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Court of Appeals
Suzanne C. Johnson,
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IN THE MATTER OF 2022 LEGISLATIVE DISTRICTING OF THE STATE OF MARYLAND	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
DAVID WHITNEY,	*	September Term, 2021
Petitioner.	*	Misc. No. 24

* * * * * * * * * * * * * * * *

RENEWED MOTION TO DISMISS PETITION

The amended petition filed by David Whitney in Misc. No. 24 states an entirely new claim based on allegations of fact that bear no resemblance to the allegations of his original petition. For this reason, his amended petition should not relate back to his original petition for purposes of whether it complies with the Court of Appeals' order setting the deadline for challenges to State legislative districts at February 10, 2022. *See* Jan. 28, 2022 Order, at 1. Because Mr. Whitney's amended petition was filed on February 18, 2022, eight days after that deadline, it is barred by the Court's scheduling order and should be dismissed.

In any event, the substance of Mr. Whitney's amended petition also fails to set forth a proper challenge.

STATEMENT OF FACTS

Article III, § 5 of the Maryland Constitution vests this Court with "original jurisdiction to review the legislative districting of the State." Md. Const. art. III, § 5. On January 27, 2022, the General Assembly passed the Legislative Districting Plan

of 2022 (the "2022 Plan"), *see* S.J. Res. 2, 2022 Sess., which constituted the "plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates" contemplated by Article III, § 5. On January 28, 2022, this Court promulgated "procedures to govern all actions brought under Article III, § 5, challenging the validity of the 2022 legislative districting plan." Jan. 28, 2022 Order, at 1. Consistent with the provisions of Article III, § 5, this Court ordered that "[a]ny registered voter of the State who contends that the 2022 legislative districting plan, or any part thereof, is invalid shall file a petition, on or before Thursday, February 10, 2022 at 4:30 p.m., with the Clerk of this Court." *Id.*

On February 9, 2022, Mr. Whitney timely filed his original petition purportedly challenging a portion of the 2022 Plan. *See* Pet. at 1. Mr. Whitney's petition did not identify the district he was challenging by number. Instead, he alleged that he lived on the Western shore of the Chesapeake Bay, but that his newly constituted home district "sweeps . . . across the Bay Bridge to the entire Eastern Shore." *Id*. He claimed that his district violates Article III, § 4's requirements that "legislative district[s] . . . consist of adjoining territory" and "be compact in form," because "nearly 4 1/2 miles of open water separates the Western branch of this proposed unconstitutional district and the Eastern shore portion of this proposed district." *Id.*

On February 15, 2022, Respondents timely moved to dismiss Mr. Whitney's Petition, on the ground that the only district that met the description described in Mr. Whitney's petition was a congressional district, and that therefore this Court lacked original jurisdiction to hear Mr. Whitney's challenge. *See* Mot. to Dismiss Pet., Misc. No. 24, at 4-5 (the "Mot. to Dismiss"). At the Scheduling Conference on February 17, 2022, Special Magistrate Judge Wilner raised this potential defect with Mr. Whitney, and Mr. Whitney indicated he would be amending his petition to clarify his allegations.

On February 18, 2022, Mr. Whitney filed his amended petition. *See* Am. Pet. He no longer challenges any district that crosses Chesapeake Bay, or that encompasses any portion of the Eastern Shore. Instead, he mounts challenges to at least 10 districts in the 2022 Plan. For example, he alleges that his home district, District 33, was "chopped into three subdistricts for no apparent reason other than it would prove more favorable to one party than the other," for which he claims there is no authority in Article III, § 4 of the Maryland Constitution. Am. Pet. at 1. He also asserts that District 30A violates Article III, § 4 by ignoring the natural boundaries of the Severn River and the South River to incorporate territory on Broadneck Peninsula and Edgewater, respectively. *Id.* He asserts the same violation as to District 27B, which he claims is "divided in half by the Patuxent River." *Id.* Next, he alleges that the "interplay" between several of districts 21 through 26

violates Article III, § 4 because it causes those districts not to consist of "adjoining territory" or be "compact in form." *Id.* at 1 at 2. Finally, he alleges that the creation of a single-member district within District 11 for the purpose of creating a majority-Black subdistrict violates the Constitution, because "no authority given in Article III, § 4 . . . permits such type of redistricting." *Id.* at 2. Mr. Whitney asks this Court to reject the 2022 Plan and instead implement the plan adopted by the Governor's Redistricting Advisory Commission instead. *Id.* at 3.

On February 18, 2022, the Court entered its Interim Scheduling Order No. 1, in which it noted that the "new petition" in this matter "has been completely rewritten to challenge General Assembly districts 33 and 30A and complain as well about Districts 21, 23, 25 and 26," and "bears no relationship whatever to the complaint made in the original petition." Interim Scheduling Order No. 1, at 3.

