

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

MICHAEL HOWELL, ET AL.,

Plaintiffs,

vs.

Civil Docket

WESTLEY MOORE, ET AL.,

No. C-02-CV-26-0001986

Defendants.

OFFICIAL TRANSCRIPT OF PROCEEDINGS

MOTION FOR SUMMARY JUDGMENT

Annapolis, Maryland

Tuesday, August 25, 2026

BEFORE :

THE HONORABLE ROBERT THOMPSON, JUDGE

APPEARANCES:

For the Plaintiffs:

JEFFREY CLARK, ESQ.

MARSHALL YATES, ESQ.

SAMUEL DEWEY, ESQ.

KYLE BROSNAN, ESQ.

ANTHONY LICATO, ESQ.

For the Defendants:

DANIEL KOBRIN, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: For the record, this is C-02-CV-26-11986,

3 Michael Howell, et al., vs. Westley Moore, et al. Counsel, for

4 the record please, and would you spell your last name for the

5 benefit of the court reporter, could you say your name.

6 MR. CLARK: For the Plaintiffs, Jeffrey Clark, Your

7 Honor, C-L-A-R-K.

8 THE COURT: Good morning, sir.

9 MR. CLARK: Good morning.

10 MR. YATES: For the Plaintiffs, Marshall Yates, Y-A-T-

11 E-S.

12 THE COURT: Good morning, sir.

13 MR. DEWEY: Samuel Dewey, D-E-W-E-Y, Your Honor.

14 THE COURT: Good morning, sir.

15 MR. BROSNAN: For the Plaintiffs, Kyle Brosnan, B-R-O-

16 S-N-A-N.

17 THE COURT: Good morning, sir.

18 MR. LICATO: For the Plaintiffs, Anthony Licato, L-I-

19 C-A-T-O.

20 THE COURT: Good morning, sir.

21 MR. LICATO: Good morning.

22 THE COURT: No other lawyers coming out of the

23 woodwork? I think five will probably do the trick.

24 Yes, sir.

25 MR. KOBRIN: For the Defendants, Assistant Attorney

1 General, Daniel Kobrin, K-O-B-R-I-N.

2 THE COURT: Good morning, sir.

3 For the record, let me just state that I met with the
4 attorneys in this case. It was supposed to be a chambers
5 conference, but it turned out there were too many to fit in my
6 chambers, so we did it in a jury room. I disclosed to them at
7 that meeting -- we talked about some tactical things and some
8 practical things, but I disclosed to them at that meeting that I
9 have an association with two of the named Plaintiffs in this
10 case on my odyssey to be appointed to the bench back in 2018.

11 I made contact with my own delegate -- one of my own
12 delegates, Delegate Brian Chisholm, who is -- was and is the
13 delegate in the district where I live, and is a named Plaintiff
14 in this case. Another person with whom I made contact was
15 Delegate Kathy Szeliga, and the reason for that is she, at the
16 time and I believe it's still the case, represents the district
17 that straddles the border between Baltimore County and Harford
18 County and I -- so much of my practice was in Baltimore County
19 that I thought it made sense to talk to her, like talking to
20 Delegate Chisholm and others about talking to the Governor on my
21 behalf. I don't believe it creates a conflict, but I think I'm
22 duty bound to share any associations of that matter -- of that
23 nature, so that's why I bring it up, and at this time.

24 Mr. Kobrin, are there any motions the State would like
25 to make?

1 MR. KOBRIN: No. There are no motions at this time.

2 THE COURT: Any motions from the Plaintiffs' side?

3 MR. CLARK: No, Your Honor.

4 THE COURT: All right. Well, in that case, we have
5 Cross-Motions for Summary Judgment in this case, and I believe
6 for my own ease of use, I would like to start with the
7 Plaintiff, unless that --

8 MR. KOBRIN: No objection.

9 THE COURT: Okay. All right. So, who's up on this
10 side?

11 Mr. Clark?

12 MR. CLARK: Yes. Thank you, Your Honor. Good
13 morning, and may it please the Court. I'm Jeff Clark from the
14 oversight project, here on behalf of the Plaintiffs, Mike
15 Howell, and the members of the -- the Freedom Caucus in
16 Maryland, plus Senators Hershey and Ready, and I'm grateful to
17 Your Honor for the opportunity to practice in your court today.

18 Your Honor, here's the bottom line of this case. The
19 General Assembly enacted mandatory certification deadlines in
20 May of 2026, and yet, just a few months later, they were
21 completely ignoring those deadlines and missing them in August.
22 They tried to paperwork over the mess that they engaged in on --
23 on procedure and the deadlines with a not withstanding clause
24 that they first introduced on the first day of the special
25 session, and that non obstante clause is invalid under any legal

1 theory. Meanwhile, the ballot --

2 THE COURT: Well, let me ask a question.

3 MR. CLARK: Sure.

4 THE COURT: Haven't -- hasn't the United States
5 Supreme Court allowed Congress to do things under a non obstante
6 clause in the past?

7 MR. CLARK: Certainly, Your Honor. If the United
8 States Congress through bicameralism and presentment passes a
9 law and the President signs it, or through inaction it's allowed
10 to become law because the President, you know, doesn't --
11 doesn't block it, then the, you know, a non obstante clause can
12 override other provisions of law, but here, we're dealing with
13 the Maryland Constitution, Your Honor.

14 THE COURT: Understood.

15 MR. CLARK: And --

16 THE COURT: So, is -- can you -- can you distinguish
17 the Maryland system from the federal system and tell me why a
18 non obstante clause, in the Plaintiffs' opinion, doesn't work?

19 MR. CLARK: Yes. The difference between the two
20 systems, Your Honor, is that there is obviously the ordinary
21 process of passing a law through bicameralism and presentment,
22 you know, in the Maryland system as well. So, that's in
23 parallel, but there's also a special process in Article 14 for
24 referenda. In this case, obviously we're dealing with a
25 Constitutional amendment referendum.

1 That process, Your Honor, sets up a -- a no-go for the
2 Governor, and indeed my -- my opponents conceded that the
3 Governor's superfluous here. Now, the Government did -- did try
4 to sign it, we'll talk -- I'll put that off to the side for the
5 second --

6 THE COURT: Well, let's -- let's let that one go,
7 because I think we all agree that the Governor really doesn't
8 play a role in a Constitutional amendment.

9 MR. CLARK: Yes.

10 THE COURT: Whether he signs purported legislation or
11 not, right?

12 MR. CLARK: Yes.

13 THE COURT: Okay. So, next step.

14 MR. CLARK: So the next step is that since it's
15 exclusively a legislative process, right, and it's not one that
16 has the involvement of the Governor, as Your Honor just noted,
17 that means that there is no provision in the Article 14 process
18 for including bolting on provisions of law, getting rid of
19 existing law so that you can clear the path for some kind of
20 Constitutional amendment, Your Honor. They could have done
21 that, via one of two paths. They could have put the non
22 obstante clause in the referendum so that the voters could vote
23 on it. I think that would have been a perilous choice for them,
24 which is probably why they avoided it, because non-lawyers,
25 ordinary people, the average voter in America is not going to

1 understand what a non-obstante clause is.

2 THE COURT: Well, wouldn't that violate the one
3 subject per ballot question --

4 MR. CLARK: Yes, Your Honor.

5 THE COURT: -- limit that we have?

6 MR. CLARK: We think there are a variety of violations
7 of the one subject limitation in Article 14. The non obstante
8 clause we think is its own subject, because it's not just about
9 this particular referendum that relates to redistricting. It
10 turns off election laws in general, according to the theory of
11 the State here.

12 THE COURT: So, another way they could skin the cat,
13 if you will, would be to repeat those laws that they thought
14 stood in their way, right?

15 MR. CLARK: That's correct, Your Honor, and in order
16 to that, right, that would have had to go through the
17 bicameralism and presentment process. The Governor would have
18 needed to, you know, agree to that and sign it. He probably
19 would have here based on the fact that he's the one who started
20 the special session, right, but the problem is that given that
21 we're out past June, under the way the Maryland Constitution
22 works, given that they didn't start this special session until
23 August, if they were to try to pass just a, you know, straight-
24 up repealer law, it wouldn't take effect until the following
25 June, and that's obviously not going to allow this ballot

1 initiative to go on the November ballot and put it before the
2 voters.

3 So, this is why we think that they had the Governor
4 come in and sign it, so that they could potentially argue, you
5 know, sort of 6 of one, half dozen of another, like we
6 functionally did an amendment to the law. We don't think that
7 works for the reasons Your Honor was recognizing, that Article
8 14 doesn't recognize a role for the Governor or prescribe one,
9 and the other reason why it doesn't work is because they're --
10 in order to do legislation like this if you're not going to wait
11 until the next June, is it has to be proper emergency
12 litigation, Your Honor -- emergency legislation.

13 I'm sorry, and that means you have to have, you know,
14 a public health or safety reason, and that's obviously a non-
15 starter for something that's directed at redistricting, and the
16 State has not pointed to anything that could -- first of all,
17 the legislature didn't purport to declare an emergency, and
18 then, you know, pass through bicameralism and presentment,
19 turning off the election laws that establish deadlines here that
20 the State blew through, but even if they had we don't think they
21 would have been able to satisfy the challenge we would have then
22 brought to say hey, look, this is not proper emergency
23 legislation.

24 This is -- this is ordinary legislation, and
25 therefore, there's just no way around the Constitutional routing

1 here that this, you know, that such a non obstante enacted into
2 law wouldn't and couldn't take effect until June of 2027 at the
3 earliest. So --

4 THE COURT: Well, from a practical standpoint, if the
5 amendment is -- if the amendment survives this hearing and
6 hearing that's yet to come and makes it onto the ballot, it
7 doesn't take effect until 2028 anyway, right?

8 MR. CLARK: Your Honor, I think it depends -- well, it
9 -- it clears a path for -- for the -- the controllers of the
10 General Assembly to engage in redistricting and try to get rid
11 of one Republican seat on the Eastern shore, and so if that's --
12 if that blocked successful here, to take the flip side of your
13 hypothetical, then they would have to wait even longer to do
14 that, and we don't think, given the mandatory nature of the
15 provisions of the election law that we're pointing to, that
16 there's the ability to just ignore that law. You know, if you
17 look at the Dutton case, for instance, Your Honor, if a pre-
18 election challenge is brought, the Dutton case has held that
19 that is mandatory. It's not directory.

20 Things are directory in the election laws as they
21 related to -- to referenda if the challenges are not brought
22 until after the referendum has been held, but here we've brought
23 it beforehand. So, we don't think there's any option in
24 Maryland law for anything other than complying with those
25 deadlines. So -- sorry about that. My mouth gets dry.

1 So, the three points I want to make to you, Your
2 Honor, are -- they fall under these categories. The missed
3 deadline, or deadlines; the invalid non obstante clause, but
4 we've -- we've covered a lot of that already, I think, Your
5 Honor; and then the deficient ballot language. So, first, let
6 me talk about the deadlines.

7 So, the first point there is the July 1st deadline was
8 -- it was mandatory, it was missed, and it is incurable.
9 Election law section 7-103(c)(1) was enacted in Senate Bill 29
10 that was signed by the Governor in May of 2026. It requires
11 that the Secretary of State, "shall certify all statewide ballot
12 questions by July 1st." The key words there, obviously, is
13 shall. It is mandatory, and as I mentioned, under the Dutton
14 case, it is treated as mandatory just like its language when a
15 pre-election challenge is brought.

16 HB 2100, which is what we're largely focused on
17 challenging here today was introduced on August 3rd, which was a
18 month after the deadline has passed. The General Assembly's own
19 fiscal note said the deadline, "had passed," and then Senator
20 Kagan said on the floor, quote: "There's no time to comply with
21 the plain language of the law, because July 1st is in my
22 rearview mirror -- in the review mirror." Sorry. End quote.

23 The State Board of Election then tried to comply with
24 this -- with this deadline, but it -- it couldn't, and as to the
25 other two questions on the ballot for November, they did manage

1 to comply with the July 1st deadline, but not as to this
2 question about redistricting. The Defendants argue that the
3 State Board of Elections can cure through election law §9-207, a
4 layout certification procedure, this deficiency, but they're
5 missing that Senate Bill 29 also enacted election law §9-207(f),
6 and that provides that layout certification may not be construed
7 to be a certification of the ballot language required to be
8 certified under 7-103.

9 So, that means that they can't recover the fact that
10 they really didn't even swing into action until a month after
11 the July 1st deadline in 7-103(c)(1) had elapsed. So, the
12 General Assembly had anticipated and foreclosed the very door to
13 try to get out of -- of a late certification default here that
14 the Defendants are -- are trying to use. The Defendants cannot
15 ask this Court to ignore an expressed statutory provision,
16 especially we would add, not one passed by the same legislature
17 in the same year.

18 Now, I want to turn to what has become, I think a
19 bigger argument for them, Your Honor, than the 207 escape hatch,
20 which we think 207(f) closes, which is to argue that because the
21 General Assembly here opted to write the referendum language
22 itself, somehow that gives the State a free pass to ignore §7-
23 103(c)(1), and here's how that argument works. The first thing
24 they pointed out in that regard, is that the Stop Slots case
25 indicated that the legislature there had not written the

1 referendum question as issue in that case about, you know,
2 having slot machines legalized in -- in Maryland. While it's
3 true that the -- the Stop Slots court recognized that things
4 were different in that case than we have in our case, but
5 nothing in Stop Slots, I'm kind of puzzled by the constant
6 reference by opposing counsel to page 192 of Stop Slots, that --
7 that somehow this gives them the free pass, because the Court
8 doesn't say that if the legislature writes the referendum
9 question, that means that no deadlines would apply, and in any
10 event, the deadline of July 1st was created this year.

11 So, Stop Slots is, I believe, a 2012 decision, so that
12 requirement didn't even exist. So, the Supreme Court couldn't
13 possibly have excused -- or the highest court of Maryland, I
14 should say, couldn't possibly have excused the -- the deadline
15 for certification when -- when that decision was written. So --

16 THE COURT: And the July 1st deadline was created this
17 year by the same body that is attempting to introduce a
18 Constitutional amendment after that deadline, right?

19 MR. CLARK: That's correct.

20 THE COURT: In the same year.

21 MR. CLARK: That's correct, and that's precisely --

22 THE COURT: I mean, not to put too fine of a point on
23 it, but --

24 MR. CLARK: That's right.

25 THE COURT: -- that seems backwards to me.

1 MR. CLARK: Yes. We agree, Your Honor, and so, you
2 know, just to be totally clear, right, and not -- not to be
3 accused of, you know, not -- not turning all square corners,
4 right, but the session ended, as I understand it, the regular
5 session, on April 13th, and so, on the last day, I believe
6 that's when the Senate agreed to -- to Senate Bill 29, and then
7 the Governor waited about a month to sign it. So, that's why it
8 came in in May, and then it was set for a June 1st effective
9 date, so obviously clearly effective before July 1st, and then
10 it wasn't until, you know, July, you know, after -- after July
11 1st, after the effective date that Governor Moore called the
12 special session, then the special session took until August 3rd
13 to actually start and really functionally given, you know, at
14 least his view that he should sign it, until August 5th to
15 conclude.

16 So, we think that's clearly late, and we think it's a
17 clear violation of the mandatory law in 7-103(c)(1). Now, I --
18 I want to, if I can, if Your Honor will -- will indulge me, I
19 want to march through the statutes if I can --

20 THE COURT: Okay.

21 MR. CLARK: -- Because I think that -- now counsel's
22 argument that a provision in 7-105 turns off the 7-103(c)(1)
23 deadline, is a clearly flawed argument. It doesn't work as a
24 matter of text, and in reality, it's like a mathematical
25 syllogism, Your Honor. So, the first thing I will point out to

1 you is if you look at election law 1-101, which curiously
2 opposing counsel cited, I think, in their -- in their
3 Opposition/Reply Brief, if you look at 101(d)(2), it says that
4 ballots and court official ballots do not include 1) a sample
5 ballot, or 2) a specimen ballot. So, the categories of a ballot
6 and a specimen ballot are mutually exclusive, Your Honor.

7 That's the very important point to draw from the --
8 from the definition provisions. Now, let's go and look at §7-
9 103. If you look at it, what it says, starting in (b) is that
10 each question shall appear on the ballot. So, I'll stop there
11 and say we're talking about the ballot that actually goes in
12 front of the voter, Your Honor. We're not talking about the
13 specimen ballot that goes up for kind of display, so people get
14 an idea of what the election is going to look like. Like we're
15 talking about the actual ballot. So --

16 THE COURT: But can we have the cart before the horse,
17 because we don't have a ballot yet. That -- that doesn't get
18 made until next week, I guess, right?

19 MR. CLARK: Well, but I'm -- I'm just -- I'm getting
20 to what the ballot actually has to do, and then the point at
21 which it has to be certified, which comes in subsection (c).
22 So, I just ask for a little -- little bit of just, you know, let
23 me wind up and kind of get there. So, 7 -- so, 107 -- sorry, 7-
24 103(b) tells you all the things the ballot has to have, okay,
25 and I will return to unpacking some of those later in the

1 argument, but then if you look at (c)(1), the next subsection,
2 it says -- that's where the July 1st deadline is. It says, on
3 or before July 1st, immediately preceding a general election,
4 the Secretary of State, so this is the Secretary of State, shall
5 prepare and certify to the State Board, the information required
6 under subsection (b). Okay?

7 So, in the subsection (b) stuff, the 6 sub-
8 requirements in (b), they all have to be done first, that's the
9 -- that's the -- the horse before the car, right, and then the
10 cart comes in of (c)(1) and it says, this certification by the
11 Secretary of State to the Board, has to be done by July 1st, and
12 here it clearly was not, and then there's a -- a concluding
13 clause that says for all statewide ballot questions and all
14 questions relating to enactment of the General Assembly, which
15 is petition to referendum. So, it specifically mentions
16 referendum, and it says all statewide ballot questions and all
17 enactments of the General Assembly which lead to referenda. So,
18 our position is, all means all, and that means that you have to
19 meet this July 1st deadline.

20 Okay. So far, so good. Now let me turn the argument
21 of my opponents. So, they're trying to rely on 7-105, and I'll
22 just point out to you, although I know that it's the text of
23 provisions that control and not their title, but the title here
24 is -- is helpful and entirely consistent with -- with the text
25 of the provision. It says, notice of question by specimen

1 ballot or publication.

2 So, notice, we're not talking about ballots. 7-103 is
3 about the ballots; 7-105 is about ballot specimens, okay? It
4 provides -- so, it's not a directive to the Secretary of State
5 and then the Secretary of State is sending things to the Board.
6 This is a directive to the local Boards that they have to
7 provide notices of questions, and they have to do that either by
8 (a)(1) a specimen ballot, or (b) publication or dissemination of
9 a mass communication, okay, and by my calculation, the mass
10 communication date here would be 10/13.

11 Now, skipping ahead a little bit to what my opponent's
12 going to rely on, and what he's relied on in the briefs; he's
13 relying on subsection (b)(3). Subsection (b)(3), you know, with
14 the lead-in from 3 says, the statement required under paragraph
15 (1) of this subsection is sufficient if it is (i) contained in
16 an enactment by the General Assembly, and the enactment clearly
17 specifies that the statement is to be used on the ballot, okay.
18 So, that's -- that provision is what Mr. Kobrin is using to try
19 to say that the July 1st deadline is turned off; it doesn't even
20 apply, because the legislature wrote the language, but that is
21 not what 7-105(b)(3) says, Your Honor.

22 It -- (b)(3) references back to paragraph 1, and
23 paragraph 1 is about the -- the information, right, that relates
24 to this whole situation of having a specimen ballot, but
25 specimen ballots and ballots are, again, mutually exclusive

1 categories under the definitional provision of Election Law 1-
2 101(d). So, you have the fact that -- what is it that gets
3 turned off? So, it's not like I'm trying to argue that 7-
4 105(b)(3) has no effect.

5 Functionally, what it turns off is the need, if the
6 legislature itself writes the question for the local boards to
7 have to give this notice. Functionally, the theory behind this
8 from the legislature has to be the idea that the legislature
9 wrote the question; that's good enough notice for the people
10 here, but the one thing that's clear is that there's nothing in
11 7-105 that says that 7-103(c)(1), the principal provision we're
12 relying on for the deadline is turned off. It's just not there,
13 and -- and to the extent as -- you know, I started with the
14 point of Mr. Kobrin argued that that's present in Stop Slots,
15 you'll see it's not present in Stop Slots, and again, it would
16 be an impossibility. It couldn't possibly be in Stop Slots,
17 because Stop Slots precedes the new Senate Bill 29 that got
18 adopted this year.

19 Okay. So, that's our -- that's our first point. The
20 second point is, because this deadline problem is such a big
21 deal, and it was spotted as a defect by the legislative services
22 division, Your Honor, and by Senator Kagan on the floor in the
23 quotation I read to you about, it's just -- you know, like we
24 can't -- we just --

25 THE COURT: The rearview mirror?

1 MR. CLARK: -- do this -- I'm sorry?

2 THE COURT: The rearview mirror?

3 MR. CLARK: The rearview mirror quotation, and then
4 there's also a delegate fair remark that's, you know, similarly
5 realizing that the deadline got missed. You know, the result
6 is, you know, a kind of set of exchanges of physical notes after
7 the non obstante clause is written, and the -- the legislative
8 services folks say, okay, well this -- this supersedes what --
9 what the law otherwise is, okay? So, you know, obviously, we
10 would argue -- we just point out to you that one reason why
11 we're here taking up Your Honor's time in the summer under such
12 exigent circumstances is because the General Assembly blew the
13 deadlines -- went way past the deadlines, and it's created this
14 emergency. It's an emergency of its own making.

