

IN THE COURT OF APPEALS OF

OF MARYLAND

(Sept. Term 2021)

IN THE MATTER OF

2022 LEGISLATIVE

DISTRICTING OF THE STATE

OF MARYLAND

PETITIONERS:

MISC. NO. 26

BRENDA THIAM

WAYNE HARTMAN

PATRICIA SHOEMAKER

**PETITIONERS' MEMORANDUM OF LAW AND RESPONSE TO RESPONDENTS
MOTION TO DISMISS**

I. Introduction

Petitioners Brenda Thiam, Wayne Hartman and Patricia Shoemaker submit the within Memorandum and Response to Respondent's Motion to Dismiss as follows;

Constitutional Prologue

On November 11, 1776 the Convention of the Delegates of the Freemen of Maryland, meeting in Annapolis, adopted what we now know as the Maryland Declaration of Rights (hereafter “Declaration”) and the Constitution of Maryland (hereafter “Constitution”). Like other contemporaneous state constitutional documents of the new republic the Declaration and Constitution were expressions of popular sovereignty as evidenced by the original first two Articles of the Declaration.

“I. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”¹

II. That the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof.”²

The 1776 Declaration, Art. 4 established that public officials, including members of the legislative and executive branches, have a fiduciary duty to the citizens of the State of Maryland as “Trustees” of a public trust. *Kerpelman v. Board of Public Works*, 261 Md. 436, 276 A.2d 56 (1971). That language now found in Declaration, Art. 6 is as follows:

“that all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct: Wherefore, whenever the ends of Government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the People may, and of right ought, to reform the old, or establish a new Government;....”

¹ In its current form, Article I of the Declaration is as follows: “That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their Form of Government in such manner as they may deem expedient.”

² This original Article II appears as current Article 4, as amended November, 1970 as follows “That the People of this State have the sole and exclusive right of regulating the internal government and police thereof, as a free, sovereign and independent State.”

The 1776 Declaration included Art. 21, the language of which is, in all relevant respects identical to that of Art. 24 of the current Declaration, commonly referred to as “Due Process” Article. See *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992). Art. 24 embodies not only due process protections but also equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. *Ibid.* Maryland’s Appellate Courts have consistently looked to opinions of the United States Supreme Court interpreting the Federal Due Process and Equal Protection provisions as authority for the interpretation of Declaration Art. 24. *Roberts v. Total Healthcare, Inc.*, 109 Md. App. 635, 675 A.2d 995 (1996).

Maryland’s 1776 Declaration also included a “free elections” clause in Art. 5. That language appears verbatim in the current Declaration as Art. 7. These “free election” clauses appear in original constitutional documents of several of the nascent states using very similar or the same terms. This Court has stated that the Maryland free election clause protects “free and fair exercise of the electoral franchise,” *State Board of Elections v. Snyder*, 435 Md. 30 at 61 (2013) and that it is “even more protective of rights of political participation than the provisions of the Federal Constitution,” *Maryland Green Party v. Maryland Board of Elections*, 377 Md. 127 at 150 (2003). These clauses have “no analogue in the Federal Constitution and is, accordingly, a provision that makes the State Constitution ‘more detailed and specific than the Federal Constitution in the protection of the rights of its citizens.’” *Harper v. Hall*, 2022-NCSC-17, Paragraph 133 (2022) (citations deleted).

Harper v. Hall, *ibid*, discussed, among other things, interpretation of a free election clause³ originating in North Carolina’s 1776 Declaration of Rights and modeled on Virginia’s 1776

³ N.C. Const. art. 1, §10

Declaration of Rights.⁴ *Harper* goes on to describe how these free election clauses were derived from a provision in the English Bill of Rights of 1689,

“...in response to the King’s efforts to manipulate Parliamentary elections by diluting the vote in different areas to attain ‘electoral advantage,’ leading to calls for a ‘free and lawful Parliament’ by the participants of the Glorious Revolution....Avoiding the manipulation of districts that diluted votes for electoral gain was accordingly a key principle of the reforms....” *Harper, ibid* at paragraph 134 (internal citations deleted).

Discussion

Petitioner Brenda Thiam (hereafter “Mrs. Thiam”) is a registered voter in Maryland. Mrs. Thiam currently serves as a member of Maryland’s House of Delegates. She is a Republican elected official who represents Maryland citizens in Washington County. She resides in Hagerstown, Maryland. Currently, and under the General Assembly’s Legislative Redistricting Advisory Commission’s (hereafter “LRAC”) legislative redistricting plan (hereafter “Plan), subject of the instant case, she resides in District 2B, a single member district juxtaposed with District 2A, a two member district.

