IN THE COURT OF APPEALS OF MARYLAND

September Term, 2008
No. 88

INT'L. ASSOC. OF FIRE FIGHTERS, LOCAL 1715, CUMBERLAND FIREFIGHTERS, ET AL.

Appellants/Cross-Appellees

v.

MAYOR AND CITY COUNCIL OF CUMBERLAND

Appellee/Cross-Appellant

and

ALLEGANY COUNTY BOARD OF ELECTIONS, ET AL.

Appellees

Appeal from the Circuit Court for Allegany County, Maryland
(Hon. W. Timothy Finan, Judge)

MEMORANDUM OF APPELLEE/CROSS-APPELLANT

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The Mayor and City Council of Cumberland ("Cumberland"), Appellee/Cross-Appellant, by Michael Scott Cohen and Michael Scott Cohen, LLC, its attorneys, submits the following Memorandum for the Court's consideration.

STATEMENT OF FACTS

This case was initiated on or about August 22, 2008 in the Circuit Court for Allegany County, Maryland pursuant to Appellants'/Cross-Appellees' (hereinafter "Appellants") filing of a Verified Complaint for Writ of Mandamus, Declaratory Judgment and Injunctive Relief (the "Complaint") along with other related pleadings. The subject matter of the dispute is Appellants' petition (the "Petition") for an amendment to the Charter of the City of Cumberland (the "Charter") which would impose binding arbitration for non-management employees of the Cumberland Fire Department.

In connection with their collection of the signatures for the Petition, Appellants requested that the Allegany County Board of Elections (the "County Board") provide it with a list of the active voters for Cumberland's elections. Their request was made by means of the an Application for Voter Registration Data (the "Application") which was submitted to the County Board by William Shannon Adams, a copy of which is attached hereto and incorporated by reference herein as **Exhibit 1**.

In response to the Application, Appellants claim that the County Board provided them with a compact disk which contained a list of the names of 11,906 active voters who are registered to vote in the City of Cumberland's municipal general elections. Although the Complaint states that the disk was attached thereto as Exhibit 6, the Exhibit 6 which was actually

attached to the Complaint was a photocopy of the disk. Therefore, Cumberland has not been able to substantiate Appellants' claims regarding the contents of the disk.

Under the terms of a Memorandum of Understanding entered into by and between Cumberland and the Board of County Commissioners of Allegany County, Maryland on or about November 6, 2001, Cumberland and the Board of County Commissioners of Allegany County, Maryland agreed to conduct joint elections commencing in 2002. Accordingly, elections have been conducted jointly since that date, with the Allegany County Board of Elections conducting the elections. The County Board maintains the list of voters registered to vote in Cumberland's municipal general elections with the exception of the names of three (3) individuals who are registered to vote solely in Cumberland's elections.

Shortly after receiving the Petition, Cumberland requested that the County Board provide it with a list of the voters registered to vote in Cumberland's municipal general elections. In response to that request, it was provided with a compact disk containing the names of 12,907 persons, constituting the active and inactive voters registered to vote in Cumberland's elections, as well as the names of an additional 23 persons who were noted as "pending" on the disk rather than being active or inactive voters. A copy of that disk was submitted to the Circuit Court as the Exhibit 3 attached to Cumberland's Motion for Summary Judgment.

It is Cumberland's position that, combining the 12,907 persons who are active or inactive voters on the list maintained by the County Board as well as the 3 names on Cumberland's list, there are 12,910 persons who are registered to vote in Cumberland's elections. It is Appellant's position that there are 11,906 active voters are the only persons qualified to vote in Cumberland's elections. According to Cumberland, the Petition must be supported by the

signatures of no less than 2,582 of the voters qualified to vote in its municipal general elections. According to Appellants, it must be supported by no less than 2,381 such signatures.

Appellants submitted the Petition to Cumberland on about July 25, 2008. As submitted, 3,550 persons signed the Petition. The preliminary count of the signatures conducted by Cumberland and announced by means of the press release dated August 15, 2008 (a copy of which is attached to the Petition for Writ of Certiorari filed by Appellants as Exhibit 4) revealed that there were an insufficient number of signatures attached thereto in that 2,192 of the signatures were determined to be valid, 1,366 were determined to be invalid and the determination of the validity of an additional 12 signatures was pending. The verification of the signatures was conducted using the disk provided by the Count Board containing 12,907 names, as supplemented by Cumberland's list of 3 names.

On or about August 18, 2008, Appellants submitted another petition (the "Second Petition"), the text of which was identical to the Petition, which was signed by 473 individuals. Appellants requested that Cumberland count the signatures attached to the Second Petition. Cumberland refused to do so because the Second Petition constitutes a separate and distinct petition for an amendment to the Charter and it was not supported by the signatures of 20% of the voters qualified to vote in the Cumberland's elections. This litigation ensued.

STATEMENT OF THE CASE

These proceedings were initiated in the Circuit Court for Allegany County, Maryland in *Int'l. Assoc. of Firefighters, Local 1715, Cumberland Firefighters, et al. v. Mayor and City Council of Cumberland, et al.*, Case No. 01-C-08-030649 pursuant to the filing of the Complaint and related pleadings on or about August 22, 2008. The principal relief sought by Appellants

included the entry of an Order: (1) directing Cumberland to count all signatures submitted in support of the Petition and the Second Petition, in essence requiring it to consider both submissions to be the same petition for an amendment to the Charter; (2) directing that, if the count of all of the signatures resulted in a determination that less than 20% of the qualified voters signed it, Appellants would be permitted to submit additional signatures at a later date; (3) determining that the proposed amendment to the Charter only needed to be supported by the signatures of 2,381 qualified voters, i.e., 20% of the active voters; (4) directing the Clerk of the City of Cumberland to supervise the counting and requiring Cumberland to pass a resolution scheduling a referendum on the proposed amendment to the Charter for November 4, 2008, the date of the upcoming general election, or for a special election to be conducted no later than December 19, 2008; and (5) directing the County Board to place the matter on the ballot for the November 4, 2008 general election if Cumberland's resolution provided for the election to be held on that date.

On or about August 28, 2008, Appellants filed a Motion for Summary Judgment. On or about September 5, 2008, Appellants filed a Memorandum of Law addressing the validity of the substantive provisions of the proposed amendment to the Charter set forth in the Petition. On September 8, 2008, Cumberland filed a response to Appellants' Motion as well as its own Motion for Summary Judgment, both of which were supported by a single Memorandum of Law.

On or about September 4, 2008 the State Board of Elections (the "State Board") filed a Motion to Dismiss. Appellants filed a response thereto and the State Board replied to that response prior to the trial of this matter.

The trial of this matter was held on September 9, 2008. The Court heard argument from

Appellants, Cumberland, the State Board and the County Board and it issued its Memorandum and Order on or about September 10, 2008 with the Memorandum and Order being entered on the docket on September 11, 2008.

Without providing any supporting rationale, the Court found that the Petition only needed to be supported by 2,381 signatures, by inference determining that only active voters are qualified to vote in municipal general elections. The Court also determined that Appellants were not entitled to have the signatures appended to the Second Petition considered in determining whether the Petition was supported by the required number of signatures. Having made those determinations, the Court did not consider the other arguments which were presented at trial. It granted the State Board's Motion to Dismiss as well as Cumberland's Motion for Summary Judgment.

On September 11, 2008, Appellants noted an appeal to the Court of Special Appeals and filed a Petition for Writ of Certiorari in this Court. On September 12, 2008, Cumberland filed a Notice of Appeal in the Circuit Court proceedings for the purpose of requesting that this Court reverse the decision of the Circuit Court effectively determining that inactive voters are not considered to be active voters for the purpose of determining the total number of qualified voters. A stamped copy of the said Notice of Appeal is attached hereto and incorporated by reference herein as **Exhibit 2**.

ARGUMENT

I. Applicable law dictates that the Petition and the Second Petition be considered to be two separate petitions seeking referenda on amendments to the Charter.

The case law clearly establishes that Md. Code Ann., Art 23A §§ 11-18 occupies the

entire field of law regarding amending municipal charters. The wording of Section 14(a), which addresses referenda on petitions for amendments to municipalities' charters does not contemplate or allow for additional signatures to be submitted after such petitions are filed with municipalities' legislative bodies. Applicable law further provides that there is no room for the expansion of the express wording of Sections 11-18, nor is their any basis to judicially legislate exceptions to or expansions upon those provisions.

Article XI-E, § 4 of the Maryland Constitution provides for the initiation of charter amendments by legislative resolution or by petition. It also provides that "[the] General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article.."

Such amplification with respect to the initiation of charter amendments by petition of a municipality's qualified voters is set forth in Md. Code Ann., Art. 23A § 14, which provides as follows:

> (a) *Petition; resolution of legislative body setting time for referendum*.- Twenty per centum or more of the persons who are qualified to vote in municipal general elections in the particular municipal corporation may initiate a proposed amendment or amendments to the municipal charter, by a petition presented to the legislative body of the municipal corporation, by whatever name known. The petition shall contain the complete and exact wording of the proposed amendment or amendments, and the proposed amendment or amendments shall be prepared in conformity with the several requirements contained in subsections (b) and (c) of § 13 of this subtitle. Each person signing it shall indicate thereon both his name and residence address. Upon receiving the petition, the legislative body is directed to verify that any person who signed it is qualified to vote in municipal general elections, and shall consider the petition as of no effect if it is signed by fewer than twenty per centum of the persons who are qualified to vote in municipal general elections. If the petition complies with the requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation. This may be at

> either the next regular municipal general election or at a special election, in the discretion of the legislative body. In the event a special election is designated, it shall be within a period of not less than forty days nor more than sixty days after the final passage of the resolution. In the resolution, the exact wording shall be specified which is to be placed on the ballots or voting machines when the question is submitted to the voters of the municipal corporation.
>
> (b) *Adoption of amendment by resolution*.- Provided, however, that if the legislative body shall approve of the amendment or amendments provided for in the petition presented to it under subsection (a) above, it shall have the right by resolution to adopt the amendment or amendments thereby proposed and to proceed thereafter in the same manner as if the amendment or amendments had been initiated by such legislative body and in compliance with the provisions of § 13 of this article.

The provisions set forth in Md. Code Ann., Art. 23A §§ 11-18 were "enacted to implement Article XI-E [of the Maryland Constitution], and particularly to implement Section 4 thereof, [and] they occupy the whole field of amendments to charters of municipalities." *Hitchins v. Mayor and City Council of Cumberland*, 208 Md. 134, 143 (1955). Thus, the entire body of statutory law relative to amending the charters of municipalities is set forth therein. If provisions which are contrary to or supplementing the state law provisions are included within local charters, they are of no force and effect. *See Hitchins, supra* (conflicting provisions in charter of City of Cumberland held of no force and effect subsequent to passage of Art. 23A §§ 11-18); *Mayor of City of Hagerstown v. Lyon*, 236 Md. 222 (1964) (Mayor of City of Hagerstown did not have power to veto proposed charter amendment despite charter provisions including mayoral veto).

Md. Code Ann., Art. 23A § 14(a) does not allow for persons petitioning for a referendum on a petition-initiated charter amendment to supplement their petition with additional signatures subsequent to the date of its original submission. Such petitions are referred to therein in the singular. All time frames set forth therein commence as of the date of the submission of a

petition.

In the Memorandum submitted in support of their Motion for Summary Judgment (*see* Exhibit 10 attached to Petition for Writ of Certiorari), Appellants claim that the Court of Appeals specifically rejected the contention that all of the signatures had to be filed on the same day in *State v. McLean*, 249 Md. 436 (1968). A plain reading of the *McLean* case shows that it cannot be interpreted in the manner proposed by Appellants. Further, the holding in that case is inapposite to the case at hand as it addresses referenda regarding enactments of the General Assembly and has no applicability with respect to the process of amending municipalities' charters by means of initiatives.

The *McLean* case concerned a petition for referendum with respect to legislation enacted by the General Assembly known as the Open Housing Bill. The applicable law relative to referenda on state legislation was found in Article XVI of the Constitution of the State of Maryland and Md. Code Ann., Art. 33 §169C. *See McLean*, at 437-38.[1]

Following the passage of the Open Housing Bill, two groups of opponents, the names of which were shortened to "Maryland" and "Taxpayers" in the opinion, gathered 20,000 signatures

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[1]Article XVI, § 3(b) of the Maryland Constitution provides:

> If more than one-third, but less than the full number of signatures required to complete any referendum petition against **any law passed by the General Assembly**, be filed with the Secretary of State before the first day of June, the time for the law to take effect and for filing the remainder of signatures to complete the petition shall be extended to the thirtieth day of the same month, with like effect.
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> If an Act is passed less than 45 days prior to June 1, it may not become effective sooner than 31 days after its passage. To bring this Act to referendum, the first one-third of the required number of signatures to a petition shall be submitted within 30 days after its passage. If the first one-third of the required number of signatures is submitted to the Secretary of State within 30 days after its passage, the time for the Act to take effect and for filing the remainder of the signatures to complete the petition shall be extended for an additional 30 days.

(emphasis added)

which were jointly submitted along with a petition for a referendum on the Open Housing Bill. Maryland gathered 2,000 of the signatures and Taxpayers gathered 18,000. The signatures were delivered to the Secretary of State on May 31, 1967. Then applicable law provided that 27,593 signatures were required, "it being sufficient if more than half were filed before the first of June and the remainder before June 30." *Id*. at 438.

It is significant to note that the *McLean* Court cited Md. Const., Art. XVI § 3, which expressly provided that the time for filing a petition for referendum would be extended by 30 days if more than one-half of the required number of signatures were filed on or before June 1. Similar provisions relative to multiple submissions remain in that section of the Maryland Constitution today and they are set forth in footnote 2 of this Memorandum. It is even more significant to note for the purposes of the instant dispute that Article 23A § 14(a) is devoid of similar provisions.

The *McLean* Court noted that section 169C of Article 33 of the Maryland Annotated Code contained the requirement that the filing of the petition submitted by Maryland and Taxpayers be accompanied by a financial statement setting forth the contributions and expenditures therefor. *McLean*, 249 Md. at 438. The Attorney General rejected the petition because Maryland's financial statement was invalid and, as all of the signatures were submitted at one time in boxes, it was impossible to distinguish which of the signatures were procured by Maryland and which were procured by Taxpayers. *Id*. at 439. Therefore, according to the Attorney General, the invalid financial statement resulted in the invalidation of all 20,000 signatures. Notwithstanding that argument, at the hearing before the trial court, it was established that the 2,000 signatures collected by Maryland could be identified and separated

from the joint filing. *Id*. at 441-42.