15 So, here is where I was going to unpack for you the --
16 the logic of the fact of, you know, they have two path choices.
17 They could have stuck the non obstante clause to get rid of the
18 7-103(c)(1) July 1st deadline in the referendum itself, and then
19 potentially had the -- the voters bless it, assuming the voters
20 could possibly understand what that means. It would have taken
21 a lot of explanation around it to give the average voter, you
22 know, an understanding of what that clause does, or they could
23 have passed ordinary legislation. The problem was, it was even
24 too late for that, because since they went past June, there's a
25 waiting period under the Maryland Constitution until the

1 following June, so they can't take either of those paths.

2 The Defendants' alternate theories are mutually
3 contradictory as well, Your Honor. So, I've gone through the
4 argument that Mr. Kobrin launched of the statutes never applied
5 because the General Assembly wrote the ballot question, right,
6 and we think that if you look carefully at the definitional
7 provisions as it feeds through what 7-105 does versus 7-103,
8 you'll see that that argument fails, and in the alternative, Mr.
9 Kobrin launches a kind of -- I'll call it a quasi-Constitutional
10 argument that the statutes cannot constrain Article 14 -- can be
11 constrained -- cannot constrain Article 14, I'm sorry, but
12 Article 3, §49 grants the legislature the power to "regulate by
13 law" elections, and the -- the Warfield vs. Vandiver case
14 confirms that statutory machinery is integral to Article 14's
15 effective execution, and to be clear, Your Honor, we're not
16 arguing -- I see this in -- in what I'm calling Mr. Kobrin's
17 reply brief, that somehow we're trying to constitutionalize
18 sections 7-103 and 7-105, but we're not -- we're not trying to
19 Constitutionalize them, Your Honor.

20 We think they're Constitutionally relevant to our due
21 process argument, because the legislature set these deadlines so
22 that the whole process could be allowed to play out, and what
23 does that process involves (sic), it involves this certification
24 from the Secretary of State to the Board, and then it involves
25 the Board putting the -- the question out for public comment,

1 and then once the public comments come back, it involves a
2 process of, you know, reacting to those comments and deciding
3 whether to make changes, and here, look, you know, if -- if Your
4 Honor -- like, this is an election law case, but it's also at
5 some level a -- an administrative law case, an certainly if you
6 had a, you know, challenge to Maryland agency action here as a
7 general matter, like take the election law, you know, kind of
8 (unintelligible 10:19:26 a.m.), and you know, something was
9 required under Maryland law to go through notice and comment and
10 regulation, or some kind of adjudication didn't go through the
11 notice and comment process, that's like, you know, shooting fish
12 in a barrel from the judicial standpoint because the
13 requirements the legislature set up for something to become law
14 did not get satisfied, and the same -- the same thing is true
15 here.

16 By doing what they did, they were able to totally
17 dispense with having a -- a comment process, and totally able to
18 dispense with any idea for the -- any ability for the voters in
19 Maryland to be heard about what they thought about this -- this
20 -- this question that would be put on the ballot, and whether it
21 was adequately explained to them or not. So, that's -- that's
22 their -- their -- they have a theory of 7-105(b)(3) turns off 7-
23 103(c)(1), and that argument fails, and then they have an -- an
24 argument that tries to say, well we can just do this under
25 Article 14, full stop, we don't have to worry about complying

1 with the election laws, and we also think that ignores the text
2 of Article 14, because the text of Article 14 says that the
3 legislature has the power to provide the form of how referendum
4 questions were to be dealt with.

5 So, I'm surprised to actually -- to hear at some
6 level, opposing counsel taking the position that there's some
7 kind of Constitutional issue here, because as the State AG, one
8 would think -- a representative of the State AG, one would think
9 he has a duty to defend the fact that the legislature has built
10 numerous specific statutes about how to handle referenda
11 process, and if Article 14 were a self-sufficient, self-standing
12 grant of authority that could override any statutes, then those
13 statutes that the legislature had adopted would not be valid.
14 We think that this is a -- a very purpose-built attempt to
15 defend this hurry up job that the -- that the Governor called
16 the legislature into special session for, and that it -- it just
17 doesn't work under Maryland law. So, whatever theory, and we
18 think the two theories are mutually exclusive, right, they --
19 they're -- they -- they contradict each other.

20 If you -- if -- if 7-103(c)(1) does not apply, then
21 how could the Constitution do an override? So, they're just --
22 they're grasping at straws, Your Honor, to find some way to get
23 this confirmed and not blocked from going on the ballot. Your
24 Honor mentioned the single subject violation, and I'll -- I'll
25 hit that briefly too.

1 So, HB 2100's single subject here is (unintelligible
2 10:22:17 a.m.), but the non obstante clause ballot certification
3 -- sorry, suspends ballot certification statutes. That's what
4 Mr. Kobrin's arguing. He's arguing that the non obstante
5 clause, you know, if -- to the extent they need it, sometimes he
6 tries to say it's technical; sometimes he tries to say it's
7 mechanics, but you know, I think that the reason why the non
8 obstante clause is there is because the legislative services
9 folks recognized that the deadline had been blow, just like
10 Senator Kagan did, Your Honor, and so, you know, from that
11 standpoint, it's clear that the non obstante clause turns off
12 general election law, and that election law covers a lot of
13 different topics. It doesn't just cover referenda, and it also
14 doesn't cover -- it doesn't just cover this particular
15 referenda.

16 It's a general turn off under -- under Mr. Kobrin's
17 theory, and under the text of what a non obstante clause is, and
18 so, we think that that is prohibited logrolling is the term,
19 like if you have multiple subjects, the theory of the single
20 subject requirement is that the voter is then put to a kind of
21 Hobson's choice. If you gave them one question at a time, he
22 could potentially say yes to one, and no to the other, but if
23 they're fused together, he might be forced to say yes to both of
24 them. That's improper Constitutionally, and here we think that
25 we're dealing with a statute that violates -- I'm sorry, we have

1 -- we have a bill with HB 2100 that violates under Article 14,
2 the single -- in §2, the single subject rule.

3 So, turning to my point three; Election Law 7-
4 103(b)(6) we think is particularly key, and it hasn't been
5 satisfied here. It requires "a brief statement explaining what
6 the practical outcome of each voting choice would be."
7 Questions 1 and 2 on the same ballot each include the statement,
8 but question 3, the one that we're dealing with here about
9 redistricting does not. It only includes the bare labels for or
10 against. The language says the amendment "clarifies that
11 certain standards" "apply to the general assembly districts,"
12 but it doesn't identify which standards.

13 In this regard, it's very similar to the -- to -- to
14 the -- to the decision from McDonough where the court noted that
15 in terms of the rezoning referendum put forward there, there
16 were five different categories of rezoning. How as the voter
17 supposed to know what -- what category was really involved in
18 this massive redistricting referenda. Similarly, here there's
19 no indication of what statute -- what -- what standards are
20 being clarified, and just like McDonough called out the -- the
21 framers, the drafters of that referenda, for trying to, you
22 know, use language to sneak one by the voters.

23 You know, rezoning, you know, rezoning, you know,
24 maybe has, you know, kind of vaguely positive connotations
25 (unintelligible 10:25:28 a.m.) clarifies of even more --

1 THE COURT: Do me a favor; pause for just a second.

2 MR. CLARK: Sure.

3 THE COURT: To the folks standing in the back, I
4 ordered some chairs which have now arrived. So, please, make
5 yourselves at home.

6 MR. CLARK: Very kind of you, Your Honor.

7 So, the term clarifies, right? It's positive. It's
8 bright sounding language, you know, it -- and -- and I submit to
9 you we're dealing with a very complex subject matter. I have a
10 little litany for you here actually, of all ways in which the
11 voter could be confused here, right? So, it refers in Bill --
12 HB 2100 to certain clarifications.

13 Again, we don't know what those are.

14 THE COURT: Well, isn't clarification kind of a
15 misnomer

16 MR. CLARK: We think it is a misnomer, because it's a
17 change. It's a significant change from --

18 THE COURT: Well -- so, let's lay this out --

19 MR. CLARK: Okay.

20 THE COURT: -- for the, you know, do it in crayon for
21 my benefit.

22 MR. CLARK: Okay.

23 THE COURT: What was the law about congressional
24 districts and legislative districts that existed on -- let's
25 pick a date, July 1st of this year. Was it that legislative

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1 districts and congressional districts were treated the same as
2 far as compactness and those kind of requirements?

3 MR. CLARK: Exactly, Your Honor, and that was in --

4 THE COURT: And the effect of the -- the amendment,
5 the purposed amendment, would be that state legislative
6 districts would remain that way, but the legislature could do
7 whatever it wanted to do with the congressional districts,
8 right?

9 MR. CLARK: Correct. That's -- you -- you have it.
10 That's a -- that's a bingo, and that's a huge change, and as a
11 practical matter --

12 THE COURT: Not a clarification, it's a -- an actual
13 change.

14 MR. CLARK: It's a significant change in
15 Constitutional law in -- in Maryland, and the decision, the
16 Szeliga decision, and there's a -- there's another one, come
17 from this very court, and you know, the -- the Judge Battaglia
18 ruled that the -- this current restriction as of -- of July 1st,
19 and as of now, right, because this couldn't possibly change
20 until first of all the hurdles were cleared to put this in front
21 of the voters, and then they were, you know, to get -- you'd get
22 majority passage of it, then the law would change, but you know,
23 as we stand here in the law, the law is that the contiguity
24 requirement, the compactness requirement, and -- and the
25 geographic notion that basically the bay cannot be cracked, but

1 that is the existing law, and so, if this referendum were to
2 pass, that would --

3 THE COURT: What is --

4 MR. CLARK: -- hint --

5 THE COURT: -- theory about why the legislator --
6 legislature wanted to decouple the treatment of legislative
7 districts versus congressional districts?

8 MR. CLARK: They're -- I think the theory is that they
9 think that the Maryland requirements are more stringent than the
10 analog federal requirements.

11 THE COURT: Because that's what Judge Battaglia told
12 them in that Szeliga case, right?

13 MR. CLARK: So, the -- but the -- the federal -- yes.
14 So, the federal requirements are -- are different. I mean, I
15 think --

16 THE COURT: Much more Laissez-faire from the United
17 States Supreme Court thus far, right?

18 MR. CLARK: Yes, and so -- but there's -- there's also
19 a tie-in which creates even more confusion for the voter, Your
20 Honor, because you know, what -- do voters -- does the average
21 voter in Maryland understand what the Supreme Court just ruled
22 in the Callais decision which this, you know, special session
23 purports to be a reaction to at an important level, do they
24 understand what the equal population requirement is? Do they
25 understand that those federal requirements are not as, you know,

1 stringent, and don't have as much reticulation as the -- as the
2 Maryland requirements that go back, you know, for a long time in
3 -- in Maryland history? I would submit to you, no, and in order
4 for the ballot question not to be misleading to voters, the
5 voters need to get the information about that, and this ties to
6 the -- to our due process argument as well, because the voters
7 were deprived of the ability to even look at the question, and
8 then -- and then make comments to say like, what are you
9 clarifying exactly?

10 In order to understand -- even if you buy the loaded
11 term clarify, and I agree with what I think Your Honor was
12 suggesting that this does a lot more than a clarification, but
13 even if you -- you're willing to accept at least someone could
14 think that it's a clarification, you know, to try to go back to
15 a state of the law prior to Judge Battaglia's decision. You --
16 you -- in order to do the comparison to know what is being
17 clarified, you have to know what the baseline federal law is,
18 right? You have to be able to say, we want to take this from
19 the current Battaglia status quo and move it back to just the --
20 the federal status quo, but the voters don't understand that,
21 Your Honor, and you know, so it's -- it's like a 1, 2 punch of
22 the voters aren't getting sufficient information, which is
23 itself an element of due process, and by cutting short the
24 process and missing the deadlines, the July 1st deadline being
25 obviously the most important one, but also the following

1 deadlines about commenting.

2 The voters can't even -- they don't have a mechanism
3 to try to help clarify this, Your Honor, and so, we think that,
4 you know, that's its own independent set of, you know, like
5 millstones around the neck of HB 2100 that would -- should just
6 drag it under and should result in it being enjoined. We see
7 this as -- and, oh I wanted -- so, just to -- just to -- to run
8 through my full litany, because I have -- I have eight, so you
9 can just stop me at any time, Your Honor, but -- but I'm going
10 to --

11 THE COURT: Oh, I will.

12 MR. CLARK: -- okay. Very good. So, I -- I said
13 first one was, what are the certain clarifications; that's not
14 clear; second, what the difference is between state legislative
15 districts and congressional districts; third, what are the
16 currently applicable Maryland Constitutional provisions that
17 weren't -- and those weren't adequately explained; fourth,
18 what's the federal Constitutional law on districting that's not
19 adequately explained; what are the applicable federal laws as a
20 general matter like Callais, and then the voters also told --
21 this is another violation of the single subject requirement,
22 that this bill is going to give original jurisdiction to the
23 Maryland Supreme Court, and you know, maybe -- maybe if that
24 were all the bill did, you know, you could say, well, you know,
25 the title gives notice of it, but I don't think the average

1 voter at all, and I think all these problems compound each,
2 understands the difference between appellate jurisdiction and
3 original jurisdiction. We understand it, you know, the -- and
4 that was -- also seven is the non obstante clause --

5 THE COURT: I have a feeling if the -- I have a
6 feeling a) that the Supreme Court already has original
7 jurisdiction over these kind of cases, and b) that if this was
8 some kind of change, it would still result in me having a
9 hearing and then them having a hearing a week later.

10 MR. CLARK: That's probably true, Your Honor.

11 THE COURT: So, that doesn't clarify anything for me.

12 MR. CLARK: I agree, and the last one, number eight,
13 was that the practical effect of all of the election laws that
14 the non obstante clause, were it to be given effect, would
15 nullify, that's also explained to the voter.

16 THE COURT: While we're on the topic of the Supreme
17 Court, and before I forget this, has the Maryland Supreme Court
18 or the Maryland Court of Appeals, as it was known up until very
19 recent --

20 MR. CLARK: 2022.

21 THE COURT: -- Constitutional amendment was passed,
22 but always the higher policy-making court in the State, has it
23 allowed the legislature to use the non obstante clause vehicle
24 in order to make new laws that were somehow contrary to
25 previously laws that were already on the books?

1 MR. CLARK: We don't think so, Your Honor. You know,
2 the -- the -- we think that the -- the State will point you to
3 the -- the Warfield case, but -- but for the theory that you can
4 kind of have maybe some -- I'll call them, you know, ancillary
5 legislation that -- that ties into putting a referendum in front
6 of the voter, but we think the idea of turning off an entire
7 body of election law just to get this one referendum forward,
8 that is, you know -- even if that is what Warfield held, and we
9 actually think the majority kind of sidestepped the issue by
10 basically finding that what they approved of there did -- was
11 consistent with state election law, but even if somehow you --
12 you took that, you know, decision, and you said, let's try to
13 map that on here, the -- the volte-face, the change --
14 especially the volte-face, right, that change in (unintelligible
15 10:34:37 a.m.) turnabout, right that happens, you know, from May
16 signing of the SB 29 to a special session that's already in
17 violation in terms of what it wants to do of that July 1st
18 deadline, and then turning off any other election laws that
19 might be a barrier to this, we think that there's no way that
20 that can be done by anything other than a bicameralism and
21 presentment process, or by putting the non obstante in front of
22 the voter.

23 And my -- my concluding point about these eight
24 subpoints of how -- why the average voter would be confused is,
25 you know, it's like a joint probability, right, or a Venn

1 diagram. So, you know, you take people who might understand
2 what the clarification is, right, if you through each of the
3 other seven in this sequence and the Venn diagram intersection
4 gets smaller and smaller, the people who truly understand --

5 THE COURT: I'm going to share your frustration, but
6 also point out, it would be nice if the average voter understood
7 Callais in the context of this amendment when they get to vote
8 on it, whether that's this year, next year, or three years from
9 now, because regardless of what we do hear, we are still going
10 to have a similar makeup in the legislature and, you know, if --
11 let's say I toss this out and the Supreme Court agrees with me,
12 they'll just follow the rules the next time, and they'll still
13 get done what they wanted to have done, because they have such a
14 large majority.

15 That aside, you and I will read multiple law review
16 articles on the Callais decision to refine our thinking and our
17 understanding about that; the average voter will not. The
18 average voter will not even know the name of the Callais
19 decision or even be able to get you a five-word sentence of what
20 its holding is, and then there's probably a larger group who
21 will give you whatever the news they watch said it means, and --
22 and -- or the news they watch -- they watch said it means, so
23 the average voter is -- is not going to be in view with that
24 level of sophistication, education --

25 MR. CLARK: So Your Honor, I understand what you're --

1 what you're wrestling with there. There is a kind of -- I think
2 that there's a practical point where you need to realize that
3 the average voter is not an expert, right, and so, we're not
4 calling for all of these fields to be mastered by the average
5 voter, and unless if they are, like a referendum couldn't go
6 forward, but we don't even know --

7 THE COURT: There would never be another referendum
8 again if --

9 MR. CLARK: I -- I think --

10 THE COURT: -- we lived under that restriction.

11 MR. CLARK: -- I -- I -- I think that is correct.
12 However, what I would say is that I don't even think anything
13 like a college try was given in order to inform the voter about
14 what this means. They're just told it's going to clarify the
15 law, when it's not really clarifying the law. It's -- it's
16 upending the existing law. You know, if -- so, let's suppose
17 like in the future there's a referendum about -- or like a
18 statewide response to Callais in some way, right?

19 Well, you would expect that the voter would at least
20 be told something like the U.S. Supreme Court ruled that racial
21 jerrymanders are unconstitutional, okay? The -- it's not going
22 to give you 50, 100 pages of reason why, and the voter doesn't,
23 you know, really need to know that, and I'm not claiming to you
24 that that's the constitutional standard in Maryland, but you
25 need to give the voter like some basic information, and we think

1 that, you know, on these points, the voter has not been given
2 that information.

3 THE COURT: All right.

4 MR. CLARK: So, we think that this case is essentially
5 an even worse version of McDonough where there the -- the key
6 word was rezone. Here it's the word clarify, and you know, it
7 suggests that there's some benign explanation for what it is
8 that's happening in the -- in the referendum, when in reality,
9 it's -- it's covering up, Your Honor, an awful lot and keeping
10 that information from the voter, and McDonough has been
11 continuously reaffirmed for five decades, in Kelly, in Stop
12 Slots, in La Plata (phonetic), in Ambridge. It is -- it is
13 fully binding.

14 You know, I can unpack a lot more of the questions
15 here, and I'm sure that Mr. Kobrin will have points he wants to
16 make in response. I'd like to, Your Honor, and -- and we didn't
17 talk about the structure for -- for this hearing, for this
18 argument, but if it's possible, I'd like to wrap up with a
19 discussion of remedy for right now, and then reserve time for
20 rebuttal after you hear from Mr. Kobrin.

21 And so, here's what I would say; that, look, the --
22 the relief here that we're requesting is narrow, and we think it
23 is the only option under the Dutton case because of the fact
24 that 7-103(c)(1) uses the term "all" multiple times, and all
25 means all, and therefore, there's no -- other than just turning

1 a blind eye to the violation of the deadline here of July 1st,
2 that this same legislature sat, albeit once in ordinary session
3 and then in a special session a couple of months later. It just
4 -- you -- you can't turn a blind eye to it is our position, and
5 we think that the harm here to the voters of Maryland, and
6 certainly to my clients, the Plaintiffs, is irreparable.

7 The -- it was unlawfully certified, because it
8 violates the -- the -- you know, came after the deadline of July
9 1st. It was improperly noticed. It's incompletely described as
10 a referendum, and the thing about it, we know that once this is
11 allowed to go to the voters, the toothpaste, Your Honor, can't
12 be put back into the tube. At that point, all of the things,
13 even framed in mandatory language, they become directory and,
14 you know, if -- if the -- if the highest court ultimately
15 decides that well, you know, there -- there are alternative
16 arguments as to why people kind of knew what was really going on
17 here, the voters, in -- in Maryland, then it gets approved.

18 That's why we came rushing here as soon as possible.
19 That's why under the provision in Article 10 -- Article 12, I'm
20 sorry, of the Election Law that tells us we have to file within
21 10 days; we filed within 10 days, Your Honor, and that -- that
22 was a heavy lift. You remarked on our -- our five lawyers, but
23 you know, this is new legislation, and so we had to get up to
24 speed on it, and all of the Constitutional principles that --
25 that it involves. So, we think that we're also entitled not

1 just to a declaration that this HB 2100 violates Maryland law,
2 but also an injunction against it, and that injunction is needed
3 to preserve the integrity of the election process consistent
4 with Constitutional principles, and you also know there's a
5 Constitutional provision in Maryland.

