In The Court of Appeals of Maryland

September Term, 2008
No. 61

JANE DOE, et al.,

Petitioners/Cross-Respondents,

v.

MONTGOMERY COUNTY BOARD OF ELECTIONS

Respondent/Cross-Petitioner.

Appeal from the Circuit Court for Montgomery County
(Hon. Robert A. Greenberg, Judge)

BRIEF OF RESPONDENT/CROSS-PETITIONER

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STATEMENT OF THE CASE

The instant lawsuit was filed on March 14, 2008 by Jane and John Doe and various other individuals ("Petitioners") against the Montgomery County Board of Elections ("MCBOE"). The Complaint challenged MCBOE's certification of a referendum Petition submitted by Maryland Citizens for Responsible Government ("MCRG"). The Petition sought to overturn a recently enacted law passed by the Montgomery County Council prohibiting discrimination based upon gender identity. In order to be successful, the Petition for referendum was required to comply with Montgomery County Charter, Article 1, Section 114, by containing the signatures of 5% of the registered voters in the County.

The Complaint contained two counts: Count I for "judicial review" and Count II for "declaratory judgment." E. 27. The Complaint alleged numerous deficiencies in the Petition, asserting three main theories: (1) that the Petition was defective in form and misleading, in that it did not fairly apprise a signer of the nature of the legislation being challenged; (2) that the first set of signatures, timely submitted on February 4, 2008, did not contain the requisite total because of defects affecting the signatures, including alleged fraud by MCRG; and (3) that the second set of signatures, timely submitted on February 19, 2008, suffered from the same deficiencies as the first submission, differing only in quantity.

The sponsor of the referendum Petition, MCRG, filed a motion to intervene in the lawsuit, which Petitioners opposed. The Circuit Court denied the motion to intervene, but held that MCRG could participate by filing an amicus brief. The parties filed cross-motions for summary judgment. MCRG filed an amicus

memorandum in support of MCBOE, as did the State Board of Elections.

Trial was held on June 11 and 12, 2008. Petitioners' Complaint had not challenged MCBOE's determination of the number of registered voters and, thus, the number (5%) of signatures required on the Petition. Rather, that issue was raised by Petitioners for the first time at trial on June 11, 2008. The Circuit Court ordered the parties to submit supplemental briefs regarding that issue. Petitioners sought leave of court to file an Amended Complaint (on July 8, 2008) asserting this new argument. Following the filing of the supplemental briefs regarding Petitioners' newly asserted challenge, another day of trial was held on July 9, 2008.

The Circuit Court issued its Memorandum Decision and Declaratory Judgment Order on July 28, 2008. The Circuit Court granted Petitioners leave to amend the Complaint. E. 584. The Circuit Court held that Petitioners' challenge to the first set of signatures submitted by MCRG was barred because it was not brought within ten (10) days of MCBOE's determination regarding that submission, as required by Maryland Code, Election Law Article, Section 6-210(e). E. 588. With respect to Petitioners' challenge to MCBOE's verification of certain signatures on the Petition under Election Law Article, Sections 6-203 and 6-207, the Circuit Court held that MCBOE properly verified the signatures. E. 593-96. The Circuit Court noted that the purpose of signature verification, as stated in §6-207(a)(2), is to verify that the signer is a registered voter. Id. Accordingly, the Circuit Court held that MCBOE properly verified the signatures by determining whether each signer was a registered voter. Id. The Circuit Court further held that §6-203 is rendered

ambiguous by virtue of §6-207, and that the statute's provisions are directory rather than mandatory. Id. The Circuit Court noted, moreover, that a literal reading of the ambiguous provisions of §6-203 would lead to absurd results, and potentially culminate in the disenfranchisement of otherwise eligible voters who seek to bring a matter to referendum. Id.

With regard to MCBOE's determination of the number of "registered voters" in Montgomery County for purposes of calculating 5% of that number required to sign the Petition, the Circuit Court held that MCBOE erred by failing to include inactive voters in the number of "registered voters." However, the Circuit Court also held that Petitioners did not timely assert this challenge by bringing it within ten (10) days of MCBOE's determination and, thus, it was barred. E. 601-03. In so holding, the Circuit Court reasoned that MCBOE's determination regarding that number had been made by February 20, 2008 at the latest, which was the date it verified the first set of signatures submitted by MCRG. Id. The Circuit Court opined that Petitioners had constructive notice of the determination no later than February 20 when the first set of signatures was verified and counted by MCBOE. Id. The Circuit Court rejected Petitioners' assertion that the ten day limitations period did not begin to run until the end of the signature verification process, since §6-210(e) required such a challenge to be brought within ten days of the determination to which it relates. Id.

Petitioners filed a Notice of Appeal on July 28, 2008. MCBOE filed a Notice of Cross-Appeal on August 5, 2008. Petitioners filed a Petition for Writ of Certiorari

with respect to two (2) issues, and MCBOE filed a Cross-Petition for Writ of Certiorari regarding one (1) additional issue. This Court granted both petitions.

QUESTIONS PRESENTED

I. Whether the Circuit Court correctly held that Petitioners failed to challenge MCBOE's determination regarding the number of registered voters within ten (10) days following that determination, as required by Maryland Code, Election Law Article, Section 6-210(e)(1)?[1]

II. Whether the Circuit Court correctly held that MCBOE's verification of certain Petition signatures complied with Maryland Code, Election Law Article, Sections 6-203 and 6-207?

III. Whether the Circuit Court erred by holding that MCBOE was required to include "inactive voters" in determining the number of "registered voters" for purposes of calculating the number of signatures required on the Petition?

STATEMENT OF FACTS

A. The Petition for Referendum.

The Montgomery County Council enacted Bill No. 23-07 on November 21, 2007. The Bill added "gender identity" as a protected characteristic under the County's anti-discrimination statutes. The Montgomery County Code, Article I, Section 114 permits a law to be petitioned to referendum upon the signatures of 5%

[1] The Circuit Court held that Petitioners' challenges to the form of the Petition and to the validity of the first set of signatures submitted were time-barred under §6-210. However, Petitioners have not challenged those rulings on appeal.

of the registered voters of the county. MCRG wished to petition the new law to referendum and began that process.

On November 30, 2007, MCBOE informed MCRG orally and in writing that it had determined the number of registered voters in the County to be 500,012. E. 572-73. This number did not include inactive voters. Upon inquiry by MCBOE to the State Board of Elections ("SBE"), SBE advised that inactive voters were not to be included in determining the number of registered voters for purposes of a petition for referendum. E. 500-01 (Affidavit of Ms. Lucey) and E. 497-99 (Affidavit of Ms. Duncan). Thus, MCRG was required to obtain the Petition signatures of 5% of 500,012, or 25,001. This determination by MCBOE and documents reflecting this determination were a matter of public record and available for inspection by the public at MCBOE's office. Half of the signatures were required to be submitted by February 4, 2008 and the remainder were due on or before February 19, 2008.

As of November 30, 2007, monthly statistics regarding the number of registered voters, including active and inactive voters, were posted on SBE's website. E. 519-21. Thus, this information was available to the public, to Petitioners herein, and to their attorney.

At trial on July 9, the parties stipulated that the calculus date for determining the number of voters in the County was November 30, 2007, the date nearest to November 21 for which registration figures were published by the State Board of Elections. E. 759-60. The Circuit Court accepted the parties' stipulation. E. 582-83. November 30, 2007 is also the date on which MCBOE provided oral and written

notification to MCRG of the number of registered voters and signatures required on the Petition.

MCRG, the Petition "sponsor," sought an "advance determination" of the sufficiency of the Petition form pursuant to Election Law Article, Section 6-202. E. 82. On December 3, 2007, MCBOE made a determination approving the sufficiency of the form of the Petition in advance.[2] E. 85. At this juncture, Election Law Article, §6-206(c) required MCBOE to make a determination of any deficiencies in the Petition, including whether the "petition does not satisfy any requirements of law for the number or geographic distribution of signatures." MCBOE did not determine there to be any "deficiencies." Election Law Article, §6-202(b), required MCBOE to notify the "sponsor" of the Petition of such a determination, and MCBOE did so. E. 85. This determination and all documents reflecting this determination by MCBOE were public record and available for inspection by the public at MCBOE's office. Any party wishing to seek judicial review of this determination by MCBOE was required to do so within ten (10) days pursuant to Election Law Article, §6-210(e). No person or entity petitioned for judicial review during that period.

On February 4, 2008, MCRG timely submitted 15,146 Petition signatures to MCBOE. E. 83. On February 19, 2008, MCRG timely submitted a second package of Petition signatures to MCBOE containing 15,506 more signatures. E. 83.