Wayne Hartman (hereafter “Mr. Hartman) is a registered voter in Maryland. Mr. Hartman currently serves as a member of Maryland’s House of Delegates. He is a Republican elected official who represents Maryland citizens in Worcester and Wicomico Counties. Currently, and under the Plan which is the subject of the instant case, he resides in Berlin, Maryland in District 38C, a single member district configured as part of three single member districts comprising District 38.

⁴ See Va. Const. of 1776, Declaration of Rights, Section 6 (1776)

Patricia Shoemaker (hereafter “Mrs. Shoemaker”) is a registered voter in Maryland. She is a registered Republican who resides in Hampstead, Maryland in what is currently a three Delegate legislative district (District 5), but will be within a newly created single member Delegate district (District 42C) in Carroll County, under the Plan, adjacent to a “new” three member district configured as District 5.

Petitioners collectively challenge the legality of the General Assembly’s 2022 legislative districting plan (the “Plan”) as set forth in their Petition and as discussed herein. Petitioners adopt and incorporate as if set forth fully herein the averments and objections to the Plan articulated in the petition and subsequent filings of the Petitioners in Misc. Case No. 25, consolidated herewith, specifically including the claims therein as to violations of Art. III, § 4 and Art. I, § 7 of Maryland’s Constitution, and Art.’s 7, 24 and 40 of Maryland’s Declaration of Rights. Further, Petitioners herein assert that the Plan violates Art.s 7, 24 and 40 of the Declaration, and Art. I, § 7 of Constitution, because it contains non-uniform, multimember districts for the House of Delegates, rather than a uniform scheme of single member districts for that body of the General Assembly.

Petitioners herein specifically allege that the Plan’s adoption of mixed multimember and single member districts, rather than uniform single member districts, violates Declaration Art.’s 7, 24 and 40. Art. 7 is the free election clause and Art. 24 guarantees due process and equal protection of law to Maryland citizens. The Plan violates these principles by, without limitation, infringing on the rights of Republican voters by systematically configuring their House of Delegate districts to minimize their representation in the General Assembly and creating different categories of voting rights among the citizens resulting in varying classes of voters based on district configuration.

Maryland Constitutional Claims

As noted above the Declaration is an expression of popular sovereignty stating that the operation of Maryland government arises from the citizens of Maryland and is dependent on a “compact” between them and those who govern them. We’ve also seen that in 1776 and continuing to this day the notion of government subservience to Maryland’s citizenry is expressed in the Declaration Art. 6, establishing the fiduciary relationship of public officials to the citizens whom they serve in the capacity of Trustees administering government as a matter of public trust.

Under authority of that “compact” Article III of the Constitution establishes a bicameral legislature to govern, the composition of that legislature and the creation and apportionment of legislative districting following each decennial census, among other things. Article III, § 3 provides for creation by the legislature of legislative districts from which the citizens will elect one Senator and three Delegates. § 3 goes on to say:

“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.”

Notably, there are no standards mentioned for when three single-member districts are appropriate, or when a single three delegate district best achieves constitutional aims, etc. When viewed in isolation Article III, §3 allows the legislature to cloak itself with impunity while making arbitrary or politically motivated decisions in their unfettered discretion.

Also significantly, LRAC and the General Assembly offered no explanation of the circumstances, principles or standards they utilized in developing and approving the Plan to demonstrate how the seeming arbitrary hodgepodge of single and multi-member districts all over the State are reasonably related to their role as fiduciaries of the public trust of the citizens of the State from whom the General Assembly’s authority to redistrict flows.

Over 160 years ago this Court said that the Declaration and the Constitution compose our form of government and they must be interpreted as one instrument. *Mayor of Baltimore v. State*, 15 Md. 376 (1860). Petitioners assert that the plan as adopted by the General Assembly violates the free elections clause manifest in Article 7 of the Declaration of Rights.

Article III, § 4 limits the broad authority of § 3 in establishing districts (and by extension, subdistricts) requiring that they be “compact in form,.. of substantially equal population” and that “[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions.”⁵ Clearly the language of Article III, § 3 is not intended to be a “blank check” in the hands of the legislature.

State Bd. of Elections v. Snyder, 435 Md. 30 (2013), discussed the interplay of Art. III, §3 with other provisions of the Constitution and Declaration including Declaration, Art. 7, Maryland’s free elections clause.

