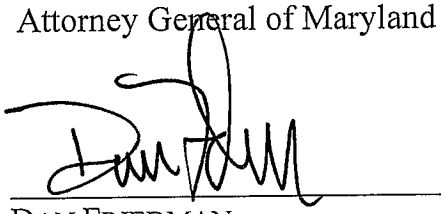
IN THE MATTER OF	*	IN THE
2012 LEGISLATIVE	*	COURT OF APPEALS
DISTRICTING OF THE STATE	*	OF MARYLAND
	*	September Term, 2012
PETITION OF	*	
CHRISTOPHER ERIC BOUCHAT	*	Misc. No. 2

MOTION TO DISMISS THE PETITION OF CHRISTOPHER ERIC BOUCHAT

The State of Maryland, by counsel, for the reasons stated and based on the authority described in the attached memorandum, hereby moves to dismiss the petition filed by Christopher Eric Bouchat, because the legal theories asserted in the petition fail to state a valid claim, as a matter of law.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland



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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2012, in conformity with ¶ 4 of the Court's May 30, 2012 Order governing these cases, copies of the attached pleadings were served electronically only on the following persons:

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DISTRICTING OF THE STATE	*	OF MARYLAND
	*	September Term, 2012
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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE PETITION OF CHRISTOPHER ERIC BOUCHAT

The State of Maryland, by counsel, hereby moves to dismiss the petition filed by Christopher Eric Bouchat, because the legal theories asserted in the petition fail to state a valid claim, as a matter of law.

LEGAL STANDARD

With only "some limited exceptions" that are "expressly set forth in the Constitution," the Court of Appeals "has only appellate jurisdiction." *Forster v. Hargadon*, 398 Md. 298, 305 and n. 3 (2007). Among those "limited exceptions" is the original jurisdiction conferred on the Court of Appeals to adjudicate a "petition of any registered voter" disputing whether the State's legislative redistricting plan adopted after the most recent decennial census is "consistent with requirements of . . . the Constitution of

the United States of America, or the Constitution of Maryland." Md. Const., Art. III, § 5. The Court has not adopted rules of procedure to govern the rare instances, such as this, when it exercises original jurisdiction. *See* Md. Rule 8-101 ("The rules in this Title govern *appellate* procedure in the Court of Appeals and the Court of Special Appeals." (emphasis added)). Even so, notwithstanding the absence of express provisions in the Rules, the Court's decisions have interpreted Article III, § 5 to permit preliminary or summary disposition of petitions under appropriate circumstances. *See In re Legislative Districting of the State*, 370 Md. 312, 336 n.17 (2002) (noting that the Court held a preliminary hearing on the 2002 plan's facial validity, a procedure that the Court likened to the "substantially similar" process followed in 1974 when the Court "considered memoranda and affidavits submitted by the parties for and in opposition to the motions for summary judgment") (citing *In the Matter of Legislative Districting of the State*, 271 Md. 320 (1974)).[1]

In its most recent decision applying Article III, § 5, the Court recognized that a redistricting plan may be upheld if the Court determines from "the plan on its face, in light of the challenges," that "the federal and State legal requirements have been met." *In re*

[1] In fact, in 2002, the State submitted a preliminary memorandum of law in support of the plan's facial validity, which was, in effect, a motion to dismiss or, in the alternative, motion for summary judgment. The State also filed a motion to dismiss one of the petitions. Though the Court did not expressly rule on the motion to dismiss, it ultimately consigned that petition to a footnote in the Court's decision. *See In re Legislative Districting of the State*, 370 Md. at 331 n.13 (noting that the petitioner in Misc. No. 23 "filed no exceptions to the Special Master's recommendations, but did present oral argument at the exceptions hearing. We will not further address Mr. Ashbury's challenge.").

Legislative Districting of the State, 370 Md. at 322. Even if the Court finds it necessary to look beyond the face of the redistricting plan to determine whether any perceived "deviations are within a permissible range or for a permissible purpose," *id.*, the Court has permitted petitions to be decided on the basis of preliminary submissions without the need for evidentiary hearings. *See, e.g., Legislative Redistricting Cases*, 331 Md. 574, 584 (1993) (noting that the Special Master adopted his report and recommended decision based on "stipulations of fact and memoranda of law").