On February 19, 2008, counsel for MCBOE, Mr. Karpinski, met with counsel

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[2] In a letter dated December 7, 2007, the MCBOE also approved the form of the petition to be downloaded via the internet. E. 86.

for Petitioners, Jonathan Shurberg, at MCBOE's office in Rockville, Maryland. E. 518. Mr. Shurberg advised that he was in the process of being retained to challenge the petition circulated by MCRG. Id. Among other things, Mr. Shurberg requested a disk of voters, which is available to the public. Id. Mr. Shurberg also inquired about the number of signatures required for the petition to be brought to referendum. Id. Mr. Shurberg was advised that the petition required 25,001 signatures for it to satisfy the referendum requirements. Id. Mr. Shurberg was provided with a Petition Processing Statistics Report (E. 520). Id. The report contained a handwritten notation from Betty Ann Lucey, Registration Manager for the Montgomery County Board of Elections, indicating that 12,501 signatures were required for the first submission of the petition filed by CRG. E. 519. At no time prior to the trial on June 11 and 12, 2008 did Mr. Shurberg question the methodology utilized by the MCBOE in determining that MCRG was required to obtain 25,001 signatures to have Bill No. 23-07 brought to referendum. Id. That information was publicly available at MCBOE's office and on the SBE website as of November 30, 2007 (as discussed above).

On February 20, 2008, MCBOE's Director sent a letter to Dr. Ruth Jacobs of MCRG formally notifying her that of the signatures submitted on February 4, the MCBOE determined that 13,476 signatures were valid. E. 87. The letter also stated that "[a]s I previously advised, there needed to be twelve thousand five hundred and one (12,501) valid, accepted signatures for the first submission." Id. Accordingly, in addition to MCBOE's previous determination of sufficiency on

December 3, 2007 and the information provided to Mr. Shurberg on February 19, 2008, in this February 20, 2008 determination MCBOE also stated the number of registered voters in the County to be 500,012 and that 5% of that number was 25,001. This determination regarding the first submission and all documents reflecting this determination by the MCBOE were public record and available for inspection by the public at the MCBOE's office. No person or entity petitioned for judicial review within ten (10) days.

On March 6, 2008, MCBOE sent a letter to the Montgomery County Executive and the President of the Montgomery County Council, providing them with the MCBOE's petition certification results as required by Election Law Article, §6-208. E. 88-89. The letter stated that MCBOE certified that the Petition contained more than the requisite number of signatures necessary to place the question on the 2008 General Election ballot, and that the Petition met the statutory requirements regarding content. Id. The letter was copied to Dr. Ruth Jacobs of MCRG in compliance with Election Law Article, §6-208(c). Id.

Petitioners filed the instant lawsuit on March 14, 2008, within ten (10) days of MCBOE's March 6th certification and determination regarding the second set of signatures submitted. Thus, the only timely challenge brought by Petitioners was with respect to the second set of signatures that were certified on March 6, 2008. As the Circuit Court held, all other legal challenges are barred by the Election Law Article's provision that any action for judicial review "shall be sought by the 10th day following the determination to which it relates." Md. Code, Election Law Art., §6-

210(e).

B. MCBOE's Petition Verification Process.

Election Law Article, Title 6, statutorily obligates MCBOE to review and certify petitions for referenda. It statutorily obligates SBE to enact COMAR regulations and State Guidelines with respect to the petition process. The process followed by MCBOE in evaluating the Petition fully comported with the Election Law Article, COMAR regulations and the State Board's Guidelines. The process was as follows. A staff member was provided with a batch from the petition. E. 83-84. Staff utilized MDVOTERS to determine whether each signer was a registered voter within Montgomery County.[3] Id. Specifically, MDVOTERS allowed each staff member to search by name, address or date of birth. Id. MDVOTERS gives a list of potential matches and staff would select the appropriate person. Id. Staff confirmed the name, date of birth and address to ensure that the person was a registered voter in Montgomery County. Id. Thereafter, the person who signed the Petition received credit for signing the Petition. Id. If the individual signed another petition sheet, the second signature would be rejected and MDVOTERS would refer the staff member to the previous petition page that the individual had signed. Id. On the Petition, the MCBOE's staff coded each signature with the codes provided in the "Petition Acceptance and Verification Procedures" promulgated by SBE. E. 84 and 90-96 (providing the codes utilized and their meanings).

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[3] MDVOTERS is the Statewide voter registration database of registered voters in Maryland.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT PETITIONERS FAILED TO TIMELY CHALLENGE THE MCBOE'S DETERMINATION REGARDING THE NUMBER OF SIGNATURES REQUIRED ON THE PETITION.

At trial, Petitioners asserted for the first time (and later filed an Amended Complaint including) the new allegation that the MCBOE improperly calculated the number of signatures required on the Petition by not counting inactive voters when calculating the total number of registered voters and, thus, the percentage of signatures required on the Petition under Montgomery County Charter, Section 114. The Circuit Court properly held that this challenge was time-barred under Election Law Article, §6-210(e). The Circuit Court also properly rejected Petitioners' assertion that §6-210 does not apply to this action.

Election Law Article, §6-209, entitled "Judicial Review," provides as follows:

§6-209. Judicial review.

Generally

(a)(1) A person aggrieved by a determination made under §6-202, §6-206, or §6-208(a)(2) of this subtitle may seek judicial review:

> (i) in the case of a statewide petition, a petition to refer an enactment of the General Assembly pursuant to Article XVI of the Maryland Constitution, or a petition for a congressional or General Assembly candidacy, in the Circuit Court for Anne Arundel County; or
>
> (ii) as to any other petition, in the circuit court for the county in which the petition is filed.

(2) The court may grant relief as it considers appropriate to assure the integrity of the electoral process.

(3) Judicial review shall be expedited by each court that hears the cause to the extent necessary in consideration of the deadlines established by law.

Declaratory relief

(b) Pursuant to the Maryland Uniform Declaratory Judgments Act and upon the complaint of any registered voter, the circuit court of the county in which a petition has been or will be filed may grant declaratory relief as to any petition with respect to the provisions of this title or other provisions of law.

Pursuant to §6-210, all actions for "judicial review" under §6-209 must be brought within ten (10) days of the determination to which it relates, as follows:

§6-210. Schedule of process.

Request for advance determination

(a)(1) A request for an advance determination under §6-202 of this subtitle shall be submitted at least 30 days, but not more than 2 years and 1 month, prior to the deadline for the filing of the petition.

(2) Within 5 business days of receiving the request for an advance determination, the election authority shall make the determination.

Notice

(b) Within 2 business days after an advance determination under § 6-202 of this subtitle, or a determination of deficiency under § 6-206 or § 6-208 of this subtitle, the chief election official of the election authority shall notify the sponsor of the determination.

Verification and counting

(c) The verification and counting of validated signatures on a petition shall be completed within 20 days after the filing of the petition.

Certification

(d) Within 2 business days of the completion of the verification and counting processes, or, if judicial review is pending, within 2 business

days after a final judicial decision, the appropriate election official shall make the certifications required by § 6-208 of this subtitle.

Judicial review

(e)(1) Except as provided in paragraph (2) of this subsection, **any judicial review of a determination, as provided in § 6-209 of this subtitle, shall be sought by the 10th day following the determination to which it relates.**

(2) If the petition seeks to place the name of an individual or a question on the ballot at any election, judicial review shall be sought by the day specified in paragraph (1) of this subsection or the 63rd day preceding that election, whichever day is earlier.

(Emphasis added).

Accordingly, Petitioners were required to seek judicial review by "the 10th day following the determination to which it relates." Petitioners argue that the ten day limitation period does not apply to this action and that, if it applies, they timely asserted their challenge. The Circuit Court properly rejected both assertions.

A. Election Law Article, Sections 6-209 and 6-210 Plainly Apply to Petitioners' Lawsuit.

Petitioners contend that an action for declaratory judgment is not "judicial review" and, thus, not subject to the ten day limitation period applicable to actions for judicial review. This assertion is plainly incorrect, as "judicial review" includes a declaratory judgment action. Section 6-209, entitled "Judicial Review," specifically includes declaratory judgment actions as one form of "judicial review." See §6-209(b), "Declaratory Relief." While section (a) applies only to a "person aggrieved" (apparently intending to mean the sponsors of referendum petitions) and only to certain determinations made, section (b) entitled "declaratory judgment" permits

"any registered voter" to bring a declaratory judgment action, as Petitioners did here. Both types of actions in subsections (a) and (b) are actions for "judicial review." Thus, contrary to Petitioners' assertions, an action for declaratory judgment is an action for "judicial review" under the statute.

Pursuant to §6-210, all actions for "judicial review" under §6-209 must be brought within ten (10) days of the determination to which the action relates. Accordingly, Petitioners' Complaint (and Amended Complaint adding the new claim) was required to be filed by "the 10th day following the determination to which it relates." §6-210(e)(1). Here, the only timely filed challenge was the challenge (in the original Complaint) to the second set of signatures submitted by MCRG and verified by MCBOE on March 6, 2008. All other challenges were untimely and, therefore, barred.

