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December 8, 2021

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 1, "Congressional Districting Plan"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1, an emergency bill creating new districts for congressional elections based on the 2020 census. Maryland has no law governing the redistricting of congressional districts. *Olson v. O'Malley*, 2012 WL 764421 *2-3 (D. Md. March 6, 2012); *Duckworth v. State Board of Elections*, 213 F.Supp.2d 543, 552 n. 1 (D. Md. 2002). With respect to federal restrictions, the United States Constitution, Article I, § 2, cl. 3, requires that the population of congressional districts be as close in population as is practicable. *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). Section 2 of the Voting Rights Act requires the creation of districts to protect the ability of minority groups to elect their candidate of choice in some circumstances. In addition, the Fourteenth Amendment has been found to prohibit racial gerrymandering. We have found no reason to believe that House Bill 1 violates any of these provisions.¹

According to the Fiscal and Policy Note for House Bill 1 the ideal population for each congressional district in the State is 771,925. Five of the eight districts have a population of 771,925 while the remaining three have a population of 771,926. It is impossible for these districts to have a population closer than that. Thus, the plan is consistent with Article I, § 2 of the United States Constitution.

¹ In *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019) the Supreme Court held that the issue of partisan gerrymandering presents a political question beyond the competence of the federal courts. *Id.* at 2500.

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The Supreme Court has created a three part test that plaintiffs must meet in order to bring a successful challenge to a redistricting plan under the Voting Rights Act (“VRA”). *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986). Specifically, it is necessary to show:

(1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the minority group is politically cohesive; and (3) that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.

Bartlett v. Strickland, 556 U.S. 1, 21 (2009). Meeting this test is not sufficient to establish a violation, but is necessary before the court will proceed to analyze whether a violation has occurred based on the totality of the circumstances. *Id.* at 21-22. The new plan, which is more compact than the current plan, continues the two majority African American districts that have been part of the congressional plans since the map based on the 1980 census. One, the fourth district, is based in Prince George’s County and the other, the seventh district, is based in the Baltimore area. The African American populations in these areas remain compact and are politically cohesive. There is also evidence of polarized voting in these districts. As a result, the General Assembly has a strong basis in evidence to believe that the VRA requires their continuation. No other area has a sufficient population of any minority to constitute a majority. The fifth district, however, may enable members of minorities to elect their candidates of choice as a coalition district. This district was not created based on race, however, but reflects the policy of retaining current districts in their current form to the extent possible, retaining 91% of the population of the current fifth district in the new fifth district.

Sincerely,



Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber