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)

REPLY BRIEF OF RESPONDENT/CROSS-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

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.

A. Petitioners Did Not Brief the Issue of the Doctrine of Laches Below and, Thus, They Cannot Assert it Now.

Throughout this litigation, each time MCBOE has addressed an argument raised by Petitioners, they have attempted to raise a new argument. For example, though they never challenged the calculation of the number of registered voters in their Complaint or at any time prior to trial, they raised that issue for the very first time on the first day of trial on June 11, 2008. The Circuit Court ordered supplemental briefing on that issue, and a subsequent day of trial was held in July. Though it was solely Petitioners' failure to think of the argument that caused their late assertion of it in the Circuit Court, Petitioners nevertheless attempted to excuse their lateness by blaming counsel for MCBOE.

In their opening Brief in this Court, Petitioners again attempted to assert new arguments that they had not thought to assert in the Circuit Court. In their opening Brief and now in their current Brief, Petitioners again attempt to belatedly assert yet another argument that they did not brief in the Circuit Court or raise in their petition for certiorari - the doctrine of laches. Respondents respectfully submit that 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 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).

B. The Time Limitation in Section 6-210(e) Applies to Petitioners' Action.

MCBOE never argued that Petitioners were "persons aggrieved" under Section 6-209(a), inasmuch as that section appears to apply to "sponsors" of petitions. Therefore, MCBOE did not "concede" as much, as Petitioners continuously assert. Petitioners fail to take into account the full language of the Election Law Article, Title 6, particularly Sections 6-209 and 6-210. Section 6-209 is entitled "Judicial Review." It contains two sections: section (a) and section (b). Section (a) is under the heading "Generally," while section (b) is under the heading "Declaratory relief." Under the heading "Generally," the statute states that a "person aggrieved by a determination made" under certain provisions of the Title may "seek judicial review." Under the subheading of "Declaratory relief," it states that "upon the complaint of any registered voter," a circuit court may grant declaratory relief "as to any petition with respect to the provisions of this title or other provisions of law." Both headings ("Generally" and "Declaratory relief") come under the title of §6-209, "Judicial Review." Thus, both types of actions

challenging a petition are actions for "judicial review," regardless of whether they are brought under (a) or (b).

Section 6-210, entitled "Schedule of process," provides under the heading "Judicial Review" in Section 6-210(e)(1) that "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." It is plain in §6-209 that "judicial review" includes both types of actions challenging a petition. It is also plain in §6-210 that it refers to "any judicial review" as provided in "§6-209 of this subtitle."

Petitioners find significance in §6-210(e)'s use of the term "determination," asserting that it refers only to §6-209(a). However, complaints for declaratory judgment under §6-209(b), just as challenges brought under §6-209(a), will contest a "determination" made by the Boards of Election. Thus, the use of the word "determination" in §6-210(e) does not bear the significance Petitioners assign to it. Further, if the General Assembly intended for the ten day time limit in §6-210(e) to apply only to actions brought under §6-209(a), then §6-210(e)(1) would state that it applied only to §6-209**(a)**. However, it does not - it states that it applies to "any judicial review of a determination, as provided in §6-209 of this subtitle." This, combined with the fact that the two types of actions permitted under §6-209(a) and (b) come under the heading of "judicial review," renders it clear that the ten day time limit applies to actions brought under both §6-209(a) and (b). If, as Petitioners assert, the statute is construed to permit anyone to file a complaint for declaratory judgment under §6-209(b) without complying with the ten day limit in §6-210(e),

then the ten day limit would be entirely eviscerated, because claimants would always assert their challenge as a declaratory judgment action under §6-209(b) in order to avoid the ten day time limit. Further, the statute itself demonstrates the General Assembly's intent that judicial review regarding petitions be sought well prior to an election. For example, §6-210(e)(2) states that "[i]f 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." The General Assembly plainly envisioned and intended that both types of judicial review be brought not only within ten days of the determination challenged, but sooner if necessary due to an impending election.