If the ten day limitation in §6-210 were intended to apply only to 6-209(a) and not (b), then the statute surely would so state, and both types of actions would not be under the same heading entitled "judicial review." Instead, the statute states that the ten day limitation applies to "any judicial review of a determination, as provided in §6-209 of this subtitle." §6-210(e)(1). If the ten day period was to apply only to §6-209(a), then the preceding quoted sentence would read "any judicial review of a determination, as provided in §6-209**(a)** of this subtitle." It does not so provide and, thus, it is clear that the ten day limitation period applies to all actions brought under §6-209, whether they are brought under (a) or (b).

Petitioners complain that they could not challenge a determination of which

they had no notice. They argue that because only the sponsor is required to be notified after an advance determination under §6-202, or a determination of deficiency under §6-206 or §6-208, that it should be inferred that the ten–day limitation does not apply to registered voters bringing actions for declaratory judgment. This construction is meritless, as it directly controverts the statute's inclusion of both types of actions within the ambit of "judicial review" and the ten day limitation. In the instant case, registered voters like Petitioners who are not sponsors or "persons aggrieved" are not prevented from challenging a petition via an action for declaratory judgment under §6-209, subject to the requirement in §6-210(e)(1) that they do so within 10 days.

If Petitioners' argument that the ten day limitations period applies to "judicial review" but not "declaratory relief" were correct, then anyone challenging a petition could couch their challenge as one for declaratory relief in order to avoid the ten day time limit, and challenges to petitions could be brought for an indefinite period, perhaps even after an election. Construing the statute in that manner would thus lead to an absurd result.

Evidence that the ten day limitations period was intended by the General Assembly to apply to both types of actions under §6-209 is found in the text of the statute. In §6-209(b), it states that "any registered voter" may file a complaint seeking declaratory relief in "the circuit court of the county in which a petition has been **or will be** filed . . ." (Emphasis added). This obviously demonstrates (contrary to Petitioners "case or controversy" argument) that a declaratory judgment action

may be filed **before** a petition is filed. It therefore shows that the General Assembly intended that a declaratory judgment action (under §6-209(b)) be filed within ten days of the determination to which it relates, regardless of whether the determination occurs prior to filing of the petition by the sponsor.

B. The Ten Day Period Began to Run on November 30, 2007, When MCBOE Made Its Determination With Respect to the Number of Registered Voters.

Petitioners attempt to capitalize on what they know to be a mere misstatement by the Circuit Court in its Memorandum Opinion. The Circuit Court stated that Petitioners should have brought their judicial challenge "on or before February 20, 2008, and perhaps earlier." E. 603. Petitioners complain that there was no triggering event ten days prior, on February 10, 2008. Obviously, the Circuit Court intended to state that Petitioners should have brought their judicial challenge within ten days of February 20, 2008, since the Court had already stated that the ten day period began to run by at least the date of MCBOE's February 20, 2008 letter to MCRG in which it validated the first set of signatures.

MCBOE made the determination as to the number of registered voters for purposes of calculating the number of signatures required on the Petition on November 30, 2007. On November 30, 2007, MCBOE informed MCRG orally and in writing that it had determined the number of registered voters in the County to be 500,012, and that it therefore needed to obtain 25,001 signatures. Documents reflecting this determination were a matter of public record and available for inspection by the public at MCBOE's office.

Petitioners assert that the public, or they in particular, could not have known of this determination by the MCBOE and/or could not have known how it was derived and, therefore, that they could not have challenged it within ten (10) days. First, the statutes do not require notice to anyone except the "sponsor" of a referendum petition. Therefore, Petitioners or others seeking judicial review are not statutorily entitled to notice from the boards of election. Nor could MCBOE have provided notice to other parties or persons because the Board had no way of identifying those interested parties and persons.

Second, Petitioners did not inquire regarding how the number of registered voters was derived until June 11, the first day of trial. Petitioners certainly knew that the Montgomery County Council had passed the legislation and it had been signed by the County Executive. Petitioners are tasked with knowing that there is a mechanism to bring to referendum legislation enacted by the County Council. Yet, Petitioners failed to inquire from the Board of Elections in a timely manner whether a Petition had been filed and whether a determination had been made regarding the number of signatures required to bring the Bill to referendum.

Third, Petitioners plainly had both actual and constructive notice of MCBOE's determination, as counsel for MCBOE met with counsel for Petitioners and the pertinent information regarding how the MCBOE derived its numbers was available to the public on SBE's website.[4]

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[4] Moreover, as explained further in the Amicus brief of MCRG, Petitioners were well aware of all public opposition to Bill 23-07.

Fourth, Petitioners' legal arguments misconstrue the holding of this Court in Roskelly v. Lamone, 396 Md. 27, 912 A.2d 658 (2006), wherein it was held that the ten day period runs from each determination and that actual notice is not required by §6-210(e). In Roskelly, the State Board provided Roskelly, the petition sponsor, with notice by mail of its determination on the same day. Roskelly did not file suit challenging that determination within ten days. The Board argued that Roskelly's challenge was therefore time barred. Roskelly contended that, because he was on vacation when the determination letter was sent and he did not actually receive the letter until he returned from vacation more than ten days later, that he was not "notified" of the deficiency determination until that day. Roskelly asserted that the ten day limitations period should not have begun to run until he had "actual receipt" of the notice letter. Roskelly also complained that no one from the Board telephoned him regarding the determination, and that this was allegedly a violation of his due process rights.

This Court rejected Roskelly's arguments, explaining that §6-210 does not require "actual notice" to a petition sponsor, as follows:

> [Roskelly] believes that the ten-day limitation period should begin on the date of 'actual' receipt. The Circuit Court rejected this argument, as do we. First, §6-210 of the Election Law Article requires notice; it does not require actual notice. Nor does it require that the chief election official ensure receipt of a deficiency determination by a petition sponsor or, by phone or otherwise, to investigate whether the sponsor has received the determination. Section 6-210 provides only that 'the chief election official of the election authority shall notify the sponsor of the determination' and that judicial review 'shall be sought by the 10th day following the determination to which it relates.' Such a requirement, as Roskelly suggests, moreover, would place an

> unreasonable burden on the election official and, rather than ensure certainty, it would have the opposite effect. It simply is unworkable.

Id., 396 Md. at 41, n.18, 912 A.2d at 666, n.18.

Here, Petitioners are simply members of the public and, thus, they are certainly not entitled to more or different notice than a petition sponsor. Even if Petitioners had been sponsors of the petition, they would not have been entitled to "actual notice" of a determination. Furthermore, as noted by this Court in Roskelly, the standard suggested by Petitioners is unworkable. If accepted, it would require the Boards of Election to provide "actual notice" to members of the public of every determination or action of the Boards regarding petitions. It would be impossible for the Boards to provide notice to allegedly "interested" parties since the Boards have no means to identify those interested parties. Moreover, the Boards' activities and documents are public record. The ten day notice period is necessary to ensure timely challenges to petition determinations. Further, Petitioners and other members of the public had full access to the number of active and inactive voters, which appeared on SBE's website, and full access to the records of MCBOE regarding its determinations involving the Petition.

C. If The Ten Day Period Did Not Begin to Run as of November 30, 2007, It at Least Began by December 3, 2007 When MCBOE Made an Advance Determination of the Sufficiency of the Form of the Petition and Found No Deficiencies.

Assuming the Court does not agree that November 30, 2007 began the running of the ten day period for Petitioners' challenge regarding the number of registered voters, there are other dates far preceding by ten (10) days the date of

Petitioners' Amended Complaint (filed July 8, 2008) seeking judicial review with respect to this issue. MCRG, the Petition "sponsor," sought an "advance determination" of the sufficiency of the Petition form pursuant to Election Law Article, §6-202. E. 82. On December 3, 2007, MCBOE made a determination approving the sufficiency of the form of the Petition in advance.[5] E. 85. MCBOE therefore did not make a determination of any "deficiencies" under Election Law Article, Section 6-206(c) and, instead, determined under 6-206(b) that all requirements of law (including those regarding the number of signatures required) had been met. Implicit in MCBOE's finding that the form of the Petition was sufficient, and its lack of any finding of deficiency regarding the number of signatures required, is that MCBOE had made a determination regarding the number of registered voters. Petitioners did not file the Complaint within ten days of this determination.

D. The Ten Day Period Began to Run, At the Very Latest, on February 20, 2008.

Assuming that the Court does not agree that the ten day period began to run on November 30, 2007 or December 3, 2007, it clearly would have been triggered by the determination made on February 20, 2008. On February 20, 2008, the MCBOE made a determination and notified MCRG that of the signatures submitted on February 4th, 13,476 signatures were valid. E. 87. The letter to MCRG also stated that "[a]s I previously advised, there needed to be twelve thousand five hundred

[5] In a letter dated December 7, 2007, the MCBOE also approved the form of the Petition to be downloaded via the internet. E. 86.

and one (12,501) valid, accepted signatures for the first submission." Id. Accordingly, in addition to MCBOE's previous determination of sufficiency on December 3, 2007 and the information provided to Mr. Shurberg on February 19, 2008, it was also clear in the February 20, 2008 letter that MCBOE had determined the number of registered voters in the County to be 500,012 and that 5% of that number was 25,001. Information regarding how this number was derived was available on the SBE's website and by inquiry at the MCBOE's office. E. 519 and 521. Moreover, this determination regarding the first submission and all documents reflecting this determination by the MCBOE were public record and available for inspection by the public at the MCBOE's office. Petitioners did not seek judicial review of this determination within ten days after February 20, 2008.

