

**UNITED STATES DISTRICT COURT  
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' SUPPLEMENTAL BRIEF PURSUANT  
TO THE COURT'S MARCH 11, 2022, ORDER (ECF 62)**

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### PRELIMINARY STATEMENT

Baltimore County has failed to comply with this Court's February 22 Order. Once again, it has proposed a redistricting plan that would dilute the vote of its Black citizens in violation of Section 2 of the Voting Rights Act. The County Council preserves a white voting majority in six of the seven council districts despite white voters constituting just over half of the County's population, and leaves its Black citizens, who make up almost a third of the population, a meaningful opportunity to elect the candidate of their choice in only a single district. As with its initial plan (Bill 103-21), the County's March 8 remedial proposal:

- Fails to create a second majority-Black district, although the County's Black population is sufficiently large, concentrated, and cohesive to make that appropriate under the Voting Rights Act in light of a history of white-bloc voting against Black voters' candidates of choice;
- "Packs" Black voters into the single majority-Black district (District 4) such that Black voters are 64.1% of the voting age population;
- Entrenches a white majority of the citizen voting age population in the six other Council districts;
- "Cracks" key majority-Black communities on the west side of the County, including Woodlawn, Milford Mill, Randallstown, and Owings Mills.

The County's arguments in its motion to approve its remedial proposal (ECF 57-1) and at the March 11 hearing contradict themselves. On the one hand, the County claims that remedial District 4 needs to have a super-majority of 64.1% Black voters to make the incumbent Councilman "safe" and to allow Black voters there to overcome white-bloc voting and elect the candidates of their choice. ECF 57-1 at 2; Mar. 11 Tr. 33:25-34:8. But the County simultaneously

asserts that Black voters in remedial District 2, who comprise 41.7% of the citizen voting age population, have the opportunity to elect their candidates of choice by winning the approval of white “crossover” voters. ECF 57-1 at 3; Mar. 11 Tr. 8:11-19. Beyond this glaring contradiction, the County’s arguments fly in the face of the core principle of the Voting Rights Act, which is one of self-determination for Black voters.

Vote dilution cannot be remedied by a plan that maintains white veto power over Black choices, yet that is what the County proposes: The County asks this Court to endorse a plan that 1) continues to dilute the votes of Black voters in District 2 through cracking of their communities in a way that keeps them the significant minority by ten percentage points, only able to elect their chosen candidates if white voters approve of their choices; while also 2) packing Black voters into District 4. This scheme violates the Voting Rights Act.

Neither the County’s original nor its remedial District 2 is a true “crossover” district, even if that were a permissible remedy here. In seeking approval of the remedial map, the County submitted no data or analysis showing that District 2 would provide Black voters “an opportunity to elect a representative of their choice,” as required by the February 22 Order. ECF 55 at 23. Notably, Defendant’s sole expert, Dr. Gimpel, did not present any analysis or data that supports his conclusion that Black voters in remedial District 2 would be able to “elect candidates of their choice.” ECF 57-6 ¶¶ 19-20. In other words, neither the County nor Dr. Gimpel offered anything more than wishful speculation.

There is significant reason to doubt that remedial District 2 will perform as Dr. Gimpel speculates it will. As discussed in the Declaration of William Cooper (Ex. A), District 2’s white citizen voting age population in the County’s remedial District 2 is 52.1%, far outstripping the Black citizen voting age population of 41.7%. Given the 10-percentage-point advantage white

voters would have in the County's District 2, it is hardly surprising, as Matthew Barreto has concluded (Ex. B), that the County's proposed map still fails to remedy the deprivation of Black citizens' right to have "an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rep. No. 97-417, at 28 (1982)).

The marginal improvements the County has made to make District 2 more competitive do not fundamentally address the Voting Rights Act violation. The proposed new map, once again, packs and cracks the County's large and geographically compact population of Black citizens—nearly a third of its overall population—with the effect of confining their influence to one out of the County's seven council districts. This is textbook vote dilution that Section 2 of the Voting Rights Act was designed to eradicate. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 479 (1997).

In contrast, the Plaintiffs have proffered six maps that create a second majority-Black district comporting with Voting Rights Act requirements and with other relevant constitutional and statutory requirements. This includes William Cooper's March 10 proposal (*i.e.*, Plaintiffs' proposed "Map 6"), in which he converted the County's remedial map to one that includes a second majority-Black district by making a minimum number of changes to the County's proposed map—swapping 10 precincts between Districts 2 and 4 and moving one from District 3 to District 4. As discussed below, this proposal is an appropriate remedy to the County's Voting Rights Act violation. As explained by Dr. Barreto's performance analysis, discussed below, under Plaintiffs' proposed Map 6, the Black voters of District 4 (who would constitute 53.2% of the voting age population and 51.6% of the citizen voting age population) should be able to re-elect the Black incumbent or another candidate of their choice; this conclusion is consistent with the history of District 4, which was able to successfully elect Baltimore County's first Black Councilmember

with a Black voting age population of 55.1%. Cooper 4th Decl., Ex. A ¶ 4 (discussing 2002 map). And unlike the County’s remedial proposal, Map 6 would give Black voters a meaningful chance to elect a candidate of their choice, including a Black candidate, in District 2.