The relevant portion of the Court's ruling is as follows:

> [Circuit Court for Harford County] Judge Dyer denied a defendant's motion for a directed verdict at the end of the plaintiffs' case, finding that the plaintiffs had shown that the "number of signatures" attributable to Maryland and Taxpayers, respectively, "although not made known to the Secretary of State at the time submitted, has been made here in Court," but at the conclusion of the case rested his decision on the ground that:
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> > "the Maryland Petition Committee, Inc. made a good faith and bona fide effort to comply with Section 169C which, while not strict or literal compliance on May 31, 1967, was a sufficient degree of compliance to merit an opportunity to amend to the strict requirement of the Section. The amendment of June 30, 1967, met this latter standard. The petition for a Writ of Mandamus, therefore, is granted."
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> We do not think it necessary to rule on this ground of decision. The Secretary did not controvert the facts as to sufficient compliance with Art. XVI of the Constitution and with § 169C of Art. 33, proven by the plaintiffs, namely that 18,000 valid signatures covered by a valid financial statement had been filed by June 1, and 17,000 more filed by June 30. He merely showed that he was told by Taxpayers and Maryland that they did not want to separate their signatures and that although later advised that Maryland's could be identified was never told how, and therefore followed the ruling of the Attorney General.
>
> We think it was abundantly and clearly proven that approximately 18,000 valid signatures related to and covered by a valid financial statement were filed on May 31. Only approximately 13,800 were needed by June 1 (there is no dispute that enough additional signatures, duly covered by valid financial statements, were filed by June 30). The persons whose signatures were legally and constitutionally presented and filed with the Secretary are entitled to have Ch. 385 referred under Art. XVI, and the Circuit Court for Harford County did not err in ordering that it be referred.

Id. at 442-43.

Although Appellants would encourage this Court to interpret the *McLean* case as a statement of the law relative to all referenda, it cannot be given such a reading, nor can it be interpreting as standing for the proposition that petitions for referenda on petition-initiated

amendments to municipalities' charters may be supplemented with additional signatures subsequent to the date of the filing of such petitions. *McLean* constitutes the resolution of a dispute regarding whether two groups of signatures submitted collectively at the same time can be separated from one another so as to distinguish which group of signatures had a valid financial statement submitted with it and which one did not. Nothing more was decided and nothing more can be inferred from the decision. It is a decision relative to the application of state law regarding referenda on enactments of the General Assembly. That decision has no applicability to the instant case.

Interestingly enough, however, the provisions of the Maryland Constitution which were cited in *McLean* show that the General Assembly knows how to provide for multiple submissions of signatures for petitions seeking referenda in the laws it enacts. It did so in Article XVI § 3 of the Maryland Constitution, Md. Code Ann., Art. 25B § 10(h)(3) and Md. Elections Code Ann. § 6-205(d). There are no similar provisions in Article 23A or Article XI-E of the Maryland Constitution. By the omission of such a provision, it is clear that the General Assembly did not intend to allow petitioners seeking referenda on amendments to municipal charters to submit signatures in support of their petitions on separate occasions.

Principles of statutory construction support the preceding arguments. "[I]t is a cardinal rule that in construing a legislative enactment courts should confine themselves to a construction of a statute as written, and not attempt, under the guise of statutory construction, to supply omissions or remedy possible defects in the statute, or to insert exceptions not made by the legislature. Cases to this effect are legion." *National Union of Hospital and Health Care Employees v. Johns Hopkins Hospital*, 293 Md. 343, 360 (1982).

> It is a settled principal of statutory construction that the Legislature's enumeration of one item, purpose, etc. ordinarily implies the exclusion of all others. *State Insurance v. Nationwide*, 241 Md. 108, 117, 215 A.2d 749 (1966); *Trust Co. v. Ward Baking Corp*., 177 Md. 212, 220, 9 A.2d 228 (1939); *Railroad Co. v. Lichtenberg*, 176 Md. 383, 390, 4 A.2d 734, *appeal dismissed*, 308 U.S. 525, 60 S. Ct. 297, 84 L. Ed. 444 (1939); *Vanderford v. Farmers' Bank*, 105 Md. 164, 168, 66 A. 47 (1907) ("the express mention of one thing implies the exclusion of another"); 2A Sutherland, Statutory Construction, §§ 47.23, 47.24 (4th ed. 1973). The principle is often expressed as the latin maxim "*expressio unius est exclusio alterius*," *Gay Investment v. Comi*, 230 Md. 433, 438, 187 A.2d 463 (1963). A related principle is that where a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, such manner becomes a mandatory limitation, and the action must be taken in conformity with it. *Trust Co. v. Ward Baking Corp., supra*, 177 Md. at 220 ("'A statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise.'"); 2A Sutherland, supra, §§ 57.14-57.18.

Office & Professional Employees Int'l. Union v. Mass Transit Admin., 295 Md. 88, 95 (1982).

Section 14(a) of Article 23A prescribes a specific method for submitting and processing a petition-initiated charter amendment. By virtue of the establishment of this framework, action must be taken in strict conformity with it.

This argument is fully supported by the Court's ruling in *Gittings v. Board of Supervisors of Elections for Baltimore*, 38 Md. App. 674 (1978). That case involved the interpretation of a provision in the Baltimore County Charter governing referenda on laws enacted by the Baltimore County Council. The only difference between the provisions in the Baltimore County Charter and Md. Const. Art. XVI was that "Art. XVI designates the Secretary of State as the official to receive petitions for referendum; whereas § 309(a) [of the Baltimore County Charter] designates the Board of Supervisors of Elections of Baltimore County. . . as the agency to receive such petitions." *Id*. at 676.

The Baltimore County Charter required that a petition for referendum must be signed by no less than 10% of the voters qualified to vote in Baltimore County elections and submitted to

the Board of Supervisors of Elections no later than 45 days from the date of the enactment of the legislative measure for which the referendum was sought. It also provided that if more than half but less than all of the required signatures were submitted within that 45 day period, the time for filing the required number of signatures would be extended for an additional 30 days. *Id*. at 676-77.

The petitioners in *Gittings* needed to submit 9,262 signatures in order to satisfy the requirement that at least 5% of the signatures be submitted within the 45 day period following the enactment of the ordinance which was the subject of the case. They submitted 9,523 signatures with their petition, but 543 were determined to be invalid, leaving them with 8,719 valid signatures.

Notwithstanding their failure to strictly comply with the applicable provisions of the Baltimore County Charter, the petitioners requested that they be permitted to submit additional signatures "for reasons of equity." *Id*. at 678-79. This Court rejected that argument, noting that the petitioners characterized their own argument as being "somewhat obtuse." *Id*. Under the law, the Court had no right to grant a dispensation with respect to the failure to comply with the applicable provision of the Baltimore County Charter. *Id*.

The *Gittings* Court remarked,

> "it is clear, in any case, that the stringent language employed in Section 4 of [Article XVI of the Maryland Constitution which was translated substantially into Section 309 of the Baltimore County Code] shows an intent that those seeking to exercise the right of referendum in this State must, as a condition precedent, strictly comply with the conditions prescribed."

38 Md. App. At 679 (*quoting Tyler v. Secretary of State*, 229 Md. 397, 401 (1962)). The Court further remarked that "the language of Art. XVI is mandatory and must be strictly complied with

by those seeking to avail themselves of the right of referendum." *Id*. at 679. Ruling against the petitioners, the Court held that

> where a group of the citizens of the county seek to challenge a decision made by the lawfully designated representatives of the entire body politic, they must strictly adhere to those provisions of the law which grants to them the concession of the referendum. Where, as in this case, they fail to meet the constitutional and statutory requirements which authorize the exercise of the privilege granted, the proposed referendum must fail.

Id. at 681.

The situation in the case at bar is quite similar to the *Gittings* case. Appellants are, in essence, requesting that the Court grant them the relief they are seeking because it is equitable to do so. In that Md. Code Ann, Art. 23A § 14(a) does not allow for supplemental signatures to be presented, this Court should not excuse strict compliance with its terms.

The Court must exercise restraint in this case and decline to create exceptions to the express provisions of Md. Code Ann., Art 23A §14(a). If it accepts Appellants' argument that supplementation is permitted, it will have to create new exceptions to the provisions set forth in Section 14(a) and determine the applicable time frames for a municipality to verify the signatures after a supplemental submission as well as the applicable time frames for the holding of a special election in the event a petition, as supplemented, contains the signatures of at least 20% of the persons qualified to vote in municipalities' general elections. The Court would also have to determine how many times petitioners are permitted to supplement a petition. Do the submissions stop at two occasions as is the case with respect to referenda regarding acts of the General Assembly, do they stop within a finite period of time provided a specified number of signatures are submitted with the original submission as is the case with respect to county charter amendment petitions in Md. Code Ann., Art. 25B § 10(h)(3), or is there some other scheme that

should be adopted so as to allow supplements to petitions for referenda on amendments to municipalities' charters?

Implicitly, at the very least, Appellants have argued that they are entitled to supplement the Petition as many times as they choose and that the sixty (60) day time frame for verifying the signatures is extended to sixty (60) days from the date of the last submission each and every time a supplemental submission is made. That argument is contrary to the express provisions of the statute. There are no provisions that indicate the time for verification of signatures can be extended.

Appellants seek to penalize Cumberland for having conducted the verification process in advance of the sixty (60) days allotted therefor by statute. Had Cumberland waited until the sixtieth day to announce the results of its count rather than doing so on August 18, 2008, Appellants would not have had the chance to file the Second Petition or otherwise supplement the signatures. The General Assembly could not have contemplated punishing municipalities which promptly comply with their statutory obligations.

Carrying out the foregoing thought process to its rational conclusion, in that the General Assembly did not provide for extensions of the sixty (60) day period to verify signatures, if the Court rules that Appellants have the right to supplement their petition, it follows that they would have had to have done so within the said sixty (60) day period in order for the additional signatures to have been considered by Cumberland. In this instance, the additional signatures were submitted within that time frame. However, had the situation been otherwise and had the Appellants submitted a significant number of supplemental signatures late in the afternoon of the sixtieth day or within a short period of time prior to the expiration of that time frame, it would

have been impossible for Cumberland to have complied with its statutory obligation to verify the signatures within the statutorily allotted time frame, not to mention passing a resolution scheduling the election for the matter within that same time frame in the event a sufficient number of signatures were submitted.

One can only speculate why the General Assembly did not allow for the supplementation of petitions for referenda for municipalities' charter amendments when it provided for the supplementation of such petitions with respect to counties and the State. However, municipalities come in various shapes and sizes. Some municipalities are quite small and, accordingly, have limited government resources. It is fair to assume that the General Assembly did not desire to impose the same administrative burdens on small municipalities that it imposes on the counties and the State.

Notwithstanding the foregoing, judicially legislating exceptions to the express provisions of the Annotated Code is inappropriate in these circumstances. If the General Assembly is inclined to do so, it may legislatively enact changes to Article 23A §§ 11-18. Until that occurs, this Court must construe those provisions strictly and it should decline to grant the relief Appellants are seeking.

II. If, under equitable principles, the Court is inclined to require Cumberland to consider the Petition and the Second Petition to be one petition for the purpose of initiating a referendum, under those same principles, if the combined petitions contain the signatures of 20% of the qualified voters, it should permit Cumberland to defer the referendum until the 2010 general election.

For the reasons stated hereinbefore, it is Cumberland's position that this Court should not consider the Petition and the Second Petition to be one petition for the purposes of initiating a charter amendment under Md. Code Ann., Art 23A § 14(a). However, in the event the Court

determines that it would be inequitable not to do so, and if it is determined that Appellants' combined submissions contain the signatures of at least 20% of the persons qualified to vote in the City of Cumberland's municipal general elections, the same equitable principles would apply to require that the Court order that Cumberland has discretion to defer the referendum until the November, 2010 general election.

In that Cumberland and Allegany County conduct joint elections which are administered by the County Board and the deadline for the County Board to submit matters to be included on the State's ballot is set by state law, Cumberland is effectively subject to that same deadline. In this instance, the deadline for submitting matters to be included on the electronic ballots was August 18, 2008. The Petition was not submitted until July 25, 2008 and the Second Petition was submitted on August 18, 2008.

The applicable provisions of Article 23A of the Annotated Code of Maryland do not address those circumstances where petitions for charter amendments are submitted within time frames that make it impossible for municipalities who conduct their elections jointly with counties to hold referendum elections at their next general elections.

The pertinent provisions of Md. Code Ann., Art. 23A § 14(a) are as follows:

> If the petition complies with the [signature verification and percentage] requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation. **This may be at either the next regular municipal general election or at a special election, in the discretion of the legislative body**. (emphasis added)

In that decisions regarding whether referenda are submitted to voters at special elections or general elections are discretionary, municipalities' legislative bodies have the right to exercise

that discretion in the manner they see fit. When a statute grants public officials the discretion to act in a certain fashion, the decision made will not be subject to review. *See Phillip Morris, Inc. v. Glendening*, 349 Md. 660 (1998).

In the instant case, Appellants seek to take away that discretion from Cumberland. Cumberland made considerable efforts to verify the signatures that were submitted on July 25, 2008 in order to meet the State's August 18, 2008. Cumberland announced the results of its counting on or about August 15, 2008, immediately after it was preliminarily completed. In that an insufficient number of valid signatures were submitted, Appellants scrambled to collect additional signatures, submitting the Second Petition on August 18, 2008, the date of the State's deadline.

Appellants admit that they started collecting signatures for the Petition in the spring of 2008. *See* Complaint ¶ 18. While Appellants collected 3,550 signatures over the course of the spring and summer of 2008 prior to July 25, they were able collect an additional 472 signatures over the course of the three day period from August 15-18.

In deferring the dates of their submissions to a time so close to the general election, Appellants have effectively divested Cumberland from its right to hold the referendum at a general election. The State Board of Elections deadline was known to all concerned and was readily ascertainable through a reading of the applicable laws and regulations as those deadlines are set as a matter of law. *See* Motion to Dismiss of State Board of Elections. That is why Cumberland completed the verification of the signatures on the Petition on August 15, 2008 rather than waiting until September 23, 2008, sixty days from the date of its submission, the deadline date for its completion of the verification process under Md. Code Ann., Art. 23A §

14(a).

For the reasons stated hereinbefore, Cumberland took the position that the Petition and the Second Petition were separate petitions seeking an amendment to the Charter and that, since the number of signatures submitted with the Second Petition did not amount to 20% of the voters qualified to vote in Cumberland's general elections, there was not point in making the effort to verify those signatures. Notwithstanding the foregoing, with the Second Petition being submitted on August 18, Cumberland did not have sufficient time in advance of the State Board of Elections' deadline to verify the signatures and pass a resolution scheduling the referendum for the next municipal general election.

In the event the Court determines that the Petition and the Second Petition constitute the same petition for the purpose of Md. Code Ann., Art 23A § 14(a) and that the number of valid signatures submitted therewith meets the 20% threshold, it must also consider the right of Cumberland to hold the referendum at a general election. If the Court makes both of those initial determinations, it will be interpreting state law to include provisions that are not expressly set forth therein. In essence, it will be creating a procedure that allows for multiple submissions of a petition for an amendment to a municipality's charter to be considered to be one submission. If the Court is going to judicially legislate, which it should refrain from doing, it should go one step further to protect Cumberland's right to exercise discretion over whether to hold the referendum at a special election or a general election. In that it appears to be out of the question for Cumberland to submit the matter for the November 4, 2008 general election, the only option available other than holding a special election on the matter is to defer the matter until the November, 2010 general election. If the Court is going to grant equitable relief, it should grant

such relief in a manner such that equity is extended to all parties concerned.