E. Assuming, Arguendo, That the Determination Regarding the Number of Registered Voters Occurred on March 6, 2008, As Petitioners Assert, Their Claim is Nevertheless Time Barred Because the Amended Complaint Was Not Filed Until July 8, 2008.

Petitioners contend that the determination they challenge did not occur until March 6, 2008, when MCBOE certified the Petition. E. 88-89. This contention is incorrect because Petitioners could not wait until ten days after petition certification instead of ten days after the determination challenged in order to seek judicial review. If Petitioners' argument were accepted, the plain terms of §6-210(e) would be obviated and rendered nugatory. The statute plainly requires that "any" judicial review under §6-209 be "sought by the 10th day following the determination to which it relates." See also Roskelly v. Lamone, supra.

Furthermore, assuming arguendo that the determination challenged occurred on March 6, 2008, Petitioners did not seek judicial review within ten (10) days of March 6th. The Amended Complaint asserting a new claim with respect to the determination of the number of registered voters was not filed until July 8, 2008. It added a new theory or cause of action and, thus, does not relate back to the filing of the original Complaint. Grand-Pierre v. Montgomery County, 97 Md. App. 170, 175-76, 627 A.2d 550, 553 (1993)(an amendment stating a new cause of action does not relate back). Petitioners failed to challenge the determination regarding the number of registered voters within ten days of March 6, 2008. Therefore, even if the Court accepts Petitioners' assertion that the limitations period did not begin to run until March 6, Petitioners nevertheless failed to timely challenge the March 6th determination.

F. Counsel for Petitioners Was Not Mislead Regarding the Determination by MCBOE of the Number of Registered Voters.

In order to avoid the bar of the ten day limitations period, Petitioners have repeatedly and without basis accused counsel for MCBOE of "hiding" information from them regarding the number of registered voters and how that number was derived. It simply does not make sense to assert that counsel for MCBOE allegedly hid something from Petitioners that was public record.[6] Moreover, such allegations are simply without basis. At no time prior to trial on June 11 and 12, 2008 did

[6] It is not difficult to predict future members of the public raising similar arguments as those asserted here by Petitioners here in order to avoid the ten (10) day time limit.

counsel for Petitioners question the methodology utilized by MCBOE in determining that MCRG was required to obtain 25,001 signatures to have Bill No. 23-07 brought to referendum. E. 519. Further, since Petitioners' eventual inquiry at trial on June 11 regarding the calculation of the required number of signatures was well outside the ten day limitations period, the issue of whether or not Petitioners were given a timely response by counsel for MCBOE is entirely irrelevant.

G. The "Discovery Rule" Is Inapplicable to Excuse Petitioners' Failure to Timely Seek Judicial Review.

Petitioners contend that the Court should excuse their failure to comply with the ten day limitation period based upon the "discovery rule" or some similar assertion that they allegedly were not aware of their cause of action. These assertions should be rejected as factually inapplicable and legally incorrect.

As the Circuit Court recognized, "statutes of limitations exist to encourage promptness," (E. 601), particularly in the election context where time is of the essence. E. 602. "They find their justification in necessity and convenience rather than logic. They represent expedience, rather than principles . . . They represent a public policy about the privilege to litigate." Walko v. Burger Chef Systems, Inc., 281 Md. 207, 210, 378 A.2d 1100, 1101 (1977). Such statutes are to be strictly construed and the court is not to give them "a strained construction to evade their effect." Decker v. Fink, 47 Md. App. 202, 206, 422 A.2d 389, 391 (1980)(citing McMahan v. Dorchester Fertilizer Co., 184 Md. 155, 40 A.2d 313 (1944)).

Petitioners had constructive notice of the calculation of the number of registered voters, which was public record and was posted on SBE's website as of November 30, 2007. Moreover, Petitioners certainly had notice by no later than February 19 when Petitioners' counsel met with MCBOE's counsel and/or February 20, 2008, when MCBOE verified and counted the first set of Petition signatures. Accordingly, Petitioners may not invoke the "discovery rule."

Moreover, Maryland Courts have held that the "discovery rule" does not apply to statutory periods for litigants to act, such as the ten day period in §6-210(e). See, e.g., State v. Copes, 175 Md. App. 351, 372-73, 927 A.2d 426, 439 (2007) (discovery rule did not apply to extend the notice period under the Maryland Tort Claims Act because the notice statutes "do not concern knowledge on the part of a potential plaintiff of facts, wrongs, opinions, or anything; rather, they concern the existence *vel non* of the facts that make up the elements of a given cause of action, irrespective of knowledge."). Like the notice statutes, the ten day period in §6-210(e) does not concern knowledge on the part of a potential challenger to a petition; rather, it concerns the existence *vel non* of a determination by the boards of election, irrespective of knowledge. Further, the discovery rule should not apply to the ten day period in §6-210(e), otherwise the limitations period would be rendered nugatory since parties suing under §6-209(b) would always be able to avoid the time bar and sue at any point, even after an election.

Even if they could invoke the discovery rule, it would be of no aid to

Petitioners because they did not challenge MCBOE's determination within ten days of March 6, 2008 (the date they claim the limitations period began), as the Amended Complaint was not filed until July 8, 2008.

For all of the foregoing reasons, Petitioners' challenge to MCBOE's determination regarding the number of registered voters and, thus, the number of signatures required on the Petition is plainly time barred.

II. THE CIRCUIT COURT CORRECTLY HELD THAT MCBOE'S VERIFICATION OF PETITION SIGNATURES COMPLIED WITH ELECTION LAW ARTICLE, SECTIONS 6-203 and 6-207.

Petitioners contend that the Circuit Court erred in its interpretation of Sections 6-203 and 6-207 and, thus, that "thousands" of signatures were improperly verified by MCBOE. Petitioners argue that "strict compliance" with referenda requirements is necessary and that the Circuit Court erred by not requiring strict compliance with Sections 6-203 and 6-207. Petitioners have confused the so-called "strict compliance" with referenda requirements discussed in the cases they cite with the appropriate statutory interpretation at issue here.

A. The Applicable Statutes.

There are two applicable provisions that, read together, create an ambiguity in subtitle 6 of the Election Law Article. The first applicable statute is §6-203 entitled "Signers; information provided by signers." Section 6-203(a) provides, in relevant part, that an individual shall:

(1) **sign the individual's name as it appears on the statewide voter**

registration list or the individual's surname of registration and at least one full given name and the initials of any other names; and

(2) include the following information, printed or typed, in the spaces provided:

(i) the signer's name as it was signed;
(ii) the signer's address;
(iii) the date of signing; and
(iv) other information required by regulations adopted by the State Board.

Id. (Emphasis added).

Section 6-203(b) provides the requirements for validation and counting of signatures on a petition, as follows:

Validation and counting

(b) The **signature of an individual shall be validated and counted if**:

(1) **the requirements of subsection (a) of this section have been satisfied**;

(2) **the individual is a registered voter** assigned to the county specified on the signature page and, if applicable, in a particular geographic area of the county;

(3) the individual has not previously signed the same petition;

(4) the signature is attested by an affidavit appearing on the page on which the signature appears;

(5) the date accompanying the signature is not later than the date of the affidavit on the page; and

(6) if applicable, the signature was affixed within the requisite period of time, as specified by law.

Id. (Emphasis added).

The other pertinent statute is Election Law Article, §6-207, "Verification of signatures," which provides the following:

Generally

> (a)(1) Upon the filing of a petition, and unless it has been declared deficient under §6-206 of this subtitle, **the staff of the election authority shall proceed to verify the signatures** and count the validated signatures contained in the petition.
>
> (2) The **purpose of signature verification under paragraph (1) of this subsection is to ensure that the name of the individual who signed the petition is listed as a registered voter.**

(Emphasis added). See also COMAR 33.06.05.02. Specifically, each local Board is to "[r]eview all names and accompanying information on each signature page" and "[d]etermine **which signers are registered voters** who meet the petition criteria and which are not registered voters or do not meet the petition criteria." Id.

B. The Applicable COMAR Regulations.

COMAR Title 33, Subtitle 6, Chapter 5 provides the regulations applicable to the Board's verification and certification of Petitions. COMAR 33.06.05.01 provides that for a petition filed with a local board, "the election director shall proceed to verify the signature pages as provided in this chapter."

