

NEIL C. PARROTT, *et al.*,
Appellants,
v.
JOHN MCDONOUGH, *etc., et al.*,
Appellees.

* IN THE
* COURT OF SPECIAL APPEALS
* OF MARYLAND
* September Term, 2012
* No. 1445

* * * * *
CERTIFICATE OF SERVICE

I certify that on this 16th day of July, 2013, two copies of the Brief of Appellee in the captioned case were served by first-class mail on:

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On Appeal from the Circuit Court for Anne Arundel County
(Ronald A. Silkworth, Judge)

BRIEF AND APPENDIX OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

In this appeal, appellants Neil Parrott and MDPetitions.com (collectively, “MDPetitions.com”) challenge the decision of the Circuit Court for Anne Arundel County that the ballot language for Question 5 on the November 2012 General Election Ballot, the Congressional Districting Plan, “fairly and concisely conveys the substance of the referred enactment.” (E. 206.) Finding that the ballot language accurately and in a

non-misleading way apprised voters of the nature of the law, the circuit court rejected MDPetitions.com's request to order the Secretary of State to draft new ballot language. (E. 206.) After the Court of Appeals denied the appellants' petition for writ of certiorari, the voters approved the law during the November 2012 election.

After each decennial census, the United States Constitution requires the State's congressional districts to be reapportioned in conformance with "one-person, one-vote" principles. U.S. Const. art. I, § 2; *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Due to population changes, the congressional districts established in 2002, which had been based on 2000 census data, *see* 2002 Laws of Maryland ch. 340, no longer satisfied the one-person, one-vote requirement. As a result, the State was required to establish new congressional boundaries that achieved population equality among the State's eight congressional districts. *Wesberry*, 376 U.S. at 7-8. The General Assembly did so by enacting legislation, based on 2010 census data, in its October 2011 special session. 2011 Laws of Maryland Spec. Sess. ch. 1. Governor O'Malley signed the act into law on October 20, 2011.

Following referendum procedures established in the Maryland Constitution and Elec. Law Article, MDPetitions.com succeeded in having the Congressional Districting Plan placed on the 2012 General Election ballot. Pursuant to Article XVI, § 5(b) of the Constitution and § 7-103(c) of the Elec. Law Article, Maryland's Secretary of State, John McDonough, prepared and certified ballot language that identified the law subject to referendum and included the following condensed statement of the purpose of the law:

“Establishes the Boundaries for the State’s eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.” (E. 108.)

On August 29, 2012, MDPetitions.com filed this action, seeking declaratory and injunctive relief ordering Secretary McDonough to draft new ballot language. (E. 8-19.)

On September 6, 2012, after a hearing on the parties’ cross-motions for summary judgment, the circuit court denied MDPetitions.com’s motion, granted the State’s motion, and issued a declaratory judgment that “the ballot language certified to the State Board of Elections fairly and concisely conveys the substance of the” Congressional Districting Plan. (E. 211.) On September 7, 2012, the Court of Appeals denied MDPetitions.com’s petition for writ of certiorari. *Parrott v. McDonough*, 428 Md. 543 (2012) (E. 212.)

QUESTION PRESENTED

Did the circuit court correctly declare that the ballot language certified by the Secretary of State with respect to the Congressional Districting Plan complies with legal requirements where the language concisely and intelligently presented the purpose of the plan?

STATEMENT OF FACTS

In 2011, to comply with the requirement of the United States Constitution that congressional districts must be reapportioned every 10 years to achieve population equality among a state’s congressional districts, Maryland undertook the process of establishing new congressional boundaries based on the 2010 census. On July 4, 2011, the five members of the Governor’s Redistricting Advisory Committee were appointed.