Pursuant to the Court’s March 11, 2022, Order (ECF 62), this supplemental brief discusses how the Court should proceed in light of Baltimore County’s proposed remedial map. First, Plaintiffs address why the County’s proposed remedial map fails to provide “an additional County District in which Black voters otherwise have an opportunity to elect a representative of their choice and that comports with the requirements of the Voting Rights Act . . . and any other relevant constitutional and statutory requirements” as required by the Court’s February 22nd Order, ECF 55 at 23. To be clear, adoption of the County’s remedial map would violate the Voting Rights Act for many of the same reasons that the Court found that the County’s initial effort (Bill 103-21) violated the Act. *See id.* Second, Plaintiffs address why Map 6—found at Exhibit B to the Fourth Declaration of William S. Cooper—would be an adequate remedy that satisfies the requirements of the Voting Rights Act and all traditional redistricting principles. In addition, the Plaintiffs have offered other maps (Maps 1 and 5) that would be an adequate remedy to the County’s violation of the Voting Rights Act.

**I. IN VIOLATION OF THE COURT’S FEBRUARY 22 ORDER, THE COUNTY’S PROPOSED REMEDIAL MAP DOES NOT PROVIDE BLACK VOTERS WITH A MEANINGFUL OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE**

**A. A remedial map that fails to remedy a Section 2 violation is afforded no deference.**

The County’s request for “deference” in redrawing its illegal map, ECF 57-1 at 5, ignores binding precedent requiring any remedial map to comply with the Voting Rights Act. As the Fourth Circuit stated in *McGhee v. Granville Cnty., N.C.*, if the “legislative body fails to respond or responds with a legally unacceptable remedy, the responsibility falls on the District Court” to

fashion a map. 860 F.2d 110, 115 (4th Cir. 1988) (cleaned up). The Court “consider[s] whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights—that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place.” *Id.* citing *Upham v. Seamon*, 456 U.S. 37, 42 (1982). Only if the remedial plan meets those standards may a reviewing court accord deference to legislative judgments. *Id.* Here, the County has not met the threshold step of demonstrating its remedial plan complies with the Voting Rights Act. Only if the County had proposed a plan that complies with Section 2 would it be entitled to deference on the nature and scope of boundaries that may reflect political judgments. *Id.* Plaintiffs have tried to accommodate the County’s political preferences by starting with the County’s remedial map and making adjustments to comply with Section 2.

**B. The County’s proposed remedial District 2 does not provide Black voters with a meaningful opportunity to elect candidates of their choice.**

After finding that Plaintiffs had established a likelihood of success on the merits that Bill 103-21 violated the Voting Rights Act, this Court directed the County to remedy that violation by drawing a district map “that includes either an additional majority-Black County District, or an additional County District in which Black voters otherwise have an opportunity to elect a representative of their choice.” ECF 55 at 22-23. The County thus must demonstrate that its map satisfies one of these requirements. *See McGhee*, 860 F.2d at 155 (requiring remedial plan to meet constitutional and statutory standards *prior* to receiving any deferential treatment).

In seeking approval of its proposed remedial map, the County concedes the map does *not* create a second majority-Black district. ECF 57-1 at 7 (“41.2% will be Black”). And in seeking that approval, the County offered no statistical analysis or data demonstrating that the newly drawn District 2 would provide Black voters with an opportunity to elect a representative of their choice.

ECF 57-1. This falls far short of what the Supreme Court has recognized as necessary to establish a viable crossover district. *See, e.g., Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (noting that evidence before the trial court included two decades of election results that demonstrated sufficient white crossover voting to successfully elect Black-preferred candidates where BVAP was under 50%).<sup>1</sup> While both the County and its expert Dr. Gimpel argue, without presenting any statistical analysis, data, or other evidence, that proposed remedial District 2 “would become an even stronger crossover or coalition district in which Black voters could elect their candidates of choice, including Black candidates, with crossover support from both other minority voters and White voters,” ECF 57-6 ¶ 18, merely asserting this does not make it true.

In contrast, Plaintiffs’ expert Dr. Barreto has demonstrated that the County’s proposed remedial map does not create a second electoral district where Black voters would have a meaningful “opportunity to elect a representative of their choice.” Barreto 3d (ECF 60-2) Decl. ¶ 7. As Plaintiffs have previously proven, Black voters in Districts 1, 2, and 4 overwhelmingly supported Anthony Brown over Larry Hogan, Donna Edwards over Chris Van Hollen,<sup>2</sup> and Ben Jealous over Larry Hogan. Barreto Decl. (ECF 28-3) ¶¶ 14-21. Under the newly configured District 2, however, only Anthony Brown would have won his race.

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<sup>1</sup> In contrast to the situation here, in *Cooper* the districts at issue were *not* created pursuant to a court finding that the existing system violated the Voting Rights Act, as this Court has found, and the evidence from recent elections did not show the type of racially-polarized voting the Court has found present in Baltimore County. Moreover, the “crossover” districts in *Cooper* included significantly higher Black voting age population (48.6% and 43.8%) than that included in Defendant’s proposed new map. (41.7%).

