

1 Elections post office in a timely manner.

2           Had these 125 letters been properly processed and  
3 delivered they would have been in the post office box by May  
4 31. They would have been submitted to the Secretary of State  
5 and they would have been part of this May 31 verification. And  
6 Mr. Roskelly, in his verified complaint, he has stated that  
7 there were approximately three to four signatures per letter  
8 coming in at that time.

9           THE COURT:    So where do you draw the line then?  
10 The mailmen didn't deliver this one, how about the person who  
11 had a flat tire going to the post office and the dog ate the  
12 other one. I mean isn't it logical to say that it's got to be  
13 received?

14           MR. WEST:    Well, I think that, Your Honor we're  
15 talking about the referendum process. This is the only  
16 opportunity for the voters of Maryland to speak to the conduct  
17 of the legislature and to override the legislature. It puts  
18 the vote to the entire electorate. And I think it would be a  
19 terrible justice to prevent that from occurring because the  
20 post office had these in their possession, they were clearly  
21 post-marked six days, at least six, anywhere from 11 to six  
22 days before the deadline and because of staffing shortages they  
23 weren't placed in the appropriate post office box.

24           And we have, I think this is distinguishable from  
25 the one case that's been cited by the State, this New Jersey

1 case where there were absentee ballots that were sent in and  
2 weren't received by I think the day after the election and that  
3 was the deadline. I think there you had a distinct policy  
4 issue which is the finality of elections which is not the case  
5 here. We're mid-stream in the petition process. This is not  
6 the end of the process, it's the middle of the process.

7 THE COURT: Doesn't there have to be some certainty  
8 to the process though? So if we start carving out the post  
9 master shortage then there's some other crises that somebody  
10 couldn't get. That's what I'm saying.

11 MR. WEST: Well, even the New Jersey court  
12 recognized and it was obviously an extraordinary circumstance  
13 of the anthrax scare delaying the mail and so the court in New  
14 Jersey did recognize that exception. I certainly don't, I'm  
15 not going to say that this is of that magnitude, but I think  
16 that exceptions --

17 THE COURT: How about the guy who really, really  
18 wanted to send it in but had a heart attack and just had to go  
19 to the hospital, but he really wanted to support your petition  
20 and he had it on his desk and he really was going to send it  
21 in. Should we accept that one too?

22 MR. WEST: Well, I think that is clearly  
23 distinguishable because what we have here is registered voters  
24 that had actually sent them in. They had signed and sent them  
25 in well in advance of the May 31 deadline. They were received

1 by the post office. If we were just making this contention  
2 sort of out of the blue I would say you're probably right. But  
3 we have an affidavit from the post master down at the Eastport  
4 Post Office --

5 THE COURT: I don't doubt that that's what  
6 happened, the question is what is the legal significance of  
7 that. I mean it was received by the post master but it wasn't  
8 received by the board or by the Secretary of State.

9 MR. WEST: I think in considering the context here,  
10 considering the significant issues that are involved that are  
11 important to the entire electorate of the State of Maryland  
12 that the Court can make an equitable exception if the facts  
13 warrant it. I don't think its warranted if the guy had a heart  
14 attack and wasn't able to get to the post office or if the guy  
15 got a flat tire on the way to the post office --

16 THE COURT: But the Court of Appeals tells me I  
17 have to strictly interpret this law. It's not a matter of  
18 making equitable exceptions. Notwithstanding your suggestion  
19 that this is sort of the populist tool for the referendum, the  
20 Court of Appeals actually has said it really isn't it. What it  
21 is is the opportunity for an organized minority to basically  
22 put a halt to a law that was passed in the ordinary course of a  
23 legislative session.

24 So it's not necessarily, I guess you could debate  
25 the philosophies, and I don't care to do that, but the law is

1 that because it is such an extraordinary remedy that I have to  
2 apply the law strictly. I can't say well, you know, I feel for  
3 you and therefore I should allow the post master's bag to come  
4 in. I mean do you see the law -- forget what sounds appealing  
5 and what I may or may not choose to do because I think its  
6 right. Let me rephrase that.

7           What I might choose to do because I accept sort of  
8 the emotional impact of your argument, but I mean the law says  
9 I've got to look at the law. And if the law says it's got to  
10 be received by the Secretary of State, it's got to be received  
11 by the Secretary of State. And if the UPS guy broke down two  
12 blocks away, that's just the way it goes.

13           MR. WEST: Well, I think that there is a confluence  
14 of counter-mailing policy issue. You've identified sort of one  
15 camp which is this is an organized minority. But the other  
16 camp is --

17           THE COURT: It's not a camp, it's the Court of  
18 Appeals.

19           MR. WEST: Well, but the Court of Appeals has also  
20 recognized that the referendum is an inalienable right that the  
21 people of Maryland have. And I think we have to recognize the  
22 significance of that right and this is the one chance. After  
23 2006 there is no chance to do this by referendum. It's the one  
24 and only opportunity that the citizens of Maryland have to  
25 weigh in on what the legislature has done.

1           And I think when you look at the New Jersey case  
2 that's been cited by the State, I think what comes through  
3 clearly is there are exceptions. There can be exceptions.  
4 What occurred in that case didn't hold up because of the public  
5 policy relating to finality in elections and the concerns about  
6 the perpetration of fraud.

7           We have neither of those here. We have no finality,  
8 we're in the middle of the petition process. And we have no  
9 possibility of perpetration of fraud because clearly these were  
10 received five to 11 days prior to the deadline and the post  
11 master has said these should have been put in the post office  
12 box. And we can't find a more impartial observer in this whole  
13 process than the post master, he feels terribly about it.

14           So I think that that, I understand what you're  
15 saying about the necessity of going by the statute. But I  
16 think there are equitable exceptions that have been recognized  
17 at least in other states. This one issue has never come up in  
18 Maryland. And I do think this is certainly an appropriate  
19 application of an equitable exception that has been recognized  
20 by at least New Jersey.

21           So, I think, Your Honor, this issue with the 125  
22 letters really only comes into play if the Court makes the  
23 determination that what has been done by the Administrator was  
24 appropriate. And I think that because there has been no  
25 petition filed the verification never should have occurred.

1 The determination of sufficiency never should have occurred.  
2 All of these issues are prematurely before the Court really.  
3 And the Court's order really ought to say that all of these  
4 issues should wait until after the final petition has been  
5 filed.

6           And, in addition to that, that what has occurred in  
7 2006 occurred at the right time. This is the time after the  
8 final action of the legislature. This is the time when the  
9 electorate in Maryland should be swinging into action to  
10 address this law.

11           So I think at the end this whole issue about the 125  
12 letters really should be a moot point if the Court follows what  
13 the statute says and follows what the Constitution says about  
14 what it means to be a completed petition.

15           THE COURT: Well, let me ask you this though.  
16 Anticipating the argument that the State has made in this case  
17 which is if your position is correct that they should not have  
18 verified the signatures at this point because there hasn't been  
19 a completed petition, then that whole notion that the petition  
20 should have been filed by May 31<sup>st</sup> and the only reason that it  
21 can be filed by June 30<sup>th</sup> is because a third of the signatures  
22 have been submitted.

23           So under your view you could just put any number of  
24 signatures from anybody that wouldn't qualify and that would  
25 buy you an additional 30 days, right?

1 MR. WEST: Well, I don't think that's, that's not  
2 really a reasonable way to approach this from the Plaintiffs'  
3 perspective. Obviously the interest and the intent of the  
4 Plaintiffs is to submit as many signatures as possible by that  
5 May 31 deadline. But what the import of the Election Law  
6 Article and the Constitution is, when you get to June 30 did  
7 you get three percent? That's the important criteria that the  
8 Maryland Constitution sets out in Article 16.

9 THE COURT: Well the Constitution really says  
10 you've got to file three percent before June 1<sup>st</sup> and only if,  
11 it's sort of an exception to the basic rule which is you've got  
12 to do it all before June 1<sup>st</sup>, but if you can get at least a  
13 third of the signatures then that deadline gets extended to  
14 June 30<sup>th</sup>.

15 MR. WEST: What Section 3B says is that you have to  
16 file one-third before the 1<sup>st</sup> day of June and that was clearly  
17 done. In filing there were 20,221 signatures filed.

18 THE COURT: But it's one-third of the type of  
19 signatures that would be ultimately countable for the  
20 referendum petition. So they can't just be any old signatures,  
21 they have to be real signatures from real qualified voters. I  
22 mean that's their position.

23 MR. WEST: That's their position, but I don't think  
24 that's what the Constitution says. The Constitution does not  
25 say file one-third verified signatures as of June 1<sup>st</sup>. What it

1 says is you have to file one-third of the signatures and the  
2 statute then says --

3 THE COURT: It says "...if more than one-third but  
4 less than the full number of signatures required to complete  
5 any referendum petition..." So it's a type of signature that  
6 you have a third of, it's not just any signature. It's got to  
7 be one-third of the signatures that are required to complete a  
8 referendum petition. Don't you agree?

9 MR. WEST: Well, I don't think that's what the -- I  
10 think you are reading into what the plain words of Section 3B  
11 are here. Because I think all it says is that you're required  
12 to --

13 THE COURT: Well, let me read it and let's make  
14 sure that I'm not reading anything and I'll avoid the  
15 inflections. Section 3B says "...if more than one-third but  
16 less than the full number of signatures required to complete  
17 any referendum petition against any law passed by the General  
18 Assembly be filed before the 1<sup>st</sup> day of June, the time for the  
19 law to take effect and for the filing of the remainder of  
20 signatures to complete the petition shall be extended to the  
21 30<sup>th</sup> day..."

22 So isn't it clear from that language that if you  
23 file a part of the petition, I recognize your position is that  
24 you have not yet filed a petition, but if you filed a third of  
25 that petition if you will then you get to file the other two-



1 thirds in time. But doesn't that, by necessary implication  
2 mean that the third that you have filed would be a legitimate  
3 part of that petition? Or could you file a third, the  
4 numerical equivalent of a third, and then say well you know  
5 half of those are bogus but as long as we go into the next  
6 month and get enough signatures then it doesn't matter?

7 MR. WEST: Well, I do think what Section 3B does  
8 signify is that by June 30<sup>th</sup> you certainly need three percent  
9 of the verified --

10 THE COURT: Well, you would have needed them by May  
11 31<sup>st</sup> except for the fact that you have submitted a third and  
12 you have more time now to get the other two-thirds.

13 MR. WEST: Well, even if that is a correct  
14 interpretation, Your Honor, I still think that we have, what  
15 has been raised in Montgomery County leads to a serious  
16 question about what's occurred. And I think this is, I  
17 understand the nature of the proceedings and the parameters  
18 that the Court has set, however, this is extremely important.

19 If that's going to be a lynch pin or a part of the  
20 Court's determination that one-third verified signatures needed  
21 to be filed by May 31, I don't think we have an accurate number  
22 here. And I think we need to --

23 THE COURT: Well, that may be. And I'm not  
24 debating that point with you, you may be right. I don't know.  
25 I've got to go one step at a time.

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1 MR. WEST: Well, I guess I'm just anticipating  
2 that's the direction that the Court's going. I think what is  
3 absolutely necessary to make this a fair process and to really  
4 adhere to what the intent of the Constitution is we need to get  
5 these invalidated signatures checked in each county's local  
6 database. It's the only way. And it's funny, when you talk to  
7 these local board's officials about MD-voters that the first  
8 reaction is they always laugh. It's like they all know this is  
9 a problem.

10 And I think that what's critical if the Court does  
11 reach that conclusion that one-third of the signatures filed by  
12 May 31 had to be verified, we do not have an accurate count at  
13 this point. And I would be happy, Your Honor, if you want to  
14 schedule in an evidentiary hearing or allow the parties to take  
15 some discovery. I think that would actually solve the problem.

16 Or, I think really even more expeditiously to get to  
17 the root of this is to order the Administrator to send back the  
18 invalidated signatures, which there are only 3,159, we're not  
19 talking about a lot. Have them sent back to the various  
20 counties. Have them run those signatures through their county  
21 database and then we'll have an accurate count.

22 THE COURT: Okay.

23 MR. WEST: Thank you, Your Honor.

24 THE COURT: Thank you. I appreciate it. All  
25 right. Mr. Davis? Excuse me a second.

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1 (Pause.)

2 THE COURT: Yes, sir?

3 MR. DAVIS: Good morning, Your Honor. Mark Davis  
4 on behalf of the Defendants in this case. I'm going to address  
5 two of the three issues for the Court. I'm going to start with  
6 statute of limitations. My colleague Bob Zarnoch will address  
7 the issue of the referability of Senate Bill 478.

8 Now, Your Honor I'm sure understands that none of  
9 the other issues need to be reached if you agree with the  
10 State's position with respect to the statute of limitations.  
11 The key facts are that Mr. Roskelly was first notified on April  
12 25<sup>th</sup> of the Attorney General's position adopted by the State  
13 Board that the 2005 bill could not be referred to referendum.  
14 That's Exhibit 1 of our filing.

15 The Plaintiffs then submitted their 20,000  
16 signatures on May 31<sup>st</sup>. Now the Administrator then on June 8<sup>th</sup>  
17 issued her deficiency determination that the bill could not be  
18 referred to referendum on the advice of counsel because a bill  
19 from the prior year's session that has been superseded by your  
20 appeal and re-enacted may not be referred to referendum.

21 Now, I did not hear counsel dispute the proffer that  
22 we made in our papers that in fact Mr. Roskelly did receive the  
23 June 8<sup>th</sup> transmission. There was a footnote in the complaint  
24 purporting to raise such a dispute that he did not receive it  
25 until June 17<sup>th</sup>. We submitted a transmission sheet, that's

1 Exhibit 2 to our filing, that shows that the document was in  
2 fact received to the same fax number to which correspondence  
3 was routinely sent by Ms. Duncan and Ms. Wagner of the State  
4 Board to Mr. Roskelly and that at least two other faxes were  
5 sent to the same fax number.

6           So I think the record is clear that indeed the June  
7 8<sup>th</sup> determination was received by Mr. Roskelly on June 8<sup>th</sup>.  
8 Notwithstanding the receipt of that transmission, the current  
9 lawsuit was not filed until June 27<sup>th</sup>. The statute of course  
10 requires Election Law Article Section 6-210(e) that a suit must  
11 be filed within 10 days of a deficiency determination. So the  
12 Plaintiffs were required to file this suit by June 19<sup>th</sup> and  
13 that's true because June 18<sup>th</sup> fell on a Sunday.

14           Of course they did not file this action until the  
15 27<sup>th</sup> and it is our position that this action is barred by  
16 limitations. It was perfectly proper for the Administrator to  
17 notify Mr. Roskelly on June 27<sup>th</sup> that its failure to challenge  
18 the June 8<sup>th</sup> determination within 10 days ended the petition  
19 process.

20           Now Plaintiffs argue that the Administrator  
21 improperly, prematurely declared a deficiency because they were  
22 not required to submit all of the signatures until June 30<sup>th</sup>.  
23 And secondarily I suppose, although he didn't say as much, that  
24 the local boards had no right to verify petition signatures.  
25 And it is our position that this argument violates the Maryland

1 Constitution.

2           We agree with the Court's questions, or at least  
3 what seem to be behind the Court's questions that --

4           THE COURT:   Don't read anything into my questions.  
5 I'm really trying to explore your views.   Don't take any  
6 consolation from my questions to Mr. West.

7           MR. DAVIS:   Okay.   Well, I think it's clear that a  
8 sensible reading of Sections 3A and 3B of Article 16 requires  
9 that there be a threshold number of valid signatures.  
10 Otherwise a petitioner could simply submit 17,062 signatures  
11 from Mickey Mouse and they would have satisfied the  
12 Constitutional threshold under that reasoning.

13           It has always been the practice on the part of the  
14 State Board for every other petition that has been filed for  
15 the verification process to take place immediately upon the  
16 submission of those signatures on May 31<sup>st</sup>.

17           Now, as the Court is aware, Section 3A requires that  
18 the petitioners file three percent of the signatures of the  
19 registered voters, and that's an important point, that the  
20 statute, or excuse me the Constitutional provision actually  
21 refers to registered voters before the 1<sup>st</sup> day of June.   But  
22 the period is extended if and only if the petitioners submit  
23 one-third of the signatures by the 1<sup>st</sup> day of June.

24           Now the Plaintiffs' argument seems to be that we  
25 should ignore the one-third requirement and whether the

1 petition is legally sufficient at all and has the required  
2 number of signatures. Now, there are at least two things wrong  
3 with this argument in our view.

4           First, it ignores the Court of Appeals' recognition  
5 of the Tyler case which we cited in our papers, that  
6 constitutional provisions involving the referendum process must  
7 be strictly construed. Because what we have here is the  
8 potential to overturn the will of popularly elected  
9 legislature, in this case three-fifths of the members of the  
10 General Assembly who voted to override the Governor's veto. So  
11 strict construction is required.

12           And secondly, it ignores the petition that is  
13 pending on June 1<sup>st</sup> must be a valid and legally sufficient  
14 petition as the Able case held. Again, we cited that case in  
15 our papers.

