IN THE MATTER OF	*	IN THE
2012 LEGISLATIVE	*	COURT OF APPEALS
DISTRICTING OF THE STATE	*	OF MARYLAND
	*	September Term, 2012
PETITION OF	*	
JAMES BROCHIN, *et al.*	*	Misc. No. 3

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT OF THE PETITION OF JAMES BROCHIN, *ET AL.*

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 James Brochin, *et al.*, because the only legal theory asserted in the petition fails to state a valid claim of lack of "due regard" for political subdivision boundaries, as a matter of law. In the alternative, the State moves for summary judgment because there is no genuine dispute of the material fact and it is entitled to judgment as a matter of law.

Respectfully submitted,

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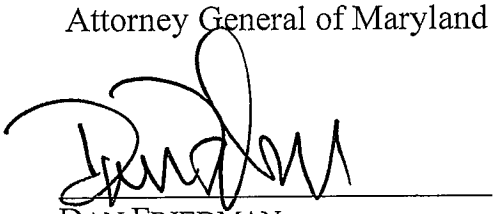
Attorney General of Maryland



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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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	*	September Term, 2012
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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT OF THE PETITION OF JAMES BROCHIN, *ET AL.*

The State of Maryland, by counsel, hereby moves to dismiss the petition filed by James Brochin, *et al.*, because the only legal theory asserted in the petition fails to state a valid claim of lack of "due regard" for political subdivision boundaries, as a matter of law. In the alternative, the State moves for summary judgment because there is no genuine dispute of the material fact and it is entitled to judgment 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]

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[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.").

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 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

I. THE PETITION FAILS TO STATE A CLAIM FOR LACK OF "DUE REGARD" FOR THE BOUNDARIES OF POLITICAL SUBDIVISIONS.

The Brochin Petitioners argue that District 44, which contains territory both in Baltimore City and Baltimore County, violates the due regard provision in Article III, § 4 of the Constitution ("Due regard shall be given to natural boundaries and the boundaries of political subdivisions."). That kind of county-specific, piecemeal approach, however, cannot be the test for whether the State's Redistricting Plan as a whole, with its 47 Senate districts and 141 House districts, complies with the due regard provision. Rather, under Maryland's due regard jurisprudence, the Court of Appeals determines compliance by looking at a redistricting plan holistically and Statewide — not by focusing solely on a single county. Indeed, if the Brochin Petitioners' county-specific analysis were correct, then the redistricting plan adopted by the Court itself in 2002 could not withstand

such scrutiny. Instead, under the Court's understanding of Article III, § 4, as demonstrated by its most recent redistricting decision, there can be no doubt that the State's Redistricting Plan is constitutional as a matter of law.

The "due regard" provision was added to our Constitution in 1972, as part of the response to the Supreme Court's one person, one vote revolution that began with *Baker v. Carr*, 369 U.S. 186 (1962).[2] The Court of Appeals has identified a number of purposes for the due regard provision, including: appropriate coordination between State and local government, *Legislative Redistricting Cases*, 331 Md. 574, 612 (1993) (*quoting Reynolds v. Sims*, 377 U.S. 533, 580-81 (1964)); deterring gerrymandering, *id.*; helping to maintain voter "orientation to their own territorial areas," *id.* (quoting *Matter of Legislative Districting of State*, 299 Md. 658, 681 (1984)); and recognition of the special importance of counties in Maryland, *In re Legislative Redistricting of State*, 370 Md. 312, 357-60 (2002).

Although compliance with the "due regard" provision is "mandatory," *id.* at 370-71, the Court has also instructed that "due regard" is "the most fluid" of the constitutional requirements and must be considered in the context of consideration of the other constitutional factors of population equality, contiguity, and compactness. *Id.* at 372; *see In re Legislative Districting of the State*, 299 Md. at 681 ("[T]he 'due regard' requirement is of mandatory application, although by its very verbiage it would appear to be the most fluid of the constitutional

[2] For a broader discussion of the effect of the *Baker* decision in Maryland, *see* Dan Friedman, Magnificent Failure *Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 Md. L. Rev. 528, 553-56 (1999).

components outlined in § 4"). In applying these considerations, the Court has recognized an unavoidable paradox: "the state constitutional requirements of § 4 work in combination with one another to ensure the fairness of legislative representation," but it is also "a plain fact" that "they tend to conflict in their practical application. . . ." *Id.* "When they do, the 'due regard' provision, as the 'most fluid' of the requirements, will often be the first to yield." *Legislative Redistricting Cases*, 331 Md. at 615.

