintiff has not unduly delayed bringing the complaint to the court; and

d) The changes in question are at least feasible before the election without significant cost, confusion, or hardship.

ECF 42-1 at 5. Each of these elements supports injunctive relief here.

As to the first three of these elements, there can be little question that Plaintiffs meet their burden. First, as set forth in the preliminary injunction papers, Plaintiffs present an overwhelming case as to why the County's redistricting plan violates Section 2. Second, they have established that, absent an injunction, they will suffer a violation of their fundamental right to vote based on their race. Third, they brought this action *within 24 hours* after the County enacted its illegal redistricting plan, having already spent *months* fruitlessly explaining to County officials why the discriminatory plan should be rejected.

This leaves only the final factor, concerning whether the County can show that the relief sought is unduly burdensome or infeasible. It has not and cannot.

For starters, the County did not raise the February 22 deadline as a concern during the January 18 hearing discussing the briefing schedule for the preliminary injunction proceeding and informing the Court's January 19 Scheduling Order. Prior to and during that hearing, the Parties, including the Board of Elections, expressly discussed a schedule for adjudicating this dispute that would allow the County to implement any Court-ordered relief by February 22. If the County had

doubts about its ability to comply with a Court order by that deadline, then the January 18 hearing was the time to raise it, and the Parties and the Court could have set a more accelerated schedule. Having failed to raise the issue then, the County waived this argument.

Moreover, no immediate deadlines threaten Baltimore County's ability to remedy its unlawful redistricting plan. Although Baltimore County belatedly flagged the February 22 candidate filing in its January 31 brief as potentially problematic without offering any evidence in support of that claim (ECF 34 at 31), last week the Court of Appeals of Maryland extended that deadline by a full month, until March 22. Ex. 1. This extension will provide ample time for an orderly election after a ruling by this Court directing the County to bring its district map into compliance with Section 2. If the Court of Appeals anticipates, in litigation just getting under way, that any needed changes to the *statewide* map for the Maryland General Assembly districts can be accomplished within that month-long extension, then that extension clearly affords enough time for the County to do the same, given the more advanced stage of this litigation, the legwork Plaintiffs' expert William S. Cooper has already done to illustrate VRA-compliant maps, and the much smaller scale of the County's task. Additionally, pursuant to the Court of Appeals' Order, election officials are authorized to extend other deadlines as needed, to corresponded to the new schedule. Even under the original February 22 candidate filing deadline, the County's opposition brief and declarations offered no evidence of any cost, confusion, or hardship that would result from this Court's enforcement of Black voters' right to an election process that does not illegally dilute their votes. The extra time allotted under the Court of Appeals Order makes it impossible for the County to make such a showing now.

It is also telling that, notwithstanding the County's attempted reliance on the stay in *Milligan*, the Baltimore County Board of Elections, a separately represented defendant in this

action, has never asserted that the relief Plaintiffs request would disrupt any election activity, nor that any scheduled deadlines cannot be adjusted to accommodate any delay necessary to establish and implement redrawn council districts compliant with the Voting Rights Act. The County Board of Elections has raised no concern about its ability to implement a new plan and has stipulated that it "agrees to act in compliance with any order entered on Plaintiffs' Motion for Preliminary Injunction." ECF No. 32 ¶ 5(d). Moreover, unlike both *Milligan* and the state legislative redistricting taking place in Maryland, the electoral map redrawing here will not involve the "extraordinarily complicated and difficult" challenge Justice Kavanaugh associated with "[r]unning elections statewide." *See* ECF 41-1 at 3. Whereas fears of "chaos" and "voter confusion" troubled the Court in both *Milligan* and *Purcell*, where election procedures were enjoined mere weeks from the commencement of voting, nothing of that sort has been alleged by County election officials here. Baltimore County's recent filing makes no assertion and offers no evidence that redrawing the maps to comply with the Voting Rights Act will be burdensome or time consuming. Rather, Plaintiffs have already shown that such an undertaking is not difficult and have provided multiple alternative maps for guidance.