Petitioners contend that the statutory ten day limit should be ignored with respect to declaratory judgment actions and that the doctrine of laches should apply instead. Petitioners rely upon Parker v. Board of Election Supervisors, 230 Md. 126, 186 A.2d 195 (1962), which involved a voter challenge to nominating petitions. The Court did apply a laches analysis, as there was no time limitation in the statute.[1] Parker does not aid Petitioners since in Parker this Court held that the plaintiff was chargeable with knowledge of the petition and unreasonably delayed challenging it even though his challenge was brought eleven days prior to the election. Moreover, in Parker, this Court noted that "[i]n a purely equitable action, a lapse of

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[1] The statute at issue in Parker was Maryland Code, Article 33, Section 67(f).

time shorter than the period of limitations may be sufficient to invoke the doctrine; and, where the delay is of less duration than the statute of limitations, the defense of laches must include an unjustifiable delay and some amount of prejudice to the defendant."' Id., 230 Md. at 130, 186 A.2d at 197. That situation does not exist in this case, as a lapse of time shorter than the period of limitations is not at issue.

Petitioners also rely upon Liddy v. Lamone, 398 Md. 233, 919 A.2d 1276 (2007), where a voter filed suit against an Attorney General candidate, the State Administrator of Elections, and the State Board of Elections for declaratory and injunctive relief asserting that the candidate was ineligible since he had not practiced law in Maryland for at least ten years. The statute at issue in Liddy was §12-202 of the Election Law Article. The Circuit Court held that Liddy's claim was not barred by any applicable statute of limitations. This Court did not address the statutory limitation, holding that laches barred the voter's challenge based upon the need for challenges to the electoral process to be brought expeditiously. Liddy, 398 Md. at 249-250, 919 A.2d at 1287. This Court explained that it "need not address [the limitation] issue, as we are disposing of the appellant's claim on the equitable theory of laches." Id., 398 Md. at 236, n.3, 919 A.2d at 1279, n.3. Thus, in Liddy, the doctrine of laches was simply another means by which the plaintiff's claim was barred, rather than an excuse for an untimely challenge. It is an affirmative defense rather than a means for Petitioners to extend the applicable statutory time limit. See Liddy, 398 Md. at 242, 919 A.2d at 1282 ("Laches is one of the affirmative defenses recognized and expressly listed in Md. Rule 2-323") and Liddy, 398 Md. at 233-34,

919 A.2d at 1283 (stating that "laches 'is a **defense** in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society.'")(quoting Ross, 387 Md. at 668, 876 A.2d at 703, in turn quoting Parker, 230 Md. at 130, 186 A.2d at 197)(emphasis added)).

In Ross v. State Board of Elections, 387 Md. 649, 876 A.2d 692 (2005), this Court explained the interplay between statutory time limitations and the doctrine of laches:

> We recognize, nevertheless, that **generally courts sitting in equity will apply statutory time limitations**. See Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 63, 300 A.2d 367, 385 (1973); Desser v. Woods, 266 Md. 696, 704, 296 A.2d 586, 591 (1972); Gloyd v. Talbott, 221 Md. 179, 186, 156 A.2d 665, 668 (1959). Courts exercising equity jurisdiction, however, are not irrevocably bound to the statutory time limitations. See Stevens v. Bennett, 234 Md. 348, 351, 199 A.2d 221, 223-24 (1964)(stating, '**even when the remedy for a claimed right is only in equity the period of limitations most nearly apposite at law will be invoked by an equity court, provided there is not present a more compelling equitable reason - such as fraud or inequitable conduct** which would cause injustice if the bar were interposed - why the action should not be barred'); Parker, 230 Md. at 130, 186 A.2d at 197 (holding, '[i]n a purely equitable action, **a lapse of time shorter than the period of limitations** may be sufficient to invoke the doctrine; and, where the delay is of less duration than the statute of limitations, the defense of laches must include an unjustifiable **delay and some amount of prejudice to the defendant**'). Thus, the courts are free, if the equities so require, to assess the facts of a purely equitable action independent of a statutory time limitation applicable at law.