6 The number of it is escaping me at the moment, that
7 it's -- that the -- the State shall preserve the purity of
8 elections, and we think the purity of this election has been
9 completely contaminated by the violations of statutory law, the
10 rush, the fact that there was this improper non obstante fix-up
11 job and on and on down the line. The -- so, we would just go
12 ahead and ask the Court to declare that question three be
13 declared illegal and enjoined because the July 1st deadline was
14 missed, and the follow-on deadlines about notice to the voters
15 and their ability to comment. The non obstante clause can't
16 save it, and that's, you know, that's something I think that Mr.
17 Kobrin didn't put a lot of eggs in that basket, because he
18 knows, and he's come up with other arguments.

19 He's come up with the Article 14 self-standing
20 argument. He's come up with Election Law 7-105 argument to try
21 to get out of that, but we don't think that noose can be
22 escaped, and lastly, we don't think that the voters here, Your
23 Honor, really understand what's being put in front of them,
24 especially not through this rushed process. Last observation on
25 the violation of due process before I -- I sit down for now,

1 Your Honor, which is we put together a whole set of exhibits to
2 show what happened with this once the legislature passed it.
3 It's a Keystone Cops, you know, comedy of errors.

4 It's like it changes from day to day to day, and I
5 would suggest to you that, you know, if you want to try to make
6 a claim that the voter is being given notice here of really what
7 was going on, that, you know, that would not have happened. It
8 would not have the shifting inconsistent sands that we show
9 about things that go up on the website, inaccurate dates, you
10 know, things that purport to like go back in time, and it's all
11 a product of -- of the fact, Your Honor, of the big rush job,
12 and you know, as we learn in kindergarten, and you know, there's
13 the whole book about everything you needed to know, you learned
14 in kindergarten. You know, haste makes waste, and here the
15 General Assembly made a lot of haste, and made a lot of waste,
16 and that's why we're calling for the declaratory judgment and
17 the injunction, Your Honor.

18 THE COURT: Thank you, sir.

19 MR. CLARK: Thank you.

20 THE COURT: Mr. Kobrin, before you make your own
21 arguments, which you are well capable of doing, I'm going to
22 propose that we take a brief recess. It is quarter to 11:00;
23 how about if we take a 10-minute break, and then we'll come bac.

24 MR. KOBRIN: Of course, Your Honor.

25 THE COURT: All right. We'll see you in a minute.

1 THE CLERK: All rise.

2 (At 10:44 a.m., recess in proceedings.)

3 (At 10:58 a.m., proceedings resumed.)

4 THE CLERK: All rise.

5 THE COURT: Good morning, everyone. Please be seated.

6 Counsel, can you come up for just a minute, please?

7 (Counsel approached bench, and the following

8 occurred:)

9 THE COURT: I want to see if this many lawyers will
10 fit at the desk. I'll wait for your boss to get here. I just
11 wanted to let you know that we have the whole day.

12 MR. CLARK: Okay.

13 THE COURT: I set it aside so there's not a time
14 crunch, unless you have personal time crunches. I do need to
15 stop at about five till noon this morning. So, if that puts you
16 in the middle of your argument, I apologize in advance. All I
17 could offer you is I'll bring you back at 1:30. Keep going.

18 Court, we're here for however long you need us here.
19 Yeah, you know, I can't give you a final decision like the
20 Supreme Court can, but I can give you all day. They'd never do
21 that for you.

22 MR. CLARK: It's very much like the old US Supreme
23 Court, Your Honor.

24 THE COURT: That's right.

25 MR. CLARK: Daniel Webster argues for an entire

1 multiple set of days.

2 THE COURT: Yeah. And I hope that that happens in
3 this day and age. Does it?

4 MR. CLARK: No.

5 THE COURT: All right. You ready?

6 MR. KORBIN: Yes.

7 MR. CLARK: Thank you, Your Honor.

8 (Counsel returned to trial tables, and the following
9 occurred in open court:)

10 THE COURT: Recalling C-02-CV-26-1986, Michael Howell,
11 et al., vs. Westley Moore, et al. Counsel, please identify
12 yourselves for the record, spelling your last names for the
13 benefit of the court reporter.

14 MR. CLARK: Jeff Clark for the Plaintiffs, Your Honor.
15 C-L-A-R-K.

16 MR. YATES: Marshall Yates for Plaintiffs, Y-A-T-E-S.

17 MR. DEWEY: Samuel Dewey for Plaintiffs, D-E-W-E-Y.

18 MR. BROSNAN: Kyle Brosnan for the Plaintiffs, B-R-O-
19 S-N-A-N.

20 MR. LICATA: Anthony Licata, L-I-C-A-T-A.

21 MR. KOBRIN: Daniel Kobrin, Assistant Attorney General
22 on behalf of the Defendants. K-O-B-R-I-N.

23 Is the microphone picking me up?

24 THE COURT: It is. Mr. Kobrin, bottom of the first
25 inning. You're up to bat.

1 MR. KOBRIN: Thank you, Your Honor. I appreciate it.

2 I want to make clear what we are arguing and are not
3 arguing because the Plaintiffs label us as arguing certain
4 things we are not. And so I want to sort of make clear for the
5 Court what we're putting in front of the Court today.

6 The Plaintiffs are alleging that the General Assembly
7 enacted a law and violated it and then enacted legislation
8 suspending that law. That our defense is that that suspension
9 was okay, that it was okay to violate the law because they
10 suspended it. That is not what we are arguing. We are not
11 arguing that there is a non-obstante clause. We are arguing
12 that when the General Assembly pulls a constitutional lever,
13 when it engages a constitutional process as laid out in a
14 provision of the Maryland Constitution, a statute can't
15 constrain it. The statute cannot defeat the Constitution.

16 That is functionally and operationally and legally our
17 argument. And the contrast here is that when an executive
18 branch agency like the Department of Health, the Department of
19 Public Safety, or Correctional Services. When they do things,
20 they do things according to a statute because a statute lays out
21 what their authority is and how they are to wield it. The
22 legislature does not have a statute that works like that. The
23 legislature wields authority according to the Maryland
24 Constitution.

25 The legislature engages processes according to the

1 Maryland Constitution. It can delegate that authority. And to
2 be perfectly clear, that's what 7103 and 7105 are. The Supreme
3 Court has said that in Morris, and that's in our briefing, that
4 7103 is a delegation of authority to the Secretary of State. It
5 can delegate that authority and can do so constitutionally. But
6 when it pulls the lever itself, when it engages the process, not
7 the Secretary of State, the statutes cannot constrain that
8 constitutional exercise.

9 And we put the reasons in our brief, but to put it
10 colloquially, because the Constitution wins, the statute cannot
11 defeat the Constitution for a number of reasons. That's the
12 argument that we make here today. That the General Assembly,
13 when it enacted Chapter 881, was not delegating any exercise of
14 authority to the Secretary of State, was not engaging the
15 executive branch in the preparation of the ballot question. It
16 was writing the question itself as it is allowed and, in fact,
17 granted to do under Article 14. And in doing so, it was pulling
18 the constitutional lever.

19 And this Court, under Koshko (phonetic), under the
20 other cases we've cited, is obliged to interpret the election
21 law article, the statutes, to not conflict with the Constitution
22 because the alternative is invalidating the statutes and saying
23 that they can't apply because they're not constitutional. And I
24 want to make very clear the relationship between the statutes
25 and the Constitution because this is actually a point of

1 contention amongst the language we use in our briefing.

2 Plaintiffs are arguing and have argued multiple times
3 that we have implementing statutes and that those implementing
4 statutes implement constitutional provisions, and that therefore
5 they take on some kind of constitutional dimension. The exact
6 words in Plaintiff's brief is that a violation of the statute
7 therefore becomes a violation of the Constitution per se.

8 That's not correct. Implementing statutes obviously exist. The
9 election law article is an implementing code. It's an
10 implementation of the statutory authority under Article 3, §49
11 to regulate the time, place, and manner of elections.

12 And we actually would agree that 7103 and 7105 are
13 implementing statutes to an extent of the proposed
14 constitutional amendment process, but they are implementations
15 of delegated authority. And I think we need to understand that
16 there are different types of implementing statutes and what
17 they're allowed to do and what they're not allowed to do. I
18 think on one end of a very, not very broad spectrum is an
19 implementing statute that simply takes the text of the
20 Constitution, copy, paste, enact. And so the words of the
21 statute are the same as the words of the Constitution. It
22 doesn't add anything. It doesn't do anything else. It just
23 places the Constitution, for whatever reason, in the statute.

24 I would agree there that a violation of that statute,
25 since it is the words of the Constitution, a violation of the

1 implementing statute, is a violation of the Constitution. And
2 that that kind of statute is both lawful and constitutional and
3 has a place if the legislature decides to enact it.

4 On the other end of that spectrum is a statute that
5 directly violates the constitutional terms. So imagine under
6 Article 14, the General Assembly enacts a statute that says --
7 the article says that three-fifths of both chambers have to pass
8 a proposed constitutional amendment for it to be submitted to
9 voters. But we are enacting a bill, and it gets signed by the
10 governor, that says you only need one chamber. Only one chamber
11 has to pass by a three-fifths majority. The other can be a
12 simple majority. That's an implementing statute that directly
13 conflicts with the terms of the Constitution. That's an obvious
14 inconsistency and would be struck down as unconstitutional.

15 So you have something that is obviously okay,
16 obviously not okay. What's in the middle? What's in the middle
17 is what we have here and what most of the election law article,
18 most of the Maryland Code is. There are statutes that need to
19 be interpreted in accord. And they can't be interpreted in
20 conflict with the Constitution, meaning when the Constitution
21 says that an agency or the legislature can do something, the
22 statute can't say it can't do it. And more importantly, when
23 the Constitution places no limitation, the statute cannot place
24 a conflicting limitation.

25 And the example I want to draw from for the Court's

1 attention is early voting in 2006, because the State made the
2 other side of the coin argument that Plaintiffs are making here
3 today. That in 2005 and 2006, the General Assembly enacted a
4 statute that said voters can vote early in early voting centers
5 at first for five days preceding the election, and then they
6 amended it the next year to a 10-day period preceding the
7 election. And that was challenged by voters as unconstitutional
8 because the Maryland Constitution says in multiple places that
9 election day is a certain day and that voting has to take place
10 in the election ward or district in which the voter resides.
11 I'm paraphrasing Article 1, §1.

12 And the State argued in front of the Supreme Court,
13 no, what we have here is an implementing statute, that Article
14 3, §49, gives the legislature the ability to regulate the time,
15 place, and manner of elections. This implements the time and
16 manner of elections and even the place. And there is no direct
17 conflict because there is no provision that says early voting is
18 not allowed. In fact, it only says election day is a certain
19 day. And let's look to federal case law. There's an analogous
20 federal statute that says election day is a certain day.
21 Federal cases have said that's the endpoint, but you can vote
22 before that. And there's a constitutional amendment that says
23 absentee voting is okay. So we know other modes of voting are
24 all right.

25 And the Supreme Court said no. You can't conflict;

1 you can't be inconsistent with the Constitution by adding, by
2 limiting where there are no limits, or by adding provisions
3 where there are no provisions. Early voting is not
4 constitutional because election day in Maryland is one day and
5 no more. And even though the Constitution doesn't say no more,
6 that's how we have to interpret it. And so you cannot write a
7 statute that conflicts with the Constitution by adding
8 limitations or adding provisions to the exercise of
9 constitutional authority.

10 Plaintiff's arguments about 7103 and 7105 add
11 limitations to the exercise of Article 14 authority. I have not
12 heard in their briefing or an argument here today how the
13 General Assembly can propose a constitutional amendment after
14 July 1st. Under Plaintiff's interpretation of the statute as
15 applied to the constitutional provision, anything proposed after
16 July 1st is automatically unconstitutional because it violates
17 the statute.

18 But Article 14 has no such limitation. And so the
19 General Assembly cannot enact a limitation, a blackout period,
20 essentially, that the Constitution doesn't impose. It cannot
21 self-limit like that, both because under Article 3, §49, time,
22 place, and manner to regulate elections, critically not
23 inconsistent with the Maryland Constitution. It says it in the
24 provision. And second, because General Assemblies cannot bind
25 future General Assemblies. A General Assembly cannot say this

1 is a law and a future General Assembly is deprived of authority
2 to do anything about it or deprived of authority to exercise
3 constitutional authority because of the law.

4 That's exactly how Plaintiffs are interpreting 7103
5 and 7105, to say that through SB 29, the General Assembly was
6 creating a blackout period after July 1st in which no proposed
7 constitutional amendments can happen anymore, and that would not
8 be lawful. That would be an interpretation of 7103 that
9 conflicts with the Maryland Constitution unnecessarily.

10 THE COURT: As to July 1, point made, but the General
11 Assembly can bind future General Assemblies and Courts By
12 enacting a constitutional amendment, right.

13 MR. KOBRIN: Of course.

14 THE COURT: So what is the mechanism prescribed by the
15 Constitution? What limits, if any, are there to the General
16 Assembly's authority to propose constitutional amendments?

17 MR. KOBRIN: Those found in the Maryland Constitution.
18 They're twofold, with a third that I think informs the analysis.
19 The first is Article 14 itself. There are inherent limitations.
20 The General Assembly may propose, but we have the single bill,
21 single vote rule, that a proposed amendment essentially has to
22 relate to a single subject matter and therefore be proposed in a
23 single bill and put to a single vote. And that multiple subject
24 matters have to be put in different proposed amendments and
25 voted on separately. That there is a publicization requirement

1 through order of the Governor, either by newspaper publication
2 or in a manner provided by law.

3 And after that, Article 14 says, shall be submitted to
4 the voters in a form prescribed by the General Assembly. Again,
5 that's a paraphrasing, I'm not directly -- but it's prescribed
6 in a form by the General Assembly. The General Assembly chooses
7 the form, which is why they get to write the question.

8 The other limitations in the Maryland Constitution are
9 in Article I, §1, all elections shall be by ballot. The General
10 Assembly cannot call for a voice vote on a proposed
11 constitutional amendment. The General Assembly cannot enact
12 another mode of voting on the proposed constitutional amendment.
13 It has to be by ballot. There is also -- this is not
14 necessarily binding, but there is a line of cases about Article
15 3, §29, which applies to the legislative ability to enact laws.
16 And is specifically about the legislative title and what
17 information a legislative title has to put in.

18 The Supreme Court has said that when the General
19 Assembly uses the legislative title as the ballot question,
20 Article 3, §29 comes into play, and there you get to, well, does
21 the question relate the scope and effect of the legislation and
22 is not -- and it's not misleading. And so that can guide this
23 Court's analysis about ballot question language. But that's
24 also -- it's illustrative. It's not necessarily implicated
25 here, both because there's language in a case, Hillman -- it's

1 the Hillman case we cite in our opposition that says that
2 Article 3, §29 cannot, because the Article 14 power is a bill,
3 not an enactment, because it doesn't get the governor's
4 signature, and because Article 3, §29 only applies to
5 enactments, it can never directly govern an Article 14 bill.
6 But it's still illustrative, it's still implicated, or at least
7 implicit guidance as to how the language has to be.

8 But in terms of the timeline, which is sort of the
9 first battle, the first skirmish in this battle, about July 1st,
10 et cetera, there is no time frame. What is functionally
11 limiting on the legislature is how quickly can something be put
12 on a ballot. If they proposed a constitutional amendment on
13 November 4th with the election on November 5th, we'd be back in
14 court about a different subject that the Court does not need to
15 solve now, but how we abide by shall be submitted to the voters
16 on election day, which is in the Maryland Constitution. How we
17 actually get it onto ballots in a 24-hour period. But we don't
18 have that here.

19 In terms of timeline, there is no limitation. There
20 is no blackout period set by the Maryland Constitution. And
21 therefore, the General Assembly cannot enact one through 7103.
22 7103, and this is turning more towards the statutory
23 interpretation argument. And I want to make clear for the
24 Court, the State is not arguing there's a statutory
25 interpretation. They are all part and parcel of the same

1 argument. That this Court could solve this challenge, or at
2 least that aspect of this challenge, by saying, let's look at
3 the plain language of 7103 and 7105. Stop slots both at 192 and
4 at footnote 16 backs up. The General Assembly is allowed to
5 write this question on their own. And when they do so, this
6 statutory process is not implicated, because this process,
7 again, from Morris, it's a delegation. It is telling the
8 Secretary what to do when the Secretary is responsible for
9 writing the question.

10 And we put the language in our briefing, the General
11 Assembly tells, for lack of a better word, the Secretary whether
12 to get involved or not through the enactment. There are some
13 enactments, if the Court looks at and they're in the briefing,
14 where there's no ballot question language at all. And that's an
15 open invitation for the Secretary to engage their authority,
16 their delegated authority to write a question on time and to
17 engage the process in 7103 and 7105.

18 There are some bills where there is language, but the
19 General Assembly writes shall appear on the ballot in a form
20 substantially similar to the following, and it proposes
21 language. And that's again an invitation to the Secretary of
22 State to write language, but to hew closely to the form that the
23 General Assembly has prescribed.

24 THE COURT: Don't stray too far from what we're
25 telling you.

1 MR. KOBRIN: Exactly. Here we don't have that. The
2 question shall appear. And this gets to the legislative
3 records; the comments allegedly made on the floor of the Senate
4 and the House about we're bypassing the Secretary of State. No.
5 The non-obstante clause, as they put it, I don't use that in the
6 briefing. I've honestly never heard that term before. §3B of
7 the bill is not saying we're suspending the law because it
8 applies to us. §3B in the bill, as Senator Kagan pointed out at
9 121 of hearing or Senate proceeding 68, 413 and 554, she did it
10 three separate times outside of the context that the plaintiffs
11 are selectively quoted. And Delegate Fair said it at 44, I
12 believe it was 20 of House proceeding 71A.

13 We're after July 1st. If we assign this to the
14 Secretary of State, there could be a problem. We could create
15 an issue. So we're not assigning this to the Secretary of
16 State. We are bypassing that process by writing the question
17 itself, by exercising our prerogative under the Constitution to
18 prescribe the form and write the question itself. Obviating the
19 need for the executive branch to get involved, obviating the
20 need for the executive branch to engage 7103 and 7105. And
21 that's why those comments were made. That's what the intent
22 behind Chapter 881, §3B was. 3B is A is saying let's put it to
23 the voters, B is saying this is the question. Secretary of
24 State, you do not need to get involved so we don't create a
25 conflict with July 1st.

1 On statutory interpretation alone, you can write a
2 ruling in this case that says the plain language is clear, the
3 Secretary of State is bound by July 1st. The notice and comment
4 period only comes into play when a question is certified under
5 the Secretary of State or county attorney's process if it's a
6 charter amendment. And 7105B has its own exception written in
7 to explain that DLS, the Department of Legislative Services,
8 does not need to write the brief statement of summary when the
9 General Assembly prescribes the question or the form itself.

10 The statutes simply don't apply, and as a matter of
11 statutory interpretation, what the General Assembly did comports
12 with the statutes because on their face they don't apply. Any
13 argument that they do apply runs into the constitutional problem
14 that I've laid out, that somehow these statutes are going to
15 restrict the General Assembly in when they can propose a bill.

16 Let's talk about the notice and comment period, the 15
17 days. Plaintiff's argument is essentially that an executive
18 branch officer who is appointed by the governor has veto power
19 over the legislative proposal of constitutional amendments.
20 Because all the Secretary has to do, I'm sorry, the State Board
21 of Elections, the State Board of Elections has to do is not open
22 up a comment period and the proposed amendment is gone. It
23 can't be put on the ballot anymore. It defeats the Article 14
24 process. Because no comment period was open, or the feedback
25 received wasn't given to the author because the statute requires

1 that. Or the author takes that feedback, incorporates it into
2 the question, and hands back a new question after five days
3 instead of four because the statute says rewrite your question
4 if you need to within four days.

5 All of these are part of a statutory process that gets
6 engaged when the executive branch is involved. But they can't
7 act as a veto point for the executive branch to say, well, if we
8 just don't do it, it never reaches the ballot. We can
9 functionally veto a proposed constitutional amendment. And the
10 same goes for 7105. 7105 engages the Department of Legislative
11 Services to write a summary, essentially a plain language
12 summary or a brief statement summary of what the amendment and
13 the question accomplishes or seeks to accomplish.

14 The complaint takes issue with the fact that the
15 Office of the Attorney General has to review that statement, and
16 I imagine that's why the Attorney General was named the
17 Defendant, although the Attorney General has no other role to
18 play in this process. And then that brief statement has to be
19 transmitted to the State Board by the first Monday in August,
20 which was, I believe, August 1st. It was before the enactment
21 of 881. We'll concede that. But that is not, first of all, not
22 part of the process when the General Assembly writes the
23 question itself. And more importantly, it's not a veto point.
24 It is not something that if it gets missed, the entire
25 constitutional process is stopped and that shall, shall be

1 submitted to the voters, is canceled by the statutory language.

2 Ultimately, that's the constitutional argument we're
3 making. There is an Article 14 process, it is governed by
4 Article 14. Article 1, §1, and illustratively, Article 3, §29.
5 And that as long as the General Assembly abides that process,
6 there are no statutory violations that stop it because the
7 statutes, as a matter of statutory interpretation, do not apply
8 and constitutionally cannot cancel the constitutional process
9 that's been put in place.

