

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

NEIL C. PARROTT, et al.,

Plaintiffs,

v.

JOHN MCDONOUGH, et al.,

Defendants.

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No. 02-C-12-172298

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**MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS’
CROSS-MOTION FOR SUMMARY JUDGMENT AND FOR DECLARATORY
JUDGMENT IN FAVOR OF DEFENDANTS**

INTRODUCTION

The federal constitution requires a state’s congressional districts to be reapportioned following each decennial census, and the resulting apportionment must satisfy “one-person, one vote” principles. U.S. Const. art. I, § 2; *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). As a three-judge federal court observed in upholding the State’s 2011 redistricting plan against constitutional challenges, “the census count represents the best population data available,” and thus “is the only basis for good-faith attempts to achieve population equality.” *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 894 (D. Md. 2011) (quoting *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (internal citations omitted), *aff’d*, ___ U.S. ___, No. 11-1178, 2012 U.S. LEXIS 4811 (June 25, 2012).

Because of population shifts in Maryland over the past decade, the congressional districts established in 2002 based on 2000 census data, *see* 2002 Laws of Maryland, ch. 340, no longer satisfy the one-person, one-vote requirement. As a result, the State could not constitutionally conduct an election using congressional boundaries based on the 2000 census and was required to adopt new congressional boundaries that achieve population equality among the State's eight congressional districts. *Wesberry*, 376 U.S. at 7-8. The General Assembly complied with constitutional mandates by enacting legislation, based on 2010 census data, in its October 2011 special session. 2011 Laws of Maryland Spec. Sess. ch. 1. The legislation passed by three-fifths votes in both houses, and thus became effective as "emergency legislation" (like the 2002 legislation) under Article XVI, § 2 of the Constitution, upon the Governor's signature on October 20, 2011.

Delegate Neil Parrott voted against the measure, and pursued his opposition to the legislation after it had become law by sponsoring a referendum petition. On July 20, 2012, the State Board of Elections determined that his petition drive had garnered signatures from 59,201 voters in the seven months since the law was enacted, slightly more than the 55,736 signatures required to place the measure on the November 2012 ballot.

Last month, proponents of the referred law sought to dislodge the question from the ballot by resorting to the courts. *Whitley v. Maryland State Bd. of Elections*, __ Md. __, No. 133, Sept. Term 2011, 2012 Md. Lexis 456 (Aug. 17, 2012). They failed, and

now, apparently, it is the opponents' turn. Delegate Parrott and MDPetitions.com have brought suit, complaining that the description of the question that will appear on the ballot does not convey every detail of the enactment that the plaintiffs think important to their cause. Of course, any ballot question that "present[s] the purpose" of a complex statute "concisely and intelligently" in accordance with the requirements of Article XVI, § 5(b) of the Maryland Constitution, will require choices between information that is essential and information that is not. *See Kelly v. Vote kNOW Coalition*, 331 Md. 164, 174, 177 (1993) (holding that language indicating that legislation established exceptions to the parental notification provision, without specifying the nature of those exceptions "concisely and intelligently" summarized the purpose of the legislation). This is particularly true when, as here, the referred law is a complex enactment that satisfies the one-person, one-vote principle by describing the contours of eight districts in 45 pages of minute detail—down to the census tract and even to the block. *See* 2011 Laws of Maryland Spec. Sess. ch. 1.

The plaintiffs ask this court to enter an order requiring the Secretary of State "to prepare revised ballot language for Question 5 that complies with the requirements of the law." (Pls.' Proposed Order ¶ 4.) Plaintiffs attach to their memorandum the affidavits of six registered voters who claim to have understood the referred legislation only after viewing a map, but plaintiffs do not claim that the ballot must include such a map. Tellingly, the plaintiffs do not even provide the Court with the revisions they ask the

Court to make, perhaps because they realize that any alternative could be faulted for omitting some detail that proponents of the legislation or opponents of the legislation think important. But, as the Court of Appeals has repeatedly emphasized, these choices are not for advocates to make, and they are not for the courts to make. *See Stop Slots Md. 2008 v. State Bd. of Elections*, 424 Md. 163, 207 (2012); *Kelly v. Vote kNOw Coalition*, 331 Md. at 170. The Constitution charges the Secretary of State with this task, *id.*, directing that “the Secretary of State shall prepare and submit a ballot title of each such measure in such form as to present the purpose of said measure concisely and intelligently.” Md. Const. art. XVI, § 5(b).