COMAR 33.06.05.02 provides that:

> .02 Verification-In General.
>
> A. Guidelines and Instructions. **The verification of signature pages shall be undertaken in accordance with guidelines and instructions adopted by the State Board.**

> B. Procedure Generally. Except as otherwise authorized in Regulation .03 of this chapter, each election director shall:
>
> > (1) Review all **names and accompanying information on each signature page**;
> >
> > (2) **Determine which signers are registered voters who meet the petition criteria** and which are not registered voters or do not meet the petition criteria; and
> >
> > (3) Indicate next to each name the results of that determination, using for that purpose uniform **codes** specified in the State Board's guidelines and instructions (for example, OK = Valid Signature; CSM = Circulator's Signature Missing).

(Emphasis added).

The word "name" in the above quoted regulation is new language added to the regulation in order to comply with Senate Bill 101 of the 2006 Legislative Session. Senate Bill 101 amended the requirement that the local boards verify the signature of the signer, and instead required that the local boards verify the **name** of the signer.

C. The State Board's Guidelines for Petition Verification Process.

As required by the Election Law Article, §6-103(b), the State Board has prepared "guidelines and instructions relating to the petition process." Those Guidelines are found on the State Board's website. E. 99-100. SBE Guidelines specifically provide that where the signer uses initials or a nickname, the name should be accepted if the identity of the voter can be determined. Id. The State Board Guidelines also provide that where an address does not match that of the

registration, the signature should be accepted if the identity of the voter can be determined (and then follow the change of address procedures). Id. The State Board Guidelines further provide that if the signer used her married name (Mrs. John Smith instead of Mary Smith), the signature should be accepted if the identity of the voter can be determined. Id. The State Board Guidelines also provide that if one or more signatures on a petition sheet are invalid, then the entire page is **not** deemed invalid. Id. Rather, only the signatures that were deemed invalid should not be counted. Id.

Similarly, the State Board Guidelines provide that if the signer's signature is missing, then only that name is invalidated. Id. If the signer's printed name is missing, the signature is accepted if the identify of the voter can be determined. Id. If the signer's address is missing, then only that name should be invalidated. Id. If the signer's birth date is missing, the signature is accepted if the identity of the voter can be determined. Id. If the signer's birth date does not match voter registration records, the signature is accepted if the identity of the voter can be determined (the birth date should be verified with the voter). Id.

D. The Pertinent Legislative History.

The Department of Legislative Services Fiscal and Policy Note regarding Senate Bill 101[7], E. 97-98, specifically explains that:

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[7] Senate Bill 101 was ultimately codified as §6-207(a)(2) in 2006.

> This emergency departmental bill clarifies that the purpose of requiring election authority staff to verify signatures on a petition filed with the State or a local election authority **is to ensure that the names of the individuals who signed the petition are registered voters, not to verify the authenticity of the signature**.

(Emphasis added). In the background section of the Fiscal and Policy Note, it was explained that:

> SBE advises that the bill reflects current administrative practice. In conducting the signature verification process, SBE verifies that a signature on a petition corresponds to a registered voter and does not make an actual comparison of the signature on the petition to the signature on file with the voter registration record. According to SBE, **to do so would increase the time and expense of certifying petitions, would require signature analysis training for staff, and could lead to inadvertent rejection of signatures that had changed over time.**

Id. (Emphasis added).

Thus, the purpose of MCBOE's verification of the signature pages of a petition is to ensure that the names of the individuals who signed the petition are registered voters.

E. The Circuit Court Properly Construed the Applicable Statutes, Regulations and Guidelines.

The "strict compliance" jurisprudence so heavily relied upon by Petitioners is simply not applicable because the question here is not whether strict compliance with the statutes is required but, rather, what is required by the statutes in the first place. The Circuit Court correctly held that §6-203 is rendered ambiguous by virtue of §6-207. Most, if not all, of Petitioners' arguments rest upon the erroneous propositions that (1) §6-203 can be viewed in a vacuum rather than within the

statutory context as a whole and (2) that there is no ambiguity.

Moreover, Petitioners all but ignore COMAR and the State Guidelines adopted by SBE with respect to this issue. Election Law Article, §6-103(b) and the regulations adopted pursuant to it at COMAR 33.06.05.02 provide that "[t]he verification of signature pages shall be undertaken in accordance with guidelines and instructions adopted by the State Board." Thus, MCBOE was required to follow the State Board Guidelines, which repeatedly and specifically provide that a signer's name should be accepted if the identity of the voter can be determined. E. 99-100. The Court should show appropriate deference to the State Board's interpretation of the law it administers. See Christopher v. Montgomery County Dep't of Health & Human Servs., 381 Md. 188, 849 A.2d 46 (2004). The key is that a voter who signs a petition should not be disenfranchised based upon a technicality regarding how he signed his name but, rather, if the identity of the voter can be determined, and the person is a registered voter, then the signature must be accepted.

Petitioners' assertion that, under the State Board Guidelines, anyone could forge a petition by pulling names from a local phone directory is simply absurd. The signers of the Petition in this case provided not only their names and addresses, but also their dates of birth.[8] Therefore, even if the name as signed did not match

[8] Whether or not dates of birth were legally required is beside the point because there is no dispute that they were provided by the signers of the Petition in this case.

exactly the name on the statewide voter registration, the identity of the voter (and, thus, the fact they were a registered voter) could still be determined by matching the names, addresses and the dates of birth.[9] Accordingly, the types of variations in the name of the signer from the manner in which it appears on the statewide voter registration system did not prevent MCBOE from determining the identity of the voter, and MCBOE was required to accept any such signature.

An example is illustrative. Imagine that the Statewide voter registration contained the name "Michael W. Smith," but Mr. Smith signed a petition as "Mike Smith." In this situation, the voter registration name and the name signed do not exactly match. In essence, Mr. Smith used the nickname of "Mike." He also left out his middle initial. However, "Mike Smith's" signature on the petition sheet can only be invalidated if MCBOE cannot determine his identity. Now also imagine that Mr. Smith provided his address and his date of birth on the petition sheet he signed. MCBOE can determine the identity of "Mike Smith" by going to the Statewide voter registration site (MDVOTERS) and first pulling up all persons in Montgomery County with the name Michael Smith or Mike Smith (or similar names). MCBOE can then match the address to the one given by "Mike Smith" on the petition. Finally, MCBOE can confirm that they have the correct "Mike Smith" by matching the name and address with the date of birth. MCBOE can thus determine that the

[9] It is also worth noting that forging another individual's name on a Petition is a crime.

name signed is that of a registered voter in Montgomery County. Because the identity of the voter can be determined, that signature cannot be invalidated even though it was not signed in a manner that matched exactly the voter's name as it appears on the Statewide voter registration system.[10]

If local Boards were to invalidate names even though the identities of the voters could be determined (as a registered voter), they would violate those voters' constitutional rights. Cf. Nader for President 2004 v. Md. State Bd. of Elections, 399 Md. 681, 926 A.2d 199 (2007)(holding that invalidation of signatures on a nominating petition, solely on the basis that the otherwise eligible signatories signed the petition sheet for the wrong county, disenfranchised the signatories in violation of the Maryland Constitution). A registered voter of a county has a constitutional right to petition for referendum (Md. Constitution, Article XVI, §1), and their signature on such a referendum must be counted if the identity of the signer can be determined. If the ambiguous and directory provisions of §6-203(a) were interpreted and applied in the manner urged by Petitioners (which is the opposite of what the statutes, regulations and guidelines provide), the statute would be unconstitutional as

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[10] See, e.g., In re Opinion of the Justices, 103 A. 761 (Me. 1917)(where a verifying petitioner's name was signed "Ralph Richards," and the only petitioner by the name of Richards was R. W. Richards, the names on the petition should be counted, the verifying petitioner being sufficiently identified; and where the verifying petitioner's name appeared as "W. W. Farrar," and in the petition the name "Walter W. Farrar" appeared, the names on the petition should be counted, the verifying petitioner being sufficiently identified).

applied because it would inhibit the right of referendum and disenfranchise voters who sign a petition. Cf. Dutton v. Tawes, 225 Md. 484, 491, 171 A.2d 688 (1961)(election laws generally construed to give effect to "the full and fair expression of the will of the voters.").

Moreover, to read the statutes as suggested by Petitioners would controvert the very purpose of the statutes and, thus, would lead to an absurd result. Roskelly, supra (citing Yox. v. Tru Rol Co., Inc., 380 Md. 326, 337, 844 A.2d 1151, 1157 (2004)("We do not interpret statutes in ways that produce absurd results that could never have been intended by the Legislature")). If Petitioners' proposed construction were correct, the mere omission of an initial in a signer's name would disqualify his or her signature, even though all other available information on the petition corroborated the signer's identity and that he or she was a registered voter.