10 With that being said, I want to move to the due
11 process arguments that the Plaintiffs make. They've expanded.
12 In the complaint and in their motion for summary judgment, the
13 due process argument is that essentially the statutory
14 violations that are alleged in counts two, three, and four
15 deprive the plaintiffs of due process. They do not. And what's
16 really critical here is two things. One, I hope it is not lost
17 on the Court that it is a bit odd to make an argument that we,
18 the Plaintiffs, are deprived of due process, of proper notice of
19 this question, 90 days before an election when we are suing,
20 knowing about it, knowing very much about it because we are
21 briefing it in the 70th through 90th day. That making a pre-
22 election due process argument is difficult because you have to
23 at least factually allege I'm not aware. I am not sufficiently
24 aware. I need to be made more aware, either statutorily,
25 constitutionally, whatever argument you need to make. That

1 argument falls a little flat when it is made this far out in
2 front of the election when there is so much time to still
3 apprise oneself or to be apprised of what's going on with this
4 proposed constitutional amendment. And the Constitution backs
5 that up.

6 I think the question the Court should ask and is
7 probably asking itself is, well, then what is due process when
8 we talk about it in this context? Because you didn't hear me
9 say it when you asked what applies from the Maryland
10 Constitution. Stop Slots announced that principles of due
11 process apply and specifically notice that voters have to be put
12 on notice that there is a proposed constitutional amendment.
13 And they have to be put on notice adequately. It's adequate
14 notice. That's the standard for timing. We'll talk about
15 ballot language clarity in a moment. But for timing, it's
16 adequate notice.

17 At no point did stop slots say, and therefore the
18 following statutes must be followed in order for there to be
19 adequate notice. What Stop Slots said was, there needs to be
20 adequate notice. Let's take a look at what's in the election
21 law article. Well, there's 7105 that says specimen ballots go
22 out three weeks before the election. There's a provision that
23 says you have to have a printed copy available to anyone who
24 asks for it of the entire legislative enactment. And in fact,
25 that is the crux of adequate notice. publishing in a forum

1 easily accessible to voters the entire legislative enactment so
2 they can see the amendment and the question all in one, and they
3 can see the legislative title. And if there were amendments
4 made to the bill, that's the crux of it, adequate notice.

5 That's happened in this case. The full text of the
6 enactment was posted by the General Assembly of July 29th, I
7 believe it was 93 or 94, perhaps even 95 days before the
8 election. That has remained the amendment text, has remained
9 unchanged since then. The amendment to the bill that changed
10 §3B, the notwithstanding and then directing the question, that
11 changed on August 3rd, and then on the 4th it was adopted by the
12 Senate. And so since August 4th, that language has been
13 publicly available. And then the State Board posted it or
14 linked it with its post on its website on the 88th day.

15 The crux of adequate notice has been available in an
16 easily accessible forum to voters from the 95th day before the
17 election onward. Voters on that aspect have received adequate
18 notice. Any further argument that 7105 is involved, that 7105
19 is part of notice because of the specimen ballot provision that
20 stop slots highlighted, is still going to be met. I should say
21 it still can be met. Don't make promises in Court until they
22 happen. But it can still be met because specimen ballots aren't
23 sent out until the week before early voting. Specimen ballots
24 will have both the ballot question, and the Department of
25 Legislative Services discretionarily wrote a summary. They were

1 not required to by law, but they did. That summary has been
2 sent to the State board. It's posted. It is available. Local
3 boards will be able to send out the specimen ballots at the
4 required time without an issue under the statutory directive.

5 And so there can't be an argument in this case that
6 there wasn't adequate notice when this complaint was filed when
7 both there was when there was an easily accessible forum through
8 which voters could find the full enactment. And we haven't even
9 reached the specimen ballot process yet.

10 I also think it's a little odd to argue that there
11 hasn't been due process yet because there's a publicization
12 requirement that sort of is a different road. It doesn't
13 normally get taken. The Governor can order this to be
14 published, the text of the enactment to be published in
15 newspapers for the period four weeks before the election. And
16 Article 14 is satisfied. That's the other route.

17 And so any argument that Plaintiffs are making, that
18 there hasn't been adequate notice, that people don't know about
19 this amendment enough, even if the Court buys all of the
20 arguments under stop slots, even if the Court says not posting
21 the language of the ballot, I'm sorry, of the amendment on the
22 90th day before is somehow constitutionally infirm, the
23 question's unripe because there is still an alternative means
24 that the governor can meet. in the four weeks leading up to the
25 election. We are not there yet.

1 That's the sort of calendar aspect of it. There is
2 adequate notice in this case. It has been met and will continue
3 to be met. Plaintiffs cannot make a showing otherwise. In
4 terms of ballot question clarity, the language of the question
5 itself, this is what's grown. In their complaint in count four,
6 Plaintiffs allege that the ballot question is insufficiently
7 clear because under 7103 there needs to be a brief statement
8 about the practical outcomes of the voters' choices for and
9 against the amendment, and that there is no such explanation for
10 what they call the non-obstante clause. And that's specifically
11 because voters are not informed what the outcome of the non-
12 obstante clause is. The question isn't clear enough.

13 In their opposition, they adopt the argument that
14 their colleagues are now making in Dorchester County that the
15 entire question is unclear because there are certain terms that
16 are allegedly unclear or misleading. The State's argument is
17 that the Plaintiffs are now arguing something outside the scope
18 of their complaint, that they are seeking relief on count 4 on a
19 basis they did not plead and therefore are not entitled to argue
20 in their motion for summary judgment. They are limited to
21 seeking relief on B-6, insufficient non-obstante clause, not
22 entire question is unclear. And that's the State's primary
23 first argument. The secondary argument is we address the merits
24 of that, the language is clear.

25 I will address both the Court's back and forth with

1 counsel in a moment with the Court's permission, but what I want
2 to say first about the ballot language issue is that you have
3 not heard plaintiffs substantively argue case law and precedent.
4 They've said McDonough, McDonough, McDonough, McDonough, because
5 no Court has ever invalidated a ballot question on a proposed
6 constitutional amendment pre-election. McDonough and Surratt,
7 the two ballot question cases where something was invalidated,
8 were charter amendments. No Court has ever done it to a
9 proposed constitutional amendment.

10 No Court has ever done it to one proposed by the
11 General Assembly when the general, and especially when the
12 General Assembly itself writes the question. But there is no
13 case in which a Court pre-election invalidates a proposed
14 constitutional amendment (unintelligible) sent to the voters or
15 submitted to the voters. That is because the bar, the case law,
16 if that is what the Court is following on ballot question
17 clarity, is not a high one. The ballot question does not need
18 to teach, as Your Honor pointed out, about Kelly (phonetic).

19 The ballot question is entitled to use certain
20 standards. We know that from the no coalition case, the K-N-O-W
21 coalition case. In which the ballot question said certain
22 provisions. And the challenge was that certain wasn't specific
23 enough. You need to cite; you need to explain what those
24 provisions are. The Supreme Court said no, the voter can look
25 it up. That's because you don't want to end up with a ballot

1 question that takes up two pages of the ballot and becomes a
2 third-year law school course as opposed to a brief summary
3 ballot question that the voter is supposed to inform themselves
4 of before going into the voting booth by learning about it and
5 by looking at the enactment, which is widely available.

6 And so, putting that the question clarifies certain
7 standards, that is exactly what it does. It clarifies that
8 specifically that first change about Article 3, §4 does not
9 apply or only applies to legislative districts. And it does
10 clarify because the State does not concede that the state of the
11 law prior to this proposed constitutional amendment was that
12 Article 3 §4 applies to congressional districts. What
13 plaintiffs don't account for are the two District of Maryland
14 Federal District Court cases in which a Federal District Court
15 said at prior redistricting sessions, 2002 and 2012, Article 3,
16 §4 does not apply to congressional districts.

17 Judge Battaglia's ruling in the Anne Arundel County
18 Circuit Court was the first time any Court had ever said that,
19 and with the utmost respect that I can express to the Circuit
20 Court for Anne Arundel County --.

21 THE COURT: (Unintelligible).

22 MR. KOBRIN: A ruling of the Circuit Court is not the
23 law of the land. It is the law that binds the parties in that
24 specific circumstance. It is not a published appellate opinion
25 that requires the State to follow it. And I think what the

1 legislature did here, and it's been made very clear both in the
2 legislative record and through the President of the Senate's
3 comments about it, the General Assembly did not want to engage
4 in redistricting under the potential of a lawsuit, under the
5 potential of litigation, where there was one ruling that could
6 then be followed again and appealed up. Why even assume the
7 risk of litigation and instead obviate that by proposing a
8 constitutional amendment that clarifies this is the common
9 understanding, that Article 3, §4 does not apply to
10 congressional districts. We are clarifying that we all
11 understand that. That is how we are working moving forward.
12 That is now enshrined in our Constitution.

13 It does not change the state of the law because the
14 state of the law was not otherwise. The state of the law was a
15 common understanding that it didn't apply with a single ruling
16 from the Circuit Court that it did that was never tested at the
17 appellate level.

18 THE COURT: All right.

19 MR. KOBRIN: Okay. In terms of the other provisions
20 of the question, it accurately -- remember, the analysis here is
21 not whether the question informs the voter of everything that
22 could happen. And that's also made pretty clear in the other
23 case law. And so talking about redistricting and what could
24 happen and what could happen with certain election districts and
25 congressional districts in the State is unnecessary, premature,

1 and assumptive. What the question has to do is relate to the
2 voter what the amendment, what the proposed amendment does. The
3 first clause does that with the clarifying language. The second
4 clause says that it permits the General Assembly the authority
5 to vest the Supreme Court with original jurisdiction over
6 congressional districting.

7 That is necessary because in fact, under Article 3,
8 §5, the Supreme Court of Maryland does not have original
9 jurisdiction. It specifically says over legislative
10 districting, original jurisdiction over legislative districting.
11 That's why in 2022, there had to be a lawsuit filed in the
12 Circuit Court for Anne Arundel County, because a case has to
13 originate in the Circuit Court for congressional districting.
14 Whereas legislative districting originates in the Supreme Court.
15 And since the Supreme Court does not generally conduct fact-
16 finding proceedings, the Supreme Court assigns it to a special
17 magistrate to conduct fact-finding and make proposed conclusions
18 of law that are then litigated in the Supreme Court. That's
19 what happens with legislative districting.

20 And so that second clause in the ballot question
21 accurately puts forth that the change being made is that
22 something needs to vest the Supreme Court with original
23 jurisdiction. The proposed amendment to Article IV, §62, I
24 believe, does that. That it gives the General Assembly the
25 power to vest.

1 THE COURT: It's important to point out at this
2 juncture that the Supreme Court of the United States has given
3 us a lot of guidance on how to deal with congressional
4 districting cases, right?

5 MR. KOBRIN: Of course.

6 THE COURT: Because it's essentially a federal matter.

7 MR. KOBRIN: Yes.

8 THE COURT: And there's nothing that the Maryland
9 legislature can do or the Maryland Constitution can do to escape
10 that structure because you pointed out earlier, you know, the
11 Constitution of Maryland is the supreme law of Maryland.
12 Statutes come in underneath that. But above that, the
13 Constitution of the United States, and the body that interprets
14 that as the Supreme Court of the United States, is above the
15 Maryland Constitution in the food chain, right?

16 MR. KOBRIN: Of course.

17 THE COURT: To put it in a colloquial term. It's
18 getting close to lunch, so thinking about food. But there are
19 some safeguards there because the federal system still exists.

20 MR. KOBRIN: Of course.

21 THE COURT: And the legislature couldn't undo that if
22 it wanted to.

23 MR. KOBRIN: Agreed. And to be clear, the federal
24 system I should say the federal body of law governing
25 congressional districting, as interpreted by the Supreme Court

1 of the United States, currently says that under §2 of the Voting
2 Rights Act, there is certain protections no longer in force.
3 And that specifically one person, one vote, and other
4 constitutional privileges obviously still apply, and a state
5 constitution cannot erase those. And that political
6 gerrymandering is a political question that Courts, Federal
7 Courts, cannot address.

8 State constitutions cannot go below that floor of
9 interpretation. Agreed. State constitutions, however, can
10 build on that floor. And so Maryland could have a
11 constitutional amendment that says we do not engage in a certain
12 type of districting. We you know, want to -- let me put it this
13 way. There could be an amendment that says Article 3, §4 does
14 apply to congressional districting. and that amendment would
15 survive because it builds above what the Supreme Court has
16 interpreted through the Federal Constitution, places more
17 restrictions. It just can't drop below that floor.

18 THE COURT: You can add, but you can't subtract.

19 MR. KOBRIN: Exactly. And so that is -- sort of gets
20 back to the question about ballot language clarity. The
21 language is clear. The amendment proposes to let the General
22 Assembly vest original jurisdiction with the Supreme Court. The
23 ballot question accurately describes that. And then finally, it
24 makes clear that federal law will apply and only federal law
25 will apply to federal districting, the congressional districting

1 in the State. And that's an accurate description of what the
2 amendment does, which says nothing in the State Constitution is
3 going to apply to congressional districting. All that's left is
4 federal law, which is the federal Constitution. And any current
5 federal statutes or any federal statutes that Congress seeks to
6 enact in the future related to congressional districting.

7 THE COURT: Just to underscore what you said a moment
8 ago, federal law permits political gerrymandering.

9 MR. KOBRIN: Federal Courts cannot stop, cannot
10 adjudge political districting.

11 THE COURT: At least that's the current stage.

12 MR. KOBRIN: That is the current interpretation.

13 THE COURT: Until the Supreme Court of the United
14 States changes its mind.

15 MR. KOBRIN: If it does so, it does so. But the
16 current under Rucho v. Common Cause, currently political
17 gerrymandering is a political question. And in Callais, the
18 Supreme Court indicated it is an acceptable consideration in
19 districting that if a State follows it, it is an alternative to
20 an allegation that the State used race-based districting. The
21 State can respond and say, no, we didn't; we used politically
22 based districting. And so the question language is fair.
23 Arguing whether it's clear or not is the wrong, frankly,
24 analysis because the case law is clear. The Court is not
25 concerned whether it's the clearest language or the best

1 language that could describe the question. It does not rewrite
2 the language. It does not do any of those things. It is
3 looking under the common law definition, which, again, we don't
4 concede, but I don't need to make my entire argument that's in
5 the papers. I know the Court's familiar with it.

6 At the very least, it's minimum reasonable clarity,
7 scope, and effect. And we have that here because the three
8 clauses of the question accurately describe what the amendment
9 is doing. Plaintiff's primary argument is there could be more,
10 but more is not required, and the amount of more they want would
11 take four pages of a ballot and would confuse voters frankly
12 more than it would assist them.

13 THE COURT: And maybe a master's degree.

14 MR. KOBRIN: I'm sorry.

15 THE COURT: Master's degree.

16 MR. KOBRIN: Potentially. And so the ballot question,
17 again, our first argument is that this argument is not before
18 the Court because what they've argued in their -- what they've
19 alleged in their complaint does not match what they're arguing
20 now or what they've expanded. But in responding to the merits,
21 the ballot question is acceptable under McDonough. Let's be
22 very clear McDonough, we make the point that lawyers couldn't
23 understand what's going on because there were 41 amendments that
24 were referred by referendum. They were legislative enactments
25 of the County Council referred to the ballot. And all the

1 ballot question said was these amendments rezone for against.

2 I'm paraphrasing the question. These amendments
3 rezone, but rezone was the operative verb. And then just
4 for/against, not even for the amendment or against the
5 amendments, just for/against. And the Supreme Court made clear
6 that there is too much of a tortured what is going on with all
7 these parcels. And in fact, it's not rezoning. It is affirming
8 the downzoning, and for and against don't explain anything about
9 your choice. Are you for what's happening to these parcels or
10 against it? That was way too unclear.

11 That we don't have that in this case. We do not have
12 a 41 amendment, 41 clause, I should say, or 41 changes to the
13 Maryland Constitution that have to be laid out in 41 different
14 ballot clauses to be explained. We have three changes. All
15 three have a clause in the question that accurately portrays
16 what the amendment seeks to do. We have sufficient and clear
17 ballot language for question three for the election. Voters are
18 able to apprise themselves of what it means, not only through
19 the question, but they're going to educate themselves before
20 going to the ballot booth.

21 We have to believe that in the courtroom, that the
22 process will play out the way it is intended to, that voters
23 will apprise themselves of what's been posted in an easily
24 accessible forum, that they will see the enactment, they will
25 see the amendment language. They will understand, frankly, from

1 the immense amount of news coverage that both this issue and
2 this case has received, that the amendment seeks to do what it
3 seeks to do, and nothing further and nothing misleading.

4 Unless the Court has further questions, I'll move to
5 the single subject, which is the last argument that Plaintiffs
6 make. The single subject argument is a bit of an odd duck
7 because it presumes that §3(b) of the bill, what they call the
8 non-obstante clause, is an amendment. The single subject
9 requirement applies to parts of the proposed constitutional
10 amendment. That when you propose an amendment, all of its
11 component parts, all the changes that it makes, have to be on a
12 single subject or relate to a single subject. §3 isn't part of
13 the amendment. It's not being submitted to voters. It is not
14 changing anything in the Maryland Constitution. It is not
15 implicated by the single-subject rule, and the Court can dispose
16 of the issue on that ground.

17 But even if it did, we point out that it is part of
18 those mechanics from the Bourbon (phonetic) case, that the
19 General Assembly does have this penumbral authority to provide
20 mechanics, and we've provided numerous examples of when it has
21 done so in our briefing. That clause is intricately related to
22 the subject matter because the voters of the State are being
23 asked to vote on whether to adopt a constitutional amendment
24 having to do with districting, and how they do so in the form of
25 that question is intricately related to how they vote on it. It

1 no more violates the single subject, or I should say, under
2 Plaintiff's argument, that the rest of the enactment would also
3 violate the single-subject argument, which says this shall be
4 put in front of the voters at the November 2026 election and
5 that it shall be printed on a ballot.

6 These are all parts of the mechanics that the General
7 Assembly is allowed to lay out in their enactment. And if 3(b)
8 is not part of the requisite subject, then neither is 2 or 3(a).
9 And that simply isn't the case. It's never been the case. But
10 the Court doesn't need to get that far. The single subject
11 requirement applies specifically to proposed changes to the
12 Constitution, not to the other parts of the bill that help
13 facilitate its submission to the voters.

14 With all that being said, I guess the last thing I
15 want to leave with this Court's consideration is kind of looking
16 towards the future. Because the one thing that hasn't been
17 addressed in this courtroom, specifically going back to the
18 larger question about 7103, 7105, and the Secretary of State, is
19 that we've been talking about Article 14, but there's another
20 article out there. Article 16. Article 16 of the Constitution
21 is the referendum. It allows anyone who does not agree with an
22 enactment of the legislative enactment of the General Assembly
23 to refer it to the voters by petitioning. By gathering enough
24 signatures and placing it on the ballot through the petitioning
25 process.

1 If you look at the timeline of that constitutional
2 amendment, it allows -- if the General Assembly enacts a bill in
3 the 45 days before June 1st, petitioners are allowed to submit
4 the first third of their signatures within, I believe it's 31
5 days after June 1st and the second 2/3s, 31 days after that.
6 And so doing our calendar math, that means petitions under
7 Article 16 can keep coming in until July 31st. And if we take
8 Plaintiff's argument at face value and we don't apply any of
9 Defendant's argument, the Secretary of State's failure to
10 certify Article 16 referendum petitions, ballot questions based
11 on those before July 1st, is also fatal. And the General
12 Assembly, through 7103 and 7105, have written Article 16 out of
13 the law. That cannot be the case.

14 That is kind of putting a point on the Article 14
15 argument. It operates the same way, right? The statute cannot
16 defeat the constitutional amendment. When the constitutional
17 amendment is Article 14, the problem is it doesn't apply a
18 blackout period, so the statute can't. When we're talking about
19 Article 16, it's writing it out of law. There is no more
20 Article 16 because petitions can come in later than July 1st.
21 And it really underscores that July 1st could have been any
22 date. Next session, the General Assembly can make it January
23 1st, and all of a sudden, your blackout period becomes the
24 entire election year. That would write Article 14 out of the
25 law.

1 So Plaintiffs have not adequately and have no adequate
2 answer to the statute can't defeat the constitutional process.
3 The only thing that can govern the constitutional process is the
4 Maryland Constitution. And unless there are no further
5 questions, I'll submit on that.

6 THE COURT: All right. Counsel, I'm going to propose
7 that we break early for lunch. Mr. Clark, I do want to hear
8 your rebuttal, but I propose we do that at 1:30. Is that all
9 right?

10 MR. CLARK: Yes, sir.

11 MR. KOBRIN: Mr. Kobrin will probably have some
12 server, though, if my experience is any gauge on that. All
13 right, gentlemen, thank you. Have a pleasant lunch break.
14 We'll see you at 1:30.

15 THE CLERK: All rise.

16 (At 11:43 a.m., lunch recess in the proceedings.)

17 (At 1:39 p.m., proceedings resumed.)

18 JUDGE WILLIAMS: Recalling C-02-CV-26-1986, Howard vs.
19 Moore. Counsel, please identify yourselves for the record by
20 spelling your last name.

