IN THE COURT OF APPEALS OF MARYLAND

September Term, 2014

Petition Docket No. 382

NEIL C. PARROTT, et al.,

Petitioners-Appellants,

v.

JOHN MCDONOUGH, et al.,

Respondents-Appellees.

BRIEF OF *AMICUS CURIAE* STEPHEN M. SHAPIRO

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Filed upon the consent of all parties under Rule 8-511(a)(1)

Court of Special Appeals of Maryland, Case No. 01445

Circuit Court for Anne Arundel County, Case No. 02-C-12-172298

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September 4, 2014

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STATEMENT OF THE CASE

Senate Bill 1 of the 2011 Special Session provided for the redistricting of the State's Congressional districts. The structure and composition of the revised Congressional districts was and is a subject of significant public controversy. Petitioner led the successful effort to obtain the requisite number of signatures to refer S.B. 1 to referendum in the 2012 General Election. *Amicus*, who is a former Democratic precinct chair, supported petitioner in this regard by signing the petition opposing S.B. 1 and by circulating the petition to obtain the signatures of other Maryland voters. The Maryland Democratic Party, reflecting the views of the Governor--who proposed S.B. 1--strongly opposed the referendum both in this Court (*Whitley v. Md. State Board of Elec*tions) and in the General Election. Respondent, a political appointee of the Governor, drafted the ballot language for Question 5--which abbreviated the legislative title and added two phrases that, while accurate, provided no relevant information but did give voters the impression that S.B. 1 was largely pro forma legislation without significant controversy. The Circuit Court found Question 5 to be clear and declined to amend it. Voters at the polls at *Amicus*' precinct indicated confusion interpreting Question 5 and its implications, and a broader review of election results suggests that such confusion was widespread throughout the State.

REFERENCE TO LOWER COURT ACTION

STATEMENT ON THE COURT OF SPECIAL APPEALS DECISION

STATEMENT ON CIRCUIT COURT ADJUDICATION OF CLAIMS

Amicus hereby incorporates the Petitioner's reference to lower court action, statement on the Court of Special Appeals' decision, and statement on the Circuit Court's adjudication of all claims.

QUESTIONS PRESENTED FOR REVIEW

Amicus proposes the following subdivision of Question 1 as presented by Petitioner:

1. In their analysis of Question 5, did the Circuit Court and Court of Special Appeals err by not specifically scrutinizing the informative value added or diminished by the specific edits made by the Respondent to the legislative title, and the impact of those edits—from the voters' perspective--with respect to question 2 below?

2. Was Question 5 concise and intelligent (Md. Const. art. XVI, § 5(b)); descriptive of the purpose of S.B.1 (Md. Election Law Art. § 7-103(b)); easily understandable, fair, and nondiscriminatory (Md. Election Law Art. § 9-203)?

3. Did Question 5 adequately advise the voters of the voting choices they had (Md. Election Law Art. § 7-103(b)(5))?

4. In their analysis of Question 5, did the Circuit Court and Court of Special Appeals err by affording inappropriate deference to the language certified by the Respondent, regardless of whether other language that could have been identified by those Courts may have much better met the requirements of questions 1 and/or

2 above? If such other language is demonstrably clearer, does it effectively render the language certified by Respondent to be inherently unclear?

5. In their analysis of Question 5, did the Circuit Court and Court of Special Appeals err by affording inappropriate deference to the language certified by the Respondent in light of his conflict of interest as an appointee of the Governor, who had a strong interest in S.B.1's approval by the voters?

6. In its analysis of Question 5, did the Court of Special Appeals err by not basing its judgment on whether the voters did, in fact, find Question 5 to be in compliance with questions 1 and 2 above when they went to the polls?

REVIEW BY THE COURT OF APPEALS IS IN THE PUBLIC INTEREST

There are several critical reasons why the review of the above questions by the Court of Appeals is highly desirable and very much in the public interest. First, is that the assurance to the public that Maryland elections are and have been fairly conducted, according to law, is perhaps among the most important duties of Maryland's judiciary. It is fully in order for the State's highest Court to review any significant question as to whether Maryland voters were afforded their full rights to fairly express their will, particularly in light of appearances and evidence that this may not have been the case.