16           To accept Plaintiffs' argument would lead to a  
17 nonsensical result. We'd have to ignore the thousands of hours  
18 of petition --- verification activity by the local board. And  
19 we've proffered some of that evidence in our papers. For  
20 example, Baltimore City spent 87.5 hours counting and verifying  
21 signatures on Senate Bill 478 alone. Harford County, another  
22 60 hours. ---

23           THE COURT: But aside from the significant effort,  
24 I mean if it was effort that was misguided does that make a  
25 difference? Should that affect my decision?

1 MR. DAVIS: No, Your Honor, but I think the fact  
2 that the Board has always interpreted it that way and the  
3 legislature aware of the Board's interpretation does not see  
4 fit to change the statute. We cited the Sussman v. Malone case  
5 in which the Court of Appeals recognized that the State Board's  
6 interpretation under the statute should be given great  
7 deference.

8 And that's what we have here. We have an ongoing  
9 activity not limited to this year --

10 THE COURT: Some deference I think they said.

11 MR. DAVIS: Well, some deference, correct, Your  
12 Honor.

13 THE COURT: Not great deference.

14 MR. DAVIS: But I think it's important to  
15 understand the common sense, real world consequences of  
16 Plaintiffs' interpretation. And that is that part of the  
17 purpose of verifying the first batch of signatures is to spare  
18 the local boards the burden of doing twice as much work after  
19 June 30<sup>th</sup> when twice as many signatures must be submitted. And  
20 here you have a specter of another possible 90,000 signatures.

21 So if the petition is legally defective as it was  
22 here, what sense would it make to construe the Constitutional  
23 provision and wait until after June 30<sup>th</sup> for the Attorney  
24 General to give his advice and for the Administrator to act on  
25 that advice, after the verification of 53,000 signatures, to

1 inform the petitioners of that deficiency? Here it makes sense  
2 to start the clock running as soon as possible, as soon as the  
3 Administrator is aware of the legal deficiency and she did  
4 start the clock running on June the 8<sup>th</sup> when she issued her  
5 deficiency determination.

6 That way additional signature gathering and  
7 verification could be avoided if the petitioners failed to file  
8 a timely suit, which they did here.

9 Now, our second argument is that Plaintiffs failed  
10 to obtain the required number of signatures. Now, the State  
11 Administrator receives reports from the 24 local boards and  
12 notified Plaintiffs on June 21<sup>st</sup>, within the 21 days required  
13 by Election Law Article 6-210<sup>o</sup> that they had not met the one-  
14 third Constitutional threshold.

15 So Plaintiffs met the statutory deadline, this was a  
16 20-day deadline and they were required to meet it and they did  
17 meet it. Plaintiffs have not met their statutory deadline and  
18 they're asking this Court to invoke the so-called equitable  
19 considerations and basically ignore a statutory requirement.

20 They denigrate our citation of the New Jersey case,  
21 but it's important to recognize that the Plaintiffs have cited  
22 no authority whatsoever for this extension, apart from these  
23 equitable considerations.

24 Now, even if we accept the premises that there were  
25 125 pieces of mail sitting in the East Port Post Office which



1 had never been submitted to the State Board or even reviewed by  
2 the Anne Arundel County Board, that situation does not justify  
3 altering a statutory deadline. There needs to be finality to  
4 the process. The legislature had that finality in mind when  
5 they established the 20-day deadline.

6           As the New Jersey court recognized, the purpose of  
7 such a deadline is to avoid fraud and to have finality to the  
8 election process. Now, I said that this lawsuit is a moving  
9 target because we're hearing things in Court this morning that  
10 we've never heard before and its impossible to respond to the  
11 fragments of evidence and to the smoke about the Maryland  
12 voters system.

13           The Montgomery County attempts to count more  
14 signatures happened after the 20-day deadline. And the General  
15 Assembly was mindful of the need for a deadline and they  
16 established a deadline. And the Administrator receiving the  
17 reports from the local jurisdictions met that deadline.

18           Plaintiffs in their pleadings, which they do not  
19 repeat here, have tried to invoke a specter of fraud and have  
20 made groundless attacks on the State Administrator and the  
21 State Board with alleged so-called secret meetings with the  
22 democratic party. They've relied on newspaper accounts.  
23 They've actually quoted from republican party officials. But  
24 there's no evidence of any of this and I'm happy to hear that  
25 counsel has retreated from these reckless, baseless allegations

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1 this morning. He has not included that in his presentation.

2 Newspaper articles are not evidence. Conversations  
3 with an unnamed election directors on the telephone are not  
4 evidence.

5 THE COURT: How would you suggest that we flesh out  
6 whether those facts are facts or whether they're just  
7 speculation? I mean I recognize that this whole thing is on a  
8 short time line, but --

9 MR. DAVIS: Well, it is on a short time line, Your  
10 Honor, and because the General Assembly required that such a  
11 challenge be filed within 10 days, I think implicit in that is  
12 the understanding that the evidence has to be presented within  
13 10 days as well. It can't be a movie without an end or a  
14 continuing story. We have to take the deadline seriously and  
15 the Plaintiffs have not done that.

16 The other so-called evidence of fraud that  
17 Plaintiffs cite and it was mentioned this morning, is the 2001  
18 directive by the State Board verifying signatures is not  
19 subject to the open meetings act. Counsel did not dispute the  
20 conclusion that in fact the open meetings act does not apply.  
21 He simply suggests that there's something mysterious and  
22 improper in allowing State officials to do their work without  
23 party operatives from both the democratic and republican  
24 parties peering over their shoulders as they did in Florida in  
25 2000. I don't think we want that here in the State of

1 Maryland.

2 But, nonetheless, I think the implication of some  
3 impropriety simply because the open meetings act does not apply  
4 and that this was suggested by the State Board in 2001 for a  
5 different petition process, not this petition process, is  
6 insufficient to draw the conclusion of wrongdoing.

7 That's basically my argument. I'll be happy to  
8 answer any questions that the Court has.

9 THE COURT: Well, let me, I don't want to overlook  
10 the fact that there have been some allegations and that there  
11 are at least some basis for those allegations, that there might  
12 be some errors. I'm not necessarily suggesting fraud, I'm not  
13 necessarily suggesting even irregularities, but that there are  
14 some errors between the databases or what have you.

15 And again, given the rapidly moving litigation that  
16 we have, do you feel that there is any method by which those  
17 could be explored, either through the Court process or at the  
18 Board level to make sure that if those signatures are rejected  
19 they were properly rejected because of real reasons. Or, do  
20 you feel that the petitioners have to basically not only file  
21 their petition but come up with all the appropriate evidence  
22 and get a Circuit judge in Anne Arundel County to find the time  
23 to hear an evidentiary hearing within the period of 10 days?

24 MR. DAVIS: I think that the latter formulation is  
25 the correct one. That's the formulation that the statute

1 requires. If the General Assembly wanted to drag this process  
2 out and have mini-trials on the Maryland voters system it would  
3 have created some statutory provisions to permit that. But we  
4 don't have that, Your Honor.

5 Mr. Zarnoch is going to address the issue of a  
6 referred ---

7 THE COURT: Thank you, sir. Mr. Zarnoch?

8 MR. ZARNOCH: May it please the Court. Your Honor,  
9 I'm going to address the issue of whether as a matter of law  
10 Senate Bill 478 of 2005 can still be petitioned to referendum  
11 since it's been in effect and law for four months and it was  
12 amended again by the 2006 General Assembly.

13 We say the issue is controlled by examining two  
14 provisions of the Constitution: Article 16, Section 2 that  
15 you've heard about and Article 2, Section 17 which you have not  
16 heard at all about. You really have to take those two  
17 provisions and put them side by side to reach the answer here.

18 A timely filed petition under Article 16 suspends a  
19 bill from becoming a law and taking effect, unless it's an  
20 emergency bill and emergency bills cannot be suspended. They  
21 can still be petitioned to referendum, but its only the action  
22 of the voters that can repeal essentially emergency law.

23 Nothing in Article 16 allows a petition of a law  
24 that's already taken effect. You can't suspend that law from  
25 taking effect. If you look at Article 2, Section 17, that's

1 the provision dealing with gubernatorial veto and veto  
2 overrides. A bill enacted by override if it's a non-emergency  
3 bill generally becomes law at the language of Article 2,  
4 Section 17, and takes effect 30 days after the override.  
5 That's exactly what happened to Senate Bill 478.

6           It took effect under the provisions of Article 2,  
7 Section 17 and has been a law for four months and is being  
8 implemented. There is no mechanism in Article 16 to suspend  
9 such a law. If you look at the text of Article 16 it doesn't  
10 allow that sort of thing.