Id., 398 Md. at 670, 919 A.2d at 704-05 (emphasis added).

Thus, courts of equity will apply the statutory time limitation and will not apply the doctrine of laches except in cases of fraud or inequitable conduct, or if the

delay is less than the statutory time limit and the delay is unjustifiable and some prejudice results to defendant. Neither situation exists in this case and, thus, the doctrine of laches is inapplicable.[2]

Assuming that the doctrine of laches applied, its application would bar Petitioners' challenge rather than extend the time for bringing it. The doctrine of laches applies when, knowing its rights, a party takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that the party cannot be restored to its former state if the right at issue is then enforced, the delay becomes inequitable and operates as an estoppel against the assertion of the right. See, e.g., Faller v. Faller, 247 Md. 631, 233 A.2d 807 (1967). In this case, MCBOE and MCRG acted in good faith in determining the number of signatures required on the Petition and MCRG acted in good faith and in reliance upon MCBOE's determination of the number of registered voters in collecting and submitting the required number of signatures. MCBOE performed its statutory duties regarding verification and certification of the Petition in good faith and in reliance on its previous determination of the number of registered voters and the number of signatures required on the Petition. Petitioners, however, having both actual knowledge of the number of signatures required on the Petition, and constructive knowledge of the number of registered voters and the number of active and inactive

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[2] The Circuit Court did not assess the facts regarding the doctrine of laches since Petitioners never briefed that argument below. See Ross, 398 Md. at 670, 919 A.2d at 704-05; Liddy, 398 Md. at 234, 919 A.2d at 1283 (stating that laches "must be determined by the facts and circumstances of each case.").

voters in the County as of November 30, 2007, nevertheless failed to inquire until the first day of trial and failed to assert their challenge until the date of the filing of the Amended Complaint on July 8, 2008. The condition of MCBOE and MCRG has, in good faith, become so changed that they cannot be restored to their former state if Petitioners' untimely claim is permitted to proceed, as the delay by Petitioners is inequitable and operates as an estoppel against Petitioners' late-asserted claim.

As for Petitioners' reliance upon City of Takoma Park v. Citizens for Decent Government, 301 Md. 439, 483 A.2d 348 (1984), that case necessarily involved a post-election challenge because it concerned whether a proposition was properly advertised and thus whether the citizenry were properly informed before voting. The case does not stand for the proposition that judicial review under Section 6-209 may be sought at any time instead of within the ten day limitation period in Section 6-210(e). The case discussed the different levels of scrutiny in pre-election and post-election challenges (in a context much different than that in the instant case), but again Petitioners confuse the requirement that a petition for referendum strictly comply with statutory requirements with the question of what the statutes require in the first place. It is the latter question at issue in this case with regard to Section 6-203 and 6-207. With respect to timeliness, however, the statute's requirements are plain, and Petitioners were required to bring their request for "judicial review" regarding the number of registered voters within ten days. Since they did not do so, their challenge is time barred.

C. Petitioners Did Not Timely Challenge MCBOE's Determination of the Number of Registered Voters for Petition Purposes.

Petitioners contend that none of the dates set forth in Respondent's brief triggered their obligation to timely challenge MCBOE's determination of the number of registered voters for purposes of calculating the number of signatures required on the Petition. Petitioners assert that there were no publicly available records revealing how MCBOE determined the number of registered voters. Reply brief, at 14. In this regard, Petitioners again ignore this Court's holding in Roskelly v. Lamone, 396 Md. 27, 912 A.2d 658 (2006), they ignore their failure to inquire, and in their zeal to avoid the time bar they assert factual claims that are simply not true.

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 of their decision (or how or why it rendered the decision) because MCBOE had no way of identifying those interested parties or persons.