C. The Court can further adjust current election deadlines as necessary.

In light of the Court of Appeals Order and the flexibility it gives election officials to further modify election deadlines as needed, there are no looming deadlines potentially implicated by a ruling from this Court directing new County Council districts compliant with the Voting Rights Act. Even if that were not the case, however, this Court has power to shape injunctive relief to accommodate constraints posed by established deadlines. "When federal law is at issue and the public interest is involved" federal courts acting in equity can and must order relief tailored to the case that ensures an effective remedy, "mould[ing] each decree to the necessities of the particular case" in order to "accord full justice to all parties." *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015)

(internal quotations and citations omitted). In the voting rights context, one form of injunctive relief (in addition to ordering the drawing of new electoral maps) is changing dates in the election calendar in order to prevent the irremediable loss of political rights. Federal courts in Maryland and the Fourth Circuit thus change dates on the election calendar when warranted, as occurred in the *Cane v. Worcester County* litigation, where the Fourth Circuit ordered elections delayed by a full year due to the County's intransigence about implementing a racially fair election system during the appeals process.[5] Courts around the country do the same when necessary to ensure compliance with the Voting Rights Act.[6] Such injunctive relief is available because "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *See League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

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[5] *See* United States District Court for the District of Maryland docket 1:92-cv-03226, at docket entry 79. (Entry text: "Order, U.S. Court of appeals, "GRANTING" appellant's motion for stay pending appeal of the order of the District Court requiring Worcester County to implement a cumulative voting system for its County Commissioners").

[6] *See, e.g.*, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 417 (S.D.N.Y. 2020) (enjoining election to be held in 15 days and ordering defendant to "propose a remedial plan that fully complies with the VRA within thirty days"), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Thomas v. Bryant*, No. 19-60133 (5th Cir. Mar. 15, 2019) (extending state senate candidate filing deadline from March 15 to April 12 to accommodate redrawing of map in order to remedy Section 2 violation); *Perez v. Perry*, 891 F. Supp. 2d 808, 812 (W.D. Tex. 2012) (ordering state to hold its primary elections on May 29, 2012, after having twice pushed back the primaries due to redistricting dispute); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 361 F. Supp. 31296, 1305 (M.D. Ga. 2018) (postponing board of education election until a new, Section 2-compliant map was drawn), aff'd, 979 F.3d 1282 (11th Cir. 2020); *Martin v. Augusta-Richmond Cnty., Ga., Comm'n*, No. CV 112–058, 2012 WL 2339499, at *6 (S.D. Ga. June 19, 2012) (adopting court-drawn, VRA-compliant map and moving qualifying dates for county commission and board of education seats from May 23-25 to August 6-8), and state courts as well, *see, e.g.*, *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021) (ordering a two-month delay in the state's primary elections from March 8, 2022, to May 17, 2022, as a result of the state's unlawful redistricting), *reconsideration dismissed*, 867 S.E.2d 185 (N.C. 2022).

II. RESPONSE TO THE COUNTY'S SUPPLEMENTAL DECLARATIONS (ECF 45)

On the evening of February 11, 2022, Baltimore County submitted declarations on behalf of the current Councilmembers of Districts 1, 2, and 4. *See* ECF 45. The County provides no explanation for why these declarations could not have been offered with its January 31 opposition. Nor does it say why, if it decided late in the process that it wished to call these officials as witnesses, it did not designate them as such in its response to the Court's inquiry about witnesses the parties wish to present. The peculiarity of the declarations is made even more conspicuous by the County's contention that they are being submitted under a cloak of "legislative immunity" purporting to insulate these witnesses from questioning. The County's failure to designate these officials as witnesses, while simultaneously submitting self-serving and untimely declarations aimed at sheltering the declarants from having to testify, is improper both as a principle of due process and as a matter of procedure under the schedule the Court set to adjudicate this motion. They should be disregarded.

Even if the untimely declarations are considered, in substance they do not in any way diminish the Plaintiffs' likelihood of success on the merits. For example, none of the declarants denies that the County Council could have adopted a second reasonably compact majority-Black district, or seeks to justify the County's excessive packing of Black voters into a single district. Nor do any of the declarations dispute that voting in the County is racially polarized. To the contrary, Councilman Quirk's declaration reinforces the Plaintiffs' evidence that white bloc voting will continue to discourage and defeat Black candidates under the County's adopted plan, given his claim that he has tried earnestly to recruit a Black candidate to run for the District 1 seat he is vacating, but has come up empty. ECF 45-1, ¶ 11. This is precisely the point Plaintiff Anthony Fugett has made in his declaration: Unless the redistricting plan is changed to make it racially fair as Plaintiffs urge, Black candidates will continue to steer clear of County Council races they view

as unwinnable, and Black voters will continue to be denied their right to elect candidates of their choice. ECF 28-4 ¶¶ 9-17, 21.