11           Now, we're not saying you can't petition to  
12 referendum a veto override, we agree with the Plaintiffs in  
13 that regard. The interesting thing is when the language about  
14 veto override was included in the referendum amendment back in  
15 1914 when it was proposed and 1915 when it passed, when it was  
16 approved by the voters, veto overrides occur during the same  
17 sessions bills were presented during the session to the  
18 Governor and veto overrides occurred during the session.

19           So there was really, if those bills were ever  
20 petitioned, and frankly I'm not aware of any veto override  
21 that's ever been petitioned in referendum in Maryland history,  
22 they would have done it in the same session, as terms of  
23 original intent.

24           We argue that you should have petitioned this bill  
25 to referendum in 2005. That was the proper course to take. We

1 say that because of the language of Article 16 and Article 2,  
2 Section 17. And it's not an irrational course of action given  
3 the time frames and the petitioners' typical lack of knowledge  
4 of what the Governor is going to do.

5           Attached to our memorandum is a series of dates,  
6 dates of the last vetoes the Governor did over the last 40  
7 years or so. And it's instructive to look particularly at the  
8 last 30 years. Governors typically wait to the end to reveal  
9 their veto decisions. Now, it didn't happen here, I'm sure the  
10 Governor would have announced the first day he would veto this  
11 bill. But in terms of the typical decision, they're made late  
12 and you can see the veto dates.

13           And interestingly enough, the way the calendar  
14 works, considering the Governor has 50 days under Article 2,  
15 Section 17 to make his veto decision, 15 days from the end of  
16 the session. Legally, two years out of every seven he can, he  
17 does not have to make his veto decision until June 1<sup>st</sup> or June  
18 2<sup>nd</sup> any time a General Assembly session ends April 12<sup>th</sup> or 13<sup>th</sup>  
19 those 50 days work out to a period after the referendum  
20 petitions must be filed.

21           So the wise petitioner lacking the knowledge of what  
22 the Governor is going to do and given those deadlines, has to  
23 gather the signatures anyway. If you gather those signatures  
24 and validate them and then they're sufficient, you will prevent  
25 the overridden bill from taking effect and you will fit

1 literally the language of Article 2, Section 17.

2           We say that's the way it works. Is it cumbersome?  
3 It could be cumbersome, but that's the only scenario we say  
4 that works. Otherwise you're allowing the voter, you're  
5 allowing petitioners, just a fraction of the voters to suspend  
6 a law that's already in existence. And I think that was not  
7 intended by the framers.

8           We've included --- says, the 1974 Constitutional  
9 Amendment to Article 2, Section 17 that set up this mechanism,  
10 the effectiveness in their 30 days after the override.

11           THE COURT: I'm sorry, I wanted to -- because I saw  
12 that and candidly I wasn't sure what the -- Chapter 883?

13           MR. ZARNOCH: Yes. Chapter 83, 1974.

14           THE COURT: That's a '74 amendment?

15           MR. ZARNOCH: Yes.

16           THE COURT: Okay.

17           MR. ZARNOCH: That is the latest expression of the  
18 voters on this issue. Article 16, Section 2, the key provision  
19 that provides for referendum has not been substantively amended  
20 in any respects really since 1915. So Article 2, Section 17 we  
21 say is the latest expression of intent. And the intent was we  
22 want these bills, these override bills to take effect  
23 regardless of whether and how it squares with the referendum  
24 article.

25           It is interesting to note in that '74 bill, '74

1 Constitutional amendment, as introduced there was an attempt to  
2 jibe it with the referendum amendment and provide for a 30-day  
3 petitioning period after the veto override. All that was  
4 stricken from the bill.

5 So all we are left with is the General Assembly's  
6 intent and the voters' intent that they want those veto  
7 override bills to take effect right away or 30 days.

8 Your Honor, a complicating factor in this case is  
9 that in 2006 the legislature amended key provisions of the 2005  
10 legislation. And it didn't just amend it, it repealed and re-  
11 enacted with amendments those sections. Now, if --

12 THE COURT: You're talking about Senate Bill 478?

13 MR. ZARNOCH: No, the house bill was not really  
14 before you but it's that bill also amended key provisions of  
15 the 2005 bill.

16 THE COURT: Okay. I'm sorry.

17 MR. ZARNOCH: Now, if the 2005 bill had been  
18 petitioned to referendum in 2005 subsequent legislation  
19 repelling and re-enacting it would knock it off the ballot.  
20 The 2005 bill would not have been able to be put on the ballot  
21 because of the subsequent amendments by the General Assembly.  
22 So we offer that as another reason, an alternative reason, for  
23 not allowing referendum here. And these issues are issues of  
24 law.

25 If Your Honor were to agree with this there's no



1 need to get to the other issues or requiring factual disputes  
2 that may exist about signatures.

3 THE COURT: Well let me, I'm just trying to catch  
4 up with my thoughts. You're talking about the fact that  
5 because there was an amendment, a re-enactment of the original  
6 bill which was --

7 MR. ZARNOCH: Key portions. It didn't enact  
8 everything.

9 THE COURT: That's what I was getting at. That it  
10 didn't, it wasn't a total re-enactment so there were certain  
11 portions of 478 initially that remained in effect and then they  
12 fine-tuned some of the hours and locations and so forth, right?

13 MR. ZARNOCH: Yes, and they also ---

14 THE COURT: Right. So it's not a complete re-  
15 enactment?

16 MR. ZARNOCH: It's not a complete re-enactment,  
17 Your Honor, but those provisions, the provisions though that  
18 were re-enacted and amended are integral to what was already  
19 there, almost non-severable from what was there.

20 THE COURT: But if for the sake of argument the  
21 petitioners were successful in rejecting the house bill, the  
22 2006 enactment --

23 MR. ZARNOCH: Yes.

24 THE COURT: -- then it's not as if there would be  
25 nolo on a subject --

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1 MR. ZARNOCH: No, no that's --

2 THE COURT: -- you'd still revert back to 478?

3 MR. ZARNOCH: That's true, Your Honor, that's true.

4 THE COURT: Right. So it still, it stands on its  
5 own legs ---

6 MR. ZARNOCH: Some of it stands on its own, but the  
7 terms of the latest expression of the General Assembly what  
8 they wanted was of course what was now on the 2006 bill.

9 THE COURT: Right.

10 MR. ZARNOCH: Your Honor, that's really all I have  
11 to say on the subject. I'll be happy to answer any questions  
12 you may have.

13 THE COURT: Well, Mr. West's position I think is  
14 pretty clear that it is somewhat of a futile gesture for any  
15 petitioner to go through I'm sure its significant effort of  
16 getting all these many signatures if there is no law in effect  
17 because a Governor has vetoed it.

18 MR. ZARNOCH: Your Honor, that would be true if you  
19 knew ahead of time that the Governor was going to veto and the  
20 Governor timely told you that. As I said, it doesn't work that  
21 way. Veto decisions are announced late May typically. And I  
22 said, I wrote a list of veto dates that will show you that's  
23 when it happens. Governors usually don't veto bills unless  
24 they're presented during a session, which is a whole other  
25 story.

1           Governors don't veto bills --- . Governors don't  
2 veto bills in early May. They veto bills in late May. And so  
3 you don't know and you just gather your signatures any way.  
4 But under our scenario that would work in case there was an  
5 override and it would give effect to the language of Article  
6 16, Section 2 and Article 2, Section 17 in that you would then  
7 suspend the effectiveness of the bill before it becomes law.

8           So we're saying that's how, that's the way it works,  
9 the whole way it works.

10           THE COURT: Thank you.

11           MR. ZARNOCH: All right. Thank you, Your Honor.

12           THE COURT: All right. Mr. West?

13           MR. WEST: Yes. Thank you, Your Honor.

14           I guess I'll start with, since we all have it sort  
15 of fresh in our minds, what Mr. Zarnoch was discussing. I  
16 believe Mr. Zarnoch said something to the effect that nothing  
17 in Article 16 allows filing a petition in support of a  
18 referendum for a law that has already taken effect. I think  
19 that is actually completely contrary to what Section 1A of  
20 Article 16 says. Which in fact specifically identifies an act  
21 that is "...passed by the General Assembly over the veto of the  
22 Governor as one that is subject to the referendum process..."  
23 And I think --

24           THE COURT: When it's passed by the General  
25 Assembly over the veto it is not yet law, it is law 30 days

1 thereafter, right?

2 MR. WEST: Right.

3 THE COURT: So I'm not sure that what you're saying  
4 and what he's saying are necessarily inconsistent. I'm sorry,  
5 what you're saying is not what -- Article 16 is saying its not  
6 a law yet, it's still a bill. It's about to be a law, but I  
7 think that's what he was saying.

8 MR. WEST: It was my understanding Mr. Zarnoch's  
9 argument that it was not even possible to petition for  
10 referendum on a law that is then in the temporal time line  
11 we're dealing with here where a bill is initially passed by the  
12 General Assembly in 2005 and vetoed by the Governor in 2005 and  
13 then overridden in 2006, his argument is you can't then  
14 initiate the referendum process in 2006 at that point in time.