“In construing a constitution, we have stated ‘that a constitution is to be interpreted by the spirit which vivifies, and not b[y] the letter which killeth.’(*citations deleted*) We similarly do not read the Constitution as a series of independent parts. (*citations deleted*) Just as a statute is read in the context of a regulatory scheme, this Court construes constitutional provisions as part of the Constitution as a whole. See *State v. Jarrett*, 17 Md. 309, 328 (1861) (‘[i]n construing a Constitution, it must be taken as a whole, and every part of it, as far as possible, interpreted in reference to the general and prevailing principle.’).” *Ibid.*, 435 Md. at 55 (2013).

Maryland’s free election clause secures the “free and fair exercise of the electoral franchise”, *Ibid.*, 435 Md. at 61 (2013) and has been interpreted to be “even more protective of

⁵ This also reinforces the idea of government’s obligation for public officials as fiduciaries to act in the best interests of the citizens as a whole as Trustees for the public trust and other protections of the citizenry within the Declaration.

rights of political participation than the provisions of the federal constitution”, *Md. Green Party v. Md. Board of Elections*, 377 Md. 127,150 (2003).

How can an arbitrary, unprincipled decision to provide one citizen the ability to vote for three delegates when their neighbor, perhaps in the same county, minutes away, may only vote for one delegate be considered “free” or “fair”? The system of mixed member districts isn’t a mere regulation of a voter’s residence or age but it creates two or more distinct classes of voters who are subjected to different types of representation, some voting for one, two or three delegates to represent them in the House of Delegates with corresponding differences for constituent services simply because of a shifting geographical line. How can this be equal treatment of the right of franchise for all Maryland citizens?

This Court has recognized that broader constitutional considerations circumscribe the General Assembly’s discretion in enacting a redistricting plan.

“But neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained.... The constitution ‘trumps’ political considerations. Politics or non-constitutional considerations never ‘trump’ constitutional requirements.” *In re Legislative Redistricting of the State*, 370 Md. 312, 370 (2002).

Other state appellate courts have found that similar language to Maryland’s free election clause in their state constitutions, guaranteeing a “free” election imply that the legislative maps created are not the product of excessive partisan gerrymandering designed to effectively minimize the voices and political impact of either ethnic, racial, or political minorities.

Petitioners submit that of particular relevance to the case *sub judice* is the recent North Carolina Supreme Court opinion in *Harper v. Hall, supra.* This opinion, referred to previously herein, discussed the history and scope of North Carolina’s “free election” clause, based on Virginia’s “free election” clause, both of which employ identical operative language as that of Maryland’s Declaration, Art. 7.⁶ The Court stated:

“...elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government. When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters’ partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people. This violates the free elections clause as interpreted against the backdrop of the fundamental principles in our Declaration of Rights. Accordingly, for an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power...” *Harper v. Hall*, 2022-NCSC-17, ¶ 140 (2022).

The Supreme Court of the United States has established that our Federal Constitution enshrines the fundamental principle of democracy that every individual’s vote should count equally. In *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964) and their progeny, the concept of “one person, one vote”, has been found to be inherent in the guarantees of equal protection, due process, and freedom of political speech and association that lie at the heart of the protected freedoms of our citizenry. Allowing multimember districts to exist and be apportioned for the Maryland House of Delegates violates the “one person, one vote” principle, both as a logical *prima facie* violation and as a violation as applied in the Plan.

The failure to use uniform, single-member districts for the House of Delegates across the state of Maryland not only violates the “one person, one vote” concept and deprives citizens of

⁶ Md. Declaration of Rights; Art. 7; ‘...elections ought to be free and frequent; ...’
North Carolina Const.; art. 1, §10; “All elections shall be free.”
Va. Const., art. 1, § 6; “That all elections ought to be free;...”

their rights to equal protection and due process under the Maryland Constitution, but further violates Maryland's unique free elections clause.

Article III, § 3 of Maryland's Constitution, in direct contravention of the "one person, one vote" principle, does expressly allow for House of Delegates districts to be so divided. Allowing the varied use of multimember and single-member districts is, however, not only a constitutional violation of base principles articulated in the Constitution and the Declaration, but is a unique anomaly in the composition of state legislatures throughout America. As discussed above, Art. III, § 3's authorization is limited by the express language of § 4 and further by the Declaration of Rights protection of free elections, due process, equal protection and popular sovereignty. As a statement of the breadth and reach of the Equal Protection Clause of the 14th Amendment, *Baker v. Carr, supra*, is also instructive of the scope of the protections under Declaration, Art. 24.

