

NEIL C. PARROTT, *et al.*

Plaintiffs,

v.

JOHN MCDONOUGH, *et al.*

Defendants

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
* CASE NO.: 02-C-12-172298

* * * * *

MEMORANDUM OPINION

On September 6, 2012, this matter came before the Court for a hearing on Plaintiffs' Verified Complaint for judicial relief and judicial review pursuant to Sections 12-202 and 9-209 of the Election Law Article of the Maryland Code Annotated and Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. The Court held the matter *sub curia*. Upon consideration of the written and oral arguments of the parties, the Court presents its conclusions below.

BACKGROUND

On October 20, 2011, the Maryland General Assembly, sitting in a special session, enacted Senate Bill 1 of the 2011 Special Session, the Congressional Districting Plan (hereinafter "Senate Bill 1"), as an emergency measure that Maryland Governor Martin O'Malley signed into law later that day. Senate Bill 1 establishes the districts that will be used for the election of Maryland's eight representatives in the United States House of Representatives following the 2010 census. The legislative title describes the enactment as follows:

AN ACT concerning Congressional Districting Plan FOR the purpose of establishing the composition of the eight districts in the State of Maryland for the election of members to the United States House of Representatives; specifying certain ward, election district, and precinct boundaries; making this Act an emergency measure; and generally relating to the reconfiguration of congressional districts in the State.

Following the enactment of Senate Bill 1, Plaintiff MDPetitions.com, as the sponsor, and Plaintiff Neil C. Parrott, in his capacity as Chairman of Plaintiff MDPetitions.com, subsequently organized and led a campaign to petition Senate Bill 1 to referendum in the November 2012 general election. On July 20, 2012, Defendant Linda H. Lamone, the State Administrator of Elections (hereinafter "Administrator"), certified that the petition had qualified Senate Bill 1 to be placed on the November 2012 general election ballot. Plaintiff MDPetitions.com then intervened and filed suit in the Court challenging the Administrator's certification of the referendum petition.

On August 10, 2012, the Court entered judgment in *Whitley, et al v. Maryland State Board of Elections, et al.*, Case No. 02-C-12-171365, declaring that the petition was legally sufficient to refer Senate Bill 1 to referendum ordering that the legislation be placed on the November 2012 General Election ballot. On August 17, 2012, in a *per curiam* order, the Court of Appeals affirmed the Court's judgment.

On August 20, 2012, the Secretary certified to the State Board and the State Administrator the following text of the ballot question for the referred Congressional Districting Plan:

QUESTION 5
Referendum Petition
Congressional Districting Plan
(Ch. 1 of the 2011 Special Session)

Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.

_____ **For the Referred Law**

_____ **Against the Referred Law**

On August 29, 2012, Plaintiffs filed their Verified Complaint challenging the ballot language for Question 5 for Senate Bill 1.¹ Plaintiffs contend that the language of Question 5 is “plainly insufficient as a matter of law,” and “fails to present the purpose of Senate Bill 1 concisely or intelligently or otherwise permit an average voter to exercise an intelligent choice in a meaningful way.” See Plaintiffs’ Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 1.

On September 4, 2012, Plaintiffs filed a Motion for Summary Judgment requesting the Court to revise the ballot language. The following day on September 5, 2012 Defendants filed their Answer to Plaintiffs’ Verified Complaint, Defendants’ Cross-Motion for Summary Judgment and Declaratory Judgment and their memorandum in support thereof. The Court presents its conclusions below.

STANDARD OF REVIEW

A. Declaratory Judgment Standard

The Court may grant a declaratory judgment in a civil case if:

it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if: (1) An actual controversy exists between contending parties; (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or (3) A party asserts a legal relation, status, right or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

MD. CODE ANN., CTS & JUDC. PROC. § 3-409

¹ Defendants do not challenge Plaintiffs’ standing to seek declaratory and injunctive relief as Defendants concede Plaintiffs have standing to seek judicial review under § 9-209 of the Election Law Article and therefore are not required to establish that the outcome of the election would be affected absent the grant of relief.

B. Summary Judgment Standard

Under Maryland Rule 2-501, “[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.” In ruling on a motion for summary judgment, any inferences drawn from the facts must be in a light most favorable to the non-moving party. *Debbas v. Nelson*, 389 Md. 364, 373 (2005). If the trier of fact can arrive at more than one conclusion based on a genuine issue of material fact, or any deduced inferences, summary judgment is not appropriate. *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 533-34 (2003). The summary judgment rule is therefore not intended to be a substitute for a trial, but it rather serves as a mechanism by which the Court may determine whether a trial is necessary. *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 478 (2007).