In the instant case, the Respondent had—and was widely understood by the public to have had —a conflict of interest in the outcome of the election. Many members of the public and the media viewed the language certified by the Respondent to be questionable if not outright misleading, tilted toward an outcome consistent with the Governor's interest. The Circuit Court confirmed the challenged language. This Court denied certiorari immediately before the election, declining to confirm or revise the language prior to the election. After the election, the Circuit Court's judgment was affirmed by the Court of Special Appeals, in an unpublished opinion, issued nearly two years later—at a point when further review by this Court is now nearly impossible in a time frame that would permit practical relief in the form of a re-vote in the 2014 General Election. Voters and the petitioner were not afforded timely review of the Circuit Court's judgment as mandated by § 6-209(a)(3) of the Election Law Article.

While public perception is not necessarily determinative of the facts or the appropriate resolution, it is a reasonable factor to justify the involvement of and review by this Court. This Court has long recognized this imperative. Many of the cases selected for posting as "Highlighted Cases" on this Court's web site address challenges related to elections and election processes. This case compares favorably with those so highlighted.

Second, by reviewing these questions now, the Court of Appeals would answer relevant questions pertinent to the legality of the challenged election that were not addressed or adequately addressed by the Courts below. To some extent, such omission was due to the

lack of guidance available to those Courts. Review now would afford this critical new guidance to lower Courts that will review referenda in the future. This guidance would include further relevant details on how to properly analyze challenged language; how to properly evaluate language—or consider alternatives to language—to adequately depict or describe modern Congressional districts that defy description through concise language; how to take into account a perceived or actual conflict of interest of a Secretary of State or other election official when analyzing challenged language; and how to consider election results or other post-election facts to evaluate challenged language for an election that has already taken place. In reviewing the few prior cases of this Court cited by the Court of Special Appeals in its opinion, it does not appear that they afforded the Court of Special Appeals adequate guidance with respect to these vital questions.

Even though the most pertinent questions with respect to this case are those of Maryland law, Federal Courts have recognized that citizens' right to vote is so firmly protected, that they have jurisdiction to ensure the protection of such rights under the U.S. Constitution--even where the specific opportunity to vote arises solely by virtue of state law, such as the Maryland Constitution's provision for referenda. The U.S. District Court for the Southern District of Indiana in *Kole v. Faultless* (10-cv-01735, Doc. 68, p.8) stated that

> once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. *Harper v.Virginia State Board of Education,* 383 U.S. 663, 665 (1966). In other words, Indiana is not bound by the Constitution to grant Indiana citizens the right to elect a city mayor; however, if the State grants that right to the voters, that right to vote is then protected by the Constitution.

Similarly, the U.S. District Court for the Southern District of Texas in *City of Houston v. American Traffic Solutions* (10-cv-04545, Doc. 35, p. 2) highlighted the greater importance of and scrutiny reserved for elections challenges compared to challenges of enacted statutes more routinely reviewed by Courts:

> People who are partisans of a proposition have an interest in the election's regularity that is distinct from the government's interest. When a question arises about the process of the election, the government that has used the questionable procedure is not going to challenge itself. Candidates, voters, parties, and advocates may sue to correct the mechanics of an election like printing ballots, counting them, wording propositions, allocating polling places, and certifying results….After a law is adopted, it may be eviscerated by a lack of executive enforcement or legislative funding. Post-election thwarting is politics, not law, unless it is independently illegal.

The instant case does not involve post-election thwarting, and the pre-election influence of politics to impact the regularity of this election, as has been challenged here, would be proscribed under both Maryland and Federal law. Thorough review by the Court of Appeals would ensure that Marylanders have been and will be afforded the regularity of election processes, untainted by politics, as guaranteed by Maryland and Federal law. The public's perception of such assurance would be heightened by this Court's review, regardless if the result is the affirmance or reversal of the judgments of the lower Courts.

REFERENCE TO PERTINENT AUTHORITIES

Md. Const. art. XVI, § 5(b)

All laws referred under the provisions of this Article shall be submitted separately on the ballots to the voters of the people, but if containing 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. The ballot title may be distinct from the

legislative title, but in any case the legislative title shall be sufficient. Upon each of the ballots, following the ballot title or text, as the case may be, of each such measure, there shall be printed the words "For the referred law" and "Against the referred law," as the case may be.

Md. Election Law Article § 6-201(c)

(c) Each signature page shall contain:
(2) if the petition seeks to place a question on the ballot, either:
(i) a fair and accurate summary of the substantive provisions of the proposal; or
(ii) the full text of the proposal;

Md. Election Law Article § 6-202(a)

(a) The format of the petition prepared by a sponsor may be submitted to the chief election official of the appropriate election authority, in advance of filing the petition, for a determination of its sufficiency.