The Court's inquiry is amenable to resolution by preliminary motion because the pertinent facts are "legislative facts," which the Court may consider without the formal presentation of evidence and without adhering to the requirements that ordinarily govern the taking of judicial notice. *See* Md. Rule 5-201(a) ("This Rule governs only judicial notice of adjudicative facts.") *id.*, Committee note ("This Rule does not regulate judicial notice of so-called 'legislative facts'. . . ."); *accord* Fed. R. Evid. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact."). "Legislative facts . . . are those," like the facts underlying the State's redistricting plan, "which have relevance to the legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. . . ." *Id.*, Advisory Committee Note. "[T]he view which should govern judicial access to legislative facts . . . renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to

hear and be heard and exchanging briefs, and any requirement of formal findings at any level." *Id.*

Preliminary or summary disposition is also available because the Court recognizes that its role is not to concern itself with the "primarily . . . legislative task" of redrawing districts, which "should be left to that branch of the State's government"; instead, the Court's review focuses upon the "legal" question of determining the constitutionality of the legislative enactment adopting the new legislative districting plan. *Getty v. Carroll Co. Bd. of Elections*, 399 Md. 710, 729, 734 (2007) (citing *In re Legislative Districting of the State*, 370 Md. at 320). Like other legislation, the enacted redistricting plan "enjoys a presumption of validity. . . ." *In re Legislative Districting of the State*, 299 Md. 658, 688 (1982).

Thus, as is true in other contexts where Maryland courts are asked to adjudicate civil disputes, the Court of Appeals, in its consideration of petitions filed under Article III, § 5, may entertain preliminary dispositive motions, such as a motion to dismiss or motion for summary judgment. *Cf. Duckworth v. State Admin. Bd. of Elections*, 332 F.3d 769, 772-73 (4th Cir. 2003) (holding that under the statute governing redistricting challenges in federal court, 28 U.S.C. § 2284(b)(1), 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").

A motion to dismiss "tests the legal sufficiency of the pleadings, except that, when matters outside the pleadings are presented to, and relied upon by the court, in which event, it may be treated as a motion for summary judgment." *Popham v. State Farm Mutual Ins. Co.*, 333 Md. 136, 140 n.2 (1994) (citations omitted). The "'object of the motion [to dismiss] is to argue that as a matter of law relief cannot be granted on the facts alleged.'" *Ricketts v. Ricketts*, 393 Md. 479, 491 (2006) (quoting Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary*, 206 (3d ed. 2003)). When reviewing a motion to dismiss, the Court will "assume the truth of all well-pled facts in the complaint as well as the reasonable inferences that may be drawn from those relevant and material facts." *Ricketts*, 393 Md. at 491-92. "Mere conclusory charges that are not factual allegations may not be considered." *Arfaa v. Martino*, 404 Md. 364, 380 (2008)(citation omitted). Dismissal is proper where "the alleged facts and permissible inferences, so viewed, if proven, would nonetheless fail to afford relief to the plaintiff." *Ricketts*, 393 Md. at 492 (citation omitted). Whether "summary judgment is proper in a particular case is a question of law" that the Court may decide by determining "whether the parties [have] generated a dispute of material fact and, if not, whether the moving party [is] entitled to a judgment as a matter of law." *Muskin v. State Dep't of Assessments and Taxation*, 422 Md. 544, 554 (2011) (citations omitted).

FACTS

The State adopts by reference those facts set forth in the State's Memorandum in support of the State's Motion to Dismiss or, in the Alternative, for Summary Judgment of the Petition of Cynthia Houser, *et al.* as if set forth in full herein.

ARGUMENT

Petitioner Christopher Eric Bouchat makes four separate claims, each of which is without merit. He asserts that provisions of Maryland Constitution Article III, § 3 that permit the creation of delegate districts that elect a single member, two members or three members "institute voting inequality upon the populous." Bouchat Petition at ¶ 1. He opposes the combination of counties in a district so that "a minority county section [is] disenfranchised by the majority county portion of a district." Bouchat Petition at ¶ 1b. He claims that the election of senators and delegates by "concurrent populous reapportionment across county jurisdictions violates the premise and precedence established by the U.S. Constitution." Bouchat Petition at ¶ 2b. Finally, he states that Article IV, § 4 of the United States Constitution guarantees to each state a Republican form of government, though he does not state how this would affect the validity of the Enacted Plan. Bouchat Petition at ¶ 4. This Court should dismiss this case because these claims are insubstantial and plainly without merit, in that, assuming any statements of fact in the petition to be correct, the petition does not state a violation of any provision of the United

States Constitution, the Maryland Constitution, or any binding Supreme Court or Court of Appeals precedent.

Even if the petition stated a claim, the relief sought by Mr. Bouchat is not only not required by any provision of the United States Constitution, the Maryland Constitution, or any binding Supreme Court or Court of Appeals precedent, but most of what is requested would itself violate the one person, one vote requirements of the Fourteenth Amendment and the equal population requirements of Article III, § 4.