The ballot language certified by the Secretary of State, together with the more detailed “non-technical summary” of the legislation that will be sent to voters in their specimen ballots, “accurately and in a non-misleading manner apprises the voters of the true nature” of Chapter 1 of the 2011 Special Session. *Stop Slots*, 424 Md. at 191 (quoting *Kelly*, 331 Md. at 172). The voters will have an opportunity to decide for themselves whether they support the legislation or oppose it. Delegate Parrott will no doubt seek to influence voters to join him in opposing the legislation, and proponents of the legislation will no doubt seek to influence voters to support the law, just as opposing parties will advocate for and against the other measures that will appear on the ballot. That is what campaigns are for. Challenges to the “content and arrangement” of the ballot under § 9-209 of the Election Law Article, however, should not be used as an

opportunity to enlist the courts in this advocacy. The Court should reject the plaintiffs' claims, grant summary judgment in favor of the defendants, enter a declaratory judgment stating that the Secretary of State's certified ballot language satisfies constitutional and statutory requirements, and leave the rest up to the voters.

STATEMENT OF FACTS

A. The Congressional Districting Plan

On July 4, 2011, the Governor's Redistricting Advisory Committee was appointed with five members. *Fletcher*, 831 F. Supp. 2d at 891. The committee held 12 public meetings across the State, received more than 350 comments from members of the public, and considered several proposed redistricting plans from third-party groups. *Id.* On October 4, 2011, the committee presented its proposed plan, and after receiving additional comments, the Governor announced that he would be submitting legislation to enact a plan "substantially similar" to the proposal. *Id.*

The redistricting legislation defines the boundaries of eight congressional districts, "the same number the State had after the 2000 census." *Id.* Like the plan adopted after the 2000 census, the 2011 legislation "creates two majority African-American congressional districts": the Seventh District, which includes large portions of Baltimore City and its surrounding suburbs, and the Fourth District, which is centered in Prince George's County, which lies adjacent to the District of Columbia. *Id.* The districts are apportioned using the adjusted population base of 5,772,231, the result of excluding from

the redistricting database 1,321 inmates who were determined to have a “pre-incarceration address outside Maryland.” *Id.* at 893-94.

Because the adjusted population is not evenly divisible by eight, it would not be possible to have all eight districts with exactly equal population. The State’s plan achieves the most equitable distribution possible by establishing seven equally-populated districts with 721,529 people in each, and an eighth district having one less person. *Id.*

On October 20, 2011, the Maryland General Assembly enacted and the Governor signed Senate Bill 1 of the 2011 Special Session (the “Congressional Districting Plan”). 2011 Md. Laws 1st Spec. Sess. ch. 1. 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.

2011 Md. Laws 1st Spec. Sess. ch. 1.

Plaintiff MDPetitions.com organized and sponsored a successful effort to place the Congressional Districting Plan on Maryland’s 2012 General Election ballot. (Compl. ¶ 10.) On July 20, 2012, the State Board notified the petition sponsor that it had determined that the petition was “legally sufficient” and “satisfied the requirements to place the question on the November 2012 ballot.” (Compl. ¶ 11.)