Because MCBOE was not required to provide notice to Petitioners and, in fact, could not do so, it was incumbent upon Petitioners to timely inquire regarding how the number of registered voters was derived. Petitioners did not do so and, thus, their assertion that they were somehow mislead by MCBOE in this regard rings hollow. Petitioners assert that in a footnote in their motion for summary judgment, filed on June 2, 2008, they alluded to the discrepancy that was obvious based on the

documents produced and that, in the footnote, they questioned MCBOE's methodology for calculating the number of signatures required at that time. This is not true. The footnote merely questioned numbers that appeared in the Petition Signer's Report produced in discovery.[3] The numbers in the Report referred not to the calculation of the number of signatures required on the Petition but, rather, to an overage percentage of signatures to be reviewed and processed by MCBOE staff. E. 657. Thus, in the footnote, Petitioners did not raise the issue or otherwise question how MCBOE calculated the number of registered voters or the number of signatures required on the Petition. Assuming that the footnote had questioned the methodology for calculating the number of signatures required, this fact would not aid Petitioners in avoiding the ten day time bar, since this assertion only serves to further demonstrate that Petitioners were at least on inquiry notice of the issue, but did not timely investigate or assert their challenge. A mere passing mention in a footnote in a lengthy pleading, with no further timely inquiry, hardly constitutes the expeditiousness required in challenging election procedures.

Petitioners assert that MCBOE allegedly "failed to respond in discovery to a number of requests for information that would have led to revelation of the BOE's erroneous methodology," citing to the Record Extract at pages 553-54. Reply brief, at 15. The citation is to Petitioner's counsel's (Mr. Shurberg's) affidavit, which makes the same bald claim. However, neither the affidavit nor Petitioners' Reply

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[3] Petitioners have not included the Petition Signer's Report in the Record Extract. The document was Exhibit 43 to the Affidavit of Anna Lucas.

brief contains a citation to any such discovery request (much less a "number of requests" or "multiple requests") in which Petitioners allegedly sought the "methodology" used by MCBOE in determining the number of registered voters.[4] That is because there was no such request made. Rather, it was not until trial on June 11, 2008 that Mr. Shurberg first inquired of counsel for MCBOE regarding the methodology utilized by MCBOE in determining the number of registered voters for purposes of calculating the number of signatures MCRG was required to obtain. E. 519, ¶4.

Moreover, 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 (as explained at length in Respondent's opening brief and MCRG's amicus brief). Respondent simply does not understand how Petitioners can assert that the number of active and inactive voters in the County was not publicly available to them when it was posted on the State's website. E. 521. Moreover, counsel for Petitioners, Mr. Shurberg, asserts in his affidavit that he was readily able to determine the number of active and inactive voters in the County "independently" of counsel for MCBOE. E. 553, ¶8. Counsel for Petitioners also asserts in his affidavit that he was aware of the number of active

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[4] Instead, Mr. Shurberg's affidavit cites only to a discovery request regarding a different topic - MCBOE's "consultations" with SBE regarding "review of the CRG referendum petition submitted on February 4 and 19, 2008 . . ." E. 553 and 557.

and inactive voters and that he submitted that data to the Circuit Court on June 16, 2008. E. 553. Petitioners also assert that they were aware of this issue as of June 2, 2008 when they noted it in footnote 3 of their motion for summary judgment. Reply brief, at 15-16. Obviously, Petitioners had both actual and constructive knowledge of the issue or, at the very least, the data regarding this issue well prior to the filing of the Amended Complaint. Yet, Petitioners stood by and did not further inquire of MCBOE, did not assert the argument, and did not otherwise timely challenge the Petition on this basis.