To the extent that the requirements of §6-203(a) and the purpose of those requirements set forth in §6-207(a)(2) are deemed to conflict, then §6-203(a) should be construed to effectuate the purpose of the statute as set forth in §6-207(a)(2). Section 6-207(a)(2) states that: "[t]he **purpose of signature verification** under paragraph (1) of this subsection **is to ensure that the name of the individual who signed the petition is listed as a registered voter**." (Emphasis added). See also COMAR 33.06.05.02. This Court has declared that, where a literal construction of statutory language would dictate a result at variance with the apparent legislative goal or purpose,"the plain-meaning rule is not rigid." Kaczorowski v. City of

Baltimore, 309 Md. 505, 513, 525 A.2d 628, 632-33 (1987). See also Catonsville Nursing Home, Inc. v. Loveman, 349 Md. 560, 709 A.2d 749 (1998). In such situations, if the legislative purpose can be derived by a thorough examination of the statute's context, a non-literal construction that effectuates the evident purpose is to be adopted, even if that construction varies from unambiguous but ill-drafted text. Kaczorowski, 309 Md. at 515, 525 A.2d at 632. As the Court stated in Kaczorowski:

> **[W]here a statute is plainly susceptible of more than one meaning and thus contains an ambiguity, courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment.** State v. Fabritz, 276 Md. 416, 348 A.2d 275 (1975); Height v. State, 225 Md. 251, 170 A.2d 212 (1961). In such circumstances, **the court, in seeking to ascertain legislative intent, may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.** Tucker, 308 Md. at 75, 517 A.2d at 732 [some citations omitted].

Id., 309 Md. at 513-14, 525 A.2d at 632 (emphasis added). Here, the Court does not need to look far to discern legislative intent or purpose because it is set forth in the statute itself, in §6-207(a)(2).[11] The Election Law Article, and §§6-203 and 6-207 in particular, should be read together to effectuate the purpose of signature verification. Petitioners challenge signatures that do not exactly match the signers' names as they appear on the Statewide voter registry, even though MCBOE was able

[11] Contrary to Petitioners' assertion, there is no reason to believe that "validation" and "verification" have different meanings, as they are used interchangeably in the statute.

to determine that the individuals who signed the Petition were registered voters. Petitioners therefore seek an interpretation of the statute that is patently at odds with its purpose and the legislative intent and thus is illogical and leads to an unreasonable result. Accordingly, Petitioners' proposed interpretation should be rejected.

Moreover, there are practical reasons why the statute should not be construed to require an exact match between names on a petition and the names on a voter registration list. First, many persons do not even know how their name appears on the statewide voter registration list and, thus, could not easily comply with such a requirement. This would unreasonably inhibit the rights of initiative, referendum and voting. Second, requiring names on a petition to correspond exactly to names on the voter registration list may be unfair and unreasonable where no effort is made to compare other information in the petition such as the person's name as printed, addresses or dates of birth. See, e.g., Vinson v. Burgess, 775 S.W.2d 509 (Tex. App. 1989)(holding that method used by county clerk to determine validity of petitions was not fair and reasonable inasmuch as clerk required names on petition to correspond exactly to names on voter registration list, and no effort was made to compare other information on petition to determine if signer was a registered voter). This is exactly why the pertinent statutes and the State Board Guidelines require that signatures be accepted if the identity of the voter can be ascertained.

In this case, where the signed name and the name on the voter registration

list varied due to nicknames or initials, MCBOE staff confirmed each name by matching it with the signer's address and date of birth to ensure that the signer was a registered voter in Montgomery County. Because the signers' identities were discernible based upon the information provided, the signatures were required to be accepted even though the signatures varied somewhat from the names as they appeared on the Statewide voter registry. MCBOE's actions fully comported with the proper and appropriate interpretation of the applicable statutes, and with the Maryland Constitution.

Petitioners discuss at length issues of no relevance, such as the merits of Bill 23-07, which are not at issue here. Moreover, Petitioners mischaracterize MCBOE's arguments in an attempt to discredit them. MCBOE did not argue "substantial compliance" with respect to the signature verification process. Rather, MCBOE asserted that reading together and harmonizing the pertinent provisions of the Election Law Article as required by the rules of statutory construction leads to the conclusion that the signatures challenged by Petitioners as invalid were properly verified by MCBOE. Moreover, the pertinent COMAR provisions, State Guidelines and pertinent legislative history support MCBOE's statutory construction.

The language of §6-203 is directory rather than mandatory. Barnes v. State, 236 Md. 564, 204 A.2d 787 (1964) is not to the contrary. While Barnes held that the language of former Article 33, §169 was mandatory, Barnes has been overruled by the many statutory changes that have occurred since it was decided. At the time of

the Court's decision in Barnes, there was no statutory section comparable to current §§6-203 and 6-207, which now prescribe the statutory scheme applicable to the petition verification process. The statutory changes that have occurred have appropriately effectuated a delegation of authority to the local Boards to determine the validity of signatures, and their actions are subject to judicial review. See Burroughs v. Raynor, 56 Md. App. 432, 441, 468 A.2d 141, 145 (1983).

For all of the foregoing reasons, the Circuit Court properly rejected Petitioners' assertion that MCBOE improperly validated the challenged signatures.

III. THE CIRCUIT COURT ERRED IN HOLDING THAT MCBOE WAS REQUIRED TO INCLUDE "INACTIVE VOTERS" IN DETERMINING THE NUMBER OF "REGISTERED VOTERS" FOR PURPOSES OF CALCULATING THE NUMBER OF SIGNATURES REQUIRED ON THE PETITION.

The Maryland Constitution, Article XVI, Section 1 reserves to the people of the State the "power known as The Referendum" by petition. The Montgomery County Charter, Section 114, Referendum, provides that "[a]ny legislation enacted by the Council shall be submitted to a referendum of the voters upon petition of five percent of the registered voters of the County . . ."

Election Law Article, §3-503 provides the following with respect to "inactive voters" on the Statewide voter registration list:

§3-503. Inactive status.

Placement on inactive status

(a) If a voter fails to respond to a confirmation notice under § 3-502(c)

of this subtitle, the voter's name shall be placed into inactive status on the statewide voter registration list.

Restoration to active status

(b) **A voter shall be restored to active status on the statewide voter registration list after completing and signing any of the following election documents**:

(1) a voter registration application;

(2) **a petition governed by Title 6;**

(3) a certificate of candidacy;

(4) an absentee ballot application; or

(5) a written affirmation of residence completed on election day to entitle the voter to vote either at the election district or precinct for the voter's current residence or the voter's previous residence, as determined by the State Board.

Removal from statewide voter registration list

(c) An inactive voter who fails to vote in an election in the period ending with the second general election shall be removed from the statewide voter registration list.

Not counted for administrative purposes

(d) Registrants placed into inactive status may not be counted for official administrative purposes including establishing precincts and reporting official statistics.

Id. (Emphasis added). Thus, an inactive voter is someone who has either moved away or who does not regularly participate in the democratic process. Under subsection (b)(2), an inactive voter automatically becomes an active voter simply by

signing a referendum petition.

The statute does not define "registered voter" or "official administrative purposes." However, the legislative history and Maryland case law reveal that "official administrative purposes" includes the issue of whether to include inactive voters in determining the number of signatures required for a referendum petition. With respect to the legislative history, prior to amendments effectuated in 2005, the statute (formerly EL Article, §3-504(f)(5))[12] at issue formerly read as follows:

> (5) Registrants placed on the inactive list shall be counted only for purposes of voting and not for official administrative purposes including petition signature verification, establishing precincts, and reporting official statistics.

Therefore, the term "petition signature verification" was removed from the provision in 2005. The statutory change was made following litigation emanating from Anne Arundel County involving the Maryland Green Party's efforts to place a candidate on the ballot. The case reached this Court in 2003, and the Court's opinion is reported as Maryland Green Party v. State Board of Elections, 377 Md. 127, 832 A.2d 214 (2003). MCBOE discussed the 2005 amendments at length in their briefs below. MCBOE therefore has no inkling whatsoever why Petitioners accuse it of ignoring the 2005 amendments. See Petitioners' Brief, at 25-30. The 2005 amendments have never been "overlooked" by MCBOE or the SBE, which is the

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[12] Prior to creation of the Election Law Article, the statute was Article 33, §3-505.

entity that **proposed** that legislation in response to Maryland Green Party.

In the Maryland Green Party case, this Court held, inter alia, that the statute was unconstitutional to the extent that it precluded the Board from counting the petition signatures of inactive voters. The Court reasoned that the provision was unconstitutional because it prevented an otherwise qualified voter (who, pursuant to §3-503(b)(2) automatically becomes an active voter simply by signing a referendum petition) from "voting" by signing a referendum petition.[13] The Court stated that §3-504(f), together with §1-101(gg), therefore "create[d] a group of 'second-class citizens' comprised of persons who are 'inactive' voters and thus not eligible to sign petitions." Id., 377 Md. at 150, 832 A.2d at 227.