Fletcher v. Lamone, 831 F. Supp. 2d 887, 891 (D. Md. 2011). The committee held 12 public meetings across the State, received more than 350 comments from members of the public, considered several proposed redistricting plans from third-party groups, and ultimately proposed a refined congressional redistricting plan that was compliant with the one-person, one-vote requirement. *Id.* Governor O'Malley subsequently submitted legislation to enact a plan "substantially similar" to the proposal, *id.*, which divided the State's eight congressional districts into seven districts containing 721,529 people each, and one district containing 721,528 people. *Id.* at 893-94.

On October 20, 2011, the Maryland General Assembly enacted, and the Governor signed, Senate Bill 1 of the 2011 Special Session. 2011 Md. Laws 1st Spec Sess. ch. 1. (E. 64-105.) The legislative title of the 45-page act is "Congressional Districting Plan," and the title contains the following description:

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.

(E. 64.) The bill was designated by its sponsors as "emergency legislation" and because it received three-fifths votes in both houses, it became effective immediately upon the Governor's signature pursuant to Article XVI, § 2 of the State Constitution on October 20, 2011.

Following referendum procedures established in the Maryland Constitution and Election Law Article, appellant MDPetitions.com successfully organized and sponsored a

drive to place the Congressional Districting Plan placed on the 2012 General Election ballot. On August 20, 2012, pursuant to Article XVI, § 5(b) of the Constitution and § 7-103(c) of the Election Law Article, Maryland’s Secretary of State, John McDonough, prepared and certified the following ballot language for the referendum question:

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

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

(E. 108.)

Pursuant to § 7-105(b) of the Election Law Article, the nonpartisan Department of Legislative Services also issued a detailed, non-technical summary of the Congressional Districting Plan, which provides:

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.

(E. 117-18.) The summary, which was transmitted to the State Board of Elections on August 27, 2012 (E. 110), was then forwarded to voters, along with the ballot language,

by a specimen ballot mailed before the election. *See* Md. Code Ann., Elec. Law §§ 7-105(a), 8-102, 9-214; COMAR 33.05.07.01.B.

On November 6, 2012, in the 2012 General Election, the voters approved the Congressional Districting Plan with more than 64% of the vote in favor. *See* Official 2012 Presidential General Election results for All State Questions, available at http://www.elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a trial court's ruling on summary judgment and entry of a declaratory judgment, this Court applies "a non-deferential standard to determine whether the trial court erred as a matter of law in entering summary judgment" and "whether the trial court's declaratory judgment was correct as a matter of law." *Long Green Valley Ass'n v. Bellevalle Farms, Inc.*, ___ Md. ___, ___, 2013 Md. LEXIS 370, *29-*30 (June 24, 2013).

II. QUESTION 5 CONCISELY AND INTELLIGENTLY CONVEYS THE PURPOSE OF THE REFERRED LAW.

The circuit court properly declared that the ballot language certified by the Secretary of State complied with legal requirements because the language concisely and intelligently presented the purpose of the Congressional Districting Plan. The ballot language was not required to summarize the content of the 45-page act, nor to present a

statement of legislative purpose slanted to advance the political agenda of any individual, party, or special interest. Instead, the ballot question is required, “accurately and in a non-misleading manner, [to] apprise[] the voters of the true nature of the legislation upon which they are voting.” *Anne Arundel County. v. McDonough*, 277 Md. 271, 296 (1976). The ballot language for Question 5 did so.

In the context of a challenge to referendum ballot language, judicial review “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 Coal.*, 331 Md. 164, 174 (1993) (quoting *Surratt v. Prince George’s County*, 320 Md. 439, 447 (1990)). The question is not whether this Court, the trial court, or any of the parties may have been capable of drafting “better ballot language,” or to have more effectively conveyed the intent of the act. *Kelly*, 331 Md. at 174. “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.” *Id.* at 174-75 (quoting with approval *Matter of Proposed Constitutional Amendment Under the Designation ‘Pregnancy,’* 757 P.2d 132, 137 (Colo. 1988)). The ballot language for Question 5 satisfies this test.