Petitioners' legal arguments also ignore the holding of this Court in Roskelly v. Lamone, 396 Md. 27, 912 A.2d 658 (2006), wherein it was held that actual notice (to a sponsor) is not required by §6-210(e).[5] Here, Petitioners are simply members of the public and, thus, they are not entitled to more or different notice than a petition sponsor. Petitioners had a duty to inquire, which they failed to do. Contrary to Petitioners' assertion, MCBOE's activities and documents are public record. Petitioners and other members of the public had access to the number of active and inactive voters, which appeared on SBE's website, and access to the records of MCBOE regarding its determinations involving the Petition.

Petitioners next contend that MCBOE did not make a determination at all regarding the number of signatures required on the Petition. Reply brief, at 16.

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[5] Petitioners instead choose to rely upon Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981), an inapplicable case addressing the "discovery rule" with respect to the statute of limitations.

Petitioners claim that MCBOE "assumes, without even arguing, that any 'determination' is subject to the 10-day statute of limitations provisions of §6-210(e)." Reply brief, at 16. MCBOE did not assume that the ten day limit applies to "any" judicial review of a determination. Rather, that is what the statute provides. Section 6-210(e)(1) states as follows:

> 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.

Thus, "any" judicial review of a determination, whether brought pursuant to subsection (a) or (b) of §6-209, shall be sought by the 10th day following the determination. Petitioners misquote and misrepresent the statute when they assert that the ten day limitation "applies only to 'judicial review of a determination, *as provided in §6-209 of this subtitle . . .*,'" (Reply brief, p. 16)(emphasis in original), inasmuch as they leave out the word "any" which precedes the statutory language they quote. They also again misinterpret the statutory language by claiming that §6-210(e)'s time limitation applies only to subsection (a) of §6-209 despite the fact that §6-210 states that it applies to "any judicial review of a determination, as provided in §6-209 of this subtitle," rather than states that it applies to §6-209**(a)** alone.

Petitioners' contention that MCBOE did not make a determination regarding the number of signatures required on the Petition pursuant to the subsections of the statute referred to in §6-209(a) entirely misses the point. Section 6-209(a) provides who may institute a challenge and which determinations they may challenge, while

§6-209(b) is broader, covering all determinations by the boards of elections and permitting anyone (even a "sponsor") to seek judicial review via a declaratory judgment. But §6-210(e)'s ten day limitation plainly applies to "any" judicial review of determinations, whether they are brought pursuant to §6-209(a) or (b).

For all of the reasons stated in MCBOE's opening brief and herein, Petitioners did not timely raise their challenge to the number of signatures required on the Petition and, thus, that claim is time barred.

D. The Amended Complaint Does Not Relate Back to the Date of Filing of the Complaint.

Without the benefit of citation to any case, Petitioners contend that the Amended Complaint (filed July 8, 2008) relates back to the filing of the original Complaint (filed March 14, 2008). The Amended Complaint asserted an entirely new claim (or challenge) regarding the determination of the number of registered voters. It added a new theory or cause of action and, thus, it 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). Paragraph 51 of the original Complaint did not contain the new claim added by Petitioners in the Amended Complaint, otherwise there would have been no need for Petitioners to file an Amended Complaint. Petitioners failed to challenge the determination regarding the number of registered voters within ten days of March 6, 2008 when the Petition was finally certified. 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.

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 assert that the Circuit Court erred in ruling that §6-203(a)(1) has no force and effect. Reply brief, at 1. However, that is not what the Circuit Court held, nor is it what MCBOE argued. While §6-203(a)(1) sets forth requirements for signatures on a petition, Petitioners fail to recognize that §6-207 (entitled "Verification of signatures") provides in the newly added (in 2006) subsection (a)(2) that "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."

