	*	IN THE
IN THE MATTER OF 2022 LEGISLATIVE DISTRICTING OF THE STATE OF MARYLAND	*	COURT OF APPEALS
	*	OF MARYLAND
SETH EDWARD WILSON,	*	September Term, 2021
Petitioner.	*	Misc. No. 27

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

MOTION TO DISMISS PETITION

The Court should dismiss the petition filed by Seth Edward Wilson because its allegations, even if assumed to be true, do not state any valid basis on which the Court could conclude that Maryland's 2022 Legislative Districting Plan is not consistent with constitutional and other applicable requirements.

Mr. Wilson, a resident of Washington County and sometime candidate for the Republican nomination for Delegate, primarily challenges District 2A of the 2022 Plan, which is a two-member district. Pet. 1 and ¶ 13. He asserts that the district "violates Article III Section 4 of the Constitution of Maryland and Section 1 of the 14th Amendment of the United States Constitution," *id.* at 1, and he offers two reasons why he believes there is a violation:

1. "District 2A has not been created as a two member district for any compelling reason," *id.* ¶ 13, which he believes to be a violation of the Fourteenth Amendment; and

2. The district, by including parts of both Washington County and neighboring Frederick County, "violates Article III Section 4 because it fails to respect the political subdivision between Washington County and Frederick County," *id.* ¶ 14.

Mr. Wilson's petition also challenges the "No Representation Without Population Act," 2010 Md. Laws chs. 66, 67, as amended by 2020 Md. Laws ch. 538 § 6, now codified at § 2-2A-01 of the State Government Article. In pertinent part, the Act provides that "[t]he population count used after each decennial census for the purpose of creating the legislative districting plan for the General Assembly: . . . (2) shall count individuals incarcerated in the State or federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the State." Md. Code Ann., State Gov't § 2-2A-01(a)(2). Mr. Wilson asserts that, "[i]n the case of Senate District 1 and 2, and perhaps other districts in the state," application of the Act "violates Article III Section 4 of the Constitution of Maryland when applied to districts that cross county lines." Pet. ¶ 19. In support of this proposition, he offers three reasons:

1. "Adjustments of population are a legislative consideration that cannot supersede the Constitution of Maryland," *id.*;

2. "Ultimately, there are flaws in the reasoning behind the 'No Representation Without Population Act' where nonvoting prison populations are concerned," *id.* ¶ 20; and

3. It is "unclear" to Mr. Wilson "how the populations were adjusted prior to apportionment," and "[t]here may be a lack of public notice and participation in these adjustments," *id.* ¶ 21.

For relief, Mr. Wilson asks the Court "to order that single member districts be drawn for Senate District 2, at least two of which lie entirely within Washington County," *id.* ¶ 22, and further order that the redrawn Delegate districts in Senate District 2 must "mirror as closely as possible the single member districts [the Court] created in 2002," *id.* ¶ 23. He

also "suggest[s]" that the "2002 maps be altered" and redrawn with respect to "2002 3B" and "2002 2A." *Id.* ¶ 24. With respect to his challenge to the No Representation Without Population Act, Mr. Wilson requests that "the population adjustment to 2022 Senate Districts 2 and 1" made in accordance with the Act "be declared null and void because it conflicts with the Constitution of Maryland and that the populations removed as a result be added back into the population of those districts prior to reapportionment." Pet. ¶ 25.

ARGUMENT

I. STANDARD OF REVIEW

The 2022 Legislative Districting Plan is a statute enacted by the General Assembly. 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 2002 Legislative Districting 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. THE PETITION'S CRITICISMS OF DISTRICT 2A DO NOT STATE A PROPER CHALLENGE UNDER ARTICLE III, § 4 AND DO NOT OTHERWISE SHOW THAT THE DISTRICT IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

Mr. Wilson argues that District 2A violates the Fourteenth Amendment to the federal Constitution because the General Assembly lacked a "compelling reason" to make it a multimember district rather than a single-member district, *id.* ¶ 13, and violates Article III, § 4 of the Maryland Constitution because "it fails to respect the political subdivision between Washington County and Frederick County," *id.* ¶ 14. Both assertions are wrong as a matter of applicable law and undisputed facts.

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 demonstrate a "compelling 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.*

(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.

As for Mr. Wilson's challenge to multimember District 2A under the Fourteenth Amendment, both the Supreme Court and this Court have "made clear that such a district is not *per se* unlawful under the Equal Protection Clause." *In re 2012 Legislative Districting of the State*, 436 Md. 121, 141 (2013) ("*2012 Legislative Districting*") (citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964)). Indeed, in the seminal legislative redistricting case of *Reynolds v. Sims*, the Supreme Court sought to reassure States that, notwithstanding its holding that the Constitution required district population equality in both houses of a State's bicameral legislature, the two houses of a legislature could still differ by, for example, having one composed of single-member districts while the other "could have at least some multimember districts." 377 U.S. 533, 576-77 (1964). Indeed the Court recognized that a State "might desire to achieve some flexibility by creating multimember or floterial districts." *Id.* at 579.