On the other equitable factors, two of the County's untimely declarations baldly assert, without any explanation or evidence, that requiring VRA-compliant maps "would severely disrupt the election cycle and potentially cause voter confusion and disenfranchisement." ECF Nos. 45-1 and 45-3. These declarations were filed after the Court of Appeals delayed the February 22 deadline, so it is unclear whether these declarants were operating under the incorrect assumption that the now-extended February 22 candidate filing deadline was still operative. It is also unclear whether the third declarant's (Israel "Izzy" Patoka's) omission of such a statement is a tacit acknowledgment by him that no such confusion would exist. ECF No. 45-2. Regardless of the answers to these uncertainties, the County's untimely declarations are simply not relevant to the equitable issues the Court must address.

III. THE RECORD ALREADY BEFORE THE COURT CONFIRMS THAT INJUNCTIVE RELIEF IS APPROPRIATE.

The record to date, which will be enhanced at a hearing on February 15, confirms that the *Purcell* principle should not deter the Court from granting an injunction. The merits here are clear-cut and stand nearly uncontested. The only meaningful evidence presented shows beyond question that the *Gingles* test for a Section 2 violation has been met.[7] Irreparable injury in the face of this flagrant Voting Rights Act violation is a given. *See League of Women Voters,* 769 F.3d at 247 ("Courts routinely deem restrictions on fundamental voting rights irreparable injury.").

[7] The County's reliance on Chief Justice Roberts' comment about "confusing" voting rights law is misplaced. ECF 42 at 2. Dissenting from the stay order, the Chief Justice observed that "in my view, the [Alabama] District Court properly applied existing law in an extensive opinion with no apparent errors for our correction." ECF 42-1 at 9. Even if the County Council and the Chief Justice may want the law to change, that is no reason not to apply existing law here.

New districts can be established before the next election without significant cost, confusion, or hardship. VRA-compliant alternative maps were provided to Baltimore County months ago, and mail-in voting in the next primary election is not scheduled to commence for *three months* (a time that the Court could extend further if needed).

As Justice Kavanaugh himself recognized, *Purcell* was never intended to entirely foreclose federal courts from remedying clear violations of the law in election years. Nothing in the *Milligan* stay order—and certainly nothing in Justice Kavanaugh's concurrence—diminishes Plaintiffs' likelihood of success on the merits of their Section 2 claims or the equitable factors that uniformly weigh in favor of preliminary injunctive relief.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: February 14, 2022

EXHIBIT 1

IN THE MATTER OF	*	**IN THE**
2022 LEGISLATIVE	*	**COURT OF APPEALS**
DISTRICTING OF THE STATE	*	**OF MARYLAND**
	*	**MISC. NOS.**
	*	**21, 24, 25, 26, 27**
	*	**SEPTEMBER TERM, 2021**

O R D E R

The Court of Appeals of Maryland, pursuant to the provisions of Article III, § 5 of the Constitution of Maryland and vested with original jurisdiction to review the legislative districting plan upon petition of any registered voter, has received timely-filed petitions on or before February 10, 2022, challenging the validity of the 2022 legislative districting plan enacted by the General Assembly of Maryland as Senate Joint Resolution 2.

Now, therefore, it is this 11th day of February, 2022, ORDERED, by the Court of Appeals of Maryland, that

(1) Miscellaneous Numbers 21, 24, 25, 26, and 27 are consolidated for purposes of oral argument to be scheduled by future Order(s) of this Court;

(2) Pursuant to this Court's February 3, 2022 Amended Order, these consolidated petitions are hereby referred to Special Magistrate Alan M. Wilner;

(3) Subject to the Special Magistrate's February 7, 2022 Scheduling Conference Order, the Special Magistrate shall conduct a virtual scheduling conference to schedule future proceedings;

(4) The following deadlines are amended for the 2022 Primary for the Gubernatorial Elections, scheduled for June 28, 2022:

(a) The deadline of Tuesday, February 22, 2022, established pursuant to Maryland Code, (1957, 2017 Repl. Vol., 2021 Supp.), Election Law ("EL") § 5-303, for filing of certificates of candidacy, is extended to Tuesday, March 22, 2022 at 9:00 p.m.;

(b) The deadline of Friday, March 4, 2022, established pursuant to EL § 5-502(a), for candidates to withdraw a certificate of candidacy, is extended to Thursday, March 24, 2022;

(c) The deadline of Tuesday, March 8, 2022, established pursuant to EL § 5-901, to fill a vacancy in candidacy for a primary election, is extended to Monday, March 28, 2022;

(d) The deadline of Wednesday, March 9, 2022, established pursuant to EL § 5-305, to challenge a candidate's residency, is extended to Tuesday, March 29, 2022;

(e) Upon review of the Attorney General of Maryland's Motion, filed Friday, January 28, 2022, and related submissions, and pursuant to EL § 9-207, the Maryland State Board of Elections is authorized to adjust any deadlines related to certifying, displaying, and printing ballots.

/s/ Joseph M. Getty
Joseph M. Getty
Chief Judge
Court of Appeals of Maryland

Filed: February 11, 2022

/s/ Suzanne C. Johnson
Suzanne C. Johnson
Clerk
Court of Appeals of Maryland

Pursuant to Maryland Uniform Electronic Legal Materials Act
(§§ 10-1601 et seq. of the State Government Article) this document is authentic.

2022-02-11
16:07-05:00

Suzanne C. Johnson, Clerk

*Judge Gould did not participate in the Court's deliberations concerning this Order.

EXHIBIT 2

PRINCE GEORGE'S COUNTY	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**Petition Docket No. 405 September Term, 2021**
	*	**(No. 1865, Sept. Term, 2021**
	*	**Court of Special Appeals)**
	*	**(No. CAL22-01728, Circuit Court**
ROBERT E. THURSTON, et al.		**for Prince George's County)**

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the answer filed thereto, the Emergency Motion for Expedited Consideration and Relief of the Petition for a Writ of Certiorari, and the response to the motion, in the above-captioned case, it is this 11th day of February, 2022

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, GRANTED, and a writ of certiorari to the Court of Special Appeals shall issue; and it is further

ORDERED, that said case shall be transferred to the regular docket as No. 63, September Term, 2021 (COA-REG-0063-2021); and it is further

ORDERED, that the Emergency Motion for Expedited Consideration and Relief of the Petition for a Writ of Certiorari be, and it is hereby, GRANTED IN PART and DENIED IN PART; and it is further

ORDERED, that counsel shall e-file briefs and printed record extract in accordance with Md. Rules 8-501, 8-502, 20-403, 20-404 and 20-406, Appellant's brief and record extract to be filed on or before February 18, 2022; Appellees' brief(s) to be filed on or before February 25, 2022; Appellant's reply brief, if any, to be filed on or before March 1, 2022; and it is further

ORDERED, that the parties shall include, in the record extract or in appendices to their briefs, the relevant legislative history concerning §§ 305 and 317 of the Prince George's County Charter; and it is further

ORDERED, that this case shall be set for argument on Friday, March 4, 2022; and it is further

ORDERED, that Appellant's request for a stay of the order of the Circuit Court for Prince George's County be, and it is hereby, DENIED; and it is further

ORDERED, that the Appellees' request for a summary affirmance of the order of the Circuit Court for Prince George's County be, and it is hereby, DENIED.

/s/ Joseph M. Getty
Chief Judge

*Judge Gould did not participate in the Court's deliberations concerning this Order.

PRINCE GEORGE'S COUNTY	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**Petition Docket No. 405 September Term, 2021**
	*	**(No. 1865, Sept. Term, 2021**
	*	**Court of Special Appeals)**
ROBERT E. THURSTON, et al.	*	**(No. CAL22-01728, Circuit Court for Prince George's County)**

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE JUDGES OF THE
COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, PRINCE GEORGE'S COUNTY v. ROBERT E. THURSTON, et al, No. 1865, September Term, 2021 is pending before your Court and the Court of Appeals is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED TO HAVE THE RECORD TRANSMITTED TO THE COURT OF APPEALS OF MARYLAND ON OR BEFORE February 25, 2022, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of Maryland this 11th day of February, 2022.

/s/ Suzanne C. Johnson
Clerk
Court of Appeals of Maryland