Petitioners incongruously assert that the statute must be read as a whole, but then urge the Court to read the two provisions (§§6-203 and 6-207) as "distinct" provisions. Reply brief, at 2. Petitioners contend in this regard that "verification" and "validation" as utilized in the Election Law Article have separate meanings and, thus, that it is clear that §6-203 and §6-207 do not conflict. "Validation" and "verification" are not defined in the statute, but they are used interchangeably throughout Title 6. They are not, as Petitioners imply, used only is §§6-203 and 6-207. For instance, in §6-203, the term "validation and counting" is utilized, while in §6-205(b) the apparently same process is referred to as "verification and counting of signatures." Perhaps the best indicator of the interchangeability of the two terms

is found in §6-207(a)(1), where it states that "[u]pon 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." There would be no reason to refer to verification of signatures as validating signatures unless the General Assembly assumed that the two terms were synonymous. Moreover, if the two terms were not intended to be synonymous, it would be expected that their separate definitions would be provided in the "definitions" section of the statute and/or that the two separate "processes" which Petitioners claim the terms engender would actually be set forth as such in the text of the statute. According to Webster's II, New College Dictionary (Houghton Mifflin Co., 1995), "verification" means "the act of verifying." To "verify" means "to determine or test the truth or accuracy of" or "to affirm formally." "Validation" means "to substantiate: verify." Thus, the words appear to be synonymous.

In §6-207(b), it states that the State Board "shall establish the process to be followed by all election authorities for **verifying and counting signatures** on a petition." (Emphasis added). The very next section of §6-207, entitled "Random sample verification," provides in §6-207(c)(3) for "verification" of a random sample "to determine what percentage of the random sample is composed of signatures that are authorized by law to be counted." Thus, again, the language speaks of "verification and counting," while in other sections of Title 6 it speaks of "validation and counting." Moreover, in §6-207(c)(3) and(4), the statute speaks of "verification"

and "validation" as if they are identical by using the phrase "**verification** establishes that the total **valid** signatures . . ." There are many other examples. Petitioners' assertion that these two terms not only have separate meanings, but refer to separate processes, directly conflicts with the statutory language and scheme and should therefore be rejected. Because these two terms are synonymous, §6-203(a)(1) is rendered ambiguous by §6-207(a), particularly in light of the 2006 addition of §6-207(a)(2).

Election Law Article, §6-207(b), requires the State Board to "establish the process to be followed by all election authorities for verifying and counting signatures on a petition." The SBE did so by adopting regulations such as COMAR 33.06.05.02, which provides 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). 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 argue that "strict compliance" with the requirements of §6-203(a)(1) is required because the General Assembly has not

repealed or changed its provisions. Reply brief, at 4. However, in light of SBE's Guidelines and practice of requiring that a petition signature should be accepted as long as the identity of the voter can be determined as a registered voter, there would be no reason for SBE to propose legislation altering the requirements of §6-203(a).

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 they should be harmonized by construing §6-203(a) to effectuate the purpose of the statute as set forth in §6-207(a)(2)("The purpose of signature verification . . . is to ensure that the name of the individual who signed the petition is listed as a registered voter."). To read the statutes as suggested by Petitioners would controvert the very purpose of the statutes as stated in §6-207(a)(2) 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. 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). 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). Petitioners 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.

Petitioners argue that fraud and abuse will result if the statutes are construed in the manner required by SBE, asserting that names can be pulled from a phone book and forged onto a petition. Reply brief, at 5. Petitioners further assert that such fraud occurred in this case, where signers failed to provide a birth date and MCBOE nevertheless accepted the signature. Reply brief, at 5-6. However, what Petitioners fail to acknowledge is that MCBOE verified those signatures by following the State Guidelines instructing it to verify and accept a signature where the identity of the voter can be determined. The birth date is merely an additional means by which the identity of the voter can be determined and sometimes it is not necessary in order

to confirm the identity of the voter, as was the case with respect to the signatures cited by Petitioners in footnote 4 of their Reply brief. To the extent that Petitioners are attempting to infer that MCBOE is required to do more to prevent fraud, such as by comparing signatures on voter registration cards, even Petitioners now concede that the 2006 revision to §6-207 rendered it clear that the Boards are not required to do so.