Thus, the Court has acknowledged and accepted the "plain fact" that to achieve population equality, some districts must cross county boundaries. *See In re Legislative Redistricting of State*, 370 Md. at 322 (Districts "are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity."). The question is not whether this will happen, but how frequently. Despite the inevitability that a valid redistricting plan must include at least some inter-county sharing of districts, this Court has construed the "due regard" provision to require that a redistricting plan cannot ignore county boundaries or subvert their importance in redistricting to the achievement of other, non-constitutionally grounded, "rational goals." *In re Legislative Redistricting of State*, 370 Md. at 373.

What this requirement means in actual practice can be gleaned from the Court's decisions applying the due regard provision. The 1992 redistricting plan had 18 shared senatorial districts, which was 5 more shared districts than the

previous plan had contained. *See In re Legislative Districting of the State*, 370 Md. at 364; *see In re Legislative Districting of the State*, 299 Md. at 694-96 (Appendix A, A1, A2). The Court of Appeals found the 1992 plan to be constitutional but cautioned future redistricters that the plan came "perilously close to running afoul" of the due regard provision. *Legislative Redistricting Cases*, 331 Md. at 614. That warning was not heeded when, in 2002, the political branches drew the next map. The 2002 map had 22 shared senatorial districts. *In re Legislative Districting of the State*, 370 Md. at 364-65. In explaining why it found the Legislature's 2002 plan to violate the "due regard" provision, the Court stated that there were "simply an excessive number of political subdivision crossings." *Id.* at 368.

The Court then undertook to redraw the map and correct the constitutional violation. Although the Court acknowledged that, in redistricting, the political branches were free to consider factors other than those contained in the constitution, *see id.* at 321-22 ("[T]he political branches . . . may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives . . . in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives. . . ."), the Court made clear that its redrawing of the map would consider only "federal constitutional requirements, the Federal Voting Rights Act, and the requirements

of Article III, § 4 of the Maryland Constitution," including population equality, contiguity, compactness, and due regard. *Id.* at 323. The Court's plan reduced the number of shared senatorial districts substantially, from 22 to 14. *Id.* at 375.

Thus, heading into this redistricting cycle, redistricters had three significant reference points to consider: (1) in 2002, this Court had held that 22 shared senatorial districts was an "excessive number" and thus unconstitutional; (2) in 1992, this Court had held that 18 shared senatorial districts was "perilously close" to a constitutional violation but survived constitutional scrutiny; and (3) in 2002, this Court itself drew a map with 14 shared senatorial districts when it shielded itself from the other legitimate political considerations that mark the redistricting process. Cain Declaration at ¶ 16. The guidance provided by these precedents did not indicate what number of shared districts above 18 but below 22 might be the maximum allowable. These examples did, however, demonstrate what this Court has deemed to be within the constitutional requirements, even without allowing for the additional considerations that the political branches may take into account.

Those drawing the Enacted Plan chose not to test the limits of what might conceivably be permissible. Instead, they took careful heed of the Court's 2002 decision. They gave "due regard" to the boundaries of political subdivisions and created a statewide plan with only 13 shared senatorial districts. Cain Declaration at ¶¶ 17-18. That is substantially fewer shared districts than the 18 found in the map approved by the Court in 1993, and even better in this respect than this

Court's own map drawn in 2002, which had 14 shared districts. The Enacted Plan also gives greater deference to municipal borders than its predecessor did, by eliminating 14 crossings from this Court's 2002 Plan, retaining only 7, and adding none. Cain Declaration at ¶¶ 16-17. If the plans the Court approved in 1993 and drew itself in 2002 were constitutional, as the Court determined, then the 2012 Enacted Plan must also satisfy the due regard provision of the constitution.