In the decades since, the Supreme Court has rejected challenges to multimember legislative districts, as this Court has done, as well.[1] *Burns v. Richardson*, 384 U.S. 73 (1966) (rejecting challenge to State's mix of multimember and single member districts similar to Maryland's); *Fortson v. Dorsey*, 379 U.S. 433 (1965); *2012 Legislative Districting*, 436 Md. at 143 (holding that petitioner "failed to show that any multi-member district provided for in the Enacted Plan would have the effect of diluting or canceling the voting strength of any racial or political element, he has failed to make a case for declaring any such district unlawful"); *In re Legislative Districting of State*, 370 Md. 312, 347, 409, 439 (2002) (applying the factors set out in *Gingles v. Thornburg*, 478 U.S. 30 (1986), in rejecting claims that multimember districts were unconstitutional and that they had been used to discriminate on the basis of race); *Matter of Legislative Districting of State*, 299 Md. 658, 673 (1984) ("A multimember legislative district is not per se unconstitutional under the equal protection clause."); *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 675 (1974) (upholding residence districts on the Eastern Shore). Notably, this Court itself used a mix of single and multimember districts in the remedial plan it drew in 2002. *In re Legislative Districting of State*, 369 Md. 601, 603 (2002) (per

[1] The only circumstances in which the Supreme Court has ruled otherwise have involved the assertion of a valid claim of racial discrimination under the Equal Protection Clause or the Voting Rights Act—a type of claim raised in none of the pending petitions. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (affirming finding that county's at-large system "was being maintained for the invidious purpose of diluting the voting strength of the black population"); *White v. Regester*, 412 U.S. 755, 769 (1973) (affirming finding that multimember district "invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives").

curiam order reciting as part of the Court plan's "General Provisions" that "(c) Each legislative district may be subdivided into 3 single member delegate districts or into 1 single member delegate district and 1 multimember delegate district").

In *2012 Legislative Districting*, this Court quoted Supreme Court language suggesting that multimember districts "may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 436 Md. at 142 (quoting *Whitcomb*, 403 U.S. at 143). The Court hastened to add, however, that the challenger must "'carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.'" *2012 Legislative Districting*, 436 Md. at 142 (citation omitted). Still in no case has the Supreme Court or this Court ever applied this principle to invalidate a multimember district on the ground that it "operate[d] to minimize or cancel out the voting strength of . . . *political elements*." *Id.* (emphasis added).

In the only Supreme Court case directly addressing the merits of a claim that the use of multimember districts benefited one political party over another, the Court deemed the claim to be justiciable, but rejected it nonetheless upon finding that the challengers had not made the necessary showing, for reasons that would apply equally, or perhaps more compellingly, to Mr. Wilson's petition. *See Davis v. Bandemer*, 478 U.S. 109, 128-30 (1986) (affirming finding of legislature's partisan intent— something "not . . . very difficult to prove," *id.* at 129—but holding that challengers failed to show "a sufficiently adverse effect on [their] constitutionally protected rights to make out a violation of the Equal

Protection Clause," *id.* at 130). Thus, under *Bandemer*'s analysis, "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." *Id.* at 131; *see also id.* at 130 (refusing '"to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them'") (quoting *Whitcomb*, 403 U.S. at 160).

In any case, whatever statements in *Davis v. Bandemer* might have suggested the availability of a politically based challenge to multimember districts upon a showing of partisan vote dilution, 478 U.S. at 131, that language can no longer provide support for Mr. Wilson's petition, since the Supreme Court in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), overruled *Bandemer*'s holding that such claims are justiciable. Even if the principles articulated in *Bandemer* retained their vitality, however, it would not aid Mr. Wilson, because his petition falls far short of making even the kind of showing that *Bandemer* deemed insufficient. That is, the petition does not even attempt to show that the configuration of District 2A "makes it more difficult for [his] particular group"—presumably Republicans—to "elect the representatives of its choice." 478 Md. at 131.

Finally, nothing in Maryland law provides support for Mr. Wilson's contention that District 2A violates Article III, § 4 of the Maryland Constitution by "fail[ing] to respect the political subdivision between Washington County and Frederick County." Pet. ¶ 14. This Court has explained that, when "a political subdivision crossing will be necessary in order to achieve substantial equality in population," "the due regard requirement is

subordinated to the Fourteenth Amendment requirement of substantially equal population across legislative districts." *2012 Legislative Districting*, 436 Md. at 156. Moreover, if "a subdivision crossing was clearly necessary to achieve substantial population equality under the Fourteenth Amendment," then "[w]here that crossing should have been placed is not for this Court to determine," but is instead "quintessentially a political" matter, "which requires judicial deference to be given to the political branches." *Id.* at 158.