B. The State's Preparation of Ballot Language and a Non-Technical Summary.

In accordance with § 7-103(c) of the Election Law Article, Defendant Secretary of State John McDonough prepared and certified to Defendants Maryland State Board of Elections (the “State Board”) and State Administrator of Elections Linda Lamone (the “State Administrator”) the required information that will appear on the ballot for the General Election on November 6, 2012. Article XVI, § 5(b) of the Maryland Constitution requires that all referred enactments “be submitted separately on the ballots to the voters of the people.” If an enactment “contain[s] more than two hundred words, the full text shall not be printed on the official ballots, but the Secretary of State shall prepare and submit a ballot title of each such measure in such form as to present the purpose of said measure concisely and intelligently.” Md. Const. art XVI, § 5(b). “The ballot title may be distinct from the legislative title, but in any case the legislative title shall be sufficient.” *Id.*¹

In accordance with the constitutional requirement, § 7-103(c) of the Election Law Article provides that the Secretary of State shall prepare the text that will appear on the

¹ Contemporary legislative titles consist of three parts: the short title, the purpose paragraph, and the function paragraphs. See Maryland Dep’t of Legis. Servs., *Legislative Drafting Manual 2012* 37-38 (Sept. 2011), available at http://dls.state.md.us/data/legandana/legandana_bildra/legandana_bildra_bildraman/2012LegislativeDraftingManual.pdf. The short title is a finding aid that gives a “general indication of the content of a bill.” *Id.* at 38. It is the purpose paragraph of the title, not the short title, that “describes in constitutionally acceptable detail what the bill does. . . .” *Id.* at 39. This is the part of the title to which the constitutional test of Article III, § 29 of the Maryland Constitution is applied.” *Id.*

ballot for questions relating to an enactment of the General Assembly which is petitioned to referendum. *See* Md. Code Ann., Election Law (“EL”) § 7-103(c)(1). This text must contain:

- (1) a question number . . . ;
- (2) a brief designation of the type or source of the question;
- (3) a brief descriptive title in boldface type;
- (4) a condensed statement of the purpose of the question; and
- (5) the voting choices that the voter has.

EL § 7-103(b). When a statewide ballot question is to be presented to the voters in a November general election, the Secretary of State must “certify” this information to the State Board by the third Monday in August. EL § 7-103(c).

On August 20, 2012, the third Monday in August this year, the Secretary certified to the State Board and the State Administrator the 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

The Secretary of State also provided ballot language for six other questions, three concerning constitutional amendments, two concerning referenda by petition, and one concerning a referendum by statutory enactment.

The nonpartisan Department of Legislative Services (“DLS”) is charged with preparing a “non-technical summary” of the proposed constitutional amendment, subject to the approval of the Attorney General. EL § 7-105(b); *see also* Md. Code Ann., State Gov’t § 2-1204(1) (describing functions of DLS). The DLS summary must contain “a brief statement, prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the question.” EL § 7-105(b)(1).

On August 27, 2012, DLS transmitted the summary prepared for the Congressional Districting Plan, which had been approved by the Attorney General, as required by § 7-105(b)(2)(ii). The DLS summary for the Congressional Districting Plan reads:

QUESTION 5: REFERENDUM BY PETITION
**Statutory Enactment Petitioned to Statewide Referendum –
Congressional Districting Plan**

Chapter 1 of the Special Session of 2011 (Senate Bill 1)

Summary

This Act establishes a new congressional districting plan for the election of Maryland’s eight representatives in the U.S. House of Representatives based on new census figures, as required by law.

The U.S. Constitution requires each state to redraw its congressional district boundaries every 10 years after a census of the United States is taken by the federal government. Several legal requirements govern the process of drawing district lines. First, federal law requires that district

boundaries be drawn so that the populations in each district are equal. Second, under federal law, district boundaries must be drawn so that minorities have an equal opportunity to participate in the electoral process and elect a representative of their choice. Finally, Maryland law requires that prisoners be counted at their last known address if they were Maryland residents before their incarceration. Prisoners who were not residents of Maryland before being incarcerated must be excluded from the census data that is used to establish the districts.

In the fall of 2011, the State of Maryland enacted a new congressional districting plan based on census data collected in 2010. The plan subsequently was challenged in federal court, but in December 2011 a three-judge panel of the U.S. District Court for the District of Maryland ruled that the plan was legal and constitutional. On June 25, 2012, the U.S. Supreme Court affirmed the district court ruling.