<sup>2</sup> Although counsel for Baltimore County made denigrating comments about former Congresswoman Edwards at the March 11 hearing, Tr. 14:22-15:2, the Black voters of Baltimore County expressed their preference for Edwards over Van Hollen. On average, about 75% of Black voters voted for Ms. Edwards. Barreto Decl. (ECF 28-3) ¶ 20. The County is not free to disregard a Black-white election and ignore the strong evidence of racial polarization that election shows because it disapproves the choices of Black voters.

**Table 1: Performance Analysis of Black Preferred Candidates Under the County’s Proposed Remedial Map**

	D1	D2	D4
Hogan	55.0%	45.0%	32.5%
Brown	42.4%	53.3%	65.8%
Van Hollen	51.6%	57.2%	36.9%
Edwards	39.4%	37.4%	57.0%
Hogan	54.6%	50.2%	36.3%
Jealous	44.1%	49.0%	62.7%

Barreto 4th Decl. ¶ 7. As Dr. Barreto has demonstrated, white-bloc voting would have prevented Black voters in the County’s proposed District 2 from electing their candidate of choice in two of these three key elections, while Black votes are “wasted” in District 4, with the Black-preferred candidates winning by 20 to 33 points.

Instead of any comparable analysis of how its proposed remedial districts actually perform, the County offered in its motion for approval (ECF 57-1) and at the March 11 status conference a series of speculations that proposed remedial District 2 complied with the Court’s February 22 Order. All of these speculations were tendered without data, and none is legally sufficient to establish that the proposed remedial District 2 provides Black voters with a meaningful opportunity to elect candidates of their choice.

First, the County argues that white voters will “cross over” to support Black-preferred candidates in its proposed remedial District 2. ECF 57-1 at 7; Mar. 11 Tr. 12:24-13:19. Not only does that assumption give white voters veto power over Black voters’ choices, it runs contrary to the evidence in this case: as the Court has found, “there is racially-polarized voting in the County.” ECF 55 at 13. *See also* Barreto Decl. (ECF 28-3) ¶ 20 (showing, on average, *eight percent* of the white electorate, but *seventy-five percent* of Black electorate, voted for the Black candidate Edwards in the 2016 Senate Democratic Primary). In entering the preliminary injunction, the

Court noted that “Defendants’ arguments to the contrary [are] unpersuasive.” ECF 55 at 14. Dr. Gimpel expressly acknowledged at the February 15 hearing, and the County implicitly acknowledges in its proposed remedial plan that racially polarized voting—i.e., a lack of cross-over voting—exists by asserting that District 4 must maintain a Black population well over 60 percent to remain “safe.” ECF 57-1 at 3.

Second, the County assumes without evidence that other non-white demographic groups will join Black voters to form a “coalition” so that Black voters in its proposed remedial District 2 can elect candidates of their choice. ECF 57-1 at 3; 57-6 ¶ 10. According to the County, when shares of Black, Hispanic, and Asian population are combined in its new District 2, the district’s non-white population would be 50.9%. ECF 57-4.<sup>3</sup> However, the County’s analysis fails to make a crucial distinction between voting age population and *citizen* voting age population (CVAP). Under the County’s proposed remedial District 2, the white citizen voting age population is 52.1%, the Black citizen voting age population is 41.7%, and the combined Black, Hispanic, and Asian citizen voting age population is 47.4%. Cooper 4th Decl. ¶¶ 2, 6. As numerous courts have recognized, “CVAP is commonly used in remedial redistricting to assess effectiveness.” *Terrebonne Parish Branch NAACP v. Edwards*, 399 F. Supp. 3d 608, 614 (M.D. La. 2019); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 708, 729 (S.D. Tex. 2017); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391, 1405, 1412 (E.D. Wash. 2014). This makes sense because, when determining whether a proposed remedial district creates a meaningful opportunity for BIPOC

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<sup>3</sup> Additionally, the County claims, when Multiracial, Biracial, Other race, Native American and Hawaiian/Pacific Islander population shares are included, the non-white share of the population in District 2 would be 54.2%. ECF 57-1 at 3.

voters to elect candidates of choice, it is important to consider whether the relevant population is actually eligible to vote.<sup>4</sup>

In its March 11 filing and at the March 11 status conference, the County argued, on two bases, that this Court should ignore racial disparities in citizen voting age population (CVAP) when evaluating the legality of the County's remedial plan. First, the County argued that Plaintiffs' use of CVAP was "substantially different" than and a "stunning reversal" from Plaintiffs' prior analysis. ECF 61 ¶¶ 2, 4-5; Mar. 11 Tr. 9:17-10:10. That is incorrect. Plaintiffs and their experts have consistently presented both voting age population and citizen-voting age population data. *See, e.g.*, ECF 28-2, ECF 41-2. Second, the County argued that any consideration of CVAP is somehow improper for redistricting purposes, citing the Supreme Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). ECF 61 ¶¶ 2, 8; Mar. 11 Tr. 32:21-25.<sup>5</sup> In so arguing, the County conflates the question of whether districts should be allocated among states and localities on the basis of CVAP rather than total population (which would violate the Constitution) and whether CVAP should be used to assess the effectiveness of a proposed remedy to a VRA violation (which is routinely done). *See Dep't of Commerce*, 351 F. Supp. 3d at 531 (summarizing importance of CVAP in VRA enforcement efforts).