Article XVI, § 5 of the Maryland Constitution requires that, where laws referred for referendum contain more than two hundred words, “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.” Thus, the Secretary of State’s obligation is to draft a concise summary of the purpose, not the content, of a referred law.

The Election Law Article requires each that each ballot question contain 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 boldface type;
- (4) a condensed statement of the purpose of the question; and
- (5) the voting choices that the voter has.

Md. Code Ann., Elec. Law § 7-103(b). Ballots are further required to “present all . . . questions in a fair and nondiscriminatory manner.” Md. Code Ann., Elec. Law § 9-203(2). Thus, the Secretary of State is required to “certify language with the ‘clarity and objectivity required to permit an average voter, in a meaningful manner, to exercise an intelligent choice.’” *Kelly*, 331 Md. at 172 (quoting *McDonough*, 277 Md. at 300).

The Question 5 ballot language certified by the Secretary of State satisfies all constitutional and statutory requirements. It identifies a question number, identifies that it is a referendum petition, includes the descriptive title “Congressional Districting Plan,” along with the chapter law reference, and identifies the choices the voter has (*i.e.*, voting for or against the referred law). The ballot language also includes as a condensed, concise statement of the purpose of the law: “Establishes the Boundaries for the State’s eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.” All elements of this statement are undeniably accurate: (1) the Congressional Districting Plan establishes the boundaries of the State’s eight

congressional districts; (2) it does so based on the 2010 census data; and (3) the State was required by the United States Constitution to establish boundaries for its congressional districts based on that census data. The 23-word statement is also undeniably “concise[],” as required by the Constitution, and “condensed,” as required by statute.

MDPetitions.com erroneously contends the ballot language is “misleading and insufficient” in two respects, by failing to apprise voters of “the full and complete nature of the proposed law,” and by failing to apprise voters that the law made changes to the boundaries of the congressional districts that were in place through 2010. Brief of Appellants at 10. Neither contention has merit. Although MDPetitions.com identifies a number of specific issues with the ballot language on Question 5, its basic contention is that the language is defective because it failed to inform voters that the primary purpose behind the Congressional Districting Plan, according to it, “*was* the creation of a politically gerrymandered map.” Brief of Appellants at 11 (emphasis in original). In essence, the appellants, a member of the minority party in the House of Delegates who voted against the law and an entity founded by him to bring referendum challenges to State laws, asked the circuit court to compel the Secretary of State to adopt their own view of the law, and to draft ballot language reflecting that view. The Constitution, statutes, and appellate precedent of this State offer no support for their position.

As set forth above, the Constitution, in § 5 of Article XVI, requires that the ballot language “present the purpose of said measure concisely and intelligently,” and statute requires a “condensed statement of the purpose of the question.” Neither calls for the

Secretary of State to include a characterization of the law favored by the backers of the referendum petition.

Nor do the cases on which MDPetitions.com relies support their criticisms of the Question 5 ballot language. In both *McDonough* and *Surratt*, the Court of Appeals found the ballot language at issue in those cases to be affirmatively misleading. In *McDonough*, the ballot language at issue asked voters to “vote for or against rezoning,” when the real question before the voters was not the rezoning itself, but 41 separate amendments to a rezoning plan that would actually have resulted in the affected parcels not being rezoned. 227 Md. at 297-300. The ballot language did not identify any aspect of the purpose behind the amendments and, thus, was found to be misleading. *Id.* at 300. Similarly, in *Surratt*, the ballot language described the law as providing ““that in all pending and future claims the County will only waive its immunity in those instances where its officers and employees are liable,”” but the Court of Appeals found that the real purpose of the law was “to effect a total repeal of the waiver of governmental immunity.” 320 Md. at 448. Thus, the Court found, the ballot language in that case was also affirmatively misleading.