III. The Circuit Court erred in determining that only active voters are considered qualified voters for purposes of Md. Code Ann., Art. 23A §14(a).

Appellants' contention that they may rely on the list of voters submitted to them in response to the request made in the Application as constituting the list of voters qualified to vote in Cumberland's general elections is baseless. They unable to cite any authority in support of that contention in their Motion for Summary Judgment.

There are 12,910 persons qualified to vote in Cumberland's general elections. That list of persons includes active voters, inactive voters and three persons who are registered solely to vote in Cumberland's general elections. Section 3-403(a) of the Elections Article provides that voters residing in a municipal corporation are considered to be registered for elections of the municipality if their names are included on the statewide registration list. Therefore, those residents of the City of Cumberland whose names are included on the statewide registry are qualified to vote in Cumberland's elections.

In that Cumberland utilizes universal registration, using the voter registry supplied by the Allegany County Board of Elections as qualification for voting in municipal elections, Subtitle 5 of Title 3 of the Elections Article applies with respect to the maintenance of Cumberland's voter registry.

Md. Elections Code Ann. § 3-503 provides as follows:

> **§ 3-503. Inactive list.**
>
> (a) *In general*.- 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.
>
> (b) *Restoration to active status*.- 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.

(c) *Removal*.- 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.

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

Subsection (c) specifically contemplates that voters who have been placed on the inactive list are qualified to vote in elections. An inactive voter is not removed from the list and disqualified from voting until that person fails to vote in two general elections. Therefore, active and inactive voters are properly included in the list of persons qualified to vote in Cumberland's general elections. The Court's ruling in *Gisriel v. Ocean City*, 345 Md. 477 (1977), which held that voter registration lists including active and inactive voters "are conclusively presumed to be the lists of all qualified voters at any given point in time," provided there are reasonable provisions for the periodic purge of unqualified voters, is consistent with this position.

Appellants specifically requested that the Allegany County Board of Elections produce an incomplete list of the voters qualified to vote in Cumberland's general elections, i.e., a list that was limited to active voters. Their mistake in the application for the voter list does not

somehow change the number of voters who are qualified to vote in Cumberland's elections. One can only assume that, had they properly couched their request for the voter list, they would have been provided with the complete list that Cumberland relied upon in verifying the signatures appended to the Petition. In that they failed to do so, the Court should not take any action to remedy their mistake in the calculation of the number of signatures required to move the Petition forward to referendum.

Md. Code Ann., Art. 23A § specifically requires that a petition for charter amendment be signed by 20% of those persons qualified to vote in the municipality's general election. Circumventing this legal requirement and permitting the matter to go forward to referendum with a lesser number of signatures is not permitted in law or in equity.

On September 8, 2008, this Court had occasion to hear oral arguments in *Jane Doe v. Montgomery County Board of Education*, No. 61 - September Term, 2008. The issue addressed in this section of this Memorandum was addressed in that case. In that regard, Cumberland adopts by reference, to the extent of their applicability to this case, the arguments set forth in pages 25-35 of the Brief of Appellants/Cross-Appellees, copies of which pages are attached hereto as **Exhibit 3**.

Notwithstanding the foregoing, it is clear that the list of voters utilized to determine whether the Appellant submitted the required 20% of the qualified voters included both active and inactive voters. In the event the Court is inclined to affirm that portion of the Circuit Court's decision determining that inactive voters are not qualified to vote in Cumberland's municipal general elections, Cumberland should be permitted to invalidate those signatures of inactive voters it considered to be valid for purposes of the verification process.

IV. The matters which were not considered by the Circuit Court should not be addressed on appeal.

The Circuit Court did not address the issue of whether the text of the amendment to the Charter proposed in the Petition is valid or invalid because its determination on the first issue addressed in this Memorandum rendered that issue inapplicable. In the event this Court rules that the Petition and the Second Petition are considered to be one petition for the purpose of amending the Charter, it should remand this case to the Circuit Court so that it may address the final issue that was before it. However, should it choose to decide those issues in this appeal, the arguments set forth in Section IV of Cumberland's Memorandum in Support of Response to Motion for Summary Judgment and in Support of the Mayor and City Council of Cumberland's Response to Motion for Summary Judgment (see Exhibit 11 attached to Petition for Writ of Certiorari) are incorporated by reference herein.

CONCLUSION

For all of the foregoing reasons, the decision of the Circuit Court for Allegany County, Maryland should be affirmed with respect to its decision that Appellants are not permitted to file additional signatures following the date of their submission of the Petition and that decision should be reversed with respect to the determination that inactive voters are not considered qualified voters for purposes of Md. Code Ann., Art 23A §14(a).

Respectfully submitted,

MICHAEL SCOTT COHEN, LLC

By:_____
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(301) 724-5200
Attorneys for Appellee/Cross-Appellant,
Mayor and City Council of Cumberland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of September, 2008, a copy of the foregoing was mailed, postage prepaid, and emailed to the following persons:

1. Francis J. Collins, Esq., Kahn, Smith & Collins, P.A., 201 N. Charles St. - 10th Floor, Baltimore, MD 21201, fjcollins@kahnsmith.com;

2. Armand M. Pannone, Esq., 14 Greene Street, Cumberland, MD 21502, Armand Pannone, ampjr@pennswoods.net;

3. David Moore, Assistant Attorney General, Office of the Attorney General, Civil Division, 200 St. Paul Place, Baltimore, MD 21202, dmoore@oag.state.md.us; and

4. Sandra Benson Brantley, Assistant Attorney General, 104 Legislative Services Building, 90 State Circle, Annapolis, MD 21401, sbrantley@oag.state.md.us.

_____
MICHAEL SCOTT COHEN

State of Maryland

Application for Voter Registration Data

1. Applicant's Name: William Shannon Adams 2. Date: 4/8/08
3. Applicant's Residence Address: 11909 Bayberry Ave
4. City: Cumberland 5. State: MD 6. Zip Code: 21502
7. Telephone numbers – Home: 301 729 2030 8. Business: 301 876 1941
9. Registered voter in Allegany County (County/City) District: 6 Precinct: 6
10. If you are buying data on behalf of a corporation or other business entity, provide the name and address of entity.
    Name of Entity: City of Cumberland Firefighters Local 1715
    Address: PO Box 1147
    City: Cumberland State: MD Zip Code: 21502
11. Specify the intended use of data (detailed explanation required): Addresses of registered voters to do petition for City election
12. Will supplemental lists be required? ☑ Yes ☐ No (refer to General Information for details)
13. Delivery: ☑ Will pick up ☐ Mail – If mailing address is different from above, provide mailing address.
    Address:
    City: State: Zip Code:

AREA: (Check one) →	☐ Statewide (All counties & Baltimore City) ☐ Single County – Specify: ☐ Multiple Counties – Specify: ☑ District – Specify Legis., Cong., etc.: City of Cumberland
TYPE OF LIST: (Check all that apply) →	☑ County Voter Walking List ☑ Registered Voter List (Basic list with no voting histories) ☐ Voting History List by Election Type and Date (Select type(s) & year(s) below) Election type: ☐ Gubernatorial Primary ☐ Gubernatorial General ☐ Presidential Primary ☐ Presidential General Election years: 1990, 1992, 1994, 1996, 1998, 2000, 2002 & 2004 are available ☐ All years ☐ Specific year(s) – Specify:
VOTER INFORMATION: (Check all that apply) →	☑ All Voters ☐ Male ☐ Female ☐ By Age Range* ☐ By Registration Date* * Specify age or date range: ☑ All Party Affiliations ☐ Specific Party – Specify: ☑ Active Voters ☐ Active & Inactive Voters

Please read statement before signing. Under penalty of perjury, I hereby declare, as required by Election Law Article, § 3-506, *Annotated Code of Maryland*, that I do not intend to and I will not use the list of registered voters for which I am applying for purposes of commercial solicitation or for any other purpose not related to the electoral process, and that I will not knowingly allow the list to be used by any other person or entity for purposes of commercial solicitation or for any other purpose not related to the electoral process. I am aware that any person who knowingly allows such a list under his or her control to be used for commercial solicitation or for any other purpose not related to the electoral process is guilty of a misdemeanor and is subject to punishment under Election Law Article, Title 16, *Annotated Code of Maryland*.