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<sup>4</sup> This is distinct from the appropriate exclusion of citizenship considerations when determining population size for purposes of determining the number of Congressional districts to be allocated to a state or the population of federal, state, and local districts (which must be based on total population).

<sup>5</sup> The Census citizenship question case concerned whether the decennial census should directly inquire about citizenship status in response to a request from the Department of Justice for such data purportedly to make CVAP data more accurate. Both the Supreme Court and the District Court found that this request was a pretext aimed at discouraging immigrants from responding to the Census, and that such a question would not further the goals of the Voting Rights Act. 351 F. Supp. 3d at 571, 652-53. Neither the Supreme Court nor the District Court suggested, as defense counsel did at argument on March 11, that consideration of CVAP was improper or irrelevant. Mar. 11 Tr. 9:19-10:18.

Finally, at the March 11 status conference and in Dr. Gimpel's report, the County suggested that Dr. Barreto placed improper emphasis on Black-white elections. ECF 57-1 at 8-9; Mar. 11 Tr. 13:7-13. This ignores that Dr. Barreto (and the Court) considered elections involving only white candidates in addition to Black-white contests,<sup>6</sup> but, as Dr. Barreto testified, Black-white elections are more probative in assessing whether *Gingles* preconditions 2 and 3 have been met. This is entirely consistent with how courts weigh the relative value of Black-white and white-white elections, following the Supreme Court's lead in *Gingles*. See, e.g., *U.S. v. Charleston Cnty., S.C.*, 365 F.3d 341, 350 (4th Cir. 2004) (recognizing that election contests between Black and white candidates are most probative of racially polarized voting); *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) ("This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates, generally on grounds that such elections do not provide minority voters with the choice of a minority candidate.") (collecting cases). Contrary to the County's assertion, ECF 57-1 at 8-9, *Lewis* does not reject placing an emphasis on Black-white elections. Instead, the Fourth Circuit criticized the district court for refusing even to consider white vs. white elections, but it found that mistake to be harmless error and affirmed the district court's findings. *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 606 (4th Cir. 1996).

Dr. Barreto's use of the 2014 and 2018 gubernatorial races and the 2016 Democratic Senate primary race to assess whether the County's proposed map provides District 2 Black voters with an opportunity to elect a representative of their choice is therefore consistent with how courts direct that such an evaluation should be performed, particularly in a jurisdiction like Baltimore County

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<sup>6</sup> See Barreto 2d Decl. (ECF 39-1) ¶¶ 15-17 & Fig. 1 (showing strong racial polarization in voting even in white v. white elections); ECF 53 at 29 (slide of Plaintiffs' preliminary injunction hearing presentation showing strong racial polarization in voting even in white v. white elections).

where longstanding discrimination and entrenched polarization have excluded Black officials from local office. *See, e.g., Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1059 (D. Md. 1994) (three-judge-court).

**C. The County presented no data or analysis to support its assertion that its proposed remedial District 2 would perform as a “crossover” district to allow Black voters to elect their candidates of choice.**

As Dr. Barreto makes clear, a few straightforward analyses reveal that the County’s proposed remedial District 2 does not create a meaningful opportunity for Black voters. It is unknown why the County did not conduct any performance analysis. Perhaps the County was disinterested, lacked the expertise, or was fearful of what the results would show.<sup>7</sup>

In support of the proposed remedial map submitted on March 8, the County added a Supplemental Declaration of Dr. James Gimpel. ECF 57-6. This Court has already found Dr. Gimpel’s testimony to be unpersuasive when he attempted to assert that Plaintiffs’ proposed districts were not sufficiently compact, Mem. Op. at 12, ECF No. 55, and the Court has implicitly rejected Dr. Gimpel’s assertions that District 2 as initially adopted by the County in Bill 103-21 would provide a meaningful opportunity for Black voters’ candidates of choice.

In his supplemental declaration, Dr. Gimpel offers no performance analysis (or any other analysis) to show that Black voters’ candidates of choice would have a meaningful opportunity to be elected in the County’s proposed remedial District 2. Rather, he offers nothing more than unsupported conclusions that “the County’s proposed map would solidify District 2’s status as a

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<sup>7</sup> It bears emphasis that the County was not transparent in this process and refused multiple requests to share its draft map and related data before filing. The County delayed providing the data necessary for Plaintiffs to analyze the map until 12:30 pm on March 9. Had this information been provided prior to filing, the parties and the Court could have been saved a substantial amount of time, money, and effort. Once the County provided the data, the flaw with the County’s map and its unsupported assertions about District 2 were readily apparent.

strong crossover district.” ECF 57-6 ¶ 18. Dr. Gimpel’s analysis emphasizes that the “total minority voting age population” of proposed remedial District 2 is 50%, *id.*, but ignores that many of the other minority residents are non-citizens who cannot vote and thus cannot create a crossover coalition along with Black voters. He does not acknowledge or otherwise address that white voters have a clear majority of the citizen voting age population in the County’s proposed remedial District 2. *Id.* And while Dr. Gimpel points to three Black candidates who he claims have been elected in Maryland in state assembly districts containing a minority of Black voters, *id.*, one of the three, Carl Jackson, was appointed to his position after losing the election in the state district at issue. Fugett Decl. (ECF 28-4) ¶ 14. The other two candidates ran in districts wholly or partly in Howard County, a county with a very different history than Baltimore County and where election patterns have never been analyzed. Dr. Gimpel’s errors aside, none of these individuals was elected from a state assembly district that includes Council District 2, and such anecdotal exceptions do not substitute for analysis.