15 And I think that that's contrary to the plain  
16 language Section 1A, which says that you can bring up a  
17 referendum an act that is passed by the General Assembly over  
18 the veto of the Governor. It doesn't place any time  
19 restrictions on that. It just says that's the appropriate  
20 moment for referendum, specifically it's when it's passed by  
21 the General Assembly over the veto of the Governor.

22 And I think really hand in glove with that point is  
23 the definition of passed, pass and passed. And Section 3C of  
24 Article 16 says "In this Article pass or passed means any final  
25 action upon any act or part of any act by both houses of the

1 General Assembly..." and I don't think anyone can look at  
2 Senate Bill 478 and say that the final act was anything other  
3 than the veto override. That has to be the final act. The  
4 final act was clearly not what happened in April 2005. The  
5 final act when you lay the time line out was what happened in  
6 January 2006.

7           And once that definition of passed is reached, then  
8 you can go through the petition process to put something on the  
9 ballot for referendum. So I think this argument of the State  
10 while it's creative and it looks at other provisions of the  
11 Constitution, it ignores the plain language of the referendum  
12 article in the Constitution which within its four corners the  
13 plain language allows the Plaintiffs to do what's being done  
14 here, which is to petition for referendum after the legislature  
15 has overridden the veto.

16           THE COURT: But again, just sticking with Section  
17 1A, what is subject to a referendum is an act. Capitalized,  
18 A-c-t, so that's a term of art that means essentially a bill.

19           MR. WEST: Right.

20           THE COURT: And if the bill is passed, but once the  
21 bill is passed and 30 days go by and it becomes law, then we're  
22 talking about a different kettle of fish aren't we?

23           MR. WEST: Well, I think that you can only get to  
24 that point if you ignore what the definition of passed is in  
25 Section 3 --

1 THE COURT: Well there's a lot of plain language  
2 here that leads us to different interpretations. So which is  
3 the plainest or the most sensible?

4 MR. WEST: Well, I think the plainest is when you  
5 have a definition certainly you have to apply the definition.  
6 And what the Constitution says in Section 3C "In this Article  
7 pass or passed means any final action..." And there's no way  
8 anybody could read anything other than the veto override as the  
9 final action. It just wouldn't make sense otherwise.

10 And I think that while we may have sort of found our  
11 way into a sort of nook that the State finds uncomfortable, the  
12 remedy here is not to throw out this petition process. If they  
13 want to fix this problem then amend Article 16. But this is  
14 what Article 16 says. And this is what we're dealing with.  
15 This is the law that we have to deal with this petition  
16 process.

17 And I think, Your Honor, common sense is never a bad  
18 thing to apply and why would anybody go through this process?  
19 I mean the State calls it the wise petitioner, the one that  
20 goes through the petition process at a time when a bill is  
21 vetoed and that doesn't make any sense at all.

22 THE COURT: Well, it does make sense when you look  
23 at it historically because as Mr. Zarnoch I think said when  
24 this article was enacted it was at a time when the vetoes were  
25 done and the overrides were all done within the session. And

1 then you would have that logical time flow. Maybe the times  
2 have changed to the point where this is archaic.

3 MR. WEST: Well, the times have changed and maybe  
4 the time has changed if the State feels like or the legislature  
5 feels like they need to initiate an amendment to the  
6 Constitution to remedy what they deem is a problem here, that's  
7 the legislature's prerogative. That has not been done at this  
8 point. And we need to operate with regard to this case and  
9 this petition process on what the definition of passed is.

10 THE COURT: But then you have inconsistent  
11 provisions in Constitution. I mean I understand your position  
12 on that, but I can't overlook Article 2. I can't say well that  
13 must not apply.

14 MR. WEST: I just don't see any way to get beyond  
15 the four corners of Article 16. I understand that there is --

16 THE COURT: The only way to get to that is to  
17 ignore Article 2. I mean that's the State's position.

18 MR. WEST: The only way to get to the State's  
19 position is to ignore what's specifically in Article 16 and the  
20 definition of passed. That's the only way to get there. And I  
21 think that its incumbent upon the legislature to the extent  
22 they feel this is a problem to change this in the future. But  
23 they can't use this as a basis for throwing out ---

24 Their changing the rules of the game after the fact.  
25 I think on this point about House Bill 1368 I would like to

1 clarify because I think the Court seems to have some questions  
2 about what it changed about 478.

3           House Bill 1368 only changed, it did a lot of things  
4 but in connection with 478 the only things that are meaningful  
5 are instead of eight hours a day for early voting it was from  
6 7:00 a.m. until 8:00 p.m.

7           THE COURT:    Right.

8           MR. WEST:    And also specified the locations in  
9 seven jurisdictions.  And 478 stands on its own.  The early  
10 voting scheme was enacted by 478.  And if that bill goes up for  
11 petition there is no early voting.  That bill stands on its  
12 own.  1368 only changed certain procedures about the way 478  
13 works.

14          THE COURT:    Right.

15          MR. WEST:    I would like to address a couple of  
16 points raised by Mr. Davis as well.  I know that the Court has  
17 expressed some reservation about accepting any evidence, but I  
18 do think that given the way things have unfolded here in the  
19 last two days, with the footnote in the complaint said that  
20 Mr. Roskelly did not receive the paper, the June 8<sup>th</sup> letter  
21 until January -- I'm sorry, June 17.  And they're relying on I  
22 guess a fax confirmation receipt.

23                 Well I have a fax confirmation sheet from  
24 Mr. Roskelly's fax machine that shows that he had no paper in  
25 the fax machine and the fax was not received until June 18<sup>th</sup>.



1 So if that's of any --- to the Court I'll be happy to provide  
2 this to the Court to fill out the record on this point. But  
3 obviously this is not an argument that I anticipated in making,  
4 so --

5 THE COURT: It was mailed I understood also, right?

6 MR. WEST: It was mailed too.

7 THE COURT: All right. So therefore, if all else  
8 fails the basic rule would be you add three days. That's the  
9 rule under Maryland Rules so it's untimely by that standard,  
10 right?

11 MR. WEST: Well, I think that you have --

12 THE COURT: Well, I shouldn't -- that's a loaded  
13 question.

14 MR. WEST: --- definition of petition, I've got an  
15 hour and a half --

16 THE COURT: I didn't mean to suggest that. It was  
17 not filed within 10 days after the letter was sent. Let's put  
18 it that way.

19 MR. WEST: It was not. If that matters of any  
20 moment then that's correct, Your Honor.

21 THE COURT: Well, it's a fact. Whether it's  
22 legally significant is a different question I understand.

23 MR. WEST: Right.

24 THE COURT: Yes.

25 MR. WEST: I think Mr. Davis asked the question of

1 the Court why does it make sense for the Administrator to wait  
2 to make a deficiency determination and to verify the signatures  
3 until the final petition? And my answer to that is that's what  
4 the statute says. If the General Assembly wanted the  
5 Administrator to make a determination of deficiency and verify  
6 the signatures at some time prior then the statute certainly  
7 can say that, but that's not what it says. Everything is  
8 hinged upon the filing of the petition.

9           And I do want to address this point Mr. Davis raised  
10 about fraud. Fraud is their word. There has never been an  
11 allegation of fraud by the Plaintiffs in this case. The  
12 purpose of reciting some of those newspaper accounts is really  
13 just to fill in the background of the case for the Court.  
14 We're just trying to get the right result here. We're not  
15 making allegations of fraud that we can't back-up.

16           And I think the final point here is, really goes  
17 back to Montgomery County. And this is really a crucial point  
18 because --- and this is something we only learned about  
19 yesterday.

20           But they're, the State is taking the position that  
21 these 121 signatures cannot be counted as of May 31. And why?  
22 Because somebody from the county Board of Elections realized  
23 after they sent in their results of this verification process  
24 that they had been doing it incorrectly, that MD-voters wasn't  
25 picking up all of the verified, all of the registered voters in

1 Montgomery County.

2           They ran the invalidated signatures through the  
3 database and realized they were 121 short. If the State's  
4 position here is allowed to stand then they have completely  
5 subverted what in actuality should be the referendum process on  
6 something that is completely out of the Plaintiffs' control.  
7 They had no control over how the local boards of elections did  
8 their verification process.

9           The only thing that the Plaintiffs can count on and  
10 hope for is that its done right. And I think clearly here the  
11 Montgomery County Board of Elections realized they didn't do it  
12 right and to their credit they sent in 121 additional  
13 signatures. And this is flagged an issue that demonstrates the  
14 problem with the database that everybody is supposed to be  
15 using.