I William Shannon Adams (print name), have read and understand the above statement and agree to pay the balance due upon receipt of the initial and/or supplemental voter registration list.

William S Adams
Applicant's Signature

4/8/08
Date

SBE-03-04 (rev 07/06)

EXHIBIT 1

IN THE CIRCUIT COURT FOR ALLEGANY COUNTY, MARYLAND

INT'L. ASSOC. OF FIRE FIGHTERS, LOCAL 1715, CUMBERLAND FIREFIGHTERS, ET AL.	:	
Plaintiffs	:	
v.	:	CASE NO. 01-C-08-030649
MAYOR AND CITY COUNCIL OF CUMBERLAND, ET AL.	:	
Defendants	:	

: : : : : : : : : : :

NOTICE OF APPEAL

The Mayor and City Council of Cumberland, Defendant, by Michael Scott Cohen and Michael Scott Cohen, LLC, its attorneys, notes its appeal of the Memorandum and Order entered in these proceedings on or about September 11, 2008.

MICHAEL SCOTT COHEN, LLC

By: _____

MICHAEL SCOTT COHEN
213 Washington Street
Cumberland, MD 21502
(301) 724-5200
Attorneys for Defendant, Mayor and City Council of Cumberland

EXHIBIT 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of September, 2008, a copy of the foregoing was mailed, postage prepaid, to Francis J. Collins, Esq., Kahn, Smith & Collins, P.A., 201 N. Charles St. - 10th Floor, Baltimore, MD 21201, Armand M. Pannone, Esq., 14 Greene Street, Cumberland, MD 21502, Sandra Brantley, Asst. Attny. General, Office of the Attorney General, 90 State Circle, Room 104, Annapolis, MD 21401, and David Moore, Assistant Attorney General, Office of the Attorney General, Civil Division, 200 St. Paul Place, Baltimore, MD 21202.

MICHAEL SCOTT COHEN

The thousands of signatures that fail to comply with § 6-203(a)(1) should be disqualified, requiring de-certification of the petition.

III. The Circuit Court Correctly Ruled That The BOE Erred In Excluding Inactive Voters From Its Calculation Of Required Petition Signatures, With The Result That The Petition Failed To Carry Signatures Of 5% Of Registered County Voters.

Section 114 of the Montgomery County Charter requires that a petition to send a law to referendum must contain the signatures of 5% "of the registered voters of the County." The Charter uses the phrase "registered voters" without qualification. It means 5% of all registered County voters, whether denominated "active" or "inactive" by the BOE.

The lower court correctly ruled that the BOE violated the law by excluding inactive voters from the denominator of the equation to determine whether the petition had the support of at least 5% of County voters. (App19-20) The court recognized that this error by the BOE caused "a petition signed by a deflated percentage of voters" to send a "validly-enacted law" to the ballot. (App21) The BOE cross-appeals from the lower court's ruling. In defense of its decision to exclude over 50,000 registered voters from participation in the referendum process and to certify a petition lacking support of 5% of all County voters, the BOE relied below on two main contentions, both of which the lower court rightly rejected.

First, the BOE argued that Elec. Code § 3-503(d) and dicta in a May 2004 lower court ruling in *Green Party*, which allow considering inactive voters differently for specific administrative purposes, control this issue. (E482-84, 496) It further claimed that the completely distinct "administrative purposes" for which inactive voters by express statutory provision may be excluded from consideration can justify the BOE's decision to exclude those voters when it comes to the referendum process. (E485-90) But the BOE neglected to acknowledge that amendments to the Election Code superseded that dicta and squarely contradict the BOE's position, as do the rulings of this Court in *Green Party* and *Gisriel v. Ocean City Board of Supervisors of Elections*, 345 Md. 477, 501-504, 693 A.2d 757, 769-71 (1997).

EXHIBIT 3

Second, the BOE contended that excluding inactive voters from the baseline tally of all registered voters, while nevertheless counting their signatures when they support MCRG's petition, somehow advances the "enfranchisement" of voters. (E490-91) The very opposite is true. Indeed, to the extent a signature on the petition can be seen as a "vote" for the referendum measure (a point pressed by the BOE itself), *not* having a signature on the petition must be seen as a "vote" *against* the measure, and, at minimum, implicit sanction to have the process of representative democracy proceed without interference. The BOE's methodology strikes at the very heart of that right for inactive voters. It completely disregards the "votes" of inactive voters who do not sign and support the petition by excluding them from the pool of voters at least 5% of who must approve the petition. The BOE continues to do exactly what this Court in *Green Party* said is forbidden: follow a system that "treats 'inactive' voters differently from 'active' voters." 377 Md. at 153, 832 A.2d at 229. The BOE further disregards the harm its skewed methodology causes the rights of Montgomery County voters and residents overall, who are entitled to have laws enacted by their elected representatives take effect unless specific requirements for a referendum are complied with strictly.

A. Recent Amendments To The Election Code Supersede The 2004 Unpublished *Green Party* Circuit Court Dicta And Make Clear That Inactive Voters May Not Be Excluded From The Referendum Process.

The BOE relies on Elec. Code § 3-503(d) to exclude inactive voters from the definition of "registered voters" for purposes of calculating the total pool of voters in the County. Section 3-503(d) provides that "[r]egistrants placed into inactive status may not be counted for official administrative purposes including establishing precincts and reporting official statistics." The BOE contends that this language excludes "inactive" voters for purposes of referendum petition calculations, on the asserted belief that such calculations are merely an "official administrative purpose."

The BOE similarly relies on a 2004 unpublished ruling by the circuit court on remand in the *Green Party* case, which included these provisions:

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; and

b. Election officials may decide whether to count voters placed in "inactive" status as registered voters for such purposes as reporting voter turnout, calculating the number of precincts required to serve the voters in a particular geographic area, calculating the number of voting machines or poll workers needed to serve a particular precinct, etc. (E496)

The BOE claims that quoted provision "a." above currently authorizes its practice to exclude inactive voters from the pool of total registered voters for purposes of determining the number of signatures required on a petition. What the BOE ignores are more recent amendments to the Election Code and legislative history making clear that the BOE's reliance on § 3-503 and the unpublished circuit court dicta in *Green Party* is entirely misplaced.

In 2005 the General Assembly amended the Election Code expressly to disallow omitting inactive voters from the pool of registered voters for purposes of fixing the number of signatures needed on a petition. Thus provision "a." in the *Green Party* declaration has been superseded by statutory amendment, a point apparently overlooked by the BOE.

Prior to 2005, subject matter now contained in § 3-503 was codified in § 3-504(f). Subsections (3)-(5) of § 3-504(f) formerly read as follows:

(3) An inactive voter who fails to vote in an election in the period ending with the second general election shall be removed from the registry.

(4) Individuals whose names have been placed on the inactive list may not be counted as part of the registry.