ARGUMENT

I. STANDARD OF REVIEW

The 2022 Legislative Districting Plan is a statute enacted by the General Assembly. Md. Code Ann., State Gov't §§ 2-201, 2-202. Therefore, '"[t]he basic rule is that there is a presumption' that the statute is valid." *Whittington v. State*, 474 Md. 1, 19 (2021) (citation omitted). That is, '"enactments of the [General Assembly] are presumed to be constitutionally valid and [ ] this presumption prevails until it appears that the [statute] is invalid or obnoxious to the expressed terms of the

Constitution or to the necessary implication afforded by, or flowing from, such expressed provisions.'" *In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 579 (2015) (citation omitted; brackets in original).

For this reason, the Court has held that "all challengers to a legislative reapportionment plan[] carry the burden of demonstrating the law's invalidity." *In re 2012 Legislative Districting*, 436 Md. 121, 137 (2013) (citation omitted). The State need make no showing unless "a proper challenge under Article III, § 4 is made and is supported by 'compelling evidence.'" *Id.* Only then will the State have "the burden of producing sufficient evidence to show that the districts are contiguous and compact, and that due regard was given to natural and political subdivision boundaries." *Id.* at 137-38. The petition is subject to dismissal if its allegations, assumed to be true, do not state "a proper challenge under Article III, § 4," *id.* at 137, and fail to show that the 2022 Plan "is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland," Md. Const. art. III, § 5.

II. PETITIONER'S AMENDED PETITION STATING AN ENTIRELY NEW CAUSE OF ACTION IS UNTIMELY UNDER THE COURT'S JANUARY 28, 2022 ORDER.

The Amended Petition should be dismissed in its entirety because it states entirely new claims, based on wholly distinct allegations of fact, from that asserted in the original Petition. For this reason, the Amended Petition cannot be deemed to

"relate back" to the original filing for purposes of satisfying the Court's established deadline for filing petitions. Because the Amended Petition was filed on February 18, 2022, eight days after the deadline set by this Court for filing challenges against the 2022 Plan, it should be dismissed.

When an amended complaint is filed after the deadline for filing the original complaint has expired, then "if the factual situation remains essentially the same after the amendment as it was before it, the doctrine of relation back applies and the amended cause of action is not barred by limitations." *Nam v. Montgomery Cty.*, 127 Md. App. 172, 186 (1999) (citing *Smith v. Gehring*, 64 Md. App. 359, 364 (1985)). However, where the amended complaint "relies on operative facts distinct from those involved in supporting [the] claims contained in the original" pleading, "the amended complaint does not relate back to the original declaration." *Priddy v. Jones*, 81 Md. App. 164, 170 (1989)).

The Amended Petition presents the latter situation. Mr. Whitney's complaint challenges several legislative districts that are part of the 2022 Plan under several different theories under Article III, § 4, but not one of those legislative districts was even plausibly implicated by Mr. Whitney's original pleading. Far from "clarifying" the allegations in his Petition regarding a district extending into the Eastern Shore, Mr. Whitney's Amended Petition simply displaces them with a new set of claims, challenging legislative districts stretching from Anne Arundel County, through

Central Maryland, and into Baltimore County. And whereas his original Petition alleged that a single district's crossing of Chesapeake Bay violated the "due regard for natural boundaries," the "compact[ness]," and the "adjoining territories" provisions of Article III, § 4, *see* Pet. at 1-2, his amended petition contends (among other things) that districts have been subdivided for no purpose affirmatively authorized by Article III, § 4.

In sum, Mr. Whitney has not filed an Amended Petition; he has filed an entirely different petition, alleging distinct violations of the Maryland Constitution on the basis of an entirely different operative set of facts. *See Priddy*, 81 Md. App. at 170 (dismissing amended complaint as untimely on the ground that "the operative facts . . . are different from those implicated in the original declaration"). Mr. Whitney's Amended Petition should be dismissed.

III. PETITIONER'S NEW CLAIMS ARE ALL DEFECTIVE AS A MATTER OF LAW AND SHOULD BE DISMISSED.

Even if the Court should hold that Mr. Whitney's new claims relate back to his original filing and consider those claims on their respective merits, it should dismiss the Amended Petition because it fails to state a proper challenge under applicable law.

A. Petitioner's Challenge to Single-Member Districts in District 33 and District 11 Fails, Because He Has Not Alleged That These Subdistricts Violate Any Provision of the Maryland Constitution.