Md. Election Law Article § 6-209(a)(2) and (3)

(2) The court may grant relief as it considers appropriate to assure the integrity of the electoral process.
(3) Judicial review shall be expedited by each court that hears the cause to the extent necessary in consideration of the deadlines established by law.

Md. Election Law Article § 7-103(b)

General Guidelines – 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 boldface type;
(4) a condensed statement of the purpose of the question; and
(5) the voting choices that the voter has.

Md. Election Law Article § 9-203

Each ballot shall:
(1) be easily understandable by voters;

(2) present all candidates and questions in a fair and nondiscriminatory manner;
(3) permit the voter to easily record a vote on questions and on the voter's choices among candidates;
(4) protect the secrecy of each voter's choices; and
(5) facilitate the accurate tabulation of the choices of the voters.

Anne Arundel Co. v. McDonough (277 Md. 271)

Kelly v. Vote Know Coal (331 Md. 164)

Surratt v. Prince George's Co. (320 Md. 439)

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The relevant facts include that the ballot language certified by Respondent made three specific revisions to the legislative title of S.B. 1, two of which (adding the phrases "based on recent census figures, as required by the United States Constitution") provided irrelevant information that served to diminish clarity for voters. The Cecil Whig's on-line Election Guide (http://www.cecildaily.com/article_881b9118-199c-11e2-a07e-001a4bcf887a.html) (Exhibit 1) which explained that "FOR LAW: Means you want to require the most recent census information to determine U.S. Congressional Districts; AGAINST LAW: Means you do not want to require the most recent census information to determine U.S. Congressional Districts" is a good demonstration as to how the Respondent's language was misunderstood.

The referendum petition's summary of S.B. 1 (Exhibit 2), that was "determined to be sufficient" by the Administrator of the State Board of Elections (Exhibit 3) in providing a "fair and accurate summary" of S.B. 1, as required by § 6-201, provided much fuller and clearer information to voters than the ballot language crafted by the Respondent—and included a picture of the map. It is also relevant that the Governor and the Maryland Democratic Party strongly advocated on behalf of S.B. 1, providing an incentive for Respondent to facilitate its approval by voters through his selection of ballot language. This aspect does not appear to have been factored into the analysis of the lower Courts.

The election results reported by the State and County Boards of Elections strongly suggests that voters were critically misinformed regarding S.B. 1. In *Amicus'* precinct (Montgomery Co. 7-7), where Amicus provided voters with copies of the map and answered voters' questions on how to vote in order to reflect their will, President Obama polled 36 percentage points above Question 5 (i.e., 76% for President Obama, 40% for Question 5). Questions asked by voters at the polls at Montgomery Co. 7-7 reflected (1) unawareness of the new districts' boundaries, (2) uncertainty as to the ramifications of a vote against Question 5 (e.g., whether it would nullify the instant 2012 Congressional election), and (3) uncertainty as to whether they should vote FOR or AGAINST Question 5 in order to vote against retention of the map (i.e., since opponents of the map had put Question 5 on the ballot, some voters—including one who had signed the petition--were not clear as to whether a vote for Question 5 would affirm the map or repeal it).

Comparison of vote totals in other precincts and subdivisions of the State, where voters were not afforded such clarifications, suggests that substantive misunderstandings of Question 5 were endemic. In the four Montgomery precincts surrounding 7-7 (7-11, 7-12, 7-26, and 7-27), the vote for President Obama ranged from 65 to 78%, and the vote for Question 5 ranged from 55 to 66%. There is no good explanation for Question 5 to have lost in 7-7 by a 20 percent margin, but to have won in very comparable adjacent precincts by a 20 percent margin—a 40 point shift. The problems are even more apparent when examining predominantly Republican areas. In Garrett County, President Obama received 24% of the vote, while Question 5 received 47%. In such a predominantly Republican county at the western end of the new 6th Congressional District, it is inconceivable that the new map could truly be twice as popular as President Obama. In Carroll County, the northeastern appendage of the new 8th District, President Obama received 32% and Question 5 received 47%. Again, it is inconceivable that a greater percentage of voters in Carroll and Garrett counties prefer the new map than the overwhelmingly Democratic voters in Montgomery 7-7. The trend continues. In the northern half of Frederick Co., now within the 8th District, President Obama received 37%, while Question 5 received 50%. Again, it is not credible that many more voters than those who supported President Obama truly intended to affirm the new map. In southern Frederick Co., within the 6th District, President Obama received 54% while Question 5 received 62%. In Cecil County (see Election Guide cited above), President Obama received 39% while Question 5 received 65%. Even if all voters for President Obama are presumed to have intended to have voted to affirm the map—and the vote in

highly Democratic Montgomery 7-7 shows this was at all not the case--it is illogical for so many voters for Governor Romney to have intended to affirm the map.