By contrast, in *Kelly v. Vote kNOW Coalition of Maryland, Inc.*, the Court of Appeals upheld ballot language describing an abortion law that had been petitioned to referendum. One of the aspects of that ballot language that was challenged was a statement that a purpose of the law was “to provide certain exceptions to the requirement that a physician notify an unmarried minor’s parent or guardian prior to minor’s abortion.” 331 Md. at 168. The plaintiffs in *Kelly* contended that the failure to identify

the particular exceptions made the ballot language too “vague and ambiguous” to permit “the average voter to discern the true nature, scope and effect of the referred measure.” *Id.* at 170, 176-77. Rejecting that contention, and highlighting the limitations inherent in the need to be concise, the Court found it sufficient that the language identified the existence of exceptions without identifying the content of the particular exceptions. *Id.* at 177. Indeed, had an attempt been made to identify and describe the particular exceptions, one or more groups would likely have complained that doing so would have rendered the language misleading. *Id.* Similarly in this case, the ballot language identified that the referred law established the boundaries of Maryland’s congressional districts without attempting to summarize the content of the boundaries themselves. Doing so, as the Court of Appeals recognized in *Kelly*, “concisely and intelligently” summarizes the purpose of the law. *Id.*

Unlike the language at issue in *McDonough* and *Surratt*, the ballot language used for Question 5 was not misleading at all. It identified truthfully that the referred law established the boundaries for Maryland’s eight congressional districts, that doing so was based on recent census figures, and that the establishment of those boundaries was required by the federal Constitution. This language is a concise, informative description that fairly relates the purpose of the redistricting to voters, and that concision should not be confused with deception or negligence.

Nor do any of the appellants’ specific complaints have merit. First, MDPetitions.com contends that the ballot language was required to state specifically that the new congressional boundaries were changed from the boundaries that preceded them.

However, no reasonable voter could have failed to understand that the boundaries would be different. The ballot language stated that the law “[e]stablishes” the boundaries for the districts, not that it maintained, reauthorized, or continued existing boundaries. A statement that this law *establishes* boundaries is entirely inconsistent with an understanding that it may have left existing boundaries in place. Moreover, any statement that implied that the voters had a choice between the old boundaries and the new ones would have been misleading. As a result of the 2010 census, the old boundaries were no longer constitutional, and they could not have been resurrected by a vote against the law. As the circuit court correctly observed: “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.” (E. 207.)

Second, MDPetitions.com argues that the ballot language misleadingly suggests that the United States Constitution required precisely the legislative boundaries embodied in the Congressional Districting Act. Brief of Appellants at 12. Again, no reasonable voter could have understood that from the ballot language issued. Had the boundaries been dictated by the United States Constitution, the State’s voters would obviously not be entitled to any say whatsoever in approving or disapproving them. Moreover, the reference to the United States Constitution clearly modifies the requirement to establish boundaries “based on recent census figures,” and cannot reasonably be read otherwise. On the other hand, it is an undeniable fact that the United States Constitution required the

establishment of new congressional boundaries based on the recent census figures, and that the law was designed to comply with that requirement.

Third, to the extent the appellants believe that the ballot language should have included more specific information about the county borders that are crossed by district boundaries and vice versa, or other specific content of the 45-page law, that was not required by the Constitution, statute, or precedent. Drafting ballot questions requires choosing between essential and nonessential information. *See Kelly*, 331 Md. at 174, 177 (upholding language mentioning the existence of exceptions to parental notification requirements for abortions without specifically enumerating those exceptions). The Congressional Redistricting Plan contains 45 pages of minutiae regarding district lines that could not easily be summarized. Given the limitations on word count, any attempt to summarize the content would necessarily have been highly selective, and thus potentially unfair, subjecting the language to attack for having left out important content or improperly emphasized certain content. *Kelly*, 331 Md. at 177 (had the Secretary of State attempted to summarize the contents of exceptions to a parental notification requirement, or to have used ballot title language for certain of them, one group or another may have claimed it rendered the language misleading). Moreover, more specific information about the boundaries of the districts was contained in the much longer summary prepared by the non-partisan Department of Legislative Services, which was distributed to voters in advance of the election. The Secretary is not required to provide an “abstract” of the referred act and the referred language does not have to specify the means by which the

legislative purpose is to be accomplished. *See Dutton v. Tawes*, 225 Md. 484, 499 (1961).¹