16           So I really, I do think that as part of the Court's  
17 order I think that all else aside I think there should be an  
18 order, part of the order should require the Administrator to  
19 send back the invalidated signatures to have them run through  
20 the county database. That's the only way we're going to find  
21 out what actually happened. Who are the actual registered  
22 voters that support this petition.

23           THE COURT: Thank you, sir. I appreciate it.

24           MR. WEST: Thank you, Your Honor.

25           THE COURT: Mr. Zarnoch, I'm going to ask you to

1 step up again because I'm still struggling with one issue here  
2 that Mr. West is raising. Which is, I guess, reconciliation of  
3 the language in Article 16, Section 1 that there are two  
4 actions that trigger a referendum or a potential referendum.  
5 One is a passage of a bill in the ordinary course with a  
6 signature by the Governor and the other is after it is vetoed  
7 and then overridden. And that's obviously a main theme in this  
8 case and I want to make sure that I have as much input as I can  
9 because that complicates matters.

10 MR. ZARNOCH: Yes, Your Honor.

11 THE COURT: So I guess address his point that the  
12 final act of the legislature is the override and that's what  
13 the definition of passed means.

14 MR. ZARNOCH: Well, I think, Your Honor, you really  
15 have to look at those provisions in conjunction with Section 17  
16 which complicates matters. You can't get full effect to  
17 Article 2, Section 17 if you're going to allow the referendum  
18 under these circumstances.

19 THE COURT: Well can you give full effect to  
20 Section 16 if you interpret Article 2?

21 MR. ZARNOCH: Well, 16 too and if your talking  
22 plain language, but the plain language of Article 16, Section 2  
23 and Section 3 talks about preventing a bill from taking effect.  
24 That's the key language of those provisions. You can read them  
25 consistently with Article 2, Section 17.

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1           But once it has become effective the referendum  
2 article doesn't allow a mechanism to suspend it. That's why  
3 we're saying that the final act would be the act of the General  
4 Assembly in the year past because of the operation of Article  
5 2, Section 17 and the very limitations contained in the  
6 referendum article itself that you only suspend a bill from  
7 becoming a law, you don't suspend a law that's been in effect  
8 because the language won't allow it.

9           And as I said, you can point to little portions of  
10 Article 16 all over to support an argument, but the basic  
11 thrust, the basic premise of the referendum article is  
12 suspending a bill before it becomes a law.

13           THE COURT: All right. Just stand by for a second,  
14 let me just reread for about the 90<sup>th</sup> time Section 3 here.

15           MR. ZARNOCH: Sure.

16           (Pause.)

17           MR. ZARNOCH: Your Honor, both Section 3B and talks  
18 about preventing a law from taking effect "...may not become  
19 effective..." and the same language of course appears in  
20 Article 16, Section 2. That's the theme of the referendum  
21 article, suspending a bill from becoming a law.

22           THE COURT: But 3C is I guess the sticking point  
23 which is that it says "In this Article pass or passed means any  
24 final action upon any act or part of an act..." so is there a  
25 way to read that to mean, to make sense in the context of all

1 of this stuff?

2 MR. ZARNOCH: I think you have to do damage to  
3 Article 2, Section 17 and to the theory. You have to change  
4 the idea of what makes a bill take effect. I mean this bill  
5 took effect under Article 2, Section 17, it was already there.  
6 The rest of the language, the relevant language of both of  
7 these provisions of Article 16, Sections 2 and 3 say you can't  
8 reach it at that point because you already have a law.

9 So we suggested one way to reconcile them, the final  
10 act would be the act of the General Assembly passing the bill  
11 at a session that it -- or, if it did the veto override by  
12 presenting the bill during the session which is really what was  
13 contemplated when this thing got off the ground in 1914, the  
14 referendum article.

15 Otherwise you do damage to Article 2, Section 17 and  
16 even the language of Article 16, Section 2 and 3.

17 THE COURT: Thank you.

18 MR. ZARNOCH: Thank you, Your Honor.

19 THE COURT: Anybody else have anything to say, add?

20 MR. WEST: I don't have anything further, Your  
21 Honor.

22 THE COURT: All right. Thank you.

23 So unless you have some better suggestion I was  
24 going to, I'm not trying to keep anybody in suspense but I  
25 really have to muddle through these things a little bit more

1 carefully. And I'd like to, unfortunately I have a pre-  
2 existing docket this afternoon so I'm not sure that I can  
3 address it this afternoon.

4 I'm going to I guess reiterate what has been I think  
5 agreed that the Board or the Secretary of State will accept  
6 such other signatures as the Plaintiffs in this case have and  
7 they will be segregated I'm sure at some appropriate place. So  
8 that will at least preserve the record and then I will render  
9 an oral opinion tomorrow morning at 9:00 o'clock if that suits  
10 your calendars. Or if you'd prefer to do it another time  
11 that's fine too.

12 MR. WEST: May I, Your Honor?

13 THE COURT: Yes, sir.

14 MR. WEST: My concern, I don't know, I have no idea  
15 how the State Board of Elections warehouses the information  
16 that they receive. I would just ask and I'm sure they probably  
17 would be the same way that it would be in a secure location.  
18 To the extent that the verification process ---

19 THE COURT: So not in Ms. Lamone's trunk of the  
20 car, anything like that?

21 MR. WEST: I'm sure it's a safe place, but I think  
22 it should be segregated somewhere so that we have no questions  
23 about what is going to be verified ---

24 THE COURT: Right. Well, is it fair to assume that  
25 you have copies or is that, maybe it's not fair to assume.

1 MR. WEST: It is not fair to assume that.

2 THE COURT: Okay. I don't know. I'm trying to  
3 envision how many pieces of paper that is. Is there some, I  
4 don't know that it's something that I need to necessarily  
5 involve myself in, but can we agree that those petition, or the  
6 remainder of the petition will be kept in a safe and secure  
7 location separate from the others so that we can then address  
8 that question?

9 MR. DAVIS: I don't see that as a problem.

10 MR. WEST: And that's included in that request the  
11 one's that have already been submitted so we can have  
12 everything together?

13 THE COURT: Well, it's also distinguishable so we  
14 can then address the question if necessary as to whether those  
15 signatures need to be verified separate and apart from the  
16 other signatures. Will that be all right?

17 MR. WEST: --- Yes, absolutely.

18 THE COURT: Now --

19 MR. WEST: Your Honor, if I may?

20 THE COURT: Yes, sir.

21 MR. WEST: I just am concerned about because some  
22 of these issues with regard to MD-voters and concerns ---  
23 they've really been something I learned about yesterday. We  
24 didn't have the opportunity to present this to the Court in  
25 some sort of formal way, I would just ask the Court accept



1 what's been stated as a proffer that that is --- as a proffer  
2 from an officer of the Court I'm just trying to relay what I've  
3 heard.

4 THE COURT: Well, no, I appreciate that. I guess  
5 the first question is what's in the pleadings. And I guess I  
6 will take your comments as being perhaps an offer not only to  
7 state what the evidence might be but also to amend the  
8 complaint to include that.

9 MR. WEST: Yes, absolutely. Because we, obviously  
10 if this would have been a normal case we would have had time to  
11 get either do it through an evidentiary hearing or do it  
12 through discovery or do it some way where we'd actually attach  
13 the pleadings, that --- for an affidavit that actually set  
14 forth these facts we've alleged.

15 THE COURT: All right. Do you wish to be heard on  
16 this?

17 MR. DAVIS: I just want to renew my objection for  
18 the same reasons as previously stated.

19 THE COURT: All right. Well, I'm going to address  
20 that tomorrow. Okay. I'm going to think about it. But I  
21 really, I'm going to say up front that it seems to me that  
22 under the circumstances it would not be beyond the pail to  
23 consider in some way the allegations that there are some  
24 irregularities or some mistakes in the tally if you will.

25 MR. WEST: And my comment on MD-voters is not a ---

1 I do not mean this in any way to indicate that we have any  
2 evidence that there is an irregularity. I think that what we  
3 have is a new system that is flawed and that's all we're  
4 saying.

5 THE COURT: Okay. And again, if it was merely  
6 counsel's or counsel's client's conjecture that something may  
7 not be working right then I would say you've got to have more  
8 than that. But there was a proffer of an affidavit, there  
9 seems to be some tangible evidence that there's more to this  
10 than just a concern. And I think that I'm amenable to figuring  
11 out a methodology to deal with it, but there's got to be some  
12 way in which this issue can be addressed whether it be, I mean  
13 there's not much time for further hearings between today and  
14 tomorrow, but as long as we all preserve the documents and know  
15 what the deal is then we can address that.