ARGUMENT

Question 1

While the Court of Special Appeals did review the challenged phrases "based on recent Census figures, as required by the United States Constitution" (COSA opinion, p. 8-10), it did not specifically review them in comparison to the legislative title. As the legislative title is presumed sufficient under the Article XVI, § 5(b) of the Maryland Constitution, it is highly relevant to scrutinize the specific edits made by the Respondent to determine whether they added to or detracted from the clarity or information afforded to voters by the legislative title. Neither phrase was relevant as neither was substantive or the subject of controversy. Any redistricting would be based on the Census as that is required by the U.S. Constitution. There was no valid reason for those phrases to have been added.

Almost by definition, the addition of irrelevant language has the effect of shadowing relevant details of the districts established by S.B. 1 or relevant information as to the controversy thereof. When the Court of Special Appeals did examine the phrases, albeit not in the context of a comparison to the legislative title, the Court held that "no reasonable voter could have understood the ballot language to have suggested that the U.S. Constitution required the precise boundaries" or "that the State's voters would have thought that their vote on Question 5 amounted to a meaningless gesture." The Cecil

Whig Election Guide cited above shows that the Court erred in this holding, and the election results suggest that the extent and ramifications of such error were substantial. Voters arriving at the polls cannot be presumed to be as sophisticated as judges with dictionaries, particularly on an issue as relatively inconspicuous to the general public in 2012 as redistricting. The lower Courts should have stricken the challenged phrases.

Question 2

Further, while the unedited legislative title alone may have satisfied Article XVI, § 5(b) of the Maryland Constitution, it did not satisfy the further relevant provisions of the Election Law Article. Section 7-103(b) required the ballot to be "descriptive of the purpose" of S.B.1, and § 9-203 required it to be "easily understandable, fair, and nondiscriminatory." The Court of Special Appeals' holding (opinion, p. 11-21) that the information provided to voters was "sufficiently informative" was in error. In this regard, the Court misapplied this Court's precedent in *Surratt v. Prince George's Co*. (320 Md. 439). While the details of the ballot at issue in *Surratt* differed from the instant case, this Court's holding in *Surratt* that the ballot "must convey with reasonable clarity the actual scope and effect of the measure" is directly on point here.

The Court of Special Appeals similarly misapplied this Court's precedent in *Anne Arundel Co. v. McDonough* (277 Md. 271). While the details of the ballot in *McDonough* differed from the instant case, this Court's holding that the ballot must afford "a clear, unambiguous and understandable statement of the full and complete

nature of the issues" is directly on point here. *Amicus* also respectfully disagrees with the Court of Special Appeals' holding that the language at issue here compares favorably with the language approved by this Court in *Kelly v. Vote Know Coal* (331 Md. 164). Question 5 provided far less information than the language at issue in *Kelly*. For comparison, the Court should have looked to the language and map afforded to voters in the petition, as found "sufficient" with amendments by the State Board of Elections, as well as to the 1962 ballot language on the challenged redistricting 50 years ago. The 1962 ballot language described the boundaries of the new 8th District established at that time—and such language was adequate to meaningfully depict the new district (i.e., "Howard and Prince George's Counties"). The petition found "sufficient" by the Board of Elections noted the counties having a portion within each district as well as a picture of the map--as the descriptions of the 2011 districts in words alone, unlike 1962, do not afford a meaningful depiction without a picture. The lower Courts should have mandated more descriptive language, such as was provided in the petition, to be on the ballot--as well as the posting of the map in the polling places. The fuller information provided in a supplemental mailing cannot cure inadequate information provided at the polls. Given the relative complexity of the districts enacted by S.B. 1, only a posted map would have been adequately "descriptive" or "easily understandable."

Question 3

Voters were not adequately advised of their choices in voting for or against Question 5. The ballot language should have clearly explained the ramifications of a vote for or

against. As noted above, this was not clear to voters in Montgomery 7-7, who asked whether they should vote for or against Question 5 in order to repeal the map, as well as whether a vote against Question 5 would nullify the concurrent Congressional election.