(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. (E394-95)

In 2005, subsequent to the 2004 *Green Party* declaratory judgment, the General Assembly amended these provisions by deleting the following struck out text and adding the text in boldface in re-designated § 3-503:

> ~~(3)~~ **(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 ~~registry~~ **statewide voter registration list**.
>
> ~~(4) Individuals whose names have been placed on the inactive list may not be counted as part of the registry.~~
>
> ~~(5)~~ **(d)** Registrants placed ~~on the~~ **into** inactive ~~list shall~~ **status may not** be counted ~~only for purposes of voting and not~~ for official administrative purposes including ~~petition signature verification,~~ establishing precincts~~,~~ and reporting official statistics. (E406)

Significantly, in the same act, the General Assembly also struck this provision formerly at Elec. Code § 1-101(mm): "'Registered voter' does not include an individual whose name is on a list of inactive voters." (E397) The current version of § 1-101 does not contain a definition of "registered voter."

These 2005 revisions make clear the General Assembly's intention that inactive voters be counted in the total number of registered voters for petition purposes. Inactive voters are to be included for purposes of "petition signature verification." They also are to be "counted as part of the registry" of voters. While the General Assembly left intact provisions codified at § 3-503(d) allowing exclusion of inactive voters only "for official administrative purposes" specifically including "establishing precincts and reporting official statistics," it deleted all references in the Election Code that would permit exclusion of inactive voters for purposes of fixing the number of signatures needed on a petition.

Moreover, the Department of Legislative Services Fiscal and Policy Note Regarding House Bill 723 (2005) (E421), further establishes the General Assembly's intention to insure that inactive voters would be considered for purposes of petitions. The Note explains: "The bill repeals a provision exempting an inactive voter from being considered a registered voter." (E423) The term "registered voter" is precisely the term used by Montgomery County Charter § 114 to define who must be included in the

formula to determine the number of signatures required for a referendum. The legislative intent demonstrated by the 2005 amendments is apparent. Prior law excluded inactive voters from being counted as part of a referendum petition process. Current law requires inactive voters to be counted — and not just as part of the numerator of the equation, but also as part of the denominator. Inexplicably, the BOE has not caught up to the current requirements of the law.[7]

In a further effort to justify its exclusion of inactive voters here, the BOE focused below on the two "administrative purposes" specified in § 3-503(d) for which exclusion of inactive voters expressly *is* permitted: "establishing precincts" and "reporting official statistics." It offered why it makes sense to present data excluding inactive voters when "establishing precincts" (so that resources can be properly allocated to polling places based on anticipated voter turnout), or when "reporting official statistics" (so that voter turnout data can be more accurately analyzed). (E486-87, 498-99) It also observed that excluding inactive voters for these purposes does not "disenfranchise" any voters or prejudice the democratic process. But none of that has anything to do with, much less justifies, the BOE's practice of excluding inactive voters from participation in the petition process (that is, unless the inactive voter affirmatively supports the petition, in which case the BOE counts them in), to the detriment of thousands of inactive voters and the overall integrity of the referendum process.

---

[7] The BOE apparently was misguided by the State Board. Tellingly, the Director of Election Management for the State Board revealed in a declaration filed below that the State Board has been excluding inactive voters for petition purposes based on the now superseded version of § 3-503(d) adopted in 1994. (E497) (Second Decl. of Donna Duncan at ¶ 3) ("Since January 1, 1995, the effective date of Chapter 370, Laws of Maryland 1994, now codified as Election Law Article ("EL") §3-503(d), [the State Board's] consistent policy and practice has been to not count inactive voters for the purpose of determining how many signatures are needed to satisfy a petition signature requirement."). As discussed above, that version had explicitly called for excluding inactive voters for purposes of "petition verification," but in 2005 it and other provisions of the Election Code were amended to eliminate any discretion on the part of the BOE to exclude inactive voters from participation in the referendum petition process. It appears that the State Board has not conformed its "policy and practice" to the later requirements of the 2005 amendments to the Code.

While the exclusion of inactive voters for the purposes still expressly permitted by § 3-503(d) assertedly further administration of democratic government, the same cannot be said of excluding such voters for purposes of fixing the number of registered voter signatures needed on a petition.

B. Beyond Its Inconsistency With Current Election Law, The BOE's Methodology Infringes The Interests Of Inactive Voters And More Broadly The Montgomery County Body Politic.

The BOE's methodology has a flaw even more fundamental than its violation of recent amendments to the Election Code. It also is unconstitutional.

The BOE asserted below that by counting the signatures of inactive voters towards the requisite number for certification, while excluding more than 50,000 inactive voters from the total pool of registered voters out of which the 5% requirement must be calculated, no voters suffer "disenfranchisement" and the democratic process is furthered, not harmed. In fact this theory entirely disregards the unconstitutional impact the BOE's practice actually has on Montgomery County inactive voters and the integrity of the referendum process.

The BOE claims that a signature on a referendum petition is tantamount to a "vote" and that the right to exercise that "vote" must be respected. But to the extent a signature on the petition can be seen as a "vote" for the referendum measure, *not* placing one's signature on the petition must be seen as a "vote" *against* the measure, and, at minimum, implicit sanction to have the process of representative democracy proceed without interference. The BOE's methodology excludes County registered inactive voters from the political process by refusing to count *their* "vote" *not* to sign a referendum petition and *not* to block from taking effect a law enacted by elected representatives. The methodology disregards the fact that the only way to oppose a petition is by not signing it and by having the absence of one's signature on the petition weighed in determining overall voter support for the referendum. Thus the decision not to sign a referendum petition, or simply to leave to elected representatives the task of lawmaking, is every bit as important to participation in the political process as the

decision to sign a petition. Inactive voters benefit from and are governed by the transgender protection law as much as active voters. They deserve equal weight with other voters in a referendum petition process challenging that law.

Integral to the privilege of referendum under § 114 of the County Charter is the requirement that the petition garner the support of at least 5% of the "registered voters" in the County. If fewer than 5% of registered voters can be persuaded to sign the petition, then the will of those voters who do not support it by signature must be respected and the law enacted by the peoples' elected representatives is entitled to go into effect. Those 95+% of County voters who do not sign the petition may not have their implicit right to reject a referendum petition and to have their elected officials enact laws infringed by fewer than 5% of County voters who favor the referendum. To allow fewer than 5% of County voters — whether active or inactive — to trigger a referendum gives the desires of each of the individual members of this minority faction greater weight than is given to the 95+% of other voters who have not supported the petition. This is contrary to the most basic one person-one vote mandate of our democratic system. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The BOE's methodology strikes at the very heart of this fundamental precept. It gives inordinate political strength to active voters, who alone have their disapproval of the petition effort counted, and to those inactive voters who support the petition, who alone among inactive voters have their choice in the matter counted. It also gives inordinate weight overall to voters who support and sign the petition, whether active or inactive, since their "votes" are given greater weight than the "votes" of the total pool of registered voters who did not sign. "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).

Green Party specifically forbade such differential treatment of inactive voters in the political process. The Court noted that "[d]isqualification from the right to vote in

Maryland is limited to voters who either are convicted of infamous or other serious crimes or who are under care or guardianship for a mental disability. . . . Nowhere in Article I does it state or suggest that voting rarely, sporadically, or infrequently, are grounds for being stricken from the uniform [voter] registry." *Green Party*, 377 Md. at 143, 832 A.2d at 223 (internal citation omitted). The Court explained that "[t]here is no constitutional reason why a once-qualified registered voter, who chooses not to vote frequently, should find his or her right to take part in the [candidate] nomination process curtailed." *Id.* at 151, 832 A.2d at 228.