First, Petitioner asserts that the three single-member districts created within District 33 and the majority-minority single-member district created within District 11 violate Article III, § 4, because "nothing in the language of Article III, § 4" supports creating single-member districts for allegedly political reasons, or creating a single-member district to provide for a majority-minority district. Am. Pet. at 1, 2. But that assertion has the law exactly backwards.

First, the Maryland Constitution expressly recognizes and preserves the General Assembly's authority to decide whether a legislative district will remain whole, with three Delegates elected at-large (by far the most common form of district found in both previous plans and the 2022 Plan), or subdivided into either (a) one single-member district and one multimember district or (b) three single-member districts. Nothing in the Maryland Constitution requires the General Assembly to have a reason for its choice among these constitutionally authorized district forms.

Article III, § 3 provides,

> The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. *Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.*

Md. Const. art. III, § 3 (Emphasis added.) This provision specifically rejects any prohibition on "subdivi[ding] any one or more of the legislative districts . . . into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district." Thus, § 3 expressly preserves the General Assembly's power to choose whether to subdivide a legislative district and to select from two constitutionally permissible methods of subdivision. By contrast, no mention of legislative district subdivision appears in either the districting criteria set forth in Article III, § 4, or the procedural requirements for enactment and judicial review of a legislative districting plan found in Article III, § 5, or elsewhere in the Maryland Constitution or Declaration of Rights. By expressly addressing subdivision of legislative districts, § 3 necessarily overrides any implied prohibition that might arguably be found in Article III, § 4 or other portions of the Maryland Constitution. As explained in *State v. Smith*, 305 Md. 489, 511 (1986), the "basic rule of construction that ordinarily the specific prevails over the general" applies to constitutional interpretation such that a "specific power" recognized by a constitutional provision "would prevail over the general principle or a general power relating thereto," and would do so "whether the general principle was in the Declaration of Rights and the specific power was in the Constitution or whether both were in the Constitution." This rule of construction has special force with respect with to Article III, § 4, given that the modern version of § 4 was adopted at the same time, in the same enactments, as Article III, § 3. *See* 1969 Md. Laws, ch. 785; 1972 Md. Laws, ch. 363. The same legislators who adopted Article III, § 3's provision expressly safeguarding the

General Assembly's district subdivision prerogatives could not have intended, without saying so, for Article III, § 4 to eliminate or impose obstacles to the creation of multimember districts.

Moreover, the creation of majority-minority legislative districts is often required by Section 2 of the federal Voting Rights Act, and thus supersedes any theoretical conflicting requirement under Maryland law. *See* Md. Decl. of Rights art. 2 ("The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding."). Congress enacted the Voting Rights Act of 1965 "[i]n an effort to eradicate persistent assaults on the ability of minorities to vote...." *Legislative Redistricting Cases*, 331 Md. 574, 602 (1993). Section 2 of the Act "proscribes states and their subdivisions from imposing any qualification, prerequisite, standard, practice, or procedure which undermines minority voting strength." *In re 2012 Legislative Districting*, 436 Md. 121, 189 (2013) (citing 42 U.S.C. § 1973, since recodified at 52 U.S.C. §10301). As this Court has recognized,

> A violation of § 2 exists if, "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protection by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

In re Legislative Districting of State, 370 Md. 312, 390 (2002) (quoting 52 U.S.C. §10301(b)). And a multimember district, by itself, may give rise to a violation of section 2 where the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," the minority group is "able to show that it is politically cohesive," and "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *In re 2012 Legislative Districting*, 436 Md. at 191 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)). The General Assembly was well within its authority to pursue compliance with the VRA as an objective in creating single-member districts as part of the 2022 Plan.

B. Petitioner Fails to State a Proper Challenge for Violating the "Due Regard" for "Natural Boundaries" Requirements of Article III, § IV Premised on the Crossing of River Boundaries.

Petitioner's challenges to subdistricts 27B, 30A, and 33B on the ground that they "ignore" natural river boundaries are deficient for similar reasons.

Article III, § 4 provides that "Due regard shall be given to natural boundaries and the boundaries of political subdivisions." Md. Const. art. III, § 4. However, as noted above, Article III, § 3 also provides that "nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district." Md. Const. art. III, § 3. By expressly addressing subdivision of legislative districts, § 3 necessarily overrides any implied prohibition that might arguably be found in Article III, § 4 or other portions of the Maryland Constitution—including prohibitions against crossing "natural boundaries" in

the drawing of sub-district lines. *See State v. Smith*, 305 Md. at 511 (applying the "basic rule of construction that ordinarily the specific prevails over the general" to constitutional interpretation).