Question 4

The Court of Special Appeals held that this Court's precedent in *Kelly v Vote Know Coal* (331 Md. 164) precluded it from improving the language if it found the certified language adequate. While the holding may have been correct in light of precedent, presuming the certified language had been adequate, *Amicus* would respectfully encourage this Court to revisit that precedent in light of this case—and clarify that where a lower Court identifies language that better meets the demands of the Election Law Article, then the challenged should be considered inherently inadequate and ordered to be revised accordingly. The focus should be to maximize the clarity and adequacy of information afforded to voters, and to avoid future elections where voters are needlessly hindered by minimal language.

Question 5

The positions of the Governor and of the Maryland Democratic Party in strong support of S.B. 1 were well known. The Md. Constitution affords the authority to craft ballot language amending the legislative title to the Secretary of State, a political appointee of the Governor. In light of the potential inherent conflict between facilitating approval of S.B. 1 and certifying ballot language that is "fair and nondiscriminatory" (per § 9-203), greater scrutiny as to the adequacy of certified ballot language, and in particular, to edits

of the legislative title are important in order to maintain the public's trust in impartial elections. *Amicus* respectfully encourages this Court to clarify that the typical deference afforded to the Secretary of State is inappropriate in such circumstances.

Question 6

The election results cited above give considerable weight to the contention that the ballot language was indeed unclear and misunderstood by the voters. It is not logical that so many Republican voters throughout the State would have voted for Question 5, while voters in highly Democratic Montgomery 7-7 voted against Question 5. These election results contradict the lower Courts' opinions that the language was adequate and clear. The ballot language may have been clear to the lower Courts, but it clearly was not for a large number of voters at the polls. While the Circuit Court could not have had such election results prior to the election, they were available to the Court of Special Appeals. *Amicus* respectfully encourages this Court to hold that challenges to ballot language that are considered on appeal after the election should be informed by relevant voting results.

CONCLUSION

In light of the foregoing, the Court of Appeals should grant the petition for a writ of certiorari, nullify the 2012 vote on Question 5, and order a special election on S.B. 1., with adequate ballot language and a map of S.B. 1 posted at the polling places, to be held sufficiently early in 2015 so that the General Assembly will have adequate time to enact new districts well in advance of the 2016 elections if S.B. 1 is repealed by the voters.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2014, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* in Support of the Petition for a Writ of Certiorari to be served, via email and first-class U.S. mail, postage prepaid, on the following:

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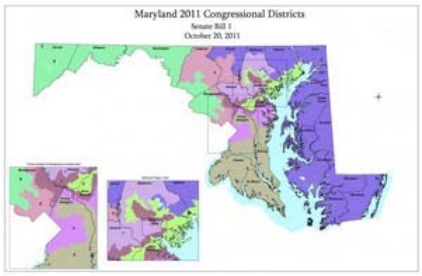
Question 5: Redistricting



Redistricting

Posted: Thursday, October 18, 2012 10:24 pm

"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 LAW: Means you want to require the most recent census information to determine U.S. Congressional Districts

AGAINST LAW: Means you do not want to require the most recent census information to determine U.S. Congressional Districts

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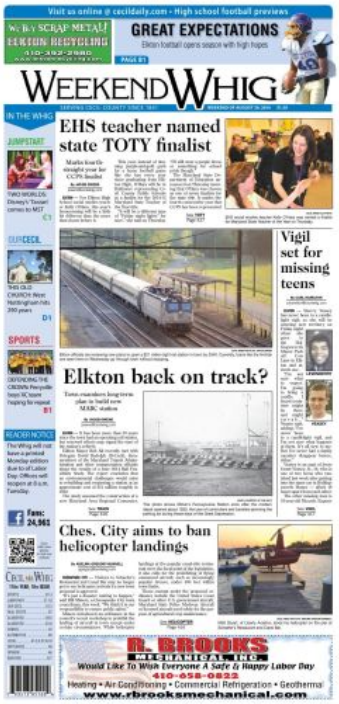

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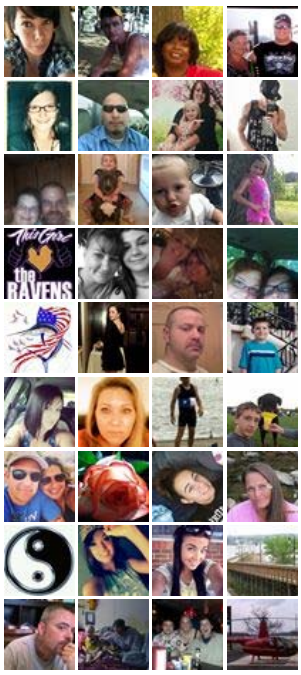

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POLL

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- ○ Yes
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