16 If you need additional time to flesh it out I don't  
17 mind giving you that time. But I do think that under the  
18 circumstances this whole process is a rather extraordinary  
19 process to come into Court with a days notice and obviously  
20 State hasn't had a whole lot more notice than I have, but I  
21 guess you kind of saw it coming and I didn't.

22 But in any event I think that perhaps if you want to  
23 discuss between yourselves a method, I don't know that you need  
24 full-blown discovery. I don't know whether there are some  
25 facts that are ultimately not going to be in dispute to address

jmm

1 the question of whether there is a problem let's call it with  
2 the way in which the votes were counted. Assuming, for the  
3 sake of argument that it matters.

4 I was assuming that my decision is that it does  
5 matter. In other words we're in the proper setting to address  
6 the merits and that the merits include whether or not the  
7 totals that were counted of that one-third signatures, if that  
8 is relevant, then there ought to be some way to make sure that  
9 they're accurate. So I encourage you to figure out a method to  
10 deal with it.

11 Now I don't know the logistics of sending 3,000 or  
12 so names back for retally, I don't know if that's a big deal or  
13 not. I would think in percentage terms it may not be a huge  
14 amount, but I don't know.

15 MR. WEST: I will say this much because I don't  
16 pretend to know a lot about what it takes to verify a  
17 signature, but in speaking to Robert Antonetti who is the Board  
18 of Elections Administrator in Prince George's County, he didn't  
19 think it would take, they're were 319 that were invalidated in  
20 Prince George's County. He said it would take minimal time and  
21 effort to verify those signatures if they were sent back to  
22 them. They sent all --- back to the State Board. He didn't  
23 think it would take much time at all.

24 THE COURT: Is it, I'm guess that the 3,000 or so  
25 signatures are spread throughout the state, although obviously

1 in some population centers more than others?

2 MR. WEST: Yes.

3 THE COURT: So it would involve some fraction of  
4 that per local board I guess.

5 MR. WEST: Right.

6 MR. DAVIS: Your Honor, if this is an issue of  
7 purely academic interest due to the defense that we raised in  
8 this case, I wish to reconsider the statement I made previously  
9 and that is that we would prefer the Court to make findings  
10 with respect to the three issues. I think to the extent that  
11 the Court can avoid burdening the local election boards any  
12 further, they have other things to do than conduct exercises on  
13 what we think is largely an academic issue given what we think  
14 is the clear law with respect to limitations and the non-  
15 referability of Senate Bill 478.

16 THE COURT: Well, the problem is after you're done  
17 here you're going to go down to Rowe Boulevard and anywhere  
18 between three and seven wiser and more senior people may  
19 totally disagree with my decision. And ultimately it becomes a  
20 moot point if time passes on. And certainly my life is easier  
21 if I just address one issue rather than the whole bunch. But  
22 I'm just wondering if ultimately that doesn't basically takes  
23 the legs out from under what may be a legitimate dispute.

24 MR. DAVIS: Your Honor, as the Court is certainly  
25 aware, the Court of Appeals does have a provision for

1 expediting these election law disputes. And I'm sure that if  
2 this Court would issue a decision tomorrow we'd be in the Court  
3 of Appeals probably early next week. Of course there's a  
4 holiday on Tuesday, but with great dispatch we'd be at the  
5 Court of Appeals.

6 THE COURT: I'm sure you would.

7 Well, that's fine. I mean let me look at all of the  
8 issues and like any judge I guess I wouldn't address an issue  
9 that's not properly before the Court, but I would do it as an  
10 advisory opinion if it turned out to be that I find that there  
11 is a problem with the jurisdiction if you will.

12 But all right. I'm sure you want to be back at  
13 9:00, but you don't have to. I'm just going to sit here and  
14 dictate my opinion to whoever happens to be in the courtroom.  
15 And I appreciate your presentations. I appreciate everybody  
16 putting this thing together so quickly. And I'll see you  
17 tomorrow at 9:00 if you'd like to be here. Thanks.

18 MR. WEST: Thanks, Your Honor.

19 (Whereupon, the hearing was recessed to reconvene on  
20 June 30, 2006 at 9:00 o'clock a.m.)

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C E R T I F I C A T E

CompuScribe hereby certifies that the attached pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Anne Arundel County in the matter of:

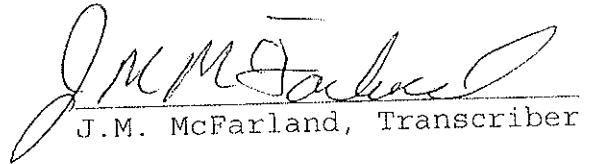
Civil No. C-2006-115044

THOMAS ROSKELLY, et al.

v.

LINDA H. LAMONE, et al.

By:

  
J.M. McFarland, Transcriber

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

----- x  
 :  
 THOMAS ROSKELLY, et al., :  
 :  
 Plaintiffs, :  
 :  
 v. : Civil No. C-2006-115044  
 :  
 LINDA H. LAMONE, et al., :  
 : Annapolis, Maryland  
 Defendants. :  
 :  
 ----- x June 30, 2006

COPY

ORAL OPINION

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAUL A. HACKNER, Judge

APPEARANCES:

FOR THE PLAINTIFFS:

JOHN H. WEST, Esquire  
 JAMES H. WEST, Esquire  
 409 Washington Avenue, Suite 10101  
 Towson, MD 21204

FOR THE DEFENDANTS:

ROBERT ZARNOCH, Assistant Attorney General  
 MARK DAVIS, Assistant Attorney General  
 Maryland State Board of Elections  
 P.O. Box 6486  
 Annapolis, MD 21401

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THE COURT: Good morning. Please be seated.

This is the matter of Thomas Roskelly, et al. v. Linda Lamone, et al., C-06-115044. Would counsel please identify yourselves and spell your last names for the reporter.

MR. WEST: James West on behalf of the Plaintiffs. W-e-s-t.

THE COURT: Good morning.

MR. WEST: John West on behalf of the Plaintiffs.

THE COURT: Good morning.

MR. DAVIS: Mark Davis on behalf of the Defendants.

MR. ZARNOCH: Robert Zarnoch on behalf of the Defendants.

THE COURT: All right. Good morning.

Counsel, you gave me a lot of homework to do the last couple of days and I'll tell you that the issues raised in this motion and the response are very complex, interesting to say the least, and difficult to meander through. And I've done the very best I could to do that.

I have very carefully and repeatedly reviewed the pleadings and the statute as well as the Maryland Constitution. And have really addressed the issues raised, not necessarily in the order that perhaps is the most logical order, but to try to really address every issue in my mind and make sure that I didn't sort of predetermine which way I was headed until I



1 really explored all of the aspects of it.

2           But when it comes down to the way in which the Court  
3 needs to address the issues there is a threshold issue and that  
4 is whether or not this petition, or let me not use the word  
5 petition, the motion for judicial review was timely filed and  
6 whether or not it is time barred.

7           And for the reasons that I'm going to explain to you  
8 I find that it is not timely filed, that it is time barred and  
9 that the motion for judicial review must be denied.

10           We start off with some sort of basic principles  
11 which are that aside from applying common sense to the reading  
12 of the Constitution or the statute we have to try to coordinate  
13 the sections of a statute or to coordinate the statute, I mean  
14 the Constitution, so that its various components make sense  
15 internally.

16           It is clear to me that there are not really any  
17 significant disputes of fact as to the timeliness or the  
18 untimeliness of the filing of the motion. The question really  
19 comes down to whether or not the time clock starts. That's  
20 obviously the main thrust of the Defendants' position, I'm  
21 sorry, the Plaintiff's position, that the time clock does not  
22 start because there has not yet been filed a petition. I'm  
23 using air quotes, to therefore start the clock and that the  
24 clock would start only upon the filing of a completed petition.

25           There are some basic principles that I start off

1 with. One of which is that the statute, which is the Election  
2 Law Article that contains the definition of what a petition is,  
3 cannot be interpreted to be inconsistent with the Constitution.  
4 That's I think pretty clear from the Constitution and the  
5 statute itself.

6 And, it is equally clear that the requirements of  
7 the entire petition for referendum process have to be strictly  
8 construed because it's an extraordinary remedy and one that is  
9 really, I think as we discussed yesterday although there is the  
10 notion that is for the public good, it is however an  
11 extraordinary departure from the ordinary course of the  
12 legislative process.

13 And so the Court of Appeals has made it very clear  
14 that these rules and the procedures have to be very strictly  
15 applied and so it is not a matter of using the Court's  
16 equitable powers to say well, you know, was it close enough?  
17 Should we go forward?