21 MR. CLARK: For the Plaintiffs, Jeff Clark, C-L-A-R-K.

22 MR. YATES: For Plaintiffs, Marshall Yates, Y-A-T-E-S.

23 MR. DEWEY: For Plaintiffs, Samuel Dewey, D-E-W-E-Y.

24 MR. BROSNAN: For the Plaintiffs, Kyle Brosnan,
25 B-R-O-S-N-A-N.

1 MR. LICATA: For the Plaintiffs, Anthony Licata,
2 L-I-C-A-T-A.

3 MR. KOBRIN: And for the Defendants, Daniel Kobrin,
4 K-O-B-R-I-N.

5 THE COURT: Same lawyers that we had this morning.
6 That's good. That means I came to the right courtroom. Mr.
7 Kobrin, did you have any additional thoughts before I ask Mr.
8 Clark for rebuttal?

9 MR. KOBRIN: No, Your Honor.

10 THE COURT: Mr. Clark?

11 MR. CLARK: Thank you, Your Honor. Good afternoon,
12 Your Honor. Thanks for continuing the argument. By my count,
13 and I might be off slightly and one of the points at the end is
14 gonna be a reprise of a section of our reply brief about Article
15 14. I believe I have 22 points for you, so I'm gonna get
16 started.

17 THE COURT: Okay.

18 MR. CLARK: Here's point number one. So Mr. Kobrin
19 argues that we are trying to argue that the Statute 7-103, 7-105
20 trump the Constitution. That is entirely untrue. That's not
21 what we're arguing. What we're arguing is that the statutes
22 help elucidate due process requirements. They help to elucidate
23 time, manner and place requirements, which is another
24 constitutional granted authority to the General Assembly.

25 Essentially, what the general election laws do in the

1 Election Code is, they channelize what happens in a
2 constitutional referendum. There is simply nothing in the
3 constitutional referendum process in Article 14 that says that
4 it is exclusive to all other parts of the Constitution or to all
5 other statutes.

6 Indeed, point number two is, if you look at the text
7 of Article 14, you're gonna see two commitments of authority, so
8 this is a delegation of constitutional authority to the General
9 Assembly.

10 First, in Section 1, you're going to see a reference
11 to "or as otherwise ordered by the Governor in a manner provided
12 by law."

13 So the idea that Article 14 creates every time a
14 bespoke process that the current General Assembly can set up to
15 the derogation of all other law that it has enacted, whether
16 pursuant to this textual reference and grant of authority in
17 Article 14, or whether as to other parts of the Constitution, is
18 just wrong.

19 Secondly, you're also going to see in the text a
20 reference to "shall be submitted in a form to be prescribed by
21 the General Assembly."

22 Mr. Kobrin wants to try to confine that to just
23 something about the form of the question, but that's not
24 entirely what it says, because it's a clear grant of authority.
25 It could be interpreted by the Legislature, by the General

1 Assembly as it sees fit. And again, this second textual
2 provision defeats the idea that Article 14 is something that is
3 a standalone universe that's cut off from everything else.

4 Third point; Mr. Kobrin's argument that there's a
5 hermetic seal around Article 14 and its process is essentially
6 an expression unius est exclusio alterius argument, Your Honor.
7 The idea that the expression of one alternative implies
8 everything else is out and, therefore, all statutes are out and,
9 therefore, any statute that Plaintiffs might try to bring to
10 bear, because it's part of general election law, is an attempt
11 to argue that that statute trumps the Constitution.

12 That argument, again, doesn't work for the reasons
13 that I've said, in terms of the fact that there are other
14 provisions of the Constitution, and the fact that there are two
15 textual commitments that involve the Legislature in Article 14
16 itself.

17 Essentially, the Legislature doesn't even accept Mr.
18 Kobrin's argument. Mr. Kobrin's argument is -- this is the
19 fourth point. Mr. Kobrin's argument is essentially a form of
20 paternalism, Your Honor. The Legislature clearly believes that,
21 whether pursuant to Article 14 or whether pursuant to its time,
22 place and manner authority, or pursuant to its obligation to
23 protect due process, that it can prescribe requirements for
24 referenda, and that's what's in 7-103, especially C and B.

25 And the fact that those things exist show that the

1 Legislature's view of its authority is entirely to the contrary
2 of Mr. Kobrin's theory. Mr. Kobrin's theory would say that
3 those statutes are ipso facto ultra vires; right? Ipso facto
4 beyond the Legislature's power because whatever happens in an
5 Article 14 process is just bespoke to Article 14 and nothing
6 else, and that's not what the Legislature thinks.

7 So whose position is this? This is the position of
8 the Executive Branch and it seems like it's the position of the
9 Executive Branch in order to get this one particular referendum
10 through, at the cost of all of the other preexisting, still
11 exent (phonetic) -- ex -- and still not, you know, repealed and
12 not reply-ably repealed provisions of the General Election Code.

13 The Legislature has an interest in that entire body of
14 law but here, in order to get this one provision through, this
15 one referendum on the election for November, we're being told
16 that Article 14 stands alone like John Donne's island and it's
17 just not consistent with Maryland law.

18 Point number five; even if the text of Article 14 was
19 not to the contrary of Mr. Kobrin's argument, and even if his
20 argument was one adopted by the General Assembly, as opposed to
21 one that's clearly at odds with the General Assembly's own
22 statutory language in provisions like 7-103 and 7-104, it still
23 would be inconsistent with the Maryland Constitution.

24 The Maryland Constitution, point six, has to be
25 harmonized with itself, and there are multiple other

1 constitutional provisions on the field here. First, there's due
2 process.

3 Voters have to be informed and they have to be
4 informed with notice, and they have to be given the requisite
5 into that will allow them to intelligently vote, and this is
6 what the Maryland case law says in the context of referenda in
7 any referendum put in front of that.

8 THE COURT: Doesn't Article 14 provide a mechanism for
9 that?

10 MR. CLARK: It provides a mechanism for notice, but
11 because it gives the General Assembly the power to go beyond
12 that potentially, right, and the power to use its other
13 constitutional headings of authority like due process, the
14 Legislature can provide extra process, and we've submitted that
15 -- you know, we submit that that's exactly what they've done
16 here.

17 They've set up a timeline that will lead to a very
18 orderly process. If the deadlines here had been met, if, you
19 know, the certification had occurred, for instance, by July 1,
20 everything else that's laid out in the declaration of the
21 Defendants about the deadlines for the election, et cetera, all
22 of those things could be completed in time, along with judicial
23 review, before -- well, in advance of the November election.

24 It's a time crunch that was created by not meeting
25 that, that risks due process. And so back at the time where the

1 world was a less complicated case, there was a discussion here
2 of the fact that at a bare minimum, you need four weeks'
3 newspaper notice. But we, you know, submit that the Legislature
4 has looked at how these things have unfolded in an increasingly
5 litigious world, and they've decided to provide extra process,
6 and there's no reason why they can't do that under their other
7 headings of authority, due process being one of them.

8 The second one of them, Your Honor, is the time, place
9 and manner power that they're granted to regulate elections in
10 the Maryland Constitution. So this is a form of election and
11 there's nothing wrong with the Legislature deciding that, well,
12 here's now we're gonna set up the time periods for referenda.
13 Here's the manner in which we're gonna have the referenda
14 unfold.

15 Here's how we're gonna involve different parts of the
16 Executive Branch, like the State Board, like the Secretary of
17 State, like the local boards, like some local lawyers. It's a
18 -- it's quite a complex regime when you look at it, you know, at
19 the entirety of it.

20 There's no reason why that is to the contrary of
21 Article 14. Again, Article 14 is not an island. The
22 Constitution, Maryland Constitution or Federal Constitution, or
23 any legal document, any statutory enactment, any regulation, it
24 has to be interpreted, Your Honor, under the, you know, holism
25 canon; right?

1 You have to look at the whole of it so you can
2 understand it. You can't just myopically look at a piece of it,
3 pull it out and say, ah-ha, I have the entirety of what the law
4 is.

5 The third heading of authority is that the -- there's
6 the Maryland constitutional provision I mentioned that's in our
7 Complaint about preserving the purity of elections, and that's a
8 grant of prophylactic authority to the Legislature. The
9 Legislature can decide in order to protect the elections, to
10 provide more than the bare minimum of Article 14.

11 So again, the idea that Article 14 is unique among
12 constitutional provisions, you put blinders on and only look at
13 Article 14, we think that's contrary to the law.

14 THE COURT: I hear your words. You're saying the
15 Legislature can decide, but what you really want me to hear or
16 think is the Legislature must decide to add to the protections
17 of Article 14, and there's no authority for that; is there?

18 MR. CLARK: No, Your Honor, that's not what I'm
19 arguing. So I -- we think it's sufficient that the Legislature
20 has decided to add to it, right, and we don't see a basis for
21 saying that Article 14 overrides the extra protections using
22 other headings of constitutional authority or using the textual
23 powers given in Article 14 itself.

24 The Legislature has passed provisions that clearly
25 govern how referenda elections will go forward. We don't think

1 that those can be ignored, and we certainly don't think they can
2 be ignored based on silence in -- there's no even silence
3 because there are grants of textual authority to the General
4 Assembly in Article 14.

5 That's why I mentioned the express yoguneus (phonetic)
6 canon. They're trying to say that if there's something that's
7 not specifically mentioned in Article 14, again putting aside
8 the reference to otherwise provided by law and providing for
9 form, that therefore that means you're -- you can't look at any
10 other constitutional provision.

11 You can't look at any constitutional provision that
12 might authorize a body of law that applies to referenda, and we
13 think that's bunkum, Your Honor. We think that you have to
14 interpret the Constitution holistically. We're not saying that
15 the -- that everything in Election Code 7-103 and 7-105 is
16 constitutionally mandated. We're not saying that at all.

17 What we are saying, that given the fact that the
18 Legislature used its various sources of constitutional authority
19 and the fact that it should be presumed essentially to be acting
20 constitutionally when it did that, that those legal provisions
21 have to be given effect. They can't just be ignored, and they
22 certainly can't be ignored based on myopia that only stares at
23 Article 14 and ignores everything else.

24 Turning to point number seven, any form of election
25 needs some form of mechanics, Your Honor, to work and the

1 mechanics in the Election Code can't be set aside unless Article
2 14 is going to carry its own kind of mini election code every
3 time a new referendum is put up; okay? That's not the way
4 things have ever worked.

5 The way things work is the Legislature, using its
6 sources of authority, sets up the parameters for referenda to
7 occur. The Legislature decides what new referendum questions to
8 pose and then it takes that process, and then that process is
9 what works the referendum question up to the election and then
10 through the election, including through the Governor certifying
11 the ultimate result of whatever comes out of an election on a
12 valid referenda question.

13 It's amazing that we're dealing with the fact that
14 there's a declaration, right, that tells us that we have all
15 these exigent time deadlines. This must happen by then, this
16 must happen by September 3, et cetera. Where did that come
17 from? It comes from the Election Code.

18 So we're dealing with a situation where Mr. Kobrin is
19 essentially, he wants you to turn off provisions of the Election
20 Code he doesn't like, like the July 1 deadline, and look at the
21 ones he does like that are trying to create a time crunch here.

22 If he's right, if you take his position about Article
23 14 to its logical conclusion, there are no rules, there are no
24 deadlines. The -- it -- the Legislature could establish
25 whatever they want.

1 THE COURT: There would be one rule, and it would be
2 Article 14; right?

3 MR. CLARK: It would -- well, it would be Article 14,
4 but Article 14 doesn't tell you how to run an election, and
5 there are cases about that, Your Honor, where --

6 THE COURT: But elsewhere in the Constitution it says
7 that the Legislature may designate the time, place and manner of
8 elections.

9 MR. CLARK: Mm-hmm.

10 THE COURT: Right?

11 MR. CLARK: But that argument supports us. We believe
12 that they've exercised the time, place, manner, power in order
13 to set up the parameters for a referendum election, and it's Mr.
14 Kobrin who wants to say that, no, you just look at Article 14;
15 right?

16 So if he's right that Article 14 turns off the July 1
17 deadline, where does it end? What -- how does he get to the
18 deadlines in his affidavit, in the affidavit from Ms. Wagner
19 (phonetic), I believe? He can only get there -- the only thing,
20 it would seem to me, is anything goes as long as you wind up
21 with a question that is done in some form, however poorly, for
22 the election on November 3.

23 THE COURT: Well, what about the argument that Mr.
24 Kobrin advances that, Legislature, you have these powers that
25 are derived from Article 14 --

1 MR. CLARK: Mm-hmm.

2 THE COURT: -- but not after July 1, because that's a
3 hard deadline, so they turn off after that period and they don't
4 turn on again until after, I guess, after the election. Or
5 maybe they turn on the next day but can't be used until the
6 following election or something.

7 But does -- where does the idea come from that the
8 Legislature would be divested of this power after a certain date
9 that appears nowhere in the Constitution?

10 MR. CLARK: It's the Legislature's power, Your Honor,
11 and so I don't think it -- the divestiture is occurring by some
12 sort of foreign agents, or via a litigation process. The
13 Legislature can set up this July deadline in order to give
14 effect to due process. In order to give people enough time to
15 understand the question, for there to be debate about the
16 question, for there to be a notice and comment process about it.

17 And so let's take the opposite extreme. Let's imagine
18 that the Legislature went into special session ten hours before,
19 you know, in the wee hours of the morning before the election
20 started and they had -- you know, they just got this on the --
21 or they printed out, you know, they mimeographed, like, add-ons
22 to the ballot.

23 Would that satisfy due process? We would say
24 absolutely not. So there's clearly a constraint that comes from
25 due process and, given that there's a constraint that comes from

1 due process, that means that the Legislature's powers to ensure
2 the purity of the election and to guarantee that Maryland due
3 process is observed --

4 THE COURT: Well, respectfully, though, in your
5 argument proposing the hours before deadline -- hours before
6 election day proposed amendment, that would violate Article 14
7 because Article 14 says -- I'm about a third of the way in.

8 "The bill or bills proposing an amendment or
9 amendments shall be publicized, either by publishing by order of
10 the Governor, at least two newspapers in" --

11 MR. CLARK: By the four weeks.

12 THE COURT: -- "each county."

13 MR. CLARK: Yes.

14 THE COURT: Right?

15 MR. CLARK: Yes.

16 THE COURT: You couldn't do that if it was in the same
17 week as the election.

18 MR. CLARK: Okay. So --

19 THE COURT: So isn't that the due process that we're
20 looking for, is the publication in the newspapers --

21 MR. CLARK: The argument that --

22 THE COURT: -- of general circulation?

23 MR. CLARK: The argument that Mr. Kobrin is making is
24 that that newspaper notice occupies the entire field, and we
25 submit to you that the Legislature itself doesn't agree with

1 that. If the Legislature agreed with that, then they wouldn't
2 have passed Incentive Bill 29, the provision that says there's a
3 deadline of July 1.

4 So it's at some level, you know, if you're putting it
5 this way, Your Honor, you have to decide what it is that's
6 unlawful. Like, I think that the July 1 deadline is clearly not
7 unlawful because the Legislature, under the Maryland
8 Constitution, both inside Article 14, the form requirement and
9 the otherwise proposed by law power, plus due process, plus
10 purity of the elections, they have the power to set those
11 deadlines and they're not divesting themselves permanently of
12 the power.

13 They're just passing a law that binds them during the
14 time period when that's in effect. We wouldn't have come to you
15 and argued that July 1 is an absolute rigid deadline for due
16 process. We think it's very helpful and we think if July 1 is
17 used as the deadline, due process, you know, assuming all the
18 other requirements can be met, is guaranteed.

19 But if that deadline is not observed, you're in danger
20 territory, Your Honor. You're in territory where people may not
21 get the notice. This is why the Legislature decided to do it.
22 If they -- if the Legislature had -- and they're the ones --
23 this -- these are the ones who have this power; right?

24 It's a serious separation of powers question for Mr.
25 Kobrin, who's part of the Executive Branch, to basically be

1 saying what it is that this power means. Now the -- you know,
2 the Governor, the Attorney General, they can take positions
3 about that, but the Legislature itself, which I suggest to you,
4 Your Honor, should be the guidepost.

5 The Legislature itself is the ones == they're the ones
6 who decided on this July 1 deadline. And then within two months
7 when it was inconvenient, because they really want to get this
8 redistricting done and they really want to end Representative
9 Harris's seat and, you know, make it an 8-0 congressional map
10 for the Democrat party.

11 That they just decided that that legislation was
12 stillborn and they can ignore it, even though when it's
13 convenient to them and when it's convenient to their affiant,
14 they use other deadlines that are part of the Election Code.
15 They're picking and choosing and they shouldn't be allowed to do
16 that, Your Honor, and we think that it itself is
17 unconstitutional for them to be doing that.

18 So turning to point eight. Oh, this is the point I
19 made already about the affiant; right? So the affiant, if the
20 affiant was truly part of the team here and thought that Article
21 14, full stop, occupied the entire field, there was nothing
22 else, then the deadlines in that document would make no sense.

23 So again, and we've seen this time and again in this
24 litigation, the Defendants are taking inconsistent positions;
25 right? They take the position that I covered in the first half

1 of my argument in the morning that, you know, the statutes don't
2 apply and that Stop Slots says the statutes don't apply.

3 I think I, you know, deconstructed that argument and I
4 don't think there's anything left to it, but the other argument
5 they made was this Article 14 supremacy exclusivity argument,
6 and the idea that they're having an affiant kind of, you know,
7 pick like a cafeteria menu of, like, what parts of the Election
8 Code they want to assert and have to be complied with in order
9 that they can jam this litigation and say it's exigent, it's
10 exigent.

11 It's totally inconsistent with their theory about
12 Article 14 supremacy, and we suggest what that means is that the
13 Article 14 supremacy theory is itself incorrect and not the law.
14 The knife point is Mr. Kobrin says that we are trying to
15 entrench -- the -- this Legislature or the Legislature with a--
16 you know, the -- their April through May hat on, before they got
17 to their July through August hat.

18 That they were trying to strip and lock in forever
19 their approach to referenda, and that that is an entrenchment.
20 Your Honor, it's not an entrenchment; okay? As you indicated in
21 the questioning of Mr. Kobrin, the Legislature passes laws all
22 the time that bind itself. What is entrenchment? Entrenchment
23 is different.

24 Entrenchment is the Legislature giving up its powers
25 in the future. It's an attempt to strip the future Legislatures

1 of their power, and if you could do that over time, you'd wind
2 up with, you know, being ruled by a dead hand that democracy and
3 new elections could never affect. So that's the constitutional
4 concern of entrenchment. We're not dealing with that here.

5 If they wanted to do this referendum, they could do
6 it, you know. Again, they would be delayed but that's kind of
7 the breaks under the law. Sometimes, like, you know, you have
8 -- it takes a process to repeal a law or, you know, to appeal
9 existing 7-103 and 7-105, and that's not something that's
10 entrenchment. That's just the fact that the laws govern while
11 they're in place and unless and until they're repealed by a
12 process of bicameralism and presentment, they govern.

13 And, you know, it's the Legislature here in the
14 special session that was trying to ignore that principle, so I
15 think the entrenchment argument is another red herring.

16 We're not saying that the law can't change. I pointed
17 out in the morning that they could bring this up in the future,
18 and Your Honor had asked questions about that. Like, couldn't
19 this -- you know, even if I were to enjoin or take some action
20 against this referendum, couldn't this come back again in the
21 future? It could.

22 We're not -- if we were making an entrenchment
23 argument, you know, which we're not doing, but if we were doing
24 that, we would be trying to say the Legislature could never
25 return to this topic and we're not saying that. We're just

1 saying this particular amendment process that started more than
2 a month late is so defective under the existing law and, unless
3 and until that law is changed, this particular referendum has to
4 be blocked.

5 Mr. Kobrin -- this is my point number ten. Mr. Kobrin
6 makes an Article 3, §29 argument. If you look at that
7 provision, Your Honor, what you're going to see is that that
8 provision is really about statutory titles. It's irrelevant
9 here and it certainly doesn't provide that what the Legislature
10 can do with statutory titles can be done using mere titles for
11 Article 14 referenda. The two provisions are different.

12 And again, there's another tension here of, you know,
13 Mr. Kobrin wants you to have myopia when he's looking at Article
14 14 and it's convenient, but if he wants to look at other
15 articles, he can. Again, it's selective. He's picking and
16 choosing.

17 McDonough (phonetic) would be wrongly decided on Mr.
18 Kobrin's argument if all the General Assembly needed was kind of
19 a, you know, some attempt at a general title and then you would
20 be off to the races with putting a referendum in front of the
21 voters. That can't be true and McDonough is binding. It's not
22 something that can be ignored.

23 Eleventh point; the argument that Stop Slots, by
24 negative implication, turned off the Statute 7-103 that didn't
25 even exist at the time of Stop Slots, that argument is just an

1 absurdity. You -- Your Honor, I submit to you that you should
2 not give that any mind.

3 Twelfth point; the legislative history in -- is
4 contrary to Mr. Kobrin's point because clearly, the legislative
5 service though that a non obstante provision was necessary in
6 the law in order to bypass the July 1 deadlines and other
7 deadlines that flow from that.