It is also possible to read this Court's due regard jurisprudence as precluding the systematic and intentional use of unnecessary shared senatorial districts to effectuate another policy objective. Thus, in both 1992 and 2002, there was evidence of a conscious attempt to bolster Baltimore City's strength, despite population losses, at the expense of the surrounding counties. *Legislative Redistricting* Cases, 331 Md. at 614; *In re Legislative Districting of the State*, 370 Md. at 374-75. Petitioners have not pled, nor will they be able to prove, any such systematic use of unnecessary border crossings to achieve another policy objective. Cain Declaration at ¶ 21.

There is only one border crossing between Baltimore City and Baltimore County in the 2012 Enacted Plan—one more than in the Court's 2002 plan. Baltimore County remains the same. This Court's map in 2002 had Baltimore County in 8 districts: Districts 6, 8, 10, 11, and 42 were wholly within Baltimore County; District 5 was shared with Carroll County; District 7 was shared with

Harford County; and District 12 was shared with Howard County.[3] The Enacted Plan has Baltimore County in 8 districts as well: Districts 6, 8, 10, 11, and 42 are still wholly within the Baltimore County footprint; District 7 is still shared with Harford County (although split more equitably); and District 12 is still shared with Howard County. The District 5 split between Baltimore County and Carroll County, however, is now gone but District 44 is now split with Baltimore City. In effect, those charged with creating the 2012 Enacted Plan exchanged a shared senatorial district between Baltimore County and Carroll County for one between Baltimore City and Baltimore County. Such decisions simply cannot be the basis for finding a constitutional violation.

Neither the Maryland Constitution nor this Court prohibit legislative districts from crossing the boundary between Baltimore City and Baltimore County. In fact, this Court has disavowed the authority to make such determinations, saying that it is "not for the Court to determine which regions deserve special consideration and which do not." *In re Legislative Districting of the State*, 370 Md. 312, 323 (2002). And there is absolutely no legal authority to justify assigning a higher priority to the Baltimore City/Baltimore County boundary than is assigned to other boundaries between other political jurisdictions throughout the State. Instead, such a border crossing must be evaluated—as all other boundary crossings are—in the context of the entire redistricting map. Cain

[3] The Court's opinion miscounts the number of Baltimore County districts and erroneously reports nine. 370 Md. at 375.

Declaration ¶ 21. When viewed in this Statewide context, the 2012 Enacted Plan clearly satisfies the constitutional standard and dismissal of the Brochin Petition is warranted.

II. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT AND THE STATE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE DISTRICT 44 WAS DESIGNED TO COMPORT WITH THE LETTER AND SPIRIT OF THE VOTING RIGHTS ACT.

The Brochin Petitioners attack on the Enacted Plan comes down to a simple syllogism. First, they posit that it violates the Maryland Constitution to cross the boundary of a political subdivision unless that crossing is required by adherence to a federal constitutional requirement. Second, they argue that to achieve sufficient population equality so as to comply with the federal constitution does not require any district located in Baltimore City to cross into Baltimore County. From these two premises they conclude that the fact that District 44 contains territory in both Baltimore City and Baltimore County must establish a violation of the due regard provision of the Maryland Constitution. Here, as so often happens, a minor mistake in one of the initial premises sends the conclusion crashing down. Under the Supremacy Clause of the United States Constitution, contrary provisions of the State Constitution must give way, not just to the federal constitution, but also "the Law of the United States which shall be made in Pursuance thereof," including, of course, the Voting Rights Act of 1965, 42 U.S.C. §1973.

The requirement of due regard to political subdivisions cannot be judged in a void, but must be judged in the aggregate. Cain Declaration at ¶ 21. It is clear

that the requirement of one person, one vote ultimately requires that there be instances in which portions of counties are included in legislative districts with other counties. The choice as to where the necessary shared districts occur is a political one, as to which this court should defer to the legislature. The Enacted Plan:

> enjoys a presumption of validity, and it is not the province of the judiciary to strike down a district as being noncompact simply because a more geometrically compact district might have been drawn. Essentially, the districting process is a political exercise for determination by the legislature and not the judiciary; the function of the courts is limited to assessing whether the principles underlying the compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations.