Dr. Gimpel and the County similarly offered no analysis to show that the County’s proposed packing of District 4 to create a 64% Black supermajority is necessary to elect Black candidates there. And as pointed out above, they offer no explanation of why they believe that a 64% supermajority is necessary to elect Black candidates of choice in District 4 despite its two-decade record of electing Black Councilmembers, but a Black minority has such an opportunity in District 2, where no Black Councilmember has ever been elected.

Plaintiffs do not know whether Dr. Gimpel has conducted an analysis or considered election data since submitting his March 8 declaration. But to the extent the County submits any such analysis with its brief today, the Court should view any such submission skeptically for at least three reasons. First, it is clear that the County did not have and did not consider such analysis

in developing its proposed remedial map, did not submit any such analysis in seeking approval of its remedial map (ECF 57), and courts have warned that *post-hac* justifications of redistricting maps are suspect. *See, e.g., Shaw v. Hunt.*, 517 U.S. 899, 908 n.4 (1996). Second, based on statements defense counsel made at the March 11 hearing suggesting that the County had conducted such analysis, Mar. 11 Tr. 10:22-23 (“doing an analysis of the map ourselves”), 14:14-21 (referring to “our numbers”), Plaintiffs requested that defense counsel produce any such analysis; defense counsel responded that they were only referring to the analysis “in Dr. Barretto’s declaration.” Ex. C. Third, since Dr. Gimpel has testified at the preliminary injunction in this matter, there is significant new evidence raising questions about Dr. Gimpel’s credibility and reliability -- specifically, the State of Maryland has submitted to the Maryland Court of Appeals a brief opposing the selection of Dr. Gimpel as a court consultant in which it convincingly summarized Dr. Gimpel’s partisanship and lack of credibility. Defs.’ Resp. to Show Cause Order Regarding Court Consultant, Cir. Ct. Anne Arundel Cnty. No. C-02-CV-21-001816, attached as Exhibit D. The State’s brief begins, “Dr. Gimpel has shown partisan bias in cases [related to redistricting]. Dr. Gimpel has defended extreme gerrymanders instituted by and for the benefit of Republicans.” *Id.* ¶ 1. The State went on to summarize Dr. Gimpel’s defense of extreme Republican gerrymanders in North Carolina, Pennsylvania, and Wisconsin; one judge’s criticism of his general answers and raising his voice and shouting on cross-examination; and his writings on immigration for an organization identified by the Southern Poverty Law Center as a hate group. *Id.* ¶¶ 1-6. Upon learning this information, Judge Battaglia declined to appoint Dr. Gimpel as an expert. Ex. E.<sup>8</sup> This Court should similarly doubt his credibility.

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<sup>8</sup> It also should be noted that in his expert submissions, Dr. Gimpel failed to make the required Rule 26(a)(2) disclosures of his prior testimony which may have allowed identification of these shortcomings.

The County has thus failed to establish that District 2 could provide a meaningful opportunity for Black voters to elect their candidates of choice with the support of “crossover” voters.

**D. The County’s proposed “crossover” remedial district is not a proper remedy for the Section 2 violation found here.**

In addition to failing to provide data showing that its proposed District 2 creates an opportunity for Black voters to elect a representative of their choice, the County’s motion for approval misreads and misapplies a number of Supreme Court decisions, most importantly the decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009). ECF 57-1 at 6-9. In *Strickland*, the question was whether a proposed district could be treated as “effectively” a majority-minority district, for purposes of applying the first *Gingles* precondition, by combining less than a majority of Black voters with white voters who could be persuaded to cross over and join with them to elect the minority population’s candidate of choice. The Court rejected that argument, ruling that Section 2 is not designed to promote district line drawing “for the purposes of forging an advantageous political alliance.” *Id.* at 14-15 (quoting *Hall v. Virginia*, 385 F.3d 421, 431 (4<sup>th</sup> Cir 2004)). *Strickland*’s *exclusive* holding is that Section 2 cannot be invoked to require creation of a crossover district.

The Supreme Court has *never* held that a Section 2 violation can be cured by using racially based district line drawing to create a crossover district. The County’s argument seeking approval of its proposed remedial map confounds the teachings from *Strickland*, where the Court warned *against* trying to assess whether racial considerations could be used to design a crossover district where minority voters would have sufficient white voter support to elect their preferred candidates.

We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2. Determining whether a

§ 2 claim would lie —*i.e.*, determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The Judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term. For example, courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive. A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2. Though courts are capable of making refined and exacting factual inquiries, they “are inherently ill-equipped” to “make decisions based on highly political judgments” of the sort that crossover-district claims would require. *Holder*, 512 U.S., at 894, 114 S.Ct. 2581 THOMAS, J., concurring in judgment). There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions.