C. Judicial Review Standard

The Court’s review of the ballot title and text is “limited to discerning whether the language certified ‘convey[s] with reasonable clarity the actual scope and effect of the measure.’” *Kelly v. Vote kNOW Coalition, Inc.*, 331 Md. 164, 174 (1993) (quoting *Surratt v. Prince George’s County*, 320 Md. 439, 447 (1990)); also see MD. ELEC. LAW §§ 7-103, 7-105, and 12-202.

We are not concerned with the ability of the Court or any other of the numerous advocates on either side of this issue to better draft the ballot language. *Kelly*, 331 Md. at 174-75. The Court is not in the business of rephrasing the language of a ballot title and summary “to achieve the best possible statement of the intent of the amendment. If the chosen language fairly summarizes the intent and the meaning of the proposed amendment, without arguing for or against its adoption, it is sufficient.” *Matter of Proposed Constitutional Amendment Under the*

Designation "Pregnancy," 757 P.2d 132, 137 (Colo. 1988) (cited in *Kelly*, 331 Md. at 174-75). Instead, the Court turns its focus to the "substantive meaning of the language and the ability of the average voter to understand the referred measure." *Kelly*, 331 Md. at 175.

DISCUSSION

The sole issue before the Court is whether Question 5 of the November 2012 General Election ballot is misleading and violates the standards set forth in the Constitution, the Maryland Election Law Article, and case law firmly addressed and established by judicial precedents.² The Constitutional provisions providing for voter input by amendment or referendum, as implemented by the Election Law, require "a clear, unambiguous and understandable statement of the full and complete nature of the issues undertaken to be included in the proposition." *Stop Slots MD 2008 v. State Bd. of Elections*, 424 Md. 163, 189 (2008) citing *Anne Arundel County v. McDonough*, 277 Md. 271, 300 (1976). Further "the contents and purpose of the proposed referendum" or Constitutional amendment must be set forth, in understandable language, "with that clarity and objectivity required to permit an average voter, in a meaningful manner, to exercise an intelligent choice." *Stop Slots MD 2008*, 424 Md. at 189. Section 7-103 of the Election Law Article of the Maryland Code specifically states:

(b) Each question shall appear on the ballot containing the following information:

- (1) a question number or letter as determined under subsection (d) of this section;
- (2) a brief designation of the type or source of the question;
- (3) a brief descriptive title in bold face;
- (4) a condensed statement of the purpose of the question; and

² Plaintiffs are not challenging the language of the notice provided to the electorate from the Department of Legislative Services ("DLS") as they contend that such notice cannot correct what they perceive as defects in the ballot language.

(5) the voting choices that the voter has.

In evaluating the sufficiency of ballot language, § 7-103 requires that “the ballot be complete enough to convey an intelligent idea of the scope and import of the amendment [and] ought not to be clouded by undue detail [or] misleading tendency, whether of amplification, or omission.” *McDonough*, 277 Md. at 301-02. Moreover, where the ballot question used is not the legislative title, but instead a brief summary of the contents or purpose of the proposed act, “the standard by which the questions’ validity will be judged, as with a legislative title, is whether the question posed, accurately and in a non-misleading manner, apprises the voters of the true nature of the legislation upon which they are voting.” *Stop Slots MD 2008*, 424 Md. at 189-92, *citing Kelly*, 331 Md. at 172 (1993).

Plaintiffs contend that the ballot language does not apprise voters of the true nature of Senate Bill 1 in an accurate and non-misleading manner. Specifically, Plaintiffs contend that without any additional clarification, the clauses “based on recent census figures” and “as required by the United States Constitution” are misleading. See Plaintiffs’ Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 10. Plaintiffs also contend that “a plain reading of the language certified by the Secretary suggests that Senate Bill 1 does nothing more than codify a result that is required by the 2010 census or the United States Constitution.” See Plaintiffs’ Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 10. Defendants disagree arguing that the Congressional Districting Plan is based on the 2010 census figures and the state’s congressional districts are to be reapportioned to satisfy the “one-person, one vote” principal. U.S. Const. art. I, §2; *see Wesberry v. Sanders*, 376 U.S. 1, 708 (1964). Defendants further argue that Plaintiffs’ contention that the Congressional Districting Plan “codifies” a result dictated by the 2010 census or the United

States Constitution is not based on a common sense reading because “no reasonable voter” would conclude as such from the language of Question 5. Defendants’ Memorandum in Opposition at 13.