8 And yet, Mr. Kobrin's argument is that either they're
9 turned off by Stop Slots or by 7-105, even though I explained
10 that's about specimen ballots, or it's turned off by the Article
11 14 supremacy theory but, you know, clearly, the -- if that were
12 true, the legislative service would have said -- wouldn't have
13 essentially required and they wouldn't have needed a fix-up job
14 on Monday, August 3, to put in the non obstante clause, which is
15 invalid.

16 Thirteen. Yeah, 13. Just a quick note, although it's
17 a, you know, a repeat of my argument from the morning, that
18 there's no Section 7-105 exemption to 7-103C.

19 The 14th point is that especially if you look at
20 7-103E, which creates a deadline that passed I believe on
21 August 5, without being satisfied, that there is no argument
22 whatsoever under 7-105 that the 7-103 90-day or so deadline that
23 ended in -- on August 5 could be satisfied.

24 I will, you know, rehash this for you, Your Honor.
25 You can find it in the reply brief. This is the 15th point.

1 The way that Mr. Kobrin has set up this argument and the idea of
2 what he thinks you can provide as notice here, you know, about
3 60 days or a little bit more than that, that is, as we described
4 it, an argument for self-sealing.

5 By the time that rolls around, the ten days in Article
6 12 of the Election Code is already passed and that can't be the
7 case, and it totally frustrates the ordinary and -- I'm sorry --
8 the organized system that was set up in the Election Code to
9 ensure that there is due process.

10 Let me -- to make the point again that the due process
11 clause is something that's completely relevant here, I want to
12 point you to this line from Stop Slots. It says, quote, "The
13 notice prescribed by the statutory scheme and well-settled
14 principles of due process of law underly any notice inquiry."

15 Okay. And we're clearly talking about a referendum in
16 that case. And that's on page 192 and it's quoting the Oman V.
17 Mayor of Baltimore case from 1890. So this has been the law in
18 Maryland for a very, very long time.

19 And Mr. Kobrin, I noticed, when he was making an
20 argument about -- referencing the well-settled principles of due
21 process of law, and trying to argue that, look, there's, you
22 know, a couple months is good enough notice, Your Honor. You
23 know, that's all we need. He specifically ignores the statutory
24 language that says that the notice prescribed by the Legislature
25 in the statutory scheme is part of the due process inquiry, and

1 that's the way we're arguing it.

2 We did not argue that 7-103 and 7-105 become locked in
3 as part of due process. We argued that they explicate the due
4 process. They are prophylactic implementations of due process.
5 There's nothing wrong with that and the Maryland courts have
6 reinforced that and enforced that since 1890.

7 Point 16; there's a serious separation of powers issue
8 here, and I have here the Maryland Declaration of Rights,
9 Article 8. Unlike the U.S. Constitution, where the separation
10 of powers is a structural inference, the Maryland Constitution
11 is like John Adams' Constitution for Massachusetts. It
12 explicitly provides by text for the separation of powers. It
13 says that --

14 "-- the legislative, executive and judicial powers of
15 the government out to be forever separate and distinct and
16 no person excusing me" -- excuse me -- "no person
17 exercising the functions of one of said departments shall
18 assume the discharge of the duties of any other."

19 And to turn one of Mr. Kobrin's arguments back on him,
20 because the Legislature decided to write this referendum
21 question itself, that means that the remedy that's available in
22 a case against, say, the State Board of Elections or the
23 Secretary of State to order a rewrite of the question, isn't
24 available to you here.

25 The Legislature wrote this question. It has that

1 power, and so that means that you're faced with a very stark
2 choice, Your Honor. You have the choice either to give effect
3 to the Legislature's law that created these deadlines in Senate
4 Bill 29, or to ignore them and allow them to be violated.

5 You don't have an out of ordering the question to be
6 clarified, as many clarification problems as it has, and we had
7 our discussion in the morning about is it really a clarification
8 as opposed to a total, you know, tumultuous upheaval and
9 overturning of what the current status quo is in the law?

10 It was one more point down, but I'll make it point 17.
11 I'll flip the order. Mr. Kobrin relies on some District Court
12 cases to say that Judge Battaglia was wrong. Now, the State,
13 you know, can potentially, you know, take some, you know, a
14 different kind of position on that, but we believe that Judge
15 Battaglia was correct and we certainly believe that the legal
16 status quo for Maryland, in Maryland, is her opinion, which
17 applies the Constitution both to federal districting and to
18 state legislative districting.

19 And indeed, it's very important to note that that
20 ruling, the State did not take that up on appeal. It forewent
21 appeal on it. So to be hearing now that, you know, they
22 actually disagree with that and then to hear Mr. Kobrin say, you
23 know, it's just clarifying it because the law never really
24 changed. The law has always been. If this referendum passes,
25 that's gonna always have been the law. We're just kind or

1 clarifying that.

2 No. The legal status quo changed with the Battaglia
3 opinion. They didn't appeal it and now through the referendum,
4 they're trying to change that status quo to a new status quo,
5 without following the proper process that the Legislature set
6 under Article 14 and other parts --

7 THE COURT: I don't think it's fair to say that Mr.
8 Kobrin's argument was that they disagreed with it. I think his
9 argument was simply a judgment of a judgment of a Circuit Court
10 for Anne Arundel County carries no precedential weight; right?

11 Now, you have argued, and I agree with you on this
12 point, that if a court makes a decision and nobody appeals it,
13 then that's the -- that shows us what the status quo is.

14 MR. CLARK: Yes.

15 THE COURT: But it still doesn't carry any
16 precedential weight. It's not as though the Supreme Court said
17 that.

18 MR. CLARK: No, but we're not here --

19 THE COURT: If you had appealed that or someone had
20 appealed it, and the Supreme Court said, oh, you know what?
21 We're not gonna grant cert. Then I think everyone in the room
22 would say, yeah, that's a precedent.

23 MR. CLARK: I completely agree with that, Your Honor.
24 That's the way precedent works. Appellate courts create
25 precedent, not --

1 THE COURT: Not trial courts.

2 MR. CLARK: -- you know, trial courts. But what I
3 would say is that there's still a judicial order that was not
4 appealed and that judicial order is binding on the parties. And
5 so, you know, the reason, the whole reason why we're here is
6 because that is a form of legal status quo. It's not a
7 precedential form of status quo. It's encompassed within the
8 four corners of the order status quo because they didn't appeal
9 it.

10 Whatever the basis is for it being the status quo,
11 it's the status quo and the referendum is an attempt to change
12 that status quo. And so to hide behind the fact that, you know,
13 they got some federal judges to disagree with Judge Battaglia
14 doesn't justify their sneaky language of they're just trying to
15 clarify what the law is. Like, no, they're trying to change
16 full up what the status quo is of the law in Maryland.

17 Actually, that was the -- no, the -- the next point,
18 so it would be 18, is that we are not trying to amend our count
19 four; okay? I think that the reason that Mr. Kobrin is making
20 that argument is because he's trying to put us together, at
21 least temporarily and conveniently, in a conceptual box with the
22 Dorchester Plaintiffs.

23 According to him, the Dorchester Plaintiffs focused a
24 lot more on the argument that the nature of the ballot question
25 was insufficient. It didn't provide enough notice to people.

1 They didn't have enough information. And so he's trying to say
2 that we pleaded a considerably larger argument.

3 Somehow, we looked over at the Dorchester case and
4 said, oh, we should expand our argument. That's a fiction.
5 That's not what we did, and I think he's trying to get you to be
6 very myopic, so the general feel of mine, in terms of how you
7 look at count four.

8 So I'm looking at count four. It begins on paragraphs
9 107 and 108, and 108 -- 107 is just an incorporation backwards.
10 108 gives the requirement that we're trying to enforce there
11 from 7-103B(6), that each question shall contain the following
12 information on the ballot. Quote, "A brief statement explaining
13 what the practical outcome of each voting choice would be."

14 So we submit that that explanation is lacking here and
15 that that's a serious problem. Our next paragraph, paragraph
16 109, says that part of the problem here is the non obstante
17 clause because it makes what's going on entirely opaque.

18 But you would think, to listen to Mr. Kobrin, that our
19 count four stopped at paragraph 109. We just said we think
20 there's a 7-103B(6) problem and now, you know, look at the non
21 obstante clause. That's what the B(6) problem is. No, we go
22 on.

23 In particular, I want to point to you, Your Honor, to
24 paragraphs 113 and especially 114; right? So, you know, we give
25 a long quotation there from Stop Slots about what the purpose of

1 this is. We don't, you know, purport to limit it at all to the
2 non obstante. And then look at paragraph 114. It says, "by
3 refusing to meet the requirements set forth in 7-103B," and
4 again, that's not even just B(6), "such as a brief statement
5 explaining the outcomes of each vote, the proposed scheme is
6 insufficient for voters."

7 There's no mention of the non obstante there. This
8 argument was not limited to the non obstante. It was a general
9 argument that voters don't have enough information and didn't
10 get the statement that they're supposed to get from B(6), and
11 there's other -- there are other problems with their compliance
12 with 7-103B, as well.

13 So, you know, we're at some level mystified by the
14 argument that we're trying to create a -- you know, we
15 sandbagged them by creating a new claim. Like, we're not
16 creating a new claim but, you know, and I'll make this argument
17 in the alternative, not our primary argument; this is why
18 yesterday we lodged an alternative version of count four.

19 We didn't lodge it because we were somehow peeking
20 over during the exam at the exam book of the Dorchester
21 Plaintiffs. We did it because of the fact that in our case,
22 they raised an argument that we were not pleading this broad
23 enough.

24 And the other reason why I think they're bringing in
25 the Dorchester case is because we came to the right forum, Your

1 Honor, which is here in Anne Arundel, where all the Defendants
2 are present, you know. I won't cast too many aspersions, but we
3 don't think the right place to sue was in Dorchester County.

4 We think that there's no venue there and so, given
5 that we made that choice, we honest up came, you know, here to
6 the right court that's historically done these kinds of cases.
7 You know, I asked Mr. Kobrin in the morning, so I wanted to make
8 sure I put this on the record: "Are you going to appeal the
9 Dorchester case for being in the wrong venue?"

10 And he said, "Oh, they haven't decided that yet."

11 So you know, it seems to me like they're trying to
12 keep the Dorchester thing in -- alive long enough so that they
13 can say that, you know, by contrasting us and then, we have not
14 pleaded our count four correctly, and we just, we think that's
15 wrong. We think it's improper.

16 And you know, the real thing is that we think that
17 that case, you know, even though they're making many of the same
18 arguments we are, we think it's in the wrong venue and the State
19 probably will win an appeal on that, Your Honor.

20 I made the separation of powers argument, so let's
21 call -- let's go now to single subject. So we look at -- let me
22 pull up my copy of HB 2100. Hopefully, I didn't lose it. Here
23 it is. You explored this with -- oops. Apologies for that.
24 Turn off.

25 If you look at this, right, there are four -- I think

1 there are five whereas clauses and then there are various
2 sections to this, and we think that these sections present
3 different subject matter. The clearest way to see that -- and
4 therefore, it violates the single subject rule.

5 Is that the non obstante clause sets aside the
6 entirety of election law for purposes of this case, for purposes
7 of this referendum. That is a -- it's not just a different
8 second subject. It subjects two through X or two through N,
9 because the -- all of the things that are embraced in the
10 Election Code include many different topics.

11 So it's like including the non obstante clause is a
12 walking admission of the fact that this cannot meet the single
13 subject rule, Your Honor. And then as for the provision that
14 the general -- I'm sorry -- that the Maryland Supreme Court
15 would have jurisdiction, let me find that.

16 Okay. So that provision, it doesn't even directly tie
17 to redistricting. It just gives an option to the General
18 Assembly to create a new form of original jurisdiction and
19 that's a -- its own topic, as well. It's not something, you
20 know, that -- they could use this to -- you know, it's --
21 they're trying to say that it relates to the redistricting plan,
22 but it's something that's only an option for the Legislature,
23 Your Honor.

24 And then the -- we've already gone through so I won't
25 belabor the point that the federal law here is its own

1 complicated body of doctrine and the voters, they're just not
2 given any information about this at all. And this is why the
3 violation of 7-103B(6), to include an explanatory statement, to
4 include what it is that this referendum would accomplish as a
5 practical matter if its adopted. The fact that that's absent is
6 a huge lacuna.

7 We think it's a fatal defect to this and, you know, as
8 I went back and forth in our colloquy this morning about all of
9 the various -- I counted up to eight elements of things the
10 voters would need to understand. I can put that argument to the
11 side and say, you know, we're not calling for perfection, but
12 there's nothing.

13 There is no 701 -- I'm sorry -- 7-103B(6) statement,
14 so the voters are not given any basic information about what it
15 is they're voting on, even though this is a very complex, like,
16 forested nest, tangled nest of interlocking questions about
17 state law, federal law, clarification, overturning, you know,
18 existing election law.

19 It's something that the voters owe -- are owed some
20 more explanation, and this is why the Legislature used its
21 powers in both Article 14 and as a matter of due process, and as
22 a matter of preserving the purity of elections, to require that
23 there be an explanatory statement about what it is that the
24 referendum is doing and what it would accomplish as a practical
25 matter in the real world.

1 And you know, Mr. Kobrin wishes that doesn't exist.
2 This is one of the provisions that he wishes he could turn off,
3 but he -- I think neither the Article 14 theory nor how Stop
4 Slots argument by negative implication, or his argument trying
5 to use the limited provision in 7-105 about specimen ballots,
6 can accomplish that goal.

7 There's more that I could cover, Your Honor, but I
8 want to make one request in the interest of time and because
9 I've covered in excess of 20 points, I believe, at this point.
10 That since we carry the burden of proof, I certainly don't mind,
11 you know, whatever. We're here for the entire day. You asked
12 us for that. We're happy to be here, you know, for however long
13 you want us.

14 So if we want to keep doing, you know, a round of me
15 and a round of Mr. Kobrin, and a second round, a third round,
16 we're all good with that. But we would ask that since we carry
17 the burden of proof that we get a brief last word, even if
18 that's only five minutes.

19 THE COURT: Oh, I think it's only fair that you should
20 have the last word before I have the last word.

21 MR. CLARK: You will always have the last word, Your
22 Honor, yes. We recognize that.

23 THE COURT: Anything else for now, sir?

24 MR. CLARK: No. Thank you, sir.

25 THE COURT: Mr. Kobrin?

1 MR. KOBRIN: Can I --

2 THE COURT: Your name has been disparaged a few times.
3 I think you should be able to defend yourself.

4 MR. KOBRIN: I have 21 points in rebuttal.

5 THE COURT: Get out. Leave now.

6 MR. KOBRIN: Let's actually answer some of Plaintiff's
7 questions. Why do we have July 1? The July 1 statute doesn't
8 just apply to the Secretary of State. It applies to all
9 questions to be placed on the ballot; county attorney, municipal
10 attorney. Whenever something that's going to appear on the
11 ballot is going to -- and it's not a candidate or a bond
12 question, it appears by question.

13 There are different things that can appear on the
14 ballot. Municipal questions about municipal charters, charter
15 amendments, county charters, referred local laws from county
16 councils, the General Assembly's referred laws either under its
17 own power or through Article 16.

18 There are lots of different things that can end up on
19 a ballot. July 1 applies to all of them. This was not written
20 -- July 1 was not written for Article 14. The July 1 --

21 THE COURT: Well, so I have a question about that.

22 MR. KOBRIN: Sure.

23 THE COURT: If it's not written for Article 14, why
24 does it say that it applies to Article 14?

25 MR. KOBRIN: Because it is a delegation of authority.

1 The Secretary of State provision in 7-103C(1), is a delegation
2 of authority under the Secretary -- to the Secretary of State
3 under Article 14, which is what the Supreme Court both held and
4 explained in Morris v. Governor. The challenge there was the --
5 that --

6 THE COURT: And you're gonna tell me like you told me
7 earlier that the Legislature can waive that when they write
8 their own question?

9 MR. KOBRIN: Exactly. That --

10 THE COURT: Then why isn't that in there? It doesn't
11 make any -- or why doesn't it say that the Legislature can waive
12 that in there?

13 MR. KOBRIN: It's not a waiver. When the Legislature,
14 when anyone delegates authority, that doesn't mean they're
15 divested of that authority. That doesn't mean they can't
16 exercise it anymore. They've just placed some of it in the
17 Executive Branch, the Secretary of State, to use when directed
18 to do so or according to certain standards.

19 THE COURT: Well, then why doesn't it say when the
20 Secretary is directed to do so, these rules apply? Otherwise,
21 we can do whatever we want. Article 14, I mean --

22 MR. KOBRIN: Sure.

23 THE COURT: -- why not be honest with the people, the
24 voters, the stakeholders in the State and let them know that if
25 you've got a 3/5 majority in the Legislature, you could do

1 literally whatever you want to do, as long as you don't give any
2 authority to anybody. You can take a question and, you know,
3 put it on a ballot on November 1, I guess, if you want to, for a
4 November 3 election.

5 MR. KOBRIN: Sure.

6 THE COURT: I mean, when are we gonna level with the
7 people in the State and let them know that their government can
8 do whatever it wants? The government really has no limitations
9 on it at all.

10 MR. KOBRIN: No, it has limitations. Those
11 limitations are inherent in the Constitution. And in fairness
12 to the General Assembly, that's exactly what the floor debate
13 leader and the senator explained to the opposition during the
14 floor debate on this bill, that we can't use the Secretary of
15 State delegation process. That has passed because we're past
16 July 1 and, therefore, we are exercising, we the General
17 Assembly, are exercising our prerogative to write the question
18 ourselves. That wasn't hidden. That wasn't kept from anyone.
19 That's in the record, and Your Honor can watch the recording.
20 Those things were announced to the public and to the opposition
21 on the floor, that the General Assembly was exercising its own
22 authority and not assigning this to the Secretary of State.

23 And it does not need to put in a statute this
24 delegated authority is also reserved because that's inherent in
25 the constitutional authority. The very separation of powers

1 argument that Plaintiffs make, the Legislature cannot give away
2 an authority. It can't assign constitutional authority wholly
3 to another branch of government.

4 There's delegation and obviously there's centuries of
5 case law on how delegation works, and the delegation is proper
6 as long as it's guided by standards, but the General Assembly
7 does not need to write, in order to abide by Article 8, this
8 power, Secretary, that we are giving you is also ours to
9 exercise. They don't need to write that because that's inherent
10 in the separation of powers.

11 THE COURT: I understand that. You understand that,
12 but we do this for a living.

13 MR. KOBRIN: Sure.

14 THE COURT: Does the average Marylander understand
15 that? And if he doesn't or she doesn't, aren't we skating up
16 against a little due process problem, as Mr. Clark suggests?

17 MR. KOBRIN: No, we are not, because the due process
18 notice owed to the voter is to make them aware of what is the
19 amendment, what is its purpose and effect, and does the language
20 on the ballot reflect that? It does not need to teach the voter
21 how the amendment came to be, who wrote the language, what legal
22 mechanism was used to process it either through the Legislature
23 or through the Secretary of State.

24 The first two ballot questions on this November's
25 ballot are other Article 14 ballot questions. They do not have

1 in them, this was written by the Secretary of State, because
2 voters don't need to be educated that -- of that fact under
3 either the Maryland Constitution or its relevant statutes.

4 What the voters need to be aware of for notice
5 purposes, what is the amendment and what was its enactment so I
6 can understand in context what the amendment does and if that
7 enactment contains the ballot question, how that ballot question
8 refers or relates to the amendment.

9 But saying that the voter needs to be aware of exactly
10 which authority was exercised is not necessary, although the
11 enactment says we are doing this pursuant. It says pursuant to
12 Article 14, this is being put in front of the voters, I believe
13 in subsection -- or Section 2 of the Act.

14 And so, Your Honor, we would push back vigorously that
15 the voters need to be educated on who is exercising what power
16 in order to come up with a question. That is exactly for me,
17 you and Plaintiffs to argue about in court. For the voters, it
18 is what is the constitutional amendment being proposed and does
19 the ballot question that is in front of them sufficiently and
20 with minimum reasonable clarity relate that amendment to them?
21 And in this case, it does.

22 And so, Your Honor, the General Assembly did not need
23 to enact a law that said our power to propose amendments resides
24 in a very small part with the Secretary of State under 7-103,
25 and we will tell the people of Maryland when we choose to

1 exercise it alone. There's nothing in the Constitution or
2 Election Law Article that would compel that kind of legislative
3 lawmaking.

4 With that being said, July 1 is, like I said before,
5 7-103C(1) is that delegation to the Secretary of State related
6 to election law. The remainder is election law and Plaintiffs
7 is actually -- Plaintiffs are actually correct about this. I
8 think there was a fundamental misunderstanding between myself
9 and Plaintiffs until the moment I heard Counsel argue that
10 Article 14 doesn't tell you how to run elections, and I agree.

11 Article 14 is not an election provision. It is a
12 proposal of constitutional amendments provision and they
13 interface. Elections and proposal of constitutional amendments
14 necessarily have to interface, but Article 14 says that when the
15 General Assembly proposes a constitutional amendment, it is
16 submitted to the voters are the next ensuing general election in
17 the form prescribed by the General Assembly.