556 U.S. at 17.

These same considerations dictate caution in considering the County’s proposed crossover remedy. At the least, they suggest that the County must support its contention that District 2 is a viable crossover district with data and analysis far more robust than Dr. Gimpel’s data-free speculation.<sup>9</sup>

In seeking approval of its plan, the County notably quotes from the *dissenting* opinion in *Strickland*, ECF 57-1 at 6, but this Court’s February 22 Opinion cited the majority decision. ECF

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<sup>9</sup> The County also cites *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993), as endorsing the “safe” majority-Black District 4. ECF 57-1 at 3. While that case recognizes that majority-Black districts are appropriate in response to Section 2 claims, the Supreme Court has noted that “in *Voinovich*, the Court stated that the first *Gingles* requirement ‘would have to be modified or eliminated’ to allow crossover-district claims.” *Strickland*, 556 U.S. at 15 (quoting *Voinovich*, 507 U.S., at 158).

55 at 11.<sup>10</sup> The guidance from that opinion does not indicate that a new or improved crossover district will cure the Section 2 issues here. To the contrary, the Supreme Court observed that “[t]he special significance, in the democratic process, of a majority means *it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.*” *Id.* at 19 (emphasis added). Although the County correctly quotes the Court’s observation that crossover districts can coexist with Section 2 (ECF 57-1 at 6), the County omits the most critical limitation on this practice in the Section 2 context:

States that wish to draw crossover districts are free to do so *where no other prohibition exists*. Majority-minority districts are only *required* if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.

555 U.S. at 24 (emphasis added). As this Court has found, the evidence here demonstrates that all three *Gingles* factors (including the third precondition) are met and Section 2 applies based on a totality of the circumstances, making a second majority-Black district the appropriate remedy.

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<sup>10</sup> The County claims that the February 22 Opinion and Order “clearly authorized the County to create a crossover district.” ECF 57-1 at 8. But the Court merely cited to and quoted from Supreme Court precedents, none of which stand for the proposition that a crossover district will overcome a Section 2 violation. This Court never suggested that the County could employ a so-called “crossover” plan that retains white veto power over the choices of Black voters in one district while entrenching vote dilution through packing in another, as the County’s remedial proposal does.

**E. The County’s remedial map still violates the Voting Rights Act.**

The County’s remedial redistricting map fails this Section 2 analysis for the same reasons as Bill 103-21. Measured against the same legal standards<sup>11</sup> and in light of the same evidence, the County’s new proposed map still fails to satisfy the three *Gingles* preconditions. In particular:

- Nothing about the newly proposed map has changed the County’s demographics or voting history.
- Black voters in Baltimore County are sufficiently large and geographically compact to constitute a majority in *two* single-member districts. *See* ECF 55 at 10-13.
- Black voters are politically cohesive in the County. *Id.* at 13-16.
- Data confirm that white-bloc voting in the County is routinely effective in defeating minority preferred candidates. *Id.* at 16-18.
- The “totality of the circumstances” in Baltimore County also have not changed. *Id.* at 18-21.

The County’s proposed map continues to “pack” a large number of Black voters into a single district (District 4), which now would be 64.1% Black in voting-age population. Cooper 4th Decl. ¶ 3. The remaining six districts retain a majority of white citizen voting age population. Cooper 3d Decl. (ECF 60-1), Ex. 1. And the County’s proposed map achieves this result by continuing to “crack” majority-Black communities, including Woodlawn, Milford Mill, Randallstown, and Owings Mills. *Id.* at ¶ 5.

When presented with a very similar record, this Court concluded that Plaintiffs had shown a strong likelihood of success on the merits:

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<sup>11</sup> As the Court previously found: “To prevail in a Section 2 case, plaintiffs must show: (1) the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district;” (2) the minority group “is politically cohesive;” and (3) “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If plaintiffs are successful in establishing the *Gingles* preconditions, the Court will also consider “the totality of the circumstances”—including the factors identified in the Senate Report accompanying the 1982 amendments to the Voting Rights Act—to determine whether, as a result of the districts, “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” by members of the minority group. *Id.* at 36 (quoting 52 U.S.C. § 10301(b)). ECF 55 at 8.

[P]laintiffs have shown that they have a substantial likelihood of success on the merits of their Section 2 claim, because they can demonstrate that: (1) the group of Black County voters located on the western side of the County is sufficiently large and geographically compact to create more than one reasonably compact majority-Black district; (2) the group of Black County voters “is politically cohesive;” (3) the White majority in the County votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidates; and (4) the totality of the circumstances, including the factors that the Supreme Court has instructed the Court to consider, show that Black County voters have less opportunity than White County voters to elect candidates of their choice to the Council.

*Id.* at 9-10. All of these observations remain true for the County’s remedial map. Indeed, the County contends that remedial District 2, which it proposes as a crossover district to cure Section 2 concerns, “was already a crossover district” in its earlier Bill 103-21 map. ECF 57-1 at 6. The County’s approach of making it a “better” crossover district (in which Black voters’ candidates of choice, especially when they are Black, are likely to lose, albeit by a smaller margin than in the County’s originally proposed District 2) does not eliminate the Section 2 violation.