Petitioners attempt to discern a distinction without a difference by asserting that §6-207(a)(2) limited the responsibilities of boards of elections in verifying petitions, but not the "responsibilities of petition sponsors." Reply brief, at 6. The purported distinction proffered by Petitioners simply does not exist in the statutes. Signatures on a petition are either valid and verified or they are not; there is no dichotomy with respect to sponsors and the boards of election as Petitioners claim.

Petitioners again assert that Barnes and other cases requiring "strict compliance" bar the interpretation of the statutes offered by MCBOE. However, the Circuit Court correctly concluded that 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, particularly the addition of §§6-203 and 6-207. 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 and state the legislative purpose. The statutory changes that

have occurred have appropriately effectuated a delegation of authority to the local Boards to determine the validity of signatures (and the SBE has adopted Guidelines for the process that were followed by MCBOE), and their actions are subject to judicial review. See Burroughs v. Raynor, 56 Md. App. 432, 441, 468 A.2d 141, 145 (1983).

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.

For all of the foregoing reasons, the trial court correctly concluded that MCBOE properly verified the total number of valid 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.

Petitioners assert that inactive voters are disenfranchised by not being counted in the pool of voters from which 5% is calculated. In support of this proposition, Petitioners contend that "the only way to oppose a referendum petition is by not signing it." Reply brief, at 7. Petitioners further assert that MCBOE's

"methodology excludes Montgomery County registered inactive voters from the political process by refusing to count their 'vote' not to sign a referendum petition . . ." Id. First, Petitioners' argument is based on nothing more than supposition. There is no evidence in the record that any inactive registered voter was actually presented with the petition but refused to sign it. Second, and more importantly, not signing a petition for referendum has no significance. A petition for referendum requires 5% of registered voters to support it. There is no provision for non-support. As long as the petition carries the requisite number of signatures in support of it, it simply does not matter how many registered voters (active or inactive) refused to sign it because they did not support it. And certainly, refusing to sign a petition for referendum cannot be referred to as a "vote." The purpose of a referendum is to place a law on the ballot so that it can be voted upon by any registered voter.

While inactive voters cannot be disenfranchised by being precluded from signing a referendum (as this Court held in Maryland Green Party v. State Bd. of Elections, 377 Md. 127, 832 A.2d 214 (2003)), the converse proposition that inactive voters must be counted when calculating 5% of the registered voters for purposes of a petition is not required by this Court's holding in Maryland Green Party nor the statutory change implemented to comply with that holding. Contrary to Petitioners' assertions, inactive voters are not treated disparately from active voters in the political process. In fact, leaving inactive voters out of the 5% calculation does not affect inactive voters' rights in any manner. If an inactive voter signs a referendum petition, he or she by virtue of §3-503(b)(2) automatically becomes an active voter

and his or her signature must be counted by virtue of Maryland Green Party. The calculation of the number of signatures required on the petition in the first place, however, has no effect upon an inactive voter. Inactive voters are not denied "a say in the referendum petition process" at all, because their signatures on such petitions are counted.

Petitioners contend that the 2005 statutory changes to §3-503 that were **proposed by SBE** in response to this Court's decision in Maryland Green Party disallow SBE's practice (and MCBOE's practice in conformity therewith) of not including inactive voters when calculating the 5% requirement. However, those changes merely effectuated this Court's decision in Maryland Green Party; they do not, however, require the boards of election to count inactive voters in calculating the number of signatures required on a petition. 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. However, post-Maryland Green Party, the boards of election continue to possess discretion to decide whether to include inactive voters when calculating the number of signatures required for petitions, which is one of the "official

administrative purposes" encompassed by §3-503(d). The 2005 amendments are not to the contrary. SBE's consistent practice has been to not count inactive voters in the calculation, and there are sound administrative reasons for doing so. See Respondent's Brief, at pp. 42-43.

In sum, the rights of inactive voters simply are not implicated, much less violated, by not counting them in determining 5% of the registered voters of the County for petition purposes.

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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CERTIFICATE OF SERVICE

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