18 There is no election law power in the Maryland
19 Constitution that allows the General Assembly to enact a law
20 inconsistent with what I just said. Article 3, Section 49,
21 which is the election law power of time, place and manner,
22 regulated by law says, "But may not do so inconsistent with this
23 Constitution."

24 And that's a key point in this case. The General
25 Assembly cannot make election laws that are inconsistent with

1 other provisions of the Constitution, like election provisions
2 that say it is a crime to -- essentially voter fraud is a crime,
3 and that there is a provision of the Maryland Constitution
4 Article 1 that equates the two. So the General Assembly can't
5 say you can commit voter fraud.

6 That's an easy one, but there are other provisions of
7 the Constitution that it can't violate, and Article 14 is one of
8 them. Article 16 is one of them. These exercise of
9 constitutional authority that are not in and of themselves
10 election provisions, but necessary interface with elections
11 because of the function of the provision.

12 THE COURT: So tell me about due process.

13 MR. KOBRIN: Yeah, due process is an interesting one.
14 I was wondering when we would get to Plaintiff's citation to
15 where due process appears in the Maryland Constitution, because
16 this is more than a bit of trivia. It doesn't. The Maryland
17 Constitution does not contain an article about due process. The
18 Maryland Declaration of Rights at Article 24 ensures and
19 provides due process, absolutely.

20 THE COURT: Don't they kind of walk down the aisle
21 together?

22 MR. KOBRIN: They do. But I want to point Your
23 Honor's attention -- this is something that is not in the
24 briefing, so I want to give you the correct citation, so forgive
25 me. It's Murphy in 2022. Murphy v. Liberty Mutual Insurance

1 Company, 478 Md. 333, and the part of the case I'm gonna talk
2 about is 383 to 84.

3 That was the post COVID challenge to the judiciary's
4 suspension of many of its own rules because of COVID, in which
5 the Plaintiffs argued there is Maryland Declaration of Rights
6 provision that generally disallows suspension of laws. You're
7 not allowed to just suspend laws under the Declaration of
8 Rights.

9 So judiciary, you have no authority to generally
10 suspend the rules and regulations related to the judiciary, and
11 the judiciary defended itself and said, yes, we do. Under
12 Article 4, we have rule-making authority, and we can suspend our
13 own rules.

14 And the Supreme Court explained in that case, just
15 like with legislative enactments and interpreting the
16 Constitution, when you have a general provision that generally
17 applies to situations, and a specific provision that applies to
18 the specific situation in front of you, the specific governs.
19 The general does not add or create any difference. It does not
20 rule over the specific.

21 And so the general disallowance of suspensions of laws
22 did not apply to the judiciary's suspension of its rules because
23 it had a specific provision in the Maryland Constitution that
24 allowed it to. Due process and declaration of -- Declaration 24
25 does not say anything about elections or proposed constitutional

1 amendments.

2 Stop Slots imported principles of due process and
3 described it as having adequate notice. That's as far as we
4 know. That's as far as we understand. That's as far as due
5 process goes. And so when Your Honor asks what is due process
6 in this situation, I would submit one of two things.

7 The notice required under Article 14 that Your Honor
8 just pointed out is written into Article 14, with the Governor,
9 newspaper publications and the otherwise provided by law,
10 and --

11 THE COURT: So you know, it doesn't say due process.
12 It shows us what due process would be.

13 MR. KOBRIN: It gives us -- yes, because it says what
14 publicization is and it's an awkward word that it uses, but
15 publicization equals notice. And from Stop Slots, due process
16 equals notice. So I am equating the two, that publicization
17 under Article 14 is adequate due process under Article 14
18 because both are providing or informing what notice is required.

19 But the due process clause in the Declaration of
20 Rights does not operate with independent force to add anything
21 and Stop Slots doesn't say it does. Stop Slots, again, it dealt
22 with two due process issues, ballot language and timing, and
23 when we're talking about timing it says there needs to be
24 adequate notice.

25 And Plaintiff's counsel read to you the opinion. It

1 reviewed principles of due process and the statutory scheme.
2 They are separate things. The only statutory scheme that it
3 related or the only provisions that it reviewed were 7-105, the
4 specimen ballots in the first -- in the three weeks before the
5 election, which by the way, lines up very, very closely to the
6 four weeks of newspaper publication that Article 14 requires.

7 And that there be a DLS summary and a brief statement
8 that goes out with that specimen ballot, and that the
9 legislative enactment is made widely available, which is the
10 crux of notice, which is there for the crux of due process. But
11 Stop Slots did not say, Article 24 of the Maryland Declaration
12 of Rights adds due process requirements.

13 And every deadline in the Election Law Article, 7-103,
14 7-105, 9-207, they are all notice points that, if not met, are
15 deprivations of due process. Stop Slots does not come even
16 close to that. So due process in this case is providing notice
17 to the voters through, under Stop Slots, the specimen ballots,
18 and by providing the legislative enactment, the full text as
19 amended, in a form that is easily accessible to them.

20 Easily accessible by statute has meant in print form
21 in the offices of the local boards and the State Board, that has
22 been upgraded to posted online on the State Board's website. It
23 has been on the Maryland General Assembly's website since
24 July 29, and so it is in an easily accessible form.

25 Due process has been met. Any further argument is

1 premature and unripe at this point. There are no other
2 constitutionally imposed due process notice requirements on
3 Article 14 from other provisions of the Constitution, and the
4 Declaration of Rights does not provide one.

5 With all that being said, now let's talk about the
6 statutes that the Plaintiffs have been highlighting. I just
7 first want to pinpoint our affidavit. It's Exhibits A and B,
8 the two affidavits from the State officials.

9 We were very clear in our motion that when we made our
10 Motion for Summary Judgment, we asked for expedited review
11 because first, 9-207, and we cited to 9-207, which is
12 certification of the ballot questions. That was on behalf of
13 one of the Defendants, the State Board of Elections, who is
14 compelled by law to do that and therefore wants to do that on
15 time.

16 That is not a concession that 9-207 is part of a
17 larger scheme that attaches to Article 14, or that there's
18 somehow some conflict between the executive and the legislation
19 when --

20 THE COURT: Or the State put up, hey, I got a job to
21 do.

22 MR. KOBRIN: Correct. And that the exhibits were part
23 of the next part of that request. There's a semi-colon, very
24 carefully with semi-colons, and it says operationally, the State
25 Board must begin printing ballots on September 3, when it is

1 able to do so.

2 And those affidavits were submitted not because
3 there's a statutory deadline to meet. Because the State Board
4 of Elections, in order to get ballots on time under federal law,
5 must start printing ballots at a certain point. And so
6 operationally, we were requesting expedited review in order not
7 to fall behind our general -- the State Board's general
8 obligations but specifically under federal law, which we have no
9 ability, neither us nor the General Assembly nor the Plaintiffs,
10 have the ability to waive at this point.

11 The statute, I think the statutes that Plaintiffs
12 highlight, we've been talking about 7-103 and 7-105 ad nauseum
13 at this point. There is only one that was not truly
14 functionally met in this case. There was the posting of the
15 State -- the State Board's posting of the ballot text, 90 days
16 before the General Election.

17 The -- it appeared on the State Board's website 88
18 days, and this is where we get into arguments about what affect
19 does it have and Plaintiff's burden, because we should all
20 recall Plaintiffs have made a 12-202 claim in this court, which
21 is showing that an action taken in contravention of a law
22 applicable to elections is outcome determinative.

23 And so we need clear and convincing evidence that
24 posting the question on the 88th day instead of the 90th day,
25 giving them credit to their argument, was a deprivation of due

1 process of such magnitude that there is no way for the
2 electorate to be apprised properly before election day.

3 That is why we included in our affidavit that between
4 August 5 and August 7, for the 48 hours in which the ballot text
5 did not appear -- I'm sorry -- in which the amendment text did
6 not appear, 100 and I believe 51 people viewed the State Board's
7 ballot question website. The footnote we included, we can't
8 determine how many of those 151 looked at the statewide ballot
9 questions as opposed to county charter amendments and et cetera.

10 And so there is a universe in the State right now of a
11 maximum of 150, because I'll go under oath if you need me, one
12 of those 151 was me, of 150 people who did not see the ballot --
13 the amendment text on the State Board's website between August 5
14 and August 7.

15 Plaintiffs cannot credibly argue that that is going to
16 be an outcome determinative deprivation of due process to all of
17 Marylanders because 150 people may not have seen something on a
18 website on the 90th and 89th day before the election, when there
19 has been ample opportunity for everyone to otherwise see it
20 since then.

21 And that is the point we were making both with that
22 number and that affidavit, not that there is any other kind of
23 remedy here. Just that eventually, we have to get down to,
24 they're alleging a violation of due process. We do not concede
25 that there is any due process implication in that 90-day

1 deadline, but even if there were, only 150 people didn't see it
2 on the website.

3 And there is no reason to believe -- at maximum.
4 There's no reason to believe that's going to be outcome-
5 determinative for an election where this is a statewide vote on
6 the constitutional -- the proposed constitutional amendment.

7 The Court's indulgence. We are not trying to create a
8 time crunch under 9-207. We are not claiming that 9-207 is
9 enforced to constrain Article 14, as Plaintiffs are arguing.
10 Again, like Your Honor said, that's someone trying to do their
11 job and to do it on time but is not -- we don't rely on 9-207 in
12 any of our briefing to say that it is otherwise of
13 constitutional force.

14 Beyond that, the Court's indulgence for one more
15 moment. Article 3, §29, and then I'll end with that. Article
16 3, §29 is part of the Legislature's article. It's Article 3.
17 It's when a law is passed, the legislative text or the
18 legislative title has to meet certain requirements.

19 We are not saying that it applies directly here. What
20 is going on there is that up until a few decades ago there was
21 the option, instead of having the Secretary of State write
22 anything, just to have the Secretary of State put the
23 legislative title of the bill on the ballot, and there is case
24 law interpreting when that happens.

25 Now, the two cases, McDonough and Serat, both mention

1 Article 3, §29 as a potential guideline for when the General
2 Assembly puts the legislative title as the ballot question, the
3 quasi-issue is that neither McDonough or Serat dealt with the
4 General Assembly. They were both charter amendments.

5 And like I said before, there is other case law
6 pointing out that Article 3, §29, can't apply to Article 14
7 because they operate -- Article 14 is a bill of the Legislature
8 that the Governor doesn't sign. Article 3, §29, only comes into
9 force once the Governor approves of by his signature or her
10 signature, a bill and makes it a legal enactment.

11 But it is and has been used in Serat versus Prince
12 George's County and McDonough as kind of a guiding principle for
13 what's sufficient for ballot language clarity when the
14 legislative title is used. And without spoiling too much, the
15 General Assembly hued extremely closely to the legislative title
16 in this case.

17 If you look at the Legislative Title 4, Chapter 881,
18 it is nearly identical to the ballot question language that the
19 General Assembly wrote in its enactment, and so it is
20 illustrative of what is necessary to be sufficient ballot
21 clarity or question clarity. We're not saying that it otherwise
22 applies.

23 The final point I want to make to kind of address
24 Plaintiff's global point, we're not picking and choosing and
25 we're not being myopic. I think what is a fair summation of our

1 argument is that the General Assembly engaged a constitutional
2 process in this case.

3 It is therefore governed by the Maryland Constitution
4 and provisions applicable to that process, and that includes
5 Article 14. That includes Article 1, §1. That includes,
6 frankly, Article 16 because it highlights how these things are
7 supposed to work and the absurd results that may produce if
8 Plaintiffs are correct.

9 We are not picking and choosing because what we are
10 talking about is what governs the General Assembly specifically
11 when they propose a constitutional amendment, and the answer
12 cannot be the election laws they are permitted to make when they
13 are not allowed to make election laws inconsistent with their
14 constitutional powers.

15 And so I think really what clarifies for me is that
16 this is an Article 14 case. It is not an election law case.
17 Obviously, it interfaces with election law, but the Election Law
18 Article must respect the Article 14, both authority and the
19 exercise of that authority.

20 And that is why we are asking this Court to interpret
21 the Election Law Article not in conflict, because if Your Honor
22 says the Election Law Article is in conflict with the -- with
23 Article 14, you have to strike down those provisions of the
24 Election Law Article. We're asking Your Honor to interpret them
25 and say there is no conflict because --

1 THE COURT: The whole purpose of the amendment is to
2 avoid an election law case; right?

3 MR. KOBRIN: Yes.

4 THE COURT: Which is why we're having an Article 14
5 case right now.

6 MR. KOBRIN: Yes. And that is why we're asking Your
7 Honor to interpret the election law provisions as not in force.
8 They didn't need suspension because they weren't in force. The
9 General Assembly was making that clear on the floor when it
10 explained in debate, or when the Legislature was explained in
11 debate.

12 We are bypassing the Secretary of State, yes, but we
13 are doing so by exercising our own prerogative, not suspending
14 laws that are applicable to us.

15 THE COURT: Anything else, sir?

16 MR. KOBRIN: No, Your Honor. I'll submit.

17 THE COURT: Mr. Clark, would you --

18 MR. CLARK: Thank you, Your Honor.

19 THE COURT: Would you like to be heard right now, or
20 should we take a brief recess?

21 MR. CLARK: Up to you, Your Honor.

22 THE COURT: Let's take a brief recess so everybody can
23 get some new water and get rid of some old water.

24 MR. CLARK: Okay.

25 THE COURT: We'll come back in five or so minutes.

1 THE CLERK: All rise.

2 (At 2:47 p.m., recess in proceedings.)

3 (At 2:54 p.m., proceedings resumed.)

4 THE CLERK: Please be seated. Michael Howell, et al.,
5 Plaintiffs, vs. Westley Moore, et al., Defendants. C-02-CV26-
6 1986. Counsel, please identify yourself for the record.

7 MR. CLARK: For the Plaintiffs, Your Honor, Jeff
8 Clark, C-L-A-R-K.

9 MR. YATES: For the Plaintiffs, Marshall Yates,
10 Y-A-T-E-S.

11 MR. DEWEY: Plaintiffs, Samuel Dewey, D-E-W-E-Y.

12 MR. BROSNAN: For the Plaintiffs, Kyle Brosnan,
13 B-R-O-S-N-A-N.

14 MR. LICATA: For the Plaintiffs, Anthony Licata,
15 L-I-C-A-T-A.

16 THE COURT: Did they tell you had to sit in the corner
17 over there?

18 MR. LICATA: Actually, yes, Your Honor.

19 THE COURT: Did you do something bad today?

20 MR. LICATA: Yeah. On a time out.

21 MR. KOBRIN: And for the Defendants, Daniel Kobrin,
22 K-O-B-R-I-N.

23 THE COURT: All right. Mr. Clark.

24 MR. CLARK: Thank you, Your Honor. Maybe we were
25 trying to hide Mr. Licata because he's like our secret weapon.

1 THE COURT: Oh.

2 MR. CLARK: He is apprised of many erudite legal
3 doctrines.

4 THE COURT: Secret's out now.

5 MR. CLARK: On the record even. So people can point
6 to the transcript. All right. I think I've come down to 15
7 points; I'm making progress for Your Honor.

8 Let me start with this. Look, the Legislature knows,
9 and this goes to the confusion point you were raising as well.
10 The Legislature knows how to turn off the provisions of the
11 general election law as applied to constitutional referenda
12 being held under Article 14 when it wants to.

13 The evidence for that is the very provision that Mr.
14 Kobrin relied on so heavily in his opening brief which is
15 election law -- and again, it's captioned election law so I
16 don't think there's this rigid distinction between election law
17 and referenda because the concept of a referenda is cited in
18 this very provision.

19 It's Election Law 7-105(b)3. Okay. And it says that
20 the Legislature can choose to write the question itself. Okay.
21 And when it does that, right, it has to have some impact. We
22 certainly don't agree with Mr. Kobrin that it has the effect of
23 turning off 7-103, we don't think it turns off due process. We
24 don't think it lets the Legislature use Article 14 to do
25 anything it wants.

1 But we do think that it shows that the Legislature is
2 conscious of when they want to do something different with
3 referenda. And they did not turn off the other general
4 provisions of the election law. The provisions that set the
5 July 1st deadline and then the follow-on comment deadlines.
6 Those were not turned off. If the Legislature had wanted to use
7 its Article 14 and other powers both due process and the purity
8 of the elections provision they would have said so. And they
9 didn't. And that actually I'd submit to Your Honor provides the
10 real answer to your question about the voters with confusion.

11 The Legislature has said when they want to do
12 something in particular with referenda. It's just that the
13 Defendants don't like the answer because it means that they blew
14 the July 1st deadline and that should be made manifest in a
15 declaratory judgment and in an injunction against them.

16 My next point since I raised the comments. I realized
17 that there's one point from Mr. Kobrin's not last time up at the
18 podium but the time before that where he tried to argue that the
19 comment provisions that I pointed the Court to in seven --
20 public comment provisions that I pointed the Court to in 7-103
21 and that is 7-103 -- looks like around (c) -- around (c)(5) and
22 both romans (i), little roman at (i), little roman at (ii).
23 That that wouldn't serve any purpose in a situation where the
24 Legislature had written the ballot question itself.

25 And we would reject that. No, what would happen --

1 first of all, there's just a mandatory requirement that it be
2 put out for public comment. What does that serve? Again, it
3 helps to supply through a statutory means a guarantee of due
4 process.

5 And so it should be obeyed. There's no reason,
6 especially when we know the Legislature knows how to turn off
7 things related to referenda, it didn't turn off these provisions
8 about comments. And even if comments come in, what would they
9 do? They wouldn't allow the Executive Branch, the State
10 Election Board or the Secretary of State to rewrite the question
11 that the Legislature had written, that would be a violation of
12 the separation of powers.

13 But what it would -- what it could do is it could
14 inform the 7-103(b) elements of providing information to the
15 voter. In other words, voters say, oh, I learned through this
16 process, or I've been reading that this referendum may do
17 something, I'm not sure of it, you should clarify it. That
18 could lead to a fuller 7-103(b)(6) process.

19 So you can't say that the notice and comment
20 provisions of 7-103 are emptied of all meaning whenever the
21 Legislature decides to write the question itself. It can still
22 serve a useful purpose, Your Honor. That's my -- that was my
23 second point.

24 The third point is that, as you pointed out, there are
25 serious due process issues here. And I have not heard a

1 response by Mr. Kobrin to the fact that I quoted Stop Slots for
2 the fact that the highest court of this State took what's
3 occurring, you know, in terms of statutory provisions as
4 something that can inform due process.

5 As I pointed out -- and I haven't heard a response to
6 this, you can provide due process on a prophylactic basis.

7 And this contrasts with, you know, Mr. Kobrin
8 essentially saying that the four-weeks' newspaper notice in
9 Article 14, he construes that not just as a floor but as a
10 ceiling. And we submit to you, Your Honor, there's no reason to
11 construe it as ceiling.

12 It is entirely possible for the Legislature to use its
13 powers under Article 14, under the due process clause and to
14 guarantee the purity of elections for it to provide an extra
15 measure of notice. And that just ensures that the voters have
16 more protections. What could possibly be wrong by that -- wrong
17 from that?

18 There is no indication in Article 14 that it is some
19 magical incantation of, as I was saying, *expressio unius*, that
20 it just occupies the field. And Mr. Kobrin doesn't even believe
21 it occupies the field, right?

22 He was telling you, well, you know, we talked about
23 Election Law 9-207 in our declaration. Well, if his maximalist
24 theory of Article 14, that it provides all the rules, you don't
25 need to look anywhere else were true then why would you need

1 Election Law 9-207, it would just be totally superseded. And
2 that's why I say that he's picking and choosing.

3 The things that he wants to emphasize and the things
4 that the AG's office wants to emphasize, they emphasize. But if
5 we point to something that's a bitter pill for them namely the
6 deadlines in 7-103, oh magically those have all been turned off
7 sub silentio by 7-105 even though 7-105 is only about specimen
8 ballots or it's turned off by the maximalist constitutional
9 theory. And that is not correct.

10 Next point is on this topic of -- and I'll merge it
11 together then with the point of are we talking about a
12 referendum case or are we talking about an election law case?
13 And I think there's a little bit of semantics going on there.

14 I think this is a case that's about both. Because in
15 order to have the machinery, the mechanism to put the ballot
16 question in front of the voters, unless you were going to have a
17 mini-election code rebuilt or, you know, built over and over
18 again every time there was a referendum question under Article
19 14, instead the Legislature has decided to proceed efficiently.

20 They have an off-the-shelf mechanism they've created
21 for complying with the election laws that exist in the election
22 code. So they simply write cross references in -- again, they
23 know how to do this when they want to -- through the referendum
24 process. And so, you know, that idea causes Mr. Kobrin to admit
25 this important concession.

1 There's an interface between the Article 14 referendum
2 process and the election laws. Yeah, you know, at some level I
3 say, you know -- not to be too colloquial, Your Honor, but
4 hopefully you'll forgive me like kind of No, duh -- it has to.
5 In order to have the system work properly, you have to have some
6 set of administrable rules and those rules have been set by the
7 Legislature in the election code.

8 And that also means that sort of, you know, Mr.
9 Kobrin's attempt to say like oh, they're mischaracterizing this
10 case, this is not an election law case, this is just a
11 referendum case. It's just another way of stating their Article
12 14 maximalist position or their Article 14 myopic position.
13 It's not correct.