> [W]e stress that the Maryland Constitution sets forth the *exclusive* qualifications and restrictions on the right to vote in the State of Maryland. The Legislature may not impose additional qualifications or restrictions by requiring voters to cast their votes frequently. Nor may the Board regulate the registry to effect such unconstitutional ends. . . . For the foregoing reasons, we hold that any statutory provision or administrative regulation which treats " inactive" voters differently from "active" voters is invalid.

Id. at 152-53, 832 A.2d at 229 (emphasis in original).

The Court concluded that a "dual registration system" treating inactive voters differently from active voters — what in essence the BOE applied here — is "antithetical" to the Maryland Declaration of Rights and violates Article I of the Maryland Constitution. *Id.* at 150, 832 A.2d at 227-28.

Furthermore, in *Green Party* the Court specifically addressed precisely the issue here — the need to include inactive voters among the pool of total registered voters to calculate a signature percentage requirement. The Court explicitly rejected the methodology the BOE now defends, that of counting signatures of inactive voters in the number of allegedly valid signatures while not counting such inactive voters in the total number of registered voters in the jurisdiction. The Court offered the very methodology now used by the BOE as the main example of the "unnecessary confusion and the specter of statistical manipulation," *id.* at 152, 832 A.2d at 228, risked by a system that differentiates between active and inactive voters:

> If inactive voters are not counted for petition purposes, then consistency would demand that they cannot be counted among the total number of

> voters which the percentage signature requirement is based upon. . . . For instance, if the total number of registered voters in an election district is 11,000, but 1000 of these voters are on the inactive registration list, then a one percent signature requirement would apparently direct a petition-circulator to obtain 100 signatures, or 1% of 10,000. On the other hand, if inactive voters' names are permitted to appear on petitions, then, in the example above, the circulator must collect 110 signatures to meet the requirement of 1% of 11,000.

Id. (citation omitted).

In certifying the MCRG petition, the BOE engaged in the very "statistical manipulation" this Court condemned in *Green Party*. The circuit court specifically made this finding in its decision below:

> [S]ome 200 inactive voters signed the instant petitions, although those signatories were not included in the denominator established by [the BOE]. The court rejects [the BOE's] argument that inactive voters should be excluded from the denominator because to do otherwise would artificially inflate the number of signatures required to successfully petition for referendum. . . .
>
> To accept [the BOE's] arguments would mean that citizens could successfully place a matter on referendum without obtaining the signature of a single active voter. In this case, for instance, the signatures of approximately one-half of the current list of inactive voters would be sufficient to petition for referendum, even though none of those voters would be counted in the denominator. (App20-21)

The requirement that inactive voters be counted both in the numerator and denominator of the equation to determine the percentage of registered signers is further compelled by this Court's reasoning in *Gisriel*, 345 Md. at 501-504, 693 A.2d at 769-71. *Gisriel* held that inactive voters on the voter registration lists were required to be included when calculating the number of signatures needed to reach the percentage of qualified voter signatures to petition for a referendum in Ocean City. At the time, the Ocean City Charter instructed its Board of Supervisors of Elections to remove voters from its rolls for inactivity if they failed to vote for a prescribed period. *Id.* at 502, 693 A.2d at 769. However, some voters remained on the rolls despite qualifying for removal under the provision. The city charter included a referendum provision similar to Montgomery County's, requiring signatures of 20% of registered voters. The Ocean City Board

calculated the required number of signatures based on the number of voters on the voter rolls, including those who qualified for removal, at the date of the petition filing.

This Court upheld this methodology as correct and, in fact, required. *Id.* at 502-04, 693 A.2d at 769-71. The Court explained, "the 128 residents of Ocean City who had not voted in the preceding two general municipal elections, but whose names remained on the voter registration list, were not unqualified voters. In no event should their names be removed from the voter registration list." *Id.* at 504, 693 A.2d at 770. The Court further explained that "the voter registration lists are conclusively presumed to be the lists of all qualified voters at any given point in time, as long as reasonable remedies are available periodically to delete from the lists the names of unqualified voters." *Id.* at 505, 693 A.2d at 771. When the BOE here calculated the number of signatures required for MCRG's petition to be successful, it disregarded this crucial principle and ignored tens of thousands of voters who were registered and presumed to be qualified.

The import of these opinions is clear: treating inactive voters differently from active voters and diluting their right to be counted among other voters on matters of substantive concern to the community is unconstitutional. It violates the rights to participate in the political process guaranteed under the Maryland Constitution, along with rights of due process, equal protection, and representative democracy. The BOE's methodology on the MCRG petition was fundamentally flawed and cannot launch an invalid referendum to a place on the ballot.[8]

---

[8] In an *amicus* brief below MCRG contended that the constitutional defects in the petition should be overlooked because the BOE's error was in "good faith" and MCRG detrimentally relied on it. (E451-73) Appellants responded to these arguments in briefing below. (E545-49) In summary, this Court has held that absent very compelling circumstances, not found here, "election officials [may not] effectively change the law by giving erroneous, ambiguous, or misleading instructions to the voters." *Lamb v. Hammond*, 308 Md. 286, 311, 518 A.2d 1057, 1069 (1987). *See also City of Seat Pleasant v. Jones*, 364 Md. 663, 684-85, 774 A.2d 1167, 1179-80 (2001) (administrative errors made by election officials in exercise of their discretion may be overlooked by courts, but not errors in non-discretionary execution of substantive legal requirements). Furthermore, detrimental reliance or promissory estoppel are not available against the State or its agencies (including the BOE) in the performance of governmental, public, or

IV. The Circuit Court Incorrectly Held That The Statute Of Limitations Barred Appellants' Challenge To The BOE's Concededly Unlawful Exclusion Of Inactive Voters And Certification Of A Concededly Insufficient Referendum Petition.

Having concluded that the BOE violated the law in excluding inactive voters and that the petition does not satisfy the requirements for referendum, the circuit court nonetheless held that Appellants' challenge to the sufficiency of the petition, filed within 10 days of the BOE's certification, is time-barred. The circuit court ruled that the 10-day statute of limitations set forth in Elec. Code § 6-210(e) governing challenges brought under § 6-209(a) applies to bar Appellants' challenge under § 6-209(b), and further set the 10-day trigger at a completely arbitrary date. (App5-6, 23) On the basis of this erroneous ruling, the circuit court then concluded that the concededly insufficient referendum should be placed on the ballot for the November 4, 2008 general election. (App23-24) This ruling should be reversed.

First, the lower court's ruling conflicts with the text of the statutes themselves, which make clear that the statute of limitations set forth in § 6-210(e) does not apply to this action brought by these Appellants.

Second, even assuming that § 6-210(e)'s 10-day limitations period did apply, the lower court erred by concluding that Appellants were required to file on or before February 20, 2008. Such a ruling would require that there had been a "determination" of some kind by the BOE on February 10, 2008. No such determination was made on that date.

Third, the court erred by imputing constructive knowledge of the BOE's faulty methodology to Appellants, in violation of long-standing "discovery rule" case law of

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enforcement duties. *See, e.g., ARA Health Servs., Inc. v. Dep't of Pub. Safety and Corr. Servs.*, 344 Md. 85, 96, 685 A.2d 435, 440 (1996). Even if such a theory did extend to a State agency, promissory estoppel or detrimental reliance are inapplicable where the alleged promise on which a party relied would have been a promise to act illegally. *See, e.g., Queen v. Agger*, 287 Md. 342, 346, 412 A.2d 733, 735 (1980). The courts may not enforce an alleged "promise" by the BOE to violate election laws and the Constitution by excluding inactive voters and certifying an insufficient referendum petition.