## **II. PLAINTIFFS’ MAPS REMEDY THE COUNTY’S UNLAWFUL MAP.**

### **A. Plaintiffs’ Map 6 creates two majority-Black districts and districts that perform for Black voters.**

Map 6 created by Plaintiffs’ demographic and redistricting expert William S. Cooper indisputably complies with the February 22 Order (ECF 55) by creating two majority-Black districts. Cooper 3d Decl. (ECF 60-1) ¶ 7. The map retains a 53.18% Black voting age population in District 4 (51.61% Black CVAP), while creating a District 2 with a Black voting age population of 53.77% (52.02% Black CVAP). *Id.*, Ex. 2C.

Mr. Cooper’s map is only a slight variation on the revised map submitted by the County—shifting only 11 precincts between Districts 2, 3, and 4—and brings the County’s map into compliance with Section 2. Cooper 4th Decl. ¶ 9. It keeps the County’s proposed Districts 1, 5, 6, and 7 entirely intact, and shifts just one lightly populated precinct out of District 3. *Id.*

Both District 4 and District 2 also establish a meaningful opportunity for Black voters to elect their candidates of choice by creating a sufficient gap between the white and Black citizen voting age populations in the district to prevent white-bloc voting from usually defeating Black-preferred candidates. The white citizen voting age population of Districts 4 and 2 is 40.6% and 42.16%, respectively. Cooper 3d Decl. (ECF 60-1) Ex. 2C. This creates a margin of at least 9.8% between the white and Black citizen voting age population of each district, ensuring that a cohesive community of Black voters would have a fair and realistic opportunity to elect representatives of their choice, in keeping with the requirements of the Voting Rights Act.

To evaluate the County’s arguments that District 4 would somehow be “unsafe” under Map 6, Dr. Barreto conducted performance analysis to address that very question. As seen below, Map 6 unpacks the super-majority of Black voters while maintaining a reasonable advantage that will continue to give Black voters the opportunity to elect candidates of their choice.

**Table 1: Performance Analysis of Black Preferred Candidates Under Plaintiffs’ Proposed Map 6**

	D1	D2	D4
Hogan	55.0%	37.2%	42.3%
Brown	42.4%	60.6%	56.1%
Van Hollen	51.6%	50.6%	44.8%
Edwards	39.4%	43.9%	49.3%
Hogan	54.6%	43.5%	44.4%
Jealous	44.1%	55.7%	54.6%

Barreto 4th Decl. ¶ 7.

Moreover, under Plaintiff’s proposed Map 6, Black voters in District 2 would have a meaningful opportunity to elect a representative of their choice, as required by the February 22 order. Anthony Brown would have won by a wide margin, Ben Jealous by a 12-point victory

(rather than a loss under the County’s new plan), and Donna Edwards would have lost but in a much tighter race (by 7 points rather than 20 points under the County’s proposed remedial plan). By moving some Black voters from District 4 to District 2, Plaintiffs new proposed map preserves the ability of Black voters to elect a candidate of their choice in District 4 while extending that same ability to District 2.

**B. Plaintiffs’ Map 6 comports with all constitutional and VRA requirements.**

Plaintiffs’ map draws seven single-member council districts that adhere to all traditional redistricting principles and includes two geographically compact majority-Black districts. It creates seven districts that (i) satisfy Constitutional one-person one-vote requirements, (ii) are reasonably shaped, compact, and contiguous, (iii) respect communities of interest, and (iv) prevent dilution of minority voting strength. Cooper 3d Decl. (ECF 60-1) ¶ 7, Ex. 2A, Ex. 2C.

The County has complained about the shape of District 2, and in particular the Reisterstown Road corridor extending from the northwest portion of the map. As the Court noted in its February 22 decision, “The Court’s inquiry “refers to the compactness of the minority population, not to the compactness of the contested district.” ECF 55 at 11 (citing *League of United Latin Am. Citizens*, 548 U.S. 399, 433 (2006), and *Houston v. Lafayette Cnty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995) (“[T]he question is not whether the plaintiff residents’ proposed district was oddly shaped, but whether the proposal demonstrated that a geographically compact district could be drawn.”)). The two majority-Black districts in Map 6 fall within the normal range for assessing compactness. *See Bush*, 517 U.S. at 977-78. Under both a Roeck and a Polsby-Popper measure of compactness – the two most widely used measures for this purpose – Plaintiffs’ Districts 4 and 2 are sufficiently compact to fall within the accepted range for redistricting. Cooper 4th Decl., Ex. C.

Moreover, the shift of more rural precincts out of the northeastern portion of Plaintiffs' proposed District 2 keeps similar precincts together. As can be seen from Mr. Cooper's overlay of Map 6 on top of a satellite photograph, Cooper 4th Decl., Ex. D, the spur extending in the northwest portion of that map results from the concentration of population along the Reisterstown Road corridor, a very different community than the rural community to the north and east.

In its motion for approval and at the March 11 hearing, Defendants also argued that drawing a map to create a second-majority Black district would somehow violate the Equal Protection Clause. ECF 57-1 at 8; Mar. 11 Tr. 9::14-16, 11:9-16. This suggestion is spurious. Contrary to the County's contention, the Supreme Court has repeatedly recognized that race-conscious map drawing is permissible under the Equal Protection Clause to remedy a Voting Rights Act violation, and Voting Rights Act compliance has been long recognized as a sufficiently compelling interest to permit racial considerations when defining legislative voting districts, provided legal requirements are followed. *See, e.g., Bush v. Vera*, 517 U.S. 952, 977 (1996) (compliance with VRA Section 2 considered a compelling state interest overcoming equal protection concerns). As the *Bush* Court stated:

If the State has a "strong basis in evidence," *Shaw I*, 509 U.S., at 656, 113 S.Ct., at 2832 (internal quotation marks omitted), for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," *Shaw II*, at 918, 116 S.Ct., at 1907, it satisfies strict scrutiny.