Plaintiffs next argue that the certified descriptive ballot language is inadequate because it does not explain that the referred act makes “material changes to existing congressional districts.” Plaintiffs’ Verified Complaint at ¶ 17. Additionally, Plaintiffs contend Question 5 for Senate Bill 1 “makes no reference to any changes to the boundaries of the congressional districts made by the enactment... nor does it contain any readily understandable geographic references to the new boundaries created by Senate Bill 1 or any reference to the map prepared by the Governor and approved by the General Assembly depicting these new boundaries.” Plaintiffs’ Verified Complaint at ¶ 22. Defendants disagree, pointing out that the voters are not being asked whether they prefer the boundaries used in the past five (5) congressional elections to the ones the General Assembly has established for the next five (5). Defendants’ Memorandum in Opposition at 14. Continuing to adhere to the boundaries established in 2002 would be unconstitutional as the shift in population would not adhere to the “one-vote, one person” principal. Defendants argue that any attempt to be more descriptive would be misleading since voters do not have a choice to return to the former district boundaries.

Plaintiffs also claim that Question 5 fails to inform voters that the boundaries on which they are voting took effect immediately upon the enactment of Senate Bill 1 on October 20, 2011. See Plaintiffs’ Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 13. Defendants respond that the mere fact that the legislation was enacted as an “emergency measure” is not relevant to the General Assembly’s purpose in enacting the

Congressional Districting Plan which is to bring the State into compliance with the constitutional requirements per the results of the 2010 census.

Lastly, Plaintiffs allege that the ballot question prepared and certified is not sufficient to provide a voter with the full and complete nature of the Congressional Districting Plan. See Plaintiffs' Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 13. Article XVI of the Maryland Constitution requires that the Secretary of State provide a fair and concise description of the purpose of the referred legislation, not to fully describe the content of the referred act.

This Court concludes that the ballot question fairly and concisely conveys the substance of the referred enactment. Contrary to Plaintiffs' claims, a review of the ballot language reveals that it does "accurately and in a non-misleading manner, apprise the voter of the true nature of the legislation upon which they are to vote." As required by §7-103(b) of the Election Law Article, the proposed ballot language (Defendants' Exhibit K) contains a "question number or letter as determined under subsection (d) of this section as well as a brief designation of the type or source of the question. The ballot language clearly refers to the "Referendum Petition, Ch. 1 of the 2011 Special Session, Congressional Districting Plan." The source of the question is clearly the referendum. The descriptive title is set forth in boldface type. The voting choices are set forth clearly. Finally, the ballot language contains a brief and concise statement of the purpose of the question that is easily understandable and is presented in a fair and non-discriminating manner.

The plaintiffs are wrong to complain that the condensed statement of the purpose of the question is misleading because it includes the information that the Congressional Districting Plan is based on recent census figures as required by the United States Constitution. As previously

discussed, the Congressional Districting Plan is based on the 2010 census figures and it adopts congressional boundaries that conform to the constitutional requirements for population equality among the State's eight congressional districts. *See Fletcher*, 831 F. Supp. 2d at 894. The Plaintiffs' contention that the certified text suggests that the Congressional Districting Plan "codifies" a result dictated by the 2010 census or the United States Constitution is not based on any common sense reading of that language, because no reasonable voter would conclude from the language of Question 5 that either the 2010 federal census or the federal constitution dictates the precise contours of Maryland's congressional boundaries for the next decade.

Plaintiffs claim that the certified descriptive ballot language is inadequate because it does not explain that the referred act makes "material changes to existing congressional districts" is without merit. Plaintiffs' Verified Complaint at ¶ 17. Plaintiffs complain that the certified text omits any "reference to any changes to the boundaries of the congressional districts made by the enactment" and that it does not "contain any readily understandable geographic references to the new boundaries created by Senate Bill 1 or any reference to the map . . . depicting these new boundaries." Plaintiffs' Verified Complaint at ¶ 22; *see also* Plaintiffs' Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 10. These claims are also without merit. The voters are not being asked whether they prefer the boundaries used in the past five congressional elections to the ones the General Assembly has established for the next five. The ballot language should not misleadingly imply that the previous districting plan could be maintained, consistent with constitutional requirements.