Almost every other state in the United States has rejected the mixed use of multimember and single member districts, recognizing that the only way to comply with the "one person, one vote" principle, and to provide both equal protection, due process, and free and fair elections to their citizenry, is to have uniform legislative districts with minimal population deviations.

The Plan passed by the General Assembly directly disenfranchises many citizens from across the state of Maryland by "mixing and matching" single member and multimember districts without articulating a rational basis for the differing treatment. In many communities, both urban, suburban and rural, individual voters assigned to a single member House of Delegates district have but one vote for one representative in that body of the General Assembly. In other jurisdictions which may be but mere minutes away and have no remarkable dissimilarities to justify such a discrepancy, an individual voter may in fact be able to cast votes for two or three members for the

House of Delegates, and rely upon those individual's joint representation, political association, and constituent services as a member of the General Assembly.

It would strain any logical interpretation to suggest any such scheme advances the fundamental requirement of "one person, one vote" or be regarded as "free" and "fair".

Each of the named Petitioners herein, being registered voters of the State of Maryland, live in (and in some cases represent as members of the House) districts designated by the Plan as a single member district. They (and their constituents, to the extent that any named Petitioner is a current member of the General Assembly) are impermissibly disadvantaged by the fact that citizens of other multimember districts have a disproportionate voting and representational advantage.

In places like Montgomery County, Prince Georges County, and Baltimore City (jurisdictions where Democrats have significant voter registration advantages and from which a Republican has not been elected to the state legislature for decades), multimember districts are employed exclusively under the Plan so as to allow for consolidation of partisan political power and advantage to the majority party. There are no single-member districts created to represent particular communities of interest in any of those three large jurisdictions, because allowing for single-member districts of uniform but smaller size and reflecting particular communities where political associations may not be identical to the political associations of the larger county in aggregate, would enhance the chances that a member of a minority political party may in fact be able to be elected.

However, in other jurisdictions from across Maryland, the proposed Plan separates communities into two member/one member districts and single-member districts in a reverse effort

to dissipate the political voices and rights of a minority political party. District 33 in Anne Arundel County is such an example. District 33 was formerly established as a three member district. District 31 and District 32 in Anne Arundel County, bordering District 33 and essentially of the same general suburban character, were and remain in the proposed Plan three member districts. However, District 33 has now been carved into three single-member districts, at least two of which are clearly designed to produce a substantial likelihood that a Democrat will be elected more easily than could be projected if District 33 remains a three member district.

District 42, encompassing part of Baltimore County and crossing into Carroll County in the Plan, constitutes a similar example of partisan gerrymandering implemented through the unprincipled mixture of multimember and single-member districts. District 42 formerly existed as a two member/one member House district configuration. Under the proposed map, it has now been converted to all single-member districts despite the fact that it's neighboring districts in Baltimore County (primarily District 8) and in Carroll County (primarily District 5) are kept under the proposed map as a three member district. In District 42, the creation of a single member district situated in the Timonium/Cockeysville area, was enacted largely to enhance the likelihood of electing a Democrat from that sub-district, who otherwise would not be likely to prevail if the entire district were configured as a three member district.

District 2B is another example of the blatant partisan gerrymandering and violation of equal protection and free election principles inherent in the Plan. District 2B is a single member district in Washington County configured with District 2A, a two member district in Washington and Frederick Counties. District 2B is expressly configured as such to attempt to elect a Democrat in 2B, while in other areas single member districts are denied to citizens because they may facilitate the election of Republicans.

Put simply, the majority party of the General Assembly chooses whether or not to implement single-member districts, two member/one member districts, or three member House of Delegate districts, merely to advance their own political prospects and to diminish the ability of citizens of opposing political viewpoints to engage in a truly “free” election. This arbitrary and politically motivated behavior was what this Court condemned in *In re Legislative Districting of the State*, 370 Md. 312, 370 (2002):

“[N]either discretion nor political considerations and judgments may be utilized in violation of constitutional standards.... That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution "trumps" political considerations. Politics or non-constitutional considerations never "trump" constitutional requirements.”

The Respondent wants to shield the LRAC Plan behind a screen of Art. III, §3 viewed in isolation from other provisions of the Constitution and Declaration. Decisions of this Court admonish against such an interpretive approach. The Plan under challenge *sub judice* violates citizen protections under the free election, due process and equal protection clauses of the Declaration of Rights and the due regard clause of the Constitution.