14 It ignores other parts of the Maryland Constitution
15 that all have to be harmonized together and it ignores the fact
16 that there are two textual commitments -- and I didn't hear any
17 response to this from Mr. Kobrin either -- to the General
18 Assembly in Article 14 itself.

19 I want to return to a point I made from this morning
20 because I think I have not heard a response to it again and it's
21 very important.

22 Which is that the Dutton case provides that in a
23 pre-election challenge that the directives of the Legislature in
24 the general law, that they are mandatory. And I don't think
25 that Article 14 is specific enough to overcome that conclusion

1 by the State's highest court. I think that's binding. And I
2 also think that it's contrary again to interpreting the entire
3 Constitution of the State on a structural basis.

4 I want to go in a little bit deeper and I want to use
5 the Warfield case for this purpose. To Your Honor's point about
6 the fact that the voters are not being well informed here.

7 So this is Warfield versus Vandiver and I am looking
8 at the majority portion of the opinion on Page 544. And just to
9 be clear the dissent does not begin until several pages after
10 that. So I'm clearly not reading from the dissent.

11 Let me get up close and personal with this given my
12 eyes at this point. So the Court says on 544:

13 "Hence of necessity the phrase must mean precisely
14 that which is implied and included in the equally
15 comprehensive provisions of the general law unless it be
16 assumed either that the General Assembly purposely intended
17 to mislead and confuse the voters by inserting a clause in
18 conflict with the then existing general law or that the
19 General Assembly obviously designed to repeal the then
20 existing general law in this particular, and to substitute
21 a different provision in its stead.

22 "No middle or intermediate attitude exists --"

23 And then the Court goes on a few sentences later to
24 say that in the view of the majority there was obviously no
25 intent to repeal the general law here.

1 So that's what -- it's clear that the general law can
2 provide legal provisions that are applicable to referenda. We
3 think that's a power explicitly granted in the two textual
4 provisions I pointed you to in Article 14 and we think it's also
5 a power conferred by the time, place and manner power the
6 Legislature has, its due process power, its purity of elections
7 power. And this has been established for a very long time.
8 This is a 1905 case from the then entitled highest court of
9 Maryland.

10 Now the dissent is also important. Because the
11 dissent in Warfield, it didn't agree with the majority that
12 there was not an attempt to overturn the existing law.

13 Instead it took the position that the existing law was
14 being overturned and then it rejected that a referendum could
15 accomplish that. It thought that you would need to have, you
16 know, a true repeal or law that passed all of the procedures the
17 Constitution would require in Maryland for such a law. And
18 since it hadn't, that that, you know, that was improper. Okay.

19 I would submit to you here, Your Honor, that we are in
20 the territory of the dissent because -- and there's a lot that
21 the two opinions agree with each other about -- but we're in the
22 territory of the dissent because we have the non obstante
23 clause.

24 They knew they had a problem. Their own legislative
25 services told them they had a problem and that's why they put a

1 non obstante clause in. They specifically said we're going to
2 overturn the general law for the purposes of this particular
3 referendum in getting it before the people.

4 And that's what the dissent holds is invalid and
5 that's what we submit to you is also invalid.

6 We think that while the majority was able essentially
7 to say that question wasn't really presented on their facts back
8 in 1905, they are presented on these facts in 2026 because of
9 the non obstante clause, because of the concession that they had
10 blown the July 1st deadline on the floor from a senator and from
11 a delegate and because of the legislative history about the
12 legislative services department saying as much.

13 So that -- and then the dissent, if you look at the
14 dissent it talks about this whole confusion issue. You're
15 saying if you have a situation where you're using a referendum
16 to overturn the general law, you're creating two different
17 processes that can easily confuse people.

18 You have a bespoke process that's kind of operating
19 supposedly unmoored under Article -- you know, current Article
20 14 and you have the general law process. And, you know, the
21 dissent thought that that's an incompatible situation. You
22 should read the laws to avoid a situation like that.

23 That is the position we're taking here as well.

24 That's why the non obstante clause cannot be used to
25 override the preexisting law. Instead as Dutton says, if you're

1 in a pre-election area and a challenge is brought and there is a
2 provision of the Legislature that says X shall be done in
3 mandatory terms then it is mandatory and it must be given
4 mandatory effect, Your Honor.

5 The next point is at some level -- you know, I'm going
6 to read it again just because I want to make sure of this, that
7 -- well, actually, oh no, here it is. No, I didn't bring it
8 with me. But in any event, I'll just remind you of it here.

9 Stop Slots says that the statutory scheme informs due
10 process. And again there's nothing, there's nothing wrong about
11 that, there's nothing remarkable about that.

12 I'll also point you to the fact that the -- there are
13 two provisions in the Maryland Constitution in the general -- in
14 the Declaration of Rights, Articles 19 and Article 24. And
15 those articles use the phrase "the law of the land." And this
16 also means that this debate at some level about exactly what is
17 a requirement of due process, what is a requirement of statutory
18 law only, what is a requirement of due process informed by a
19 statutory provision or improved by a statutory provision. At
20 some level it's semantic.

21 Because the provisions currently in 7-103 and the
22 deadlines it's set in 7-105, they are currently the law of the
23 land of Maryland. And the people of Maryland, the citizens of
24 Maryland and the Plaintiffs are entitled to the protection of
25 that unless and until it changes. And it is not validly

1 changed. And the non obstante clause was a particularly clumsy
2 attempt to try to change it.

3 And I actually -- I don't believe I've heard Mr.
4 Kobrin even try to defend the non obstante clause. It's like he
5 just wants to pretend that the actual rationale was either the
6 Article 14 maximalist position occupies the whole field, don't
7 need to look at anything else or his argument that 7-105 turns
8 off all the other provisions including 7-103 when the
9 Legislature happens to write the referendum question. And
10 that's also not true.

11 THE COURT: You would agree though -- I think I agree
12 -- that if the Legislature itself authors the amendment, it does
13 not need to have the Secretary of State certify a substantially
14 similar question by July 1st. Right? Because they have already
15 said what the question will be. They're not delegating the
16 authorship of the question to anyone else, they're voting on it
17 in some sort of three-fifths way.

18 MR. CLARK: No, Your Honor, I would not agree with
19 that respectfully. So I'm looking at 7-103 (c)(1). It says,
20 "On or before July 1st immediately preceding a general election,
21 the Secretary of State shall prepare and certify to the State
22 Board the information under subsection (b) of this section."

23 The subsection (b) information is very important. It
24 provides very important information to the voters so that they
25 can be informed for voting day.

1 We spent a lot of time talking about (b)(6) because it
2 requires you to, quote, do a brief statement explaining, quote,
3 what the practical outcome of each voting choice would be.

4 There is no explanation whatsoever as to this
5 referendum of what the practical outcome of this would be. It's
6 all smoke and mirrors, it's clarifying, you have to understand
7 what the preexisting state law is, you have to understand what
8 Judge Battaglia's decision is in Szeliga. There's no
9 explanation given to the voter about that.

10 And so the (c)(1) provision with the July date does
11 serve a very useful function. It's not a function that's turned
12 off by the fact that the Legislature chose to write the
13 question. It just means that any provisions that could cause
14 potentially the -- a delegation to the Secretary of State or any
15 other state actors to try to rewrite the question, it doesn't
16 have that power. That would violate the separation of powers.

17 But that provision of requiring the July 1st deadline
18 to be hit, that was not turned off by the Legislature. Whereas
19 if you do it by contrast and you look at 7-105(b)(3) that was
20 turned off. It tells you specifically now be attentive to the
21 fact that the Legislature has issued this particular referendum.

22 And the other point I would say about it is that this
23 also has a reference to referenda (c)(1). Look at the end of
24 (c)(1), the clause there. This applies essentially for all
25 statewide ballot questions and it's the conjunctive and all

1 questions relating to the enactment of the General Assembly
2 which is -- well that's the one about petition to referendum.
3 So I'm sorry. I want to correct that and say it shows that the
4 Legislature knows how to refer to referenda when it wants to.

5 But our key point for this purpose is that it says all
6 statewide ballot questions. And this is a statewide ballot
7 question and for that reason it is governed by July 1st and it's
8 irrelevant whether the Legislature wrote the question or not for
9 purposes of complying with the July 1st deadline and complying
10 with all of the six requirements of 7-103(b)(1) through (6).

11 Let's see. So Mr. Kobrin tries to argue that, you
12 know, all they had to do was to give 90-days' notice and he
13 admits a foot fault of well, they did 88 days, isn't that, you
14 know, kind of close enough for horseshoes and hand grenades?

15 And, you know, my argument there would be again Dutton
16 tells you that if a time period is set by the Legislature, if
17 there's a mandatory rule then it must be obeyed. It's not
18 something where there's an indication that there's discretion in
19 how that should be enforced. That's the approach that the
20 courts take if a challenge is brought post-referendum.

21 In that kind of challenge you could make the argument
22 about horseshoes and hand grenades all the time and say, you
23 know, c'mon, the people voted for this or they didn't vote for
24 this and, you know, 88 over 90, you know, whatever that
25 percentage is 95 percent or whatever, that's good enough. But

1 that doesn't work when you're in a pre-election context.

2 Mr. Kobrin referred to the -- obliquely to the UOCAVA
3 requirement. There is a -- well, we think this supports us,
4 right. There is a requirement to get the ballot question
5 solidified by, you know, something in advance of 45 days so that
6 you can send it out and comply with UOCAVA to, you know, our
7 armed services members, for instance, that are currently abroad.

8 And so yeah, I mean there's an independent requirement
9 there but we don't see that as ending any of our arguments.

10 It still doesn't explain why there's a declaration
11 from Wagner that tells you that deadlines that Mr. Kobrin has
12 taken the maximalist position, the Legislature is free to turn
13 off using its Article 14 powers at will somehow views other
14 deadlines as ones that absolutely must be complied with because
15 they exist in statutory law.

16 So here's the last thing I want to do, Your Honor.
17 Just to make sure that I cover all of the points we made in our
18 reply brief about the Article 14 issue because that's become so
19 important in the course of this argument.

20 The first argument we make on Page 11 of that reply
21 brief is that, you know, the argument proves too much that Mr.
22 Kobrin is making. It would allow the entirety of election law
23 to be turned off. And that just can't be the law. And I'd
24 point out to you it especially cannot be the law when you're
25 talking about a situation where the Legislature itself has

1 decided that it will apply election law provisions and timelines
2 and other procedural requirements and other kinds of
3 requirements to constitutional referenda; and other times it
4 just, you know, it specifically says we're not going to apply
5 those.

6 And, you know, there's the famous canon -- Federal
7 Court, I'm sure there's a Maryland analog but I don't know what
8 it is off the top of my head so I'll refer to the Federal
9 version of it. The Russello case, the Russello canon. That
10 when, you know, Congress speaks by using disparate inclusion and
11 exclusion, that that is purposeful.

12 And the same thing here. The Legislature decided when
13 writing the question would be relevant and when it would not be
14 relevant, when it was relevant to apply something to referenda
15 and when it was not.

16 The second argument we make at the top of Page 12 is
17 the response on the entrenchment. And I didn't hear any
18 particular response from Mr. Kobrin on the entrenchment.

19 We are not trying to claim that 7-103 and 7-105 are
20 built, hardwired into the Constitution now; they can be changed.
21 We just argue that the non obstante clause cannot change them
22 now and that if -- and they couldn't have changed it in the
23 course of this session because of the Constitutional restriction
24 until the next June waiting period. And that it was not
25 denominated as emergency legislation and it couldn't have fit

1 into the emergency legislation box because it's not a public
2 health and safety measure to do anything about redistricting.

3 And so entrenchment is about the Legislature
4 diminishing in its power and we don't think any of the
5 Legislature diminished its power in any way. If it wants to in
6 the future repeal 7-103, repeal 7-105 as long as it's providing,
7 then you would go back to the constitutional -- you would have
8 to test what the constitutional minima is for due process but
9 they could do that if they wanted to. They just have to jump
10 through the right hoops. They did not jump through the right
11 hoops in August of this year, Your Honor.

12 The third argument is our references to Warfield v.
13 Vandiver which I pointed out some of them to you. And we tied
14 to that my point about the two textual references in Article 14;
15 the ones to the manner provided by law and the prescribing the
16 form by which the proposed amendment is put forward.

17 So these textual points, provisions, in Article 14 are
18 totally contrary to the idea that Article 14 has no tie in to
19 general election law that the Legislature might use its powers
20 to get.

21 And we also quoted from the Maryland Supreme Court in
22 -- well, Maryland Court of Appeals then in 1971 but the highest
23 court. Quote:

24 "From time to time since 1896 at least, the
25 Legislature has by general legislation prescribed to some

1 extent the form in which a proposed constitutional
2 amendment is thereafter to be submitted to the voters.
3 This court seemingly has regarded such a procedure as
4 acceptable and valid."

5 And then from Warfield. This is on Page 100 of
6 Warfield in the Maryland Reporter.

7 "Had Section 2 been wholly admitted or if it were now
8 stricken out, the code would supply all the details and
9 machinery needed to place the amendment on the official
10 ballot at the next general election."

11 It's clear, Your Honor, that that is referring to
12 general election law that was not passed as part of a referendum
13 process. So it again negates the State's theory.

14 And then our fourth argument was to point, again, to
15 Article 3 §49, which is what confers the power on the
16 Legislature to regulate the time, place, and manner of
17 elections. And again, we think referenda are -- they have some
18 unique aspects, but they're a form of election, Your Honor.
19 There's no getting away from that. And clearly the Legislature
20 can use its time, manner and place regulations to regulate that.

21 Our fifth point on Page 13 was to reject the idea, the
22 absolutist construction of Article 14 that Mr. Kobrin has put
23 forward. And we explained one of the rationales for that was
24 that it could create serious voter confusion. And we cite --
25 let me start with Munroe v. Wells, saying that the order of the

1 House of Delegates sitting in election contest could not be
2 implemented as there was no statutory scheme in effect under
3 which to hold the election.

4 So you have to always have a set of machinery to
5 govern it. And in the shadow and then the ensuing years after
6 Munroe that's what the Legislature has built in the election
7 code.

8 The seventh point was to rely on Warfield and to cite
9 some of the same provisions I pointed you to in terms of the
10 confusion created for the voters. If you have an Article 14
11 bespoke process operating alongside a general process that that
12 creates too much confusion for the voter and that's why the
13 dissent rejected it. And the reason why that's relevant -- you
14 can't just dismiss it because it's a dissent -- is that they
15 were the only ones who addressed the question of what happens if
16 an Article 14 heading (phonetic) of authority is used to
17 displace the general provisions of the election law. The
18 majority just thought that question wasn't presented so they
19 didn't need to reach it.

20 But I would, you know, submit to you that it does need
21 to be reached here for the reasons I've explained and for that
22 reason the dissent we think is what should be followed.

23 And then the last point from Pages 15 over to 16 of
24 our reply was to point out the contradiction in the Wagner
25 affidavit. Again that it is, you know, elevating some things

1 that the State thinks must be complied with but then Counsel
2 appears in court and says everything can be ignored under the
3 maximal authority of Article 14.

4 So does the Court have any questions? Otherwise I'm
5 happy to rest.

6 THE COURT: I don't think I have any questions.

7 MR. CLARK: Thank you, Your Honor.

8 THE COURT: Mr. Kobrin, do you want take one more shot
9 or are we done on your side as well?

10 MR. KOBRIN: We're done on my side.

11 THE COURT: Okay. Do you have any closing remarks
12 you'd like to make, sir? Or did you just do that?

13 MR. CLARK: I think I just did that, Your Honor.

14 THE COURT: Okay. Well, Counsel, you've given me a
15 lot to think about. And I hoped early today that I would be
16 able to rule from the Bench and put something in writing a
17 little bit later. I don't feel that I'm quite prepared to rule
18 from the Bench so I will tell you that it will be my goal to
19 have a written decision issued and filed by this time tomorrow.
20 I think that would give us enough time given the trip down the
21 street that might need to take place. Does that sound right to
22 you, Counsel?

23 MR. KOBRIN: I would always counsel the sooner the
24 better. And I would ask for Your Honor's courtesy if that when
25 you issue that, that it be emailed to Counsel as a courtesy

1 copy.

2 THE COURT: I think we can handle that.

3 MR. KOBRIN: Okay.

4 THE COURT: I wouldn't expect anything lengthy.

5 MR. KOBRIN: Okay.

6 THE COURT: I'm leaving the lengthy to you guys. And
7 you more than took care of it. There are a couple of things
8 that trouble me about this case. In particular when all of this
9 law-making authority or at least statutory law-making authority,
10 rests in one branch of the government and that branch of the
11 government wants to do something that its own laws that it's
12 enacted don't allow or don't make easy to do, it can just say
13 well, you know, we won't follow those laws.

14 And that doesn't seem right to me because I know that
15 the Legislature, that branch of government that has that
16 authority, also has the ability to repeal laws, amend laws,
17 carve out exceptions in laws -- I guess that would be an
18 amendment. And it bothers me that the argument that's put forth
19 is well, you know, if the statute is inconvenient, we'll just
20 fall back on the general law, the Constitution.

21 I think the way we were taught at the beginning of our
22 careers was that the statutes are presumed to be and should be
23 and must be constitutional. That means that they explain the
24 Constitution or they follow the Constitution and that they're
25 they don't limit or add to the Constitution but they help enact

1 the general principles of the Constitution.

2 By the way, these are the same people who want to set
3 the law aside who are constantly telling us how we're a nation
4 of laws, not of men. We need to follow the law. We all need to
5 be, you know -- have this fidelity to the law. And then when
6 they want something they can't get in the ordinary way, they
7 want to toss the law out. Doesn't make a lot of sense to me.

8 I think I'll leave my remarks at that because I don't
9 want to do anything to cause anyone else to have trouble.

10 MR. KOBRIN: Your Honor, may I make a request?

11 THE COURT: Sure.

12 MR. KOBRIN: If Your Honor is inclined and is ruling
13 tomorrow to rule and issue injunctive relief removing the ballot
14 question from the general election ballot, would you consider
15 staying the operation of that judgment pending any appeal?

16 THE COURT: I think I would have to from a practical
17 standpoint.

18 MR. KOBRIN: Thank you, Your Honor.

19 THE COURT: Because I know that the decision will be
20 made at 361 (Indiscernible) Boulevard.

21 MR. KOBRIN: And so if Your Honor is inclined to do
22 that tomorrow in your order, just making clear that the
23 injunctive effect of any of the Court's order is stayed pending
24 any appeal.

25 THE COURT: All right. Got it, got it. Yep. I would

1 I would agree to do that. Any special request from your side,
2 sir?

3 MR. CLARK: Your Honor, I understand that. I'm not
4 going to keep everyone here longer debating that. But if I
5 could, you know, reserve our rights at the at the Supreme Court
6 to argue potentially if there were a stay granted, that it
7 shouldn't have been granted. Just to preserve our options.

8 THE COURT: Wait a minute, say that one more time a
9 bit louder.

10 MR. CLARK: What I -- okay. So I'll come up to the
11 podium just to be sure. So what I said is I'm not going to
12 resist where, you know, you're saying that you might grant a
13 stay. And what I would like to do though is make sure that I
14 can preserve my ability to argue at the Maryland Supreme Court
15 that a stay should not have been granted. So I'm not going to
16 argue it now, I just -- I just want to make sure that I'm not
17 surrendering it.

18 THE COURT: No, no. I think if I grant injunctive
19 relief tomorrow and stay that, you would have all of your
20 options available to you as would the Supreme Court when it
21 decides whether I'm right or wrong or -- of course, I'm right.
22 I haven't even made that decision yet. So I will be right
23 tomorrow. Yeah, I --

24 MR. CLARK: Yeah. I just --

25 THE COURT: I think it preserves everything's options.

1 MR. CLARK: Yes. Yes.

2 THE COURT: Which is the point.

3 MR. CLARK: That was the point. Yes.

4 THE COURT: Okay.

5 MR. CLARK: Thank you.

6 THE COURT: All right. Mr. Kobrin, Mr. Clark,
7 gentlemen who never got the spotlight on this side, it was nice
8 to spend the day with you. You were all very courteous to me
9 and very collegial with each other and civil. And it's nice to
10 have the mental exercise. I'm still kind of mad at you for me
11 making me read all this stuff while I was on vacation last week
12 but, you know, I asked for the job.

13 So I will file something tomorrow. I will make sure
14 that the courtesy copy gets emailed to you. And I hope if
15 business brings you this way again that you will stop in at
16 Courtroom 3-E. All right.

17 UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

18 THE COURT: Thank you, all. Have a wonderful day.
19 Everyone is excused.

20 (At 3:31 p.m., proceedings concluded.)

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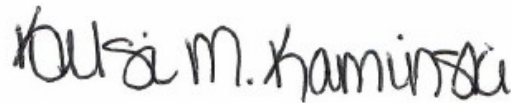
CERTIFICATE OF TRANSCRIBER

I hereby certify that the proceedings in the matter of Michael Howell, et al., vs. Westley Moore, et al., Case No. C-02-CV-26-0001986, heard in the Circuit Court for Anne Arundel County, Maryland, on August 25, 2026, were recorded by means of digital audio.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 141 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness whereof, I have affixed my signature this 26th day of August 2026.



Kelsi M. Kaminski

Transcriber