

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

HOWARD LEE GORRELL,

*

Plaintiff,

*

v.

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Civil Action No: WDQ-11-2975

MARTIN O'MALLEY,

*

Defendant.

*

* * * * *

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Martin O'Malley, Governor of Maryland, by his undersigned attorneys and pursuant to Federal Rule of Civil Procedure 12(b)(6), moves to dismiss this action with prejudice, for failure to state a claim upon which relief can be granted.

ARGUMENT

I. MR. GORRELL'S CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE INSUBSTANTIAL AND FAIL TO STATE A CLAIM.

"[A] single district judge," rather than a three judge panel under 28 U.S.C. § 2284(a), "may dismiss a complaint otherwise subject to § 2284(a) if the judge determines that the constitutional claims are insubstantial in that they are obviously without merit or clearly determined by previous case law." *Duckworth v. State Bd. of Elections*, 213 F.Supp.2d 543, 546 (D. Md. 2002), *aff'd sub nom. Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003); *see also Md. Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 607 (4th Cir. 1970) (affirming dismissal by a single

federal district judge of reapportionment challenge). In its most recent opportunity to consider the proper application of the rules governing the appointment of three-judge panel, the Fourth Circuit expressly held that where a plaintiff's "pleadings do not state a claim" upon which relief may be granted within the meaning of Rule 12(b)(6) of the Federal Rules of Civil Procedure, "then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Duckworth*, 332 F.3d at 772-73 (citing *Simkins*, 631 F.2d at 295); *see id.*, 332 F.3d at 777 ("Duckworth's complaint . . . cannot survive the demands of Rule 12(b)(6). And, having failed to state a claim at all, Duckworth also failed to present a substantial question. Thus, the district court was justified in acting on the case itself and refraining from referring it to a three-judge district court.").

In his Amended Complaint Mr. Gorrell makes five separate claims, each of which is equally without merit. Specifically, he claims that the congressional redistricting plan enacted by Senate Bill 1 as Chapter 1 of the Special Session of 2011 ("the State Plan") (1) fails to preserve communities of interest; (2) is an unconstitutional gerrymander because it splits the agricultural communities of Western Maryland; (3) violates the hearing requirement of Article III, § 5, of the Maryland Constitution; (4) does not comply with guidelines issued by the Governor's Redistricting Advisory Committee; and (5) fails to comply with the equal population requirement of United States Constitution Article I, § 2. This Court should dismiss this case because Mr. Gorrell's claims are insubstantial and plainly without merit, in that, assuming all of his statements of fact to be correct, they do not state a violation of any provision of the United States Constitution, applicable statute, or binding Supreme Court precedent.

A. No Statute or Constitutional Provision Requires Consideration of Communities of Interest.

No provision of the United States or Maryland Constitution, or federal or State law, requires the State to preserve particular communities of interest in the drawing of congressional districts. Though the Supreme Court has recognized communities of interest as a legitimate consideration in redistricting, *Miller v. Johnson*, 515 U.S. 900, 920 (1995), and the Maryland Court of Appeals permits consideration of communities of interest within the legislative redistricting process at least where it does not interfere with the accomplishment of a constitutional requirement, *Matter of Legislative Districting of the State*, 370 Md. 312 (2002), neither court has *required* such consideration. Consequently, an allegation of a failure to preserve communities of interest fails to state a claim for which relief can be granted. *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1296 (D. Kan. 2002) (although the preservation of communities of interest is “a legitimate and traditional goal in drawing congressional districts,” that “does not mean that there is an individual constitutional right to have one’s particular community of interest contained within one congressional district”). Because preserving communities of interest is not required by any pertinent constitutional or statutory provision, Mr. Gorrell’s assertions relating to communities of interest fail to state a plausible claim, and his claim should be dismissed as insubstantial.

B. The Amended Complaint Does Not Allege Facts Sufficient to Show Partisan Gerrymandering or any Other Actionable Form of Gerrymandering.

Mr. Gorrell’s gerrymandering claim does not relate to partisan gerrymandering, but focuses on claims that the State Plan “will deprive Gorrell and agriculture-related electorates

of their civil rights in violation of the Fourteenth Amendment of the United States Constitution.” Amended Complaint at ¶ 54. No provision of the United States or Maryland Constitution, or federal or State law, requires the State to make special provisions for “agriculture-related electorates” or any other interest group.

Mr. Gorrell makes the general statement that the State Plan “gerrymandered the Congressional districts to favor [the] Governor’s political party,” but makes no allegations of fact to support that claim. Such a “naked assertion, devoid of further factual enhancement” is insufficient to state a claim for relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citations omitted). Though the Supreme Court has not approved any test for a partisan gerrymandering claim, Mr. Gorrell’s Amended Complaint fails even to allege what has been identified as the minimum requirement for any conceivable political gerrymandering claim. That is, like the plaintiffs whose partisan gerrymandering claim was rejected in *League of United Latin American Citizens v. Perry*, 548 U.S. 349 (2006), Mr. Gorrell fails to “show a burden, as measured by a reliable standard, on the complainant[’s] representational rights.” *Id.* at 418 (Kennedy, J.). As a result, the second count of the Amended Complaint also fails to state a claim on which relief could be granted.

C. Maryland Constitution Article III, § 5 Does Not Apply to Congressional Redistricting.

Similarly, there is no conceivable merit to Mr. Gorrell’s claim that Article III, § 5, of the Maryland Constitution was violated by any lack of hearings on the Congressional redistricting plan developed by the Governor’s Redistricting Advisory Committee (“GRAC” or the “Committee”). Article III, § 5 provides, in relevant part, that:

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the *legislative districts* for electing members of the Senate and the House of Delegates.