Response to Motion to Dismiss

Petitioners herein respond to the Motion to Dismiss filed previously in this action by the Respondents as follows:

I. Standard of Review

As alleged in Petitioner’s Petition and discussed in the preceding portion of this filing, Petitioners assert that the facts plead are sufficient to make a *prima facie* showing that the adopted plan subject of this litigation is “invalid or obnoxious” to the terms of the Constitution as alleged by the Petitioners, sufficient to withstand a Motion to Dismiss. The Petition involves claims

flowing from multiple provisions of the Declaration of Rights and Constitution which are well plead.

II. Maryland's Practice of Mixed Multi-Member/Single Member Districts

The introductory discussion of this part of Respondent's Motion to Dismiss references the rejection of the proposed 1967-1968 Constitution of Maryland which included a provision calling for single member districts. By focusing on that single member district provision, Respondent's imply that public rejection of that principle drove the defeat of that proposed Constitution in 1968. There are no facts alleged to substantiate that implication and the reality is that during the 1968 General Election voters rejected the proposed 1967-1968 Constitution entirely, not by individually proposed provisions thereof.

A. Maryland Constitution, Art. III, §3

Respondent's assert that the language of Art. III, §3, standing on its own, is complete justification for continuation of the practice of Maryland's utilization of mixed single and multi-member legislator districts for House of Delegates representation. Petitioner hereby incorporates by reference the provisions of its Memoranda above discussing the need to interpret Constitutional provisions not in isolation but in context with other provisions of the Constitution and Declaration as a whole. See *State Board of Elections v. Snyder, supra*.

B. Claims Limited to Invidious Racial Discrimination

Petitioners challenge to the adopted LRAC plan is a challenge based on provisions of the Maryland Declaration of Rights and Constitution. They include the Declaration's free elections clause (Art. 7) and due process and equal protection clause (Art. 24) and the Constitutions Art. IV and VII. Any asserted limitations about the scope of protections afforded by the Federal

Constitution's 14th Amendment are irrelevant and inapplicable to Petitioners' recovery under the State Constitutional provisions.

**C. Maryland's Practical Experience with Multi-Member
and Single Member Districts**

The Respondent's argument in this corresponding section of their Motion to Dismiss demonstrates that this is a factual issue for the Court to resolve and therefore is not grounds for a Motion to Dismiss. The Respondent's Motion further fails to recognize that this Petition is about issues larger than the political considerations and expedience of political parties, but implicates free and fair elections guaranteed the citizens of the State of Maryland by the Constitution and Declaration.

D. Maryland Districting Compared with Other States' Practices

Petitioners hereby incorporate the same argument set forth immediately above. This challenge is about more than the relative expediency of one process of redistricting compared to another for the consideration of any states' organized political parties. It again is based on an issue of fact and is not grounds for a Motion to Dismiss.

Conclusion

For the foregoing reasons the Respondent's Motion to Dismiss should be denied.

Respectfully submitted,

/s/ David K. Bowersox

David K. Bowersox
CPF# 8212010031
Hoffman, Comfort , Offutt, Scott & Halstad, LLP
24 North Court Street
Westminster, MD 21157
(410)-848-4444
dbowersox@hcolaw.com

Certificate of Service

I hereby certify that on this 22nd day of March, 2022, the foregoing Petitioners' Memorandum of Law and Response to Respondent's Motion to Dismiss was filed and served electronically by the MDEC system or by email on all the persons entitled to service:

ANDREA W. TRENTO
Assistant Attorney General
Attorney No. 0806170247
STEVEN M. SULLIVAN
Assistant Attorney General
Attorney No. 9706260005
Office of the Attorney General
200 Saint Paul Place
20th Floor
Baltimore, Maryland 21202
atrento@oag.state.md.us

Attorneys for Respondent

Strider L. Dickson, AIS No. 0212170219
Brenton H.J. Conrad, AIS No. 2012170014
McAllister, DeTar, Showalter & Walker LLC
706 Giddings Avenue, Suite 305
Annapolis, Maryland 21401
sdickson@mdswlaw.com
bconrad@mdswlaw.com

Attorneys for Petitioner in Misc. No. 25

David Whitney
1001 Round Top Drive
Annapolis, Maryland 21409
dwhitney@cefcmd.org

Petitioner in Misc. No. 24

Seth Wilson
12010 Warrenfeltz Lane
Hagerstown, Maryland 21742
gopseth@outlook.com

Petitioner in Misc. No. 27

/s/ David K. Bowersox

David K. Bowersox