Accordingly, the practice disapproved by this Court in Maryland Green Party was that of not counting the petition signatures of inactive voters, who became by statute active voters simply by signing the petition, since the practice disenfranchised those voters. Thus, following the decision in Maryland Green Party, the statute was changed and the practice of not counting inactive voters who signed petitions was discontinued. The crux of the decision in Maryland Green Party is that inactive voters who sign petitions, thus automatically becoming "active" voters, are voting and thus their signatures must be counted and verified.

In Maryland Green Party, this Court also disapproved the practice by SBE of

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[13] Thus, contrary to Petitioners' arguments, signing a referendum petition is "voting."

having two (2) separate voter registration lists, one for active and one for inactive voters. The Court stated, relying upon Gisriel v. Ocean City Board of Supervisors of Elections, 345 Md. 477, 693 A.2d 757 (1997), that if inactive voters are not counted as petition signers, then they should not be "counted among the total number of voters which the percentage signature requirement is based upon." Id., 377 Md. at 152, 832 A.2d at 228. The converse, however, is not true, as will be explained below. This Court in Maryland Green Party reversed the Circuit Court and ordered the case "remanded to that Court for the entry of a declaratory judgment consistent with this opinion." Id., 377 Md. at 165, 832 A.2d at 236. The Court thus invited the SBE to obtain clarification from the Circuit Court.

Upon remand, the Circuit Court entered a "Second Declaratory Judgment" E. 493-96. The Circuit Court (Loney, J.) declared that, while the signatures of inactive voters on a petition must be counted, the SBE and local Boards possess discretion to decide whether to include inactive voters when calculating the number of signatures required for a petition for referendum, explaining as follows:

> [A]s long as voters in 'inactive' status who continue to be Maryland residents are not denied the right to sign any petition or to have their signatures on petitions counted in the same manner as the signatures of other voters, and as long as those voters are not denied any other rights of registered voters, SBE and local election officials may exercise discretion in deciding whether to include those voters in the total number of registered voters for various administrative purposes.

Id.

The Court continued by providing examples, as follows:

For example:

> a. Maryland voters placed in 'inactive' status may, but need not, be included in determining the total number of registered voters for purposes of fixing the number of signatures needed on a petition (where the number needed is a percentage or proportion of the total registered voters) or in determining whether 1% of registered voters are affiliated with a particular party . . .

Id.[14]

The State Board possesses the discretion described by Judge Loney to decide whether to include inactive voters when calculating the number of registered voters and the number of signatures required for petitions. This is one of the "official administrative purposes" referred to in §3-503(d). The 2005 amendments are not to the contrary. SBE's practice is not to count inactive voters when determining the number of signatures required for a petition, as set forth in the "Second Declaration of Donna Duncan," the Director of Election Management for SBE, in which she attests that the SBE's consistent policy and practice under §3-503(d) has been to not count inactive voters for the purpose of determining how many signatures are needed to satisfy a petition signature requirement. E. 497, ¶3. Ms. Duncan explained the significant administrative reasons for not counting inactive voters when determining the number of signatures required. The vast majority of inactive voters do not participate in the electoral process. E. 498, ¶4. For example, at the

[14] The Green Party did not appeal Judge Loney's declaratory judgment on remand.

time of this Petition, there were over 50,000 inactive voters in Montgomery County, but only 208 of those inactive voters signed the Petition (and their signatures were verified and accepted by MCBOE in accordance with Maryland Green Party). E. 500-01. Therefore, it would not make sense to include inactive voters in calculating the percentage requirement of signatures for a referendum petition, as doing so would artificially inflate the number of signatures required to bring a law to referendum. Consistent with current §3-503(d), inactive voters are therefore not counted for "official administrative purposes."

Maryland Green Party implicitly recognized that this was appropriate by disapproving only the practice of not counting inactive voters' signatures on petitions, and by remanding the case to the Circuit Court. Contrary to Petitioners' contentions, Maryland Green Party simply does not require SBE or local Boards to count inactive voters when determining the percentage requirement and did not declare that practice unconstitutional.

Voters are not disenfranchised by the practice of not being counted for purposes of calculating the requisite number of signatures for a petition, since those individuals are not precluded from voting or from having ballot access. On the other hand, if inactive voters were included in the calculation so as to inflate the number of signatures required, then persons or groups affected would no doubt allege that their access to the ballot has been improperly restricted.

The phrase "official administrative purposes" is not defined in the statute and,

thus, the Court must attempt to discern its meaning. In doing so, the Court must accord deference to SBE's (and MCBOE's) interpretation of the statute. It is well settled that "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." See Solomon v. Bd. of Physician Quality Assurance, 132 Md. App. 447, 455, 752 A.2d 1217 (2000)(deciding to "accord the Board's interpretation of the Maryland Medical Practice Act considerable weight and deference."). Moreover, legislative acquiescence in a long-standing administrative construction gives rise to a strong presumption that the interpretation is correct. As stated by this Court in Lussier v. Maryland Racing Commission, 343 Md. 681, 696-97, 684 A.2d 804, 811-12 (1996):

> The General Assembly has not, over the past 75 years, changed that administrative construction of the statute. See, e.g., Md. Classified Employees Assoc., Inc. v. Governor, 325 Md. 19, 33, 599 A.2d 91, 98 (1991)('legislative acquiescence in a long-standing administrative construction ' 'gives rise to a strong presumption that the interpretation is correct'); Morris v. Prince George's County, 319 Md. 597, 613, 573 A.2d 1346, 1354 (1990)('long-standing administrative construction of [the statute] and its predecessor statutes by an agency charged with administering them . . . is entitled to deference'); Board v. Harker, 316 Md. 683, 699, 561 A.2d 219, 227 (1989)('the agency rule is entitled to considerable weight in determining the meaning of [the statute's] provisions'); McCullough v. Wittner, supra, 314 Md. [602,] 612, 552 A.2d [881,] 886 [(1989)]('The interpretation of a statute by those officials charged with administering the statute is, of course, entitled to weight'); Sinai Hosp. v. Dep't of Employment, 309 Md. 28, 46, 522 A.2d 382, 391 (1987)('the long-standing legislative acquiescence [in the administrative interpretation of the statute] gives rise to a strong presumption that the interpretation is correct'); Balto. Gas & Elec. v. Public Serv. Comm'n, 305 Md. 145, 161, 501 A.2d 1307, 1315 (1986)('the

> contemporaneous interpretation of a statute by the agency charged with its administration is entitled to great deference, especially when the interpretation has been applied consistently and for a long period of time'); Consumer Protection v. Consumer Pub., supra, 304 Md. [731,] 759, 501 A.2d [48,] 63 [(1985)]('The consistent construction of a statute by the agency responsible for administering it is entitled to considerable weight').

Clearly, the General Assembly has been aware of the State Board's interpretation and practice with respect to 3-503(d), and its acquiescence raises a strong presumption that the Board's interpretation is correct.

A review of the two examples of "official administrative purposes" stated in Section 3-503(d) provides some insight. The two examples of "official administrative purposes" (which is not by any means exclusive) for which inactive voters may not be counted are for "establishing precincts, and reporting official statistics." In her Affidavit, Ms. Duncan explained that voting precincts are established based upon the number of registered voters in an area. Inactive voters are not counted in the number of "registered voters" because election officials need to accurately anticipate how many voters will go to a polling place for the precinct. E. 498, ¶5. The vast majority of inactive voters do not vote or participate in the electoral process, so including them would artificially inflate the estimated number of persons who would arrive at a polling place to vote. Id., ¶5. If too many persons arrive to vote at a polling place, it would be unmanageable for the Boards. Id., ¶5. If election officials were required to set up polling places and voting units for both active and inactive voters, it would constitute an enormous waste of time and resources.

Moreover, the inactive voters are not included in the calculation because the law requires one (1) voting unit or booth to be allocated for every 200 voters. Id., ¶5. Again, election officials do not count inactive voters in calculating the number of registered voters for this purpose because counting them would lead to an inflated number that does not reflect reality and would inhibit the Boards' ability to properly prepare polling places. Id., ¶5. Similarly, including inactive voters in the number of total registered voters to calculate the 5% required for a petition for referendum would also inflate unnecessarily the number of signatures required to place a referendum question on the ballot.

The other example of an official administrative purpose in §3-503(b) for which inactive voters may not be counted is for "reporting official statistics" such as voter turnout. As Ms. Duncan explains in her Affidavit, including inactive voters in voter turnout statistics would skew the actual voter turnout, which in turn raises concerns from groups and individuals analyzing voter turnout. E. 498, ¶6. Inactive voters, though registered, are not permitted to be included in establishing precincts or analyzing voter turnout because of their tendency to artificially inflate or skew reality; concomitantly, inactive voters certainly are not permitted to be counted for purposes of inflating the number of signatures required on a petition, thus restricting access to the ballot with respect to referenda questions.