Matter of Legislative Districting of State, 299 Md. 658, 688 (1984).

Petitioners admit that the choice of the location of this border crossing can be explained by "many excellent political and other reasons," Brochin Petition at ¶10. One of the reasons for the configuration of District 44 is the desire of the State—consistent with, if not compelled by, the Voting Rights Act—to ensure that the number of Senatorial Districts in the Baltimore Metropolitan region in which African American citizens constitute a majority and are able to elect the representative of their choice does not diminish in comparison with the 2002 plan.[4] District 44 achieves this goal by uniting adjacent African American

[4] Even if the State was not compelled by the Voting Rights Act to create a majority-minority district, the State is still entitled to judgment because it gave due regard to this important federal statute and the goals that it reflects before crossing the boundary and thereby satisfied the constitutional requirement. Thus, it is unnecessary for this

neighborhoods across the Baltimore City/Baltimore County border. Cain Declaration at ¶¶ 14, 21. The creation of this shared senatorial district, therefore, properly reflects the priority of federal over state redistricting criteria.

III. OTHER CLAIMS ASSERTED BY PETITIONERS ARE EQUALLY WITHOUT MERIT

The Brochin Petition states, at ¶ 4, that the configuration of District 44 violates the equal population requirement of Maryland Constitution Article III, § 4. They cite no facts in support of this statement. Although the equal population requirement could be given a stricter meaning than that of the one person, one vote requirement of the Fourteenth Amendment of the United States Constitution, this Court has followed the federal cases under that provision, providing a leeway of +/- 5% from the ideal district. *In re Legislative Redistricting*, 331 Md. 574, 594-597 (1993).[5] The adjusted population of District 44 is 118,498, which is -3.64, significantly less than 5% under the size of the ideal district of 122,813. Cain Declaration ¶ 3.[6]

Court to engage in the potentially expensive and time-consuming process of determining the applicability of the Voting Rights Act.

[5] For a fuller discussion of the equal population requirements of the federal and state constitutions applicable here, see the discussion in the State's Memorandum in Support of Motion to Dismiss the petition of Cynthia Houser, *et al.*, or, in the alternative, Motion for Summary Judgment, which is incorporated by reference as if set out here in full.

[6] The deviation of District 44 as a whole is -3.64%. Nor is either subdistrict outside the +/- 5% guideline. Subdistrict 44A has a population of 40,394, which has a deviation of -1.33% and

The Brochin Petition also states, at ¶ 6(a), n.3, that Districts 7 and 42 are less compact than they were under the current plan. As is the case with shared districts between counties, compactness of a plan cannot be judged in isolation on a district by district basis. The compactness requirement of Maryland Constitution Article III, § 4 must be applied in light of the federal requirements of one person, one vote and the Voting Rights Act, as well as the pressures applied by other constitutional requirements, such as due regard for political subdivision boundaries, and the very real difficulties imposed by Maryland's shape and geographical features. *In re Legislative Districting*, 299 Md. 658, 680 (1984). For this reason, the test is not whether a more compact district could have been drawn than that under challenge, but whether the principles underlying the requirement of compactness of territory have been considered and properly applied considering all relevant circumstances. *Id.* at 680-81. In this case, application of the two most common measures of compactness show that the compactness of the districts in the Enacted Plan are comparable to those of the existing plan, which was drawn by this Court. Cain Declaration at ¶ 22. Therefore, no violation of the compactness requirement has been shown.

Subdistrict 44B has a population of 78,104, which has a deviation of -4.61%. http://www.mdp.state.us/PDF/Redistricting/2010data/Legislative_Total_population.pdf.

CONCLUSION

For the foregoing reasons, the State of Maryland requests that the petition of James Brochin, *et al.*, be dismissed or, in the alternative, that summary judgment be granted to the State of Maryland with respect to those claims.

Respectfully submitted,

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