Fourth, MDPetitions.com contends that the ballot language was misleading for failing to identify that the Congressional Districting Plan was “emergency legislation.” It is unclear what message MDPetitions.com believes would have been conveyed to voters by including this fact in the ballot language, but use of that term would have almost certainly been misleading to more voters than any who would have been enlightened by it. Emergency legislation, defined in § 2 of Article XVI of the Constitution, is the term of art used to describe legislation passed by at least a three-fifths majority of both houses of the General Assembly and identified as emergency legislation, which allows the law not to be suspended awaiting the result of the referendum vote. It is unclear how a failure to include in the ballot language that the Congressional Districting Plan was passed as emergency legislation could possibly have misled any voter regarding the purpose, or true nature, of the law.

In sum, the Question 5 ballot language concisely and objectively identified the purpose of the law, without any attempt to describe the specific content of the act or the way in which it accomplished its purpose. As such, it complies with Maryland law.

¹ Notably, the ballot language from 1962 that the plaintiffs point to as a model described a map that largely corresponded to county lines, which made boundaries easy to describe. That ballot language, of course, was written before the Supreme Court held that near-absolute population equality, not county lines, must be the predominant factor in drawing district lines. *See Wesberry*, 376 U.S. 1. 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, *see Fletcher*, 831 F. Supp. 2d at 887.

CONCLUSION

For the forgoing reasons the judgment of the Circuit Court for Anne Arundel County should be affirmed.

Respectfully submitted,

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Rule 8-504(a)(9) Certification: This brief has been prepared with proportionally spaced type: Times New Roman - 13 point.

TEXT OF PERTINENT PROVISIONS
(Rule 8-504(a)(8))

Constitution of Maryland, Article I

Section 2. Registration of voters

The General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless his name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

Annotated Code of Maryland, Election Law Article

§ 7-105. Publication of questions

(a) *Notice of submitted questions.* — A local board shall provide notice of each question to be submitted statewide and each question to be submitted to the voters of the county, by:

(1) specimen ballot mailed at least 1 week before the general election; or

(2) publication or dissemination by mass communication during the 3 weeks immediately preceding the general election at which a question will appear on the ballot.

(b) *Questions submitted under Article XIV or XVI, Maryland Constitution.* — (1) For any question submitted under Article XIV or Article XVI of the Maryland Constitution, the notice required by subsection (a) of this section shall contain the information specified in § 7-103(b) of this title and a brief statement, prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the question.

(2) The statement required under paragraph (1) of this subsection shall be:

(i) prepared by the Department of Legislative Services;

(ii) approved by the Attorney General; and

(iii) submitted to the State Board by the fourth Monday in August.

(3) The statement required under paragraph (1) of this subsection is sufficient if it is:

(i) contained in an enactment by the General Assembly, and the enactment clearly specifies that the statement is to be used on the ballot; or

(ii) consistent with some other process mandated by the Maryland Constitution.

(c) *Regulations governing notice of questions.* — The State Board shall adopt regulations governing notice of questions to appear on the ballot, including the use and content of specimen ballots and the publication or dissemination of notice by mass communication.

(d) *Posting text; furnishing copies.* — (1) The complete text of a question shall be posted or available for public inspection in the office of the State Board and each applicable local board for 30 days prior to the general election.

(2) Copies of the complete text of all statewide questions shall be furnished by the State Board to the local boards in quantities as determined by the State Board, including quantities sufficient to provide one copy of each for posting in each polling place and in each local board office.

(3) An individual may receive without charge a copy of the complete text of all constitutional amendments and questions from a local board, either in person or by mail.