I. THE USE OF MULTI-MEMBER DISTRICTS IN THE HOUSE OF DELEGATES IS NOT UNCONSTITUTIONAL.

Maryland Constitution, Article III, § 3, provides that it does not "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. Slightly fewer than half of the senatorial districts in the State are divided into one or more delegate districts. These subdistricts are created for a variety of reasons, including increasing the possibility that the residents of a given county may elect a person from that county, as is done in Western Maryland, Southern Maryland and the Eastern Shore, making it possible for a geographically isolated pocket of voters to elect a member of their own party, when that would not be possible in the full district, *see* District 3B, or providing opportunities for minorities to elect their candidate of choice. *See* District 47B, which is 60.5% Hispanic voting age population.

It is well-established that multi-member state legislative districts are constitutionally permissible. *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *In re Legislative Districting*, 299 Md. 658, 673 (1982). A multi-member district is invalid only if it can be shown that "designedly or otherwise," it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson*, 384 U.S. at 66; *In re Legislative Districting*, 299 Md. at 673; *see also State of West Virginia ex rel. Thornton Cooper v. Tennant*, 2012 W. Va. LEXIS 77, slip op. at 52 (W. Va. February 13, 2012) ("There is no constitutional, statutory, or other authority prohibiting the utilization of multi-member districts."). Mr. Bouchat has made no allegation that any particular multi-member district in the Enacted Plan has this effect. Thus, he has not established a claim based on the use of multi-member districts.

Mr. Bouchat further argues, however, that the combination of single member and multi-member districts "institute voting inequity upon the populous." In fact, the combination of districts of varying size has uniformly been held not to violate the principle of one person, one vote so long as equal numbers of people elect equal numbers of representatives. The Supreme Court recognized this possibility in *Reynolds v. Sims*, 377 U.S. 533 (1964). In that case, the Court expressly rejected the notion that equal protection requires the formation of single-member districts, and stated that a state could achieve some flexibility by using multi-member or floterial districts. *Id.* at 577, 579. Then, in

Fortson v. Dorsey, 379 U.S. 433 (1965), the Supreme Court upheld a plan under which Senate districts were drawn, to the extent possible, along county lines. Population equality was achieved by combining from one to eight counties into single-member districts from which a senator was elected district-wide. The remaining districts were allotted among the more populous counties, and senators were elected by the voters of each county rather than from each district within a county. The Court found no constitutional infirmity in the fact that voters in a larger county might vote for seven senators while others would vote for only one, stating that there "is clearly no mathematical disparity" where the county has a population seven times larger than that of a single-member district. *Id.* at 437. Similarly, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court held that a plan under which eight of thirty-one senate districts and twenty-five of thirty-nine house districts were multi-member districts represented by two or more representatives elected at large did not violate one person, one vote. The Court noted that having voters in multi-member districts vote for and be represented by more legislators than in single-member districts "has so far not demonstrated an invidious discrimination against the latter," *id.* at 142-143, and found that challengers had not met their burden of showing that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.

The combination of single member and multi-member districts has also been upheld by the Supreme Court in *Mahan v. Howell*, 410 U.S. 315, 329 (1973), by a three-judge

district court in *Larios v. Perdue*, 306 F.Supp.2d 1190, 1208 (D. Ga. 2003), and by the West Virginia Supreme Court in the recent case of *State of West Virginia ex rel. Thornton Cooper v. Tennant*, 2012 W. Va. LEXIS 77 (W.Va. Feb. 13, 2012). Mr. Bouchat has made no showing that the use of multi-member districts disadvantages any particular group in comparison to those in single member districts. Thus, this portion of his argument also fails to state a claim and should be dismissed.

II. THE UNITED STATES CONSTITUTION PLACES NO LIMITATIONS ON THE DIVISION OF COUNTIES.

Mr. Bouchat claims that "the case law" addresses the combining of partial sections of counties to adjoining ones, "causing a minority county section to be disenfranchised by the majority county portion of a district." He cites no cases for this proposition. In fact, Supreme Court cases have consistently recognized that the Fourteenth Amendment requirement of one person, one vote outweighs state requirements concerning the crossing of county lines. While *Reynolds v. Sims*, 377 U.S. 533 (1964) recognized that a "State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature," it cautioned that this was constitutional only "as long as the basic standard of equality of population among districts is maintained." *Id.* at 580. Ultimately, however, "[l]egislators represent people, not trees or acres," and are "elected by voters, not farms or cities or economic interests." *Id.* at 562. Thus, population equality outweighs the integrity of subdivision lines in the constitutional analysis of plans to the extent that the pursuit of that integrity requires greater deviations

than the federal constitution permits. *Reynolds v. Sims*, 377 U.S. 533, 584 (1964), *cf.*, *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (upholding plan designed to protect county boundaries, but recognizing that resulting deviation of approximately 16% "may well approach tolerable limits").[2] This Court also has recognized that population equality "is the *sine qua non* of fair representation," *Legislative Districting*, 299 Md. 658, 672 (1982). Thus, the claim that any combination of portions of counties violates the federal constitution (or that of the State), is unsupported by case law and must be dismissed.