*Id.*; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (noting that "the VRA demands consideration of race" and assuming "that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed"); *Strickland, supra* at 13 (2009) (Section 2 can require the creation of majority-minority districts). Here, there is a "strong basis in evidence" to conclude that creation of a majority-minority district is reasonably necessary to comply with Section 2.

The County's first map violated Section 2, and its proposed remedial map does the same, by entrenching white majorities in six of the seven Councilmanic districts, such that the County's 52% of white voters control of 86% of the Council seats. The County's argument that neither it nor the Court can consider race when remedying a Section 2 violation turns the Voting Rights Act on its head.

**C. Plaintiffs' other proposed maps also remedy the VRA violation.**

Mr. Cooper's Map 6 is merely the latest of six maps provided by the Plaintiffs that establish a second majority-Black district. All these maps comply with the Voting Rights Act and constitutional standards, and, unlike the County's remedial map, none of them would dilute the votes of Black residents.

Based on statements the County made at the March 11 status conference and the County's prior efforts, we expect the County's submission will nit-pick and denigrate Map 6, as the County previously did for Maps 1 and 5. ECF 34 at 10-15; Mar. 11 Tr. 9:12-10:18. As the Supreme Court has held, a "district that is reasonably compact and regular, taking into account traditional districting principles" does not have to "defeat rival compact districts" in a "beauty contest[]." *Bush*, 517 U.S. at 977.

With that in mind, Plaintiffs note:

- The primary virtue of Map 6 is that it preserves, to a great degree, the lines drawn by the County in its proposed remedial map—keeping four districts identical and swapping only 11 precincts. It splits precisely the same communities the County's proposed remedial map does.
- The primary virtue of Map 5 is that it is drawn to keep communities whole—the only communities that are split are Woodlawn, Reisterstown, and Essex. ECF 28-2 ¶ 54. This is far fewer community splits—in total or of majority-Black communities—than either the County's original or remedial plans. ECF 57-6 ¶ 22 (acknowledging that County remedial plan splits 12 communities and 6 precincts). And Map 5 specifically keeps together communities the Defendants

have emphasized are important, such as Arbutus and Towson; the County’s remedial map splits Towson.

- The primary virtue of Map 1 is that in addition to the two majority-Black districts, it draws a third influence district where the population is 49% non-Hispanic white and 51% BIPOC. ECF 28-2 ¶ 51. In addition, in the second majority-Black district (District 1 under this map), the incumbent is retiring.

Under all three of these maps (Maps 1, 5, and 6), the two proposed majority-Black districts are reasonably compact and comply with basic redistricting principles. Cooper 4th Decl. ¶¶ 10-13, Ex. B. Their compactness is comparable to the County’s initial and remedial maps.

**Compactness Comparison – All Plans**

	Reock		Polsby-Popper	
	Mean	Low	Mean	Low
<b>2021 Council Map</b>	.45	.25	.42	.26
<b>Proposed Map 1</b>	.36	.20	.33	.18
<b>Proposed Map 5</b>	.39	.23	.37	.20
<b>Council Remedial Map</b>	.43	.23	.43	.24
<b>Proposed Map 6</b>	.42	.23	.40	.21

Cooper 4th Decl. ¶ 11. All of these compactness scores are well within ranges that have been found to comply with traditional redistricting criteria. Cooper 4th Decl. ¶¶ 11-12.

**CONCLUSION**

In order that the 2022 County Council election may be conducted under a map that complies with the Voting Rights Act, the Court should order that Plaintiffs’ proposed Map 6 be adopted by the County for the 2022 election.

Respectfully submitted,

/s/ Deborah A. Jeon

Deborah A. Jeon (Bar #06905)  
Tierney Peprah (Bar # 21986)  
AMERICAN CIVIL LIBERTIES UNION  
OF MARYLAND  
Clipper Mill Road Suite 350  
Baltimore, MD 21211  
(410) 889-8555  
jeon@aclu-md.org

/s/ John A. Freedman

John A. Freedman (Bar #20276)  
Mark D. Colley (Bar #16281)  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Ave, N.W.3600  
Washington, D.C. 20001  
(202) 942-5000  
john.freedman@arnoldporter.com

/s/ Andrew D. Freeman

Andrew D. Freeman (Bar #03867)  
BROWN GOLDSTEIN & LEVY LLP  
120 E. Baltimore Street, Suite 2500  
Baltimore, MD 21202-6701  
(410) 962-1030  
adf@browngold.com

Michael Mazzullo (admitted pro hac vice)  
ARNOLD & PORTER KAYE SCHOLER LLP  
250 W. 55th Street  
New York, NY 10019  
(212) 836-8000  
michael.mazzullo@arnoldporter.com

*Counsel for Plaintiffs*

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