The State's plan provides that the 1st Congressional District consists of the entire Eastern Shore (Caroline, Cecil, Dorchester, Kent, Queen Anne's, Somerset, Talbot, Wicomico, and Worcester counties) and parts of Baltimore, Carroll, and Harford counties; the 2nd Congressional District consists of parts of Anne Arundel, Baltimore, Harford, and Howard counties and parts of Baltimore City; the 3rd Congressional District consists of parts of Anne Arundel, Baltimore, Howard, and Montgomery counties and parts of Baltimore City; the 4th Congressional District consists of parts of Anne Arundel and Prince George's counties; the 5th Congressional District consists of the entire Southern Maryland counties of Calvert, Charles, and St. Mary's and parts of Anne Arundel and Prince George's counties; the 6th Congressional District consists of the entire Western Maryland counties of Allegany, Garrett, and Washington and parts of Frederick and Montgomery counties; the 7th Congressional District consists of parts of Baltimore and Howard counties and parts of Baltimore City; and the 8th Congressional District consists of parts of Carroll, Frederick, and Montgomery counties.

On August 20, 2012, the State Board posted on its internet website the Secretary of State's ballot language for the question, the DLS summary, and the full text of Chapter 1 itself. *See* www.elections.state.md.us. In addition, the DLS summary will be provided to voters along with the ballot question, by a specimen ballot mailed at least one week

before the election. *See* EL §§ 7-105(a), 8-102, 9-214; COMAR 33.05.07.01.B (requiring pre-election mailing).

The State Board is required to certify the “content and arrangement” of each ballot style used throughout the State, on a statutory timetable. EL § 9-207(a). The last day on which the State Board may certify the content and arrangement of the ballot styles to be used in this year’s general election is September 11, 2012. *See* EL § 9-207(a)(2)(i) (certification must occur 55 days before date of election in presidential election year). Within 48 hours of that certification, the State Board must provide each local board of elections the appropriate ballots for that local board’s election districts. *See* EL § 9-207(c). Compliance with these statutory deadlines requires finalization of the ballot language for 2012 by September 13, 2012.

ARGUMENT

I. STANDARD OF REVIEW

Plaintiffs challenge that portion of the certified language that will appear on the ballot that comprises a “condensed statement of the purpose of the question.” EL § 7-103(b)(4). Article XVI of the Maryland Constitution requires that the Secretary of State submit a ballot title that “present[s] the purpose of [the] measure concisely and intelligently.” Judicial review “is limited to discerning whether the language certified ‘convey[s] with reasonable clarity the actual scope and effect of the measure.’ ” *Stop Slots*, 424 Md. at 204 (citations omitted); *see also Kelly*, 331 Md. at 173 (requiring

“understandable language” that summarizes the “actual scope and effect of the measure” with “reasonable clarity.” (quoting *Surratt v. Prince George’s County*, 320 Md. 439, 447 (1990)).²

Under Maryland Rule 2-501, the grant of a motion for summary judgment is appropriate “if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” *Barclay v. Briscoe*, __ Md. __, No. 41, Sept. Term, 2011, 2012 Md. LEXIS 385 at *16 (June 27, 2012) (quoting Rule 2-501(f)).

II. THE BALLOT QUESTION FAIRLY AND CONCISELY CONVEYS THE SUBSTANCE OF THE REFERRED ENACTMENT.

Contrary to the plaintiffs’ claim, the certified language presents the purpose of the referred measure concisely and intelligently. The language “accurately and in a non-misleading manner, apprises the voters of the true nature of the legislation upon which they are voting.” *Stop Slots*, 424 Md. at 189-192 (citations omitted). This Court should therefore reject the plaintiff’s challenge, grant summary judgment for defendants, and enter a declaratory judgment upholding the challenged ballot language.