This case does involve Petitioners' ballot access, as they assert. However, it also involves the voting rights of the signers of the Petition. Here, MCRG sought to

place a question on the ballot for voters to decide whether a law enacted should become effective or not. MCRG's access to the ballot is at issue, as is the Petition signers' access to the ballot. MCBOE protected the inactive voters' right to vote by accepting their signatures on the Petition as valid, as is required by §3-503(b)(2)(inactive voter becomes an active voter by signing a petition). Whereas Maryland appellate courts have jealously guarded a candidate's right to access the ballot, and the General Assembly has accordingly relaxed or lessened those requirements,[15] so too must SBE and local Boards be cognizant of not inhibiting ballot access for a referendum question by artificially inflating the number of signatures required (or by failing to verify and count signatures that are not an exact match to registration names). Petitioners self-servingly assert that inactive voters must be counted in the denominator simply because they want to prevent the referendum from getting onto the ballot.[16] The State Board and MCBOE have

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[15] A law enacted in 1998 and which took effect on January 1, 1999 reduced the percentage of signatures required by an unestablished or non-affiliated candidate from 3% to 1%. Since then, SBE has continued to adopt policies intended to increase access to the ballot, including its policy and practice of not including inactive voters for administrative purposes when calculating the number of signatures required to place a referendum question on the ballot. Following the decision in Maryland Green Party, any "established" party can nominate a candidate without obtaining any signatures.

[16] Petitioners complain that the votes of inactive voters who refused to sign the Petition are not counted. However, Petitioners came forward with no evidence of any inactive voter who was presented with the Petition and refused to sign it.

exercised their discretion appropriately to err on the side of caution so as not to inhibit or restrict ballot access by artificially inflating the number of signatures required to place a referendum question on the ballot. The significant administrative and legal reasons underlying the "official administrative purposes" provided as examples in §3-503 are the same reasons that support MCBOE's action here in not counting inactive voters in the calculation of the number of signatures required for the Petition.

In light of the language of §3-503(d) to the effect that "[r]egistrants placed into inactive status **may not be counted** for official administrative purposes including establishing precincts and reporting official statistics," arguably MCBOE had no choice but to not count inactive voters for "official administrative purposes." MCBOE submits that determining the number of registered voters for purposes of calculating the percentage of signatures required on a petition is such an "official administrative purpose." Petitioners have cited no authority to the contrary. Instead, they point merely to the removal of "petition signature verification" as an official administrative purpose following this Court's decision in Maryland Green Party. They argue that Bill 723 (E. 421) demonstrates "the General Assembly's intention to insure that inactive voters would be considered for purposes of petitions." Brief, at 28. However, this is an incorrect statement inasmuch as Maryland Green Party and Bill 723, **which was proposed by SBE** (see E. 421) in response to Maryland Green Party, merely address the issue of whether the

signatures of inactive voters on a petition must be counted. E. 421. Maryland Green Party does not hold and the legislation does not have the effect of establishing the converse proposition espoused by Petitioners, i.e., that inactive voters must be included when calculating the total number of registered voters to determine the requisite amount of signatures for a referendum petition. If Petitioners' assertion were correct, then there would have been no reason for this Court to remand Maryland Green Party to the Circuit Court. Clearly, the legislative history of §3-503 simply does not support Petitioners' arguments.

The concern of this Court in Maryland Green Party was that inactive voters, who automatically become active voters by signing a referendum petition (per §3-503(b)(2)), not be disenfranchised by not having their signatures counted during the petition verification process. In the instant case, the signatures of all 208 inactive voters who signed the Petition were accepted by MCBOE. If those 208 signatures were taken away (which they cannot be pursuant to §3-503(b)(2) and the Constitution), the Petition would still have sufficient valid signatures to validate the Petition.

Maryland Green Party did not even address the issue, much less hold, that inactive voters must be counted in calculating the required number of signatures on a petition for referendum. That is plainly an "official administrative purpose" within the discretion of MCBOE, and there are significant administrative and practical reasons why inactive voters should not be counted for that purpose. And,

in fact, if SBE or local Boards were to inflate the required number of signatures by including inactive voters, then they face a lawsuit accusing them of improperly restricting access to the ballot for voters who sign petitions.

MCBOE contacted SBE to inquire whether inactive voters were required to be included in calculating the number of signatures required on the Petition. The response from SBE was that the inactive voters should not be required to be counted for that "official administrative purpose."[17] E. 497-501. MCBOE is statutorily required to follow the policies and procedures established by SBE. Accordingly, MCBOE did not include the inactive voters when calculating the percentage of signatures required to be upon the Petition. However, MCBOE (consistent with Maryland Green Party, the statute, and SBE's practice) did accept as valid all 208 signatures of inactive voters who signed the Petition (thus becoming active voters).

IV. THE ARGUMENTS SET FORTH IN PETITIONERS' BRIEF, SECTIONS IV(E), IV(F), AND V, MAY NOT BE CONSIDERED BECAUSE THEY WERE NOT RAISED IN OR DECIDED BY THE TRIAL COURT.

This Court may not decide an issue that was not raised in, addressed or decided by the lower court. See Md. Rule 8-131(a)("Ordinarily, the appellate court will not decide any other issue [other than jurisdiction] unless it plainly appears by

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[17] Contrary to Petitioners' grossly inaccurate assertion, the SBE did not rely upon a prior (or 1994) version of §3-503(d) in providing this guidance to MCBOE. Rather, it relied upon the Maryland Green Party decision and the 2005 legislative amendments **it** proposed to comply with the decision in Maryland Green Party.

the record to have been raised in or decided by the trial court."). See also Livesay v. Baltimore County, 384 Md. 1, 18, 862 A.2d 33, 43 (2004)("Because these issues were not raised below, we shall not consider them. We have held consistently that this Court will not ordinarily decide issues not raised in and decided by a trial court."); Moats v. City of Hagerstown, 324 Md. 519, 524-25, 597 A.2d 972, 974-75 (1991)(ordinarily, an appellate court will consider only those issues that were raised in or decided by the trial court).

Petitioners assert in Section IV(E) of their brief that the Circuit Court's interpretation of the time limitation conflicts with the "case or controversy" requirement for a declaratory judgment action. Petitioners assert in Section IV(F) of their brief that the Circuit Court's interpretation of the time limitation violates Articles 19 and 24 of the Declaration of Rights. Finally, in Section V of their brief, Petitioners assert that relief should be granted pursuant to §6-209(a)(2). None of these arguments were raised in or decided by the trial court. Therefore, they should not be considered by this Court.

V. ASSUMING THE COURT CONSIDERS THE ARGUMENTS SET FORTH IN PETITIONERS' BRIEF, SECTIONS IV(E), IV(F), AND V, THOSE ASSERTIONS ARE MERITLESS.

The basis of Petitioners' argument in Section IV(E) of their brief is that no case or controversy existed since they did not know of the "determinations" rendered by MCBOE. However, Petitioners did know or, at the very least, they should have known of the determinations of MCBOE with respect to the Petition. Thus, a case

or controversy existed, regardless of whether Petitioners "knew" it existed. Moreover, as discussed previously, the discovery rule does not apply to statutory time limitations such as the ten day limitation in §6-209 and, thus, a "case or controversy" entitling a person to file suit under §6-209 arises once it exists, not when that person discovers it. Petitioners' argument is simply a rehash of its assertion that it was entitled to notice, when clearly they were not so entitled.

Petitioners argue in Section IV(F) of their brief that §6-210(e)'s ten day limitations period violates Articles 24 and 26 "by robbing voters of any meaningful opportunity to exercise their statutory right to challenge illegally certified petitions." Brief, at 47. Statutes of limitations, however, do not rob potential litigants of their rights; rather, they encourage promptness, finding their justification in necessity. See Walko, supra, 281 Md. at 210, 378 A.2d at 1101. Here, the necessity is that legal challenges to determinations by boards of election be promptly brought with respect to each determination so that the electoral process is not disrupted. Such statutes are to be strictly construed. Decker, supra, 47 Md. App. at 206, 422 at 391. The Circuit Court did not err, and certainly Articles 24 and 26 are not violated by the statute of limitations.

Petitioners assert in Section V of their brief that this Court is empowered under §6-209(a)(2) to "grant relief as it considers appropriate to assure the integrity

of the electoral process." Brief, at 49. However, the Court can grant no such relief where the challenge was not timely filed. The only timely challenge at issue here is Petitioners' challenge that the second set of signatures contains names that should not have been verified by MCBOE. If the Court were to accept Petitioners' arguments in that regard, it could of course grant "relief" regardless of whether or not §6-209(2) existed. However, §6-209 cannot enable the courts to grant relief with respect to a claim that is otherwise time barred, as Petitioners appear to suggest.

CONCLUSION

For all of the foregoing reasons, Respondent/Cross-Petitioner respectfully submits that the Circuit Court's rulings be affirmed, with the exception of its ruling that MCBOE was required to include "inactive voters" when calculating 5% of the "registered voters" in the County for petition purposes.

Respectfully submitted,

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