III. THE GUARANTEE CLAUSE PLACES NO REQUIREMENTS ON STATE LEGISLATIVE REDISTRICTING.

Petitioner Bouchat cites no cases for his argument that the State Plan in some way violates the guarantee of a republican form of government found in Article IV, § 4 of the United States Constitution. The relevant portion of Article IV, § 4 states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . ." In most of the cases in which the Supreme Court has been asked to apply the Guarantee Clause, it "has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992) (citing *City of Rome v. United States*, 446 U.S. 156, 182, n. 17 (1980) (challenge to

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[2] Challengers in *State of West Virginia ex rel. Thornton Cooper v. Tennant*, 2012 W. Va. LEXIS 77 (W.Va. Feb. 13, 2012) based a similar claim on the recognition of the Supreme Court in *Mahan v. Howell*, 410 U.S. 315 (1973) that a state's adherence to county boundary lines is not unconstitutional. As noted in the *Tennant* case, however, that recognition "does *not* translate into a mandate that failure to abide by county boundary lines in a redistricting plan renders such plan unconstitutional."

preclearance requirements of the Voting Rights Act); *Baker v. Carr*, 369 U.S. 186, 218-29) (challenge to apportionment of state legislative districts); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 140-51 (1912) (challenge to initiative and referendum provisions of state constitution)."

While the Supreme Court "has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," *New York*, 505 U.S. at 185 (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)), the Court has "yet to identify any such claims," *United States v. Vazquez*, 145 F.3d 74, 83 (2d. Cir. 1998), and no case has held that the Guarantee Clause imposes requirements on the states for legislative redistricting. There is simply no legal basis for this claim.[3]

IV. STATE LEGISLATIVE DISTRICTS MUST BE BASED ON POPULATION, NOT ON THE FEDERAL MODEL.

Bouchat's requested plan of two senators for each county would create a variance of 404%, and a ratio between the largest and smallest districts of 48 to 1. This is larger than the variances found invalid in even the earliest redistricting cases, such as *Reynolds v. Sims*, 377 U.S. 533 (1964) (41 to 1) and *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964) (32 to 1), and is clearly invalid under the one person, one vote principle under the Fourteenth Amendment of the United States Constitution. The

[3] Mr. Bouchat may be somewhat unclear on the meaning of the phrase "Republican Form of Government." In an article in the Carroll County Times, he said "My objective is that they can change the structure of the state Senate and get it under the control of the Republican party, which can be done if senators are equally divided up amongst the counties." Christian Alexandersen, *Carroll Man Challenging Government Norm*, Carroll County Times (Apr. 29, 2012).

recommendation that each county have at least one delegate with the remainder divided on the basis of population would also create serious difficulties in terms of the one person, one vote requirement.[4]

The concept that a state could, like Congress, have one house that is based on population, and one in which each county was guaranteed a representative with the rest divided based on population, was rejected by the Supreme Court in the case of *Reynolds v. Sims*, 377 U.S. 533 (1964). That case held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. One of the plans discussed in *Reynolds* granted each county in the state one senator, and also granted each county one delegate, with the remaining delegates divided over the counties based on population. The Court rejected the "so-called federal analogy," stating that it "appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." *Id.* at 573. The Court distinguished the federal system, stating that it:

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[4] For Kent County, which is the smallest county, to have a single delegate the House would have to be expanded to approximately 285 members to allow for compliance with one person / one vote. To accomplish the aim of giving at least one delegate to each county without shared districts would require an even larger body, as creating a district of 20,266 for Kent County would mean that Garrett County, with 30,124 would be badly malapportioned. To correct this, Kent County would have to have two delegates, and Garrett three, requiring a House of 570 delegates. Most likely, an even larger body would be required to achieve the end of at least one delegate per county without crossing lines while still complying with the constitutional requirement of one person / one vote.

> is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.'

Id. at 574. In contrast, political subdivisions of the States, "never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.* at 575.

Addressing an argument similar to that of Mr. Bouchat that "concurrent populous reapportionment across county jurisdictions violates the premise and precedence established by the U.S. Constitution," the Court stated:

> We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in

> many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

Id. at 576-77. On the same day, the Court rejected a Maryland plan "analogous to the representation of the States in the Federal Senate" that gave one senator to each county and six senators to Baltimore City. *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964). Thus, the Senate and House plans recommended by Petitioner Bouchat would violate well-established law at the heart of the doctrine of one person, one vote and his action should be dismissed on this ground as well.

CONCLUSION

For the foregoing reasons, the State of Maryland requests that the petition of Christopher Eric Bouchat be dismissed.

Respectfully submitted,

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