(Emphasis added.) This requirement clearly applies only to State legislative redistricting, and not to congressional redistricting. Even if the requirement were applicable here, the State's Congressional redistricting plan does not violate it. Article III, § 5 requires only that the hearings be held before the *Governor* prepares a plan; there is no requirement that hearings be held on the plan developed by GRAC. In fact, there is no constitutional requirement that an advisory body be appointed or suggest a plan. As a result, the failure to hold hearings on the GRAC plan would not violate Article III, § 5, even if it were applicable to congressional redistricting.

D. The State Plan is Not Required to Comply With the Guidelines for Third Party Plans.

Mr. Gorrell asserts that the State Plan is invalid because plans allegedly considered by the Governor in drawing the State Plan were not submitted by the date set in the Guidelines for Congressional and Legislative Redistricting Third Party Plan Proposals.¹ As Mr. Gorrell has noted, however, there is no law governing the way in which the State's plan for congressional redistricting is developed. *See* Amended Complaint at ¶ 8. In this round of redistricting, as is traditional, the Governor appointed a committee, the Governor's Redistricting Advisory Committee, to hear testimony from the public and to recommend a

¹ This document is available on the Internet at <http://www.mdp.state.md.us/PDF/redistricting/2010docs/Guidelines3rdpartyplan2011.pdf>.

plan. The Committee set a deadline for submission of third party plans to the Committee to allow time for consideration of those plans by the Committee before creating a recommended plan for the Governor. Neither GRAC nor the Governor is a third party. There is no requirement that any person submit a plan to the Committee rather than directly to the Governor, or that a plan submitted directly to the Governor be sent by any particular date. Nor is there any constitutional or statutory limit on what the Governor may consider in drawing the plan that is submitted to the General Assembly for enactment. Therefore, Count 4 fails to present a claim upon which relief may be granted.

E. The State Plan Complies with Constitutional Requirements of Equal Population.

The Supreme Court has interpreted Article I, § 2, of the United States Constitution to require states “to make a good faith effort to achieve precise mathematical equality.” *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). The State Plan has achieved this goal; seven of the eight congressional districts have an adjusted population of 721,529 while the eighth has an adjusted population of 721,528. It is mathematically impossible to make the district populations more equal. Contrary to Mr. Gorrell’s suggesting, the splitting of precincts necessary to the achievement of this goal does not violate any federal or State requirement. *See id.*, 394 U.S. at 533-34 (“We do not find legally acceptable the argument that variances [from the equal population requirement of Article I, § 2] are justified if they necessarily result from a State’s attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries.”). As a result, Mr. Gorrell’s fifth count fails to state a claim upon

which relief can be granted.

II. INSUBSTANTIALITY CAN ALSO BE SHOWN IN THIS CASE BECAUSE MAINTAINING THIS SUIT WILL CAUSE GREAT DISRUPTION IN THE UPCOMING ELECTION.

The complaint can be dismissed as insubstantial on an alternate ground, namely, that the close proximity of the upcoming elections forecloses the grant of any equitable relief under *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970), and *Simkins v. Gressette*, 631 F.2d 287, 290 (4th Cir. 1980). The State Plan was enacted during a special session of the General Assembly and signed into law as an emergency measure on October 20, 2011—less than three months before the deadline for candidates to register for the April 3, 2012 primary election. Md. Code Ann., Election Law § 8-201(a)(2)(ii). Early voting begins on March 24, 2012, just thirteen weeks from now.

Even more immediately, the State must mail absentee ballots to absent uniformed services and overseas voters by Friday, February 17, 2012, only 9 weeks away. 42 U.S.C. § 1973ff-1(a)(8). This Court has previously recognized that “[v]oting by absentee ballot provides these men and women with their only meaningful opportunity to vote in state and federal elections while they are deployed.” *Doe v. Walker*, 746 F. Supp. 2d 667, 679 (D. Md. 2010). Thus, any delay that does not give military personnel deployed overseas sufficient time to receive, fill out, and return their absentee ballots “imposes a severe burden on absent uniformed services and overseas voters’ fundamental right to vote.” *Id.* at 680.

In addition to the potential burden it places on overseas military personnel, this suit

imposes a real burden on the State and local boards of election, which must configure new precincts, assign new polling places, prepare and print ballots, and program voting machines in time to meet these deadlines. *See generally* Declaration of Donna J. Duncan (attached as Exhibit 1 to the simultaneously filed Motion for an Expedited Litigation Schedule). The close proximity of these deadlines is made more pressing by the fact that Mr. Gorrell, though he promptly filed his complaint, has still not effectuated service. *See* Response to Motion for Default Judgment (filed simultaneously with this motion). The potential for “great disruption in the election process in Maryland,” *Simkins*, 631 F.2d at 295 (citing *Maryland Citizens*, 429 F.2d at 611), provides an additional grounds and additional support for dismissing this case as insubstantial, as described above.

* * *

This Court should dismiss this case without referring it to the three-judge panel because plaintiffs’ claims are insubstantial and without merit. Even if all properly pled allegations of fact are assumed to be true, they do not state a claim for relief that is “plausible” under the pleading standard applied in *Iqbal* or under the substantive provisions of the United States Constitution and applicable statutes. Accordingly, this single-judge Court should dismiss the complaint and remove even the potential for the pendency of these claims to disrupt preparations for the upcoming primary election.

CONCLUSION

This Court should dismiss the Complaint with prejudice.

Respectfully submitted,

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/s/

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