In any event, it is also clear that the constitutional history forecloses claims for "natural boundary" violations under Article III, § 4 premised on river crossings. In *In re Legislative Districting of the State*, the Special Master examined the constitutional history of § 4 to determine whether the "compact[ness]" and "adjoining territory" requirements of that provision precluded river crossings. *See* 370 Md. at 343-44. Amendments that would have changed the requirement to "adjoining land area" were rejected because, according to the Convention's Chairman of the Committee on the Legislative Branch, "we can't use a prohibition about crossing a body of water." *Id.* at 343. A subsequent amendment would have prohibited districts from crossing "the center of the Chesapeake Bay," but this too was rejected because it might be construed to "prevent the creation of a district which crossed the Susquehanna River." *Id.* ("if we start adding tributaries, estuaries, and other bodies of water ... we won't know where we stand" (quoting *Minutes of the Proceedings of the 1967 Constitutional Convention* at 6529-31)). Ultimately, the "Committee of the Whole of the Convention placed on the record a statement of its intention: 'that under the interpretation of the words adjoining and compact ... a redistricting commission or the General Assembly could not form a district . . . by crossing the Chesapeake Bay.'" *Id.* (quoting *Minutes of the Proceedings of the 1967 Constitutional Convention* at 6574-75). If the framers of the "adjoining territory" and "compactness" requirements went to such lengths to ensure that river crossings would *not* be prohibited by those requirements, it

would make little sense to interpret the "due regard" for "natural boundaries" requirement of the same constitutional provision to require what the framers were striving to avoid. Mr. Whitney's challenge to districts 27B, 30A, and 33B should be dismissed.

C. Petitioner's Challenges to Districts 21, 23, 25 and 26 Are Meritless.

Finally, Mr. Whitney challenges Districts 21, 23, 25 and 26, on the ground that they are not "compact" or that they do not consist of "adjoining territory" *See* Am. Pet. at 2-3. Specifically, he alleges that District 23 violates these standards because it "stretches north to south" and has "four separate districts just to its west." *Id.* He also alleges that the "interplay" between Districts 21 and 23 results in the "carv[ing] out" of territory from District 21 into District 23 in violation of these standards, and that the "interplay" between Districts 25 and 26 gives rise to similar violations. *Id.* at 3.

Initially, there can be no contention that any of these districts violate Article III, § 4's "adjoining territory" requirement. The "adjoining territory" requirement has been compared by this Court to "contiguity" requirements appearing in other states' constitutions. *See Matter of Legislative Districting of State*, 299 Md. 658, 675-76 (1984). "The contiguity requirement mandates that there be no division between one part of a district's territory and the rest of the district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory." *Id.* Since, as is clear from the face of the map, each of Districts 21, 23, 25 and 26 consists of undivided territory that is "touching, adjoining and connected," none of these districts violates the "adjoining territory" requirement of Article III, § 4.

As for the alleged lack of "compactness," this Court has held that the "compactness" requirement states "a requirement for a close union of territory (conducive to constituent-representative communication), rather than as a requirement which is dependent upon a district being of any particular shape or size." *Id.* at 688. That said, in analyzing compactness, "due consideration must be afforded . . . to the 'mix' of constitutional and other factors which make some degree of noncompactness unavoidable, i.e., concentration of people, geographic features, convenience of access, means of communication, and the several competing constitutional restraints, including contiguity and due regard for natural and political boundaries, as well as the predominant constitutional requirement that districts be comprised of substantially equal population." *Id.* This is particularly important in Maryland, where "the State's geography inhibits the geometric fashioning of districts of symmetrical compactness." *Id.* at 687. In practice, this means that "[o]ddly shaped or irregularly sized districts of themselves do not, therefore, ordinarily constitute evidence of gerrymandering and noncompactness."

Here, Mr. Whitney's challenge to the compactness of Districts 21, 23, 25 and 26 addresses their appearance alone. *See, e.g.*, Am. Pet. at 2-3. But other than how they look, he has not alleged that they were drawn in this manner for any non-permissible purpose. *See Matter of Legislative Districting of State*, 299 Md. at 687 (holding that "*an affirmative showing* is ordinarily required to demonstrate that such districts were intentionally so drawn to produce an unfair political result, that is, to dilute or enhance the voting strength of discrete groups for partisan political advantage or other impermissible purposes" (emphasis added)). The 2022 Plan "enjoys a presumption of validity, and it is not the

province of the judiciary to strike down a district as being noncompact simply because a more geometrically compact district might have been drawn." *Id.* at 688. Mr. Whitney's challenges to Districts 21, 23, 25 and 26 should be dismissed.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted,

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February 22, 2022

CERTIFICATE OF SERVICE

I certify that, on this 22nd day of February, 2022, a copy of the foregoing was filed electronically by the MDEC system and served by first-class mail and el-mail on all parties entitled to service:

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