In this case, the need for District 2A of the 2022 Plan to cross the boundary between Washington and Frederick Counties to achieve district population equality was dictated by population loss suffered by Garrett and Allegany Counties and population growth in Frederick County. As the Court is aware, the customary method of legislative district map-drawing used in Maryland, whether the map has been established by the political branches or by this Court, has been to start with District 1 at the far western extremity of the State and construct the districts by proceeding to the east. *See, e.g.*, 2012 Md. Laws J.R. 2 § 2, enacting former State Gov't § 2-202 ("The composition of the 47 legislative districts is: (1) legislative district 1 consists of: (a) delegate district 1A (single member delegate district): (i) Garrett County; (ii) Allegany County election districts 8, 9, 10, and 21; and . . . ."); *In re Legislative Districting of State*, 271 Md. 320, 324-25 (1974) (per curiam order) ("The composition of the forty-seven legislative districts shall be as follows: (A) Legislative District 1 shall consist of the following areas: All of Garrett County, and Election Districts 5, 6, 7, [etc.] of Allegany County. . . ."); *In re Legislative Districting of State*, 369 Md. 601, 604 (2002) (per curiam order) ("The composition of the 47 legislative districts is: (1) LEGISLATIVE DISTRICT 1 CONSISTS

OF: (A) DELEGATE DISTRICT 1A (SINGLE MEMBER DELEGATE DISTRICT): (I) GARRETT COUNTY; (II) ALLEGANY ELECTION DISTRICTS 8, 9, 10, AND 18; AND . . . .").

In this instance, uneven population growth patterns in Maryland, as reflected in the results of the 2020 Census, showed that the two westernmost counties in Maryland, Garrett and Allegany, both lost population.[2] That loss required District 1 of the 2022 Plan to extend farther to the east than in the previous plan, in order to encompass sufficient population to bring it within an acceptable range of deviation from the ideal Senate district size of 131,391. The unavoidable eastern expansion of District 1's territory to make use of more Washington County population meant that the remaining portion of Washington County lacked sufficient population to constitute a full District 2 within the County's boundaries.

Meanwhile, Frederick County's population grew significantly between 2010 and 2020—by 16.4 %. As a result, both Frederick County Senate districts in the 2012 Plan had come to exceed the ideal district population size for the 2022 reapportionment: 2012 District 3 exceeded the ideal district size by 12,554 persons and 2012 District 4 exceeded the ideal by 9,995 persons. To meet the equal population requirement, 15,757 persons in Frederick County were added to District 2 in the Enacted Plan. Consequently, District 2 needed to cross into neighboring Frederick County to secure the population necessary to

[2] The population loss from 2010 to 2020 in 2012 District 1 resulted in an end-of-decade deviation from the ideal population amounting to minus 17,960 persons. The 2012 District 2A was found to have a deviation of minus 493 persons per 2020 adjusted population.

achieve population equality. Therefore, under the Court's precedent, "the due regard requirement" of Article III, § 4 "is subordinated to the Fourteenth Amendment requirement of substantially equal population across legislative districts." *2012 Legislative Districting*, 436 Md. at 156.

As for the decision to have a single-member District 2B encompassing Hagerstown, and a multimember District 2A including other parts of Washington County and part of Frederick County, that determination was an exercise of the authority expressly reserved to the General Assembly in Article III, § 3. The 2012 map, which this Court upheld, had a similar 2A and 2B, except population changes shown in the 2020 Census have made it no longer feasible for both subdistricts to be contained entirely within Washington County, as they were in the 2012 Plan. On the other hand, the population of Hagerstown in 2020 was sufficient to permit the map-drawers to show due regard for municipal boundaries by placing all of Hagerstown within its own District 2B. Though Mr. Wilson would prefer that the multimember District 2A be divided into two single-member districts, Pet. ¶ 22, that is a determination the Constitution has commended to the legislature.

III. APPLICATION OF THE NO REPRESENTATION WITHOUT POPULATION ACT DOES NOT CONFLICT WITH ARTICLE III, § 3 OF THE MARYLAND CONSTITUTION OR ANY OTHER PROVISION OF LAW.

Mr. Wilson argues that, "[i]n the case of Senate District 1 and 2, and perhaps other districts in the state," application of the No Representation Without Population Act "violates Article III Section 4 of the Constitution of Maryland when applied to districts that cross county lines." Pet. ¶ 19. He is mistaken, because there is no conflict between the Act and constitutional requirements for legislative redistricting.