18 Article 16, Section 2 of the Constitution provides  
19 that no law takes effect until the 1<sup>st</sup> day of June that follows  
20 the session where the law was passed by the legislature. And  
21 that's sort of the basic default law, default rule if you will.  
22 If however before the 1<sup>st</sup> day of June there is a petition  
23 filed, and I'm emphasizing the word petition, then that act or  
24 that bill does not become law until it is ultimately approved  
25 either by the Governor -- I'm sorry, it is not approved until

1 after the whole process of the referendum takes place.

2           The petition must be signed by at least three  
3 percent of the qualified voters. And that's the document that  
4 needs to be filed before the 1<sup>st</sup> of June, in other words, May  
5 31<sup>st</sup>. Now there's an exception to that which is contained in  
6 Section 3 of the Constitutional Article. And that is if you  
7 have one-third of the number of signatures, not the entire  
8 three percent but one-third, in other words one percent, then  
9 that deadline is extended to June 30<sup>th</sup> and it says "to complete  
10 the petition".

11           So, it seems to me completely incongruous to  
12 consider the document or the documents that were filed on or  
13 before May 31<sup>st</sup> as being anything less than or anything other  
14 than a petition. It is not a complete petition to be sure, but  
15 the language that is in the Constitution makes it quite clear  
16 to me at least that it is a petition nonetheless and that the  
17 process that takes place between May 31 and June 30 is the  
18 completion of the petition.

19           So, it isn't just a bunch of signatures in a vacuum.  
20 There is additional support for my feelings on this point,  
21 which is in Section 3D, which talks about signatures on a  
22 petition for referendum can be signed at any time after the  
23 act. So again, we're not talking about a signature in a  
24 vacuum, but we're talking about a signature on a petition.

25           It is a petition if it has one signature. It is a

1 petition if it has 100. It is a petition if it has 1 million.  
2 And the statutory definition of petition which is in 6-101(i)  
3 simply tells the parties what all of the documents are that  
4 need to be submitted eventually for the process to take place  
5 and for the verification process and the certification process.

6 I don't believe that the Constitution would permit  
7 or for that matter common sense would permit me to take that  
8 definition and read it the way that the Plaintiffs in this case  
9 would want which is to say that unless a petition is 100  
10 percent complete and perfect it is not a petition. Otherwise  
11 we would engage in an obviously circuitous argument that you  
12 can never have a petition unless it's perfect and so why is  
13 there any reason to certify it at all.

14 It just doesn't make any sense to say it's not a  
15 petition unless it is 100 percent submitted with all the  
16 signatures and all of the various attachments. I think a  
17 reading, and the only reading I should say of Section 3 of the  
18 Constitution is that there is a petition process. And that the  
19 petition process can be a single petition or that it can be  
20 fragmented into two installments essentially. One that's  
21 requiring only a third of the signatures and then the other  
22 requiring the balance.

23 And that I think sort of as an aside is the reason  
24 why I believe that the Board of Elections has not only the  
25 right but the obligation to verify that the third, the one

1 percent, signatures are valid, are of qualified voters and so  
2 forth.

3           Because again, it would seem to me completely  
4 nonsensical to suggest that a process which has these two  
5 components could allow the first component to be a number of  
6 signatures that are not valid and then at the end come in with  
7 the valid signatures. It's quite clear that you've got to  
8 have, at least to me it's quite clear, to have at least a third  
9 of the signatures and they must be valid signatures.

10           There's an additional clue I think as to what the  
11 framers of the Maryland Constitution intended the concept of a  
12 petition to mean. In Article 11A which is not related to  
13 referendum, but is related to county charter amendments and  
14 petitions for those, a provision that is mentioned in the  
15 Thicker v. Denny case that was actually I think, urged upon the  
16 Court by the Plaintiffs yesterday, the county charter  
17 amendments in certain counties can be proposed by a petition  
18 that is signed by a certain number of qualified voters, 20  
19 percent.

20           And then there is a provision that says however that  
21 10,000 signatures shall be sufficient to complete a petition.  
22 So the drafters of the Constitution obviously, at least in that  
23 context, and I think we can certainly infer from that that in  
24 other contexts, consider the concept of a petition as something  
25 that was not just a single unitary perfect document but one

1 that might be incomplete at some points.

2           So, to me it stands to reason and I so find that the  
3 document or the documents that were filed with the Board on May  
4 31<sup>st</sup> would constitute a petition, albeit an incomplete  
5 petition.

6           So, we then come to the letter that was written on  
7 June 8, 2006 by the Administrator of the Board. And that  
8 letter indicated that the petition for referendum as to the  
9 Senate Bill was not timely because it should have been filed in  
10 the prior year and not in the current year. To me that is a  
11 clear compliance with the Election Law Article, Section 6-206.  
12 "Is a determination under 6-206 that the petition is  
13 deficient." That in turn triggers 6-209(e) which says "That a  
14 person that is aggrieved is required to file for judicial  
15 review by the 10<sup>th</sup> day following the determination."

16           Yesterday we heard that the decision of the  
17 Administrator was faxed and mailed to Mr. Roskelly. There was  
18 some suggestion that he might not have received the fax, but  
19 there certainly wasn't any indication that he didn't receive  
20 the mail. And even if we were to add three days to that for  
21 the mailing which is applicable to Court pleadings, and I'm not  
22 suggesting that is necessarily applicable to this statutory  
23 provision. But even if we were to add that it's quite clear  
24 that the motion for judicial review was not timely.

25           It is also, again just a clue in my view to the

1 concept that a petition is not just the final petition. That  
2 Section 6-208 of the statute in (a)(2) which talks about the  
3 certification process says that "...the board shall among other  
4 things determine if the petition has satisfied all other  
5 requirements established by law if it has not done so  
6 previously." So there again the law seems to suggest that this  
7 is not a one-shot deal where you have to wait until the last  
8 date and then look at it to see whether it is sufficient.  
9 In other words the statute contemplates that the review of the  
10 petition is not going to happen just in one time.

11           So for these reasons I find that the motion for  
12 judicial review must be denied because it is time barred.  
13 There is, as I touched upon yesterday, in addition to the  
14 portion of the pleading that is called motion for judicial  
15 review, there was also a request for declaratory judgment.

16           If for the sake of argument that stood on its own  
17 and if there were issues that were not dispositive, or I should  
18 say that were not disposed of, then one could argue that that  
19 request for declaratory judgment would still be viable.

20           However, it seems to me that the fact that the  
21 determination made by the Board that the filing of the petition  
22 for referendum was untimely makes the other issues moot. They  
23 simply are not material at this point. They may be interesting  
24 issues and they may be issues of interest in terms of  
25 procedures that are followed or have been followed, but it is

1 not for the Court to rule on something that is essentially  
2 moot.

3           And for the same reason, although I insinuated  
4 yesterday that I might consider giving advisory opinions, I  
5 feel that it is not appropriate under the circumstances to do  
6 that. So I will reserve any comment that I may have as to the  
7 merits of the motion and simply indicate that the Court finds  
8 that the motion is untimely, it's time barred. And therefore  
9 it is denied.

10           I will give a copy of the hearing sheet to counsel  
11 and you're welcome to take it down to Rowe Boulevard and see  
12 what they say.

13           Thank you very much, counsel.

14 MR. DAVIS: Thank you, Your Honor.

15 MR. WEST: Thank you, Your Honor.

16 THE CLERK: All rise.

17 (Whereupon, the hearing was concluded.)

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25 Keynote: "----" indicates inaudible in the transcript.



C E R T I F I C A T E

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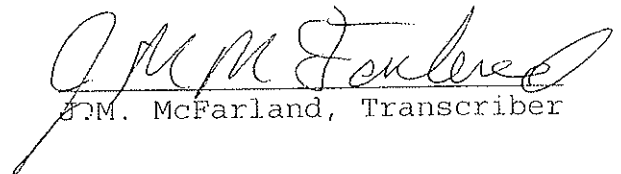
Civil No. C-2006-115044

THOMAS ROSKELLY, et al.

v.

LINDA H. LAMONE, et al.

By:

  
J.M. McFarland, Transcriber



Civil Hearing Sheet  
IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Thomas Roskelly, et al.  
Plaintiff  
(James West/John West)

Case No. C-06-115044 DJ

Date: June 29, 2006

VS

Linda Lamone, et al.  
Defendant  
(M. Davis/R. Zamoch)

Clerk: M. Smith - 3D

Case called for Hearing on Motion (Emergency)

In Open Court before Judge Paul A. Hackner

Counsel heard. Court to render oral opinion to motion on the record, June 30, 2006 at 9:00 a.m. Court retained file.

June 30, 2006 -- Case resumed. Parties present. Court denied motion for judicial review as being time-barred.

Paul A. Hackner, Judge  
Circuit Court for  
Anne Arundel County

Judge

FILED  
JUN 30 A 10:19

TRUE COPY,

TBST: Robert P. Duckworth, Clerk

By: S.L.B. Deputy

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