² Plaintiffs devote considerable space to the argument that they have standing to seek declaratory and injunctive relief. (Pls.’ Mem. 6-8.) Because the plaintiffs have standing to seek judicial review under § 9-209 of the Election Article, the defendants agree that the plaintiffs have standing and are not required to establish that the outcome of the election would be affected absent the grant of relief. The defendants disagree however that the plaintiffs’ proffered affidavits of six registered voters would be sufficient to make that showing by clear and convincing evidence. (*See Ex. 1 to Pls.’ Mem.*).

Consistent with the Election Law Article, the ballot language that will appear on the November ballot contains a “condensed statement of the purpose of the question” presented to the voters, EL § 7-103(b)(4), in prose that is “easily understandable by voters,” and it “present[s] . . . the question[] in a fair and non-discriminatory manner,” EL § 9-203. *See Stop Slots*, 424 Md. at 205 (holding that challenged language sufficiently described and explained the constitutional amendment at issue). 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. (Pls.’ Mem. 10.) 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. Indeed, the plaintiffs’ own successful petition contained the information on the census and constitutional requirements about which they now complain. That language is conveys,

in more words, essentially the same information conveyed by the ballot language: “The United States Constitution requires congressional districts to be redrawn following a census that is conducted every ten years. 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.” *See* Ex. 1 to Pls.’ Mem. (attaching petition page to affidavits of six registered voters).

The plaintiffs also erroneously complain that the certified descriptive ballot language is inadequate because it does not explain that the referred act makes “material changes to existing congressional districts.” (Compl. ¶ 17.) The 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.” (Compl. ¶ 22; *see also* Pls.’ Mem. 10.) These contentions are wrong for several reasons. The plaintiffs seem to be laboring under the misapprehension that the boundaries established in 2002 could be used without change in 2012. Of course, that would not be constitutional. 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, and the ballot language should not misleadingly imply that the previous districting plan could be maintained, consistent with constitutional requirements. It would be possible to add

geographic references; both the DLS non-technical summary that will be sent to voters and the petition circulated by Delegate Parrot and MDPetitions.com contain some information about which district include which counties and portions of counties. But one may reasonably question how informative those lengthy descriptions are. The ballot language from 1962 that the plaintiffs point to as a model described a map that could be drawn to track county lines to a considerable degree. That, of course, was before the Supreme Court held that near-absolute population equality must be the predominant factor in drawing district lines, not county lines. *See Wesberry v. Sanders*, 376 U.S. 1 (1964). The legislation that went before the voters in 1962 did not honor one person, one-vote principles, *see Maryland Citizens Committee for Fair Congressional Districting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966); the 2012 districting plan, by contrast, does meet this constitutional requirement, *see Fletcher v. Lamone*, 831 F. Supp. 2d 887 (2012). Moreover, the legislative title 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,” but instead describes the law’s purpose as “specifying certain ward, election district, and precinct boundaries,” and the plaintiffs acknowledge, as the must, that the legislative title is constitutionally sufficient. (Compl. ¶¶ 14, 15.)

The only other alleged deficiency is the omission of the information that the referred act was emergency legislation. (Compl. ¶ 17; Pls.’ Mem. 13.) 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 supermajorities 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).

The plaintiffs complain that 23 words is not sufficient to provide the voter with the “full and complete nature” of the Congressional Districting Plan (Pls.’ Mem. 13), but that is not what Article XVI requires. It 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. Furthermore, 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 any case, as the Court of Appeals has observed, judicial review of the ballot language is not “concerned with the question of whether [the court] or any of the

numerous advocates on either side of this issue are capable of drafting better ballot language.” *Kelly v. Vote kNOw Coalition*, 331 Md. at 174. And “it is legally irrelevant” whether another version of the condensed statement might in some respect be preferable, because, under the Election Law Article, the “responsibility for th[e] task [of drafting the ballot language] in this State rests with the Secretary of State.” *Id.*, 331 Md. at 170.

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.

CONCLUSION

Plaintiffs’ Motion for Summary Judgment should be denied and Defendants’ Cross-Motion for Summary Judgment should be granted. The court should declare that the ballot language certified to the State Board of Elections fairly and concisely conveys the substance of the referred enactment in accordance with constitutional and statutory requirements.

Respectfully submitted,

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