First, Mr. Wilson says "[a]djustments of population are a legislative consideration that cannot supersede the Constitution of Maryland," and on this point he is half right. Yes, adjustments of population are a legislative consideration, but there is no need to weigh whether they can "supersede the Constitution of Maryland," because the Constitution does not pose any obstacle to legislation providing for adjustment of census data to make it better reflect the true residences of incarcerated persons. Most pertinently, Article III, §§ 3, 4, and 5 do not address the matter, either expressly or implicitly. Section 3 prescribes the makeup of legislative districts, but it does not mention adjustment of census figures. Section 4 establishes criteria for drawing districts, but does not mention adjustment of census figures, nor is there any reason to believe that population adjustments required by the Act would interfere with a districting plan's ability to give "due regard" to political and natural boundaries. Section 5 establishes procedures for redistricting and directs that it occur "[f]ollowing each decennial census of the United States," but § 5 does not otherwise concern itself with whether the General Assembly may authorize adjustments to census results.

This Court has "recognized that the political branches, the Governor and General Assembly, are given a wide-berth in formulating a legislative apportionment scheme," and "[s]o long as the plan they devise does not violate State or Federal law, the political branches may pursue a wide variety of objectives[.]" *2012 Legislative Districting*, 436 Md. at 134. Since Mr. Wilson has not identified any provision of the Maryland Constitution or federal law that would preclude application of a statute designed to make census data more accurate and just, that purpose is surely within the "wide variety of

objectives" the "political branches may pursue." *Id.*; *see Fletcher v. Lamone*, 831 F. Supp. 2d 887, 893-97 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012) (rejecting "one person, one vote" challenge to No Representation Without Population Act and holding that the population adjustment it prescribes is consistent with Census Bureau policy and other applicable federal law).

Next, Mr. Wilson suggests there are unspecified "flaws in the reasoning behind the 'No Representation Without Population Act' where nonvoting prison populations are concerned." Pet. ¶ 20. If there are any such flaws, they eluded the three-judge federal district court that upheld Maryland's application of the Act in the 2011 congressional redistricting process; they eluded the Census Bureau, whose practices and pronouncements were cited by the district court in support of its ruling, *Fletcher*, 831 F. Supp. 2d at 895-96; and the flaws must have eluded the Supreme Court, which summarily affirmed, 567 U.S. 930. The plausibility of any meaningful "flaws in the reasoning" of the Act is further diminished if one understands that the Act merely enables the apportionment process to reflect generally applicable Maryland law regarding residency and domicile. As this Court held in *Jones v. Anne Arundel County*, 432 Md. 386 (2013), because "'[r]esidence, as contemplated by the framers of our Constitution, for political or voting purposes, means *a place of fixed present domicile*,'" *id.* at 405 (citation omitted; emphasis in original), and "[o]ne's domicile, generally, is that place where he intends to be," *Oglesby v. Williams*, 372 Md. 360, 373 (2002), a county council member's official residence did not change to "the correctional facility in South Carolina" where he was incarcerated, and "his domicile remained in" his councilmanic district in Anne Arundel County during his incarceration.

Jones, 432 Md. at 411. The Act helps to ensure that these established principles of law will inform the apportionment process.

Finally, Mr. Wilson believes it "unclear" "how the populations were adjusted prior to apportionment," and "[t]here may be a lack of public notice and participation in these adjustments." Pet. ¶ 21. But the Act itself sets forth how population is to be adjusted, State Gov't § 2-2A-01, as explained by the federal court in *Fletcher*, 831 F. Supp. 2d at 893-94. As for whether he was entitled to notice or an ability to "participate" in adjustments, a due process claim of that nature typically requires that the claimant have a pertinent "protected liberty or property interest." *Town of La Plata v. Faison-Rosewick LLC*, 434 Md. 496, 526 (2013). Mr. Wilson has presented no reason to believe he had a protected liberty or property interest that was implicated by the process of adjusting population by reassigning prisoners, for purposes of apportionment, from their places of incarceration to their last known addresses. *See id.* (holding there was "no fundamental liberty or property interest at issue in this case" where town manager "was under no obligation to inform the public of the precise standards he would employ in validating a referendum petition").

Therefore, Mr. Wilson's challenge to the application of the No Representation Without Population Act lacks any legal support and should be dismissed.

CONCLUSION

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

Respectfully submitted,

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February 15, 2022

CERTIFICATE OF SERVICE

I certify that, on the 15th day of February, 2022, the foregoing Motion to Dismiss Petition was filed and served electronically by the MDEC system on all persons entitled to service, and served by first class mail, postage prepaid to

Seth Edward Wilson
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Petitioner

The foregoing Motion to Dismiss Petition was also provided by e-mail to Mr. Wilson at the address gopseth@outlook.com, obtained from the following webpage maintained by the Washington County Republican Central Committee: https//www.wcmdgop.com/seth-wilson.

/s/ Steven M. Sullivan

_____

Steven M. Sullivan