Another alleged deficiency is the omission of the information that the referred act was emergency legislation. As Defendants point out, that information is "not relevant to the General Assembly's purpose in enacting the Congressional Districting Plan—to bring the State into

compliance with constitutional requirements—and therefore its omission affords plaintiffs no basis for relief. The language appears in the legislative title because it must, *see* Md. Const. art. XVI, § 2, and because the legislation was passed by the required super majorities in both houses. The term “emergency measure” is a term of art, and it is not clear that voters would appreciate its very limited significance to the “purpose” of the legislation, which is what the Secretary of State is asked to ‘present . . . concisely and intelligently.’ Md. Const. art. XVI, § 5(b).”

Lastly, Plaintiffs complain that 23 words is not sufficient to provide the voter with the “full and complete nature” of the Congressional Districting Plan. Plaintiffs’ Statement of Grounds and Authority in Support of their Motion for Summary Judgment at 13. Article XVI does not require the Secretary of State to fully describe the *content* of a referred act but requires only that the Secretary of State provide a fair and concise description of the *purpose* of the referred legislation. As Defendants point out, “because efforts to include a full description of the content would be particularly impossible in the space allotted, such efforts would inevitably have been highly selective and thus potentially unfair. Indeed, different proponents and critics of the plan have asserted different virtues and defects in it, underscoring that what is important about the plan or relevant to the voter is not easy to fairly identify or describe.”

In this case, the Secretary of State has fulfilled his constitutional and statutory duty by providing a fair and concise description of the purpose of the Congressional Districting Plan by stating that it “[e]stablishes the boundaries for the State’s eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.” The DLS summary provides additional information including which counties (or parts of counties)

are in each of the eight districts. A voter who wishes to explore in further detail the minute contours of any or all the eight congressional districts may consult the referred act itself.³

During oral argument, when asked whether Plaintiffs had any proposed language that they believed would be more desirable and sufficient under § 7-103 they failed to provide the Court with one succinct proposal.⁴

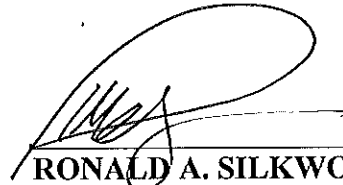
The Court, in making this decision, follows the precedents of Maryland's Court of Appeals in seeking to avoid a misleading ballot title, but firmly follows the proposition that "it is not the function of this court to rephrase the language of the summary and title to achieve the best possible statement of the intent of the amendment. *Matter of Proposed Constitutional Amendment Under the Designation "Pregnancy,"* 757 P.2d 132, 137 (Colo. 1988) (cited in *Kelly*, 331 Md., at 174-75). Accordingly, after reviewing the requirements of § 7-103, the Court finds the Secretary provided a fair and concise description of the purpose of the referred legislation, as required under the Election Law Article.

³ MD. ELEC. LAW, § 7-105(b) and MD. CODE ANN., STATE GOV'T, § 2-1204(1) require the nonpartisan Department of Legislative Services ("DLS") to prepare a "non-technical summary" of the proposal, subject to the approval of the Attorney General, to provide notice of the referendum to the electorate, prior to the election. ³ Plaintiffs do not challenge the language of the "notice" but argue that the DLS "non-technical summary" is inadequate to cure the alleged ballot deficiencies as the "moment of greatest impact" is when the voter is confronted with the ballot in the voting booth. *Surratt*, 320 Md. at 450. Despite Plaintiffs' argument, the Court is convinced that the "non-technical summary" prepared by the DLS assists in providing the electorate with sufficient notice conveying to the voters the full purpose of the Congressional Districting Plan as the DLS summary, along with a specimen ballot will be mailed to voters at least one week prior to the election. See MD. ELEC. LAW, §§ 7-105(a), 8-102, 9-314; COMAR 33.05.07.01B. Furthermore, the best possible understanding of such legislation can be obtained by voters who seek full information from other sources, such as Maryland government websites.

⁴ Plaintiffs' Exhibit One (1) provided the Court with four (4) ballot language options which they believe would comply with the requirements of § 7-103 but they failed to point to one option that would be preferable to them.

CONCLUSION

For the reasons set forth in this memorandum opinion, the Court shall enter the attached order hereto.

 9/6/12

RONALD A. SILKWORTH, Judge
Circuit Court for Anne Arundel County