IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2008

No. 87

STOP SLOTS MD 2008, *et al.*,

Appellants,

v.

STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

On Appeal from the Circuit Court for Anne Arundel County
(Ronald A. Silkworth, William C. Mulford, II, and Philip Caroom, Judges)

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellants oppose slot machine gaming and, accordingly, they oppose legislation enacted during the Maryland General Assembly's 2007 Special Session that placed the slots issue on the November 2008 ballot. One of the Appellants, Delegate Michael D. Smigiel, Sr., sued the State last year to invalidate the same legislation that is at issue in this case. In that recent case, *Smigiel v. Franchot*, No. 121 (September Term, 2007), this Court rejected constitutional challenges to the Special Session legislation and affirmed a declaratory judgment that the legislation was enacted in compliance with the Maryland Constitution.

In the instant lawsuit, Delegate Smigiel and his new co-plaintiffs, represented by the same lead attorney as in *Smigiel v. Franchot*, challenge the same legislation they challenged in *Smigiel v. Franchot*, and rehash many of the same arguments that failed in that case. Appellants contend that the legislature acted unconstitutionally and, on that basis, ask that this Court remove the proposed constitutional amendment from the ballot. This Court refused that request in *Smigiel v. Franchot*, and the result in this case should be the same.

Appellants also express dissatisfaction with descriptive language that will appear on the November ballot and in a non-technical summary of the proposed constitutional amendment that voters will receive before the election. As alternative relief, Appellants ask that the ballot language and summary be revised.

On September 10, 2008, a three-judge panel of the Circuit Court for Anne Arundel County, convened pursuant to Md. Code Ann., Election Law ("EL") § 12-203(a)(2), rejected Appellants' claims that the challenged enactments are impermissible delegations of legislative authority; that the legislature did not propose a valid constitutional amendment on slots; that legislation to implement slots gaming in Maryland, if the constitutional amendment is approved, is invalid because it is contingent; that the implementing legislation's title violates Article III, § 29 of the Maryland Constitution; and that the non-technical summary is deficient. (Apx. 1-11.) The circuit court also rejected Appellants' broad attacks on the ballot language and on the summary of the

ballot question that voters will receive before the election. The court did, however, direct a one-word addition to the ballot question. (Apx. 2, 5-9.)

On September 11, 2008, the Secretary of State revised the ballot language in accordance with the circuit court's instruction. (Apx. 12-13.) That same day, Appellants filed a direct appeal to this Court under EL § 12-203(a)(3). The appeal is being considered on an expedited basis under EL § 12-203(b).

QUESTIONS PRESENTED

1. Did the circuit court correctly reject constitutional challenges to the video lottery enactments of the General Assembly's 2007 Special Session, consistent with this Court's rejection of similar constitutional challenges in *Smigiel v. Franchot*?

2. Did the circuit court, after directing a one-word addition to the ballot question on video lottery gaming, correctly determine that both the revised ballot language and the Department of Legislative Services' non-technical summary of the ballot question are accurate and not misleading?

STATEMENT OF FACTS

Like *Smigiel v. Franchot*, this case involves constitutional challenges to enactments of the 2007 Special Session of the General Assembly. Appellants also challenge the Secretary of State's and Department of Legislative Services' performance of their duties in implementing one of those enactments.

A. The Legislature's Enactment of Chapters 4 and 5 of the 2007 Special Session.

On October 15, 2007, the Governor issued Executive Order 01.01.2007.23 proclaiming the convening of the General Assembly in special session. (Defendants' Exhibit 1 (Executive Order).)[1] The Governor explained that Maryland faced a projected $1.7 billion structural deficit for Fiscal Year 2009 (*i.e.*, July 1, 2008 through June 30, 2009), and similar budget shortfalls in future years. (*Id.*) Outlining a plan to cut spending and raise revenue, the Governor advised the General Assembly that "[s]tructural reform [of the budget] is the only long-term solution to this problem," and it needed to be accomplished by January 2008. (*Id.*)

At the outset of the 2007 Special Session, the Administration introduced in both chambers of the legislature a package of six bills that would generate budget savings and raise new revenue beginning in Fiscal Year 2008. (*See* Complaint (Circuit Court Doc. No. 1) Exhibit D (summarizing fiscal impact of Administration bills).) The Governor's plan for resolving the structural deficit included, among other actions, revising the personal and corporate income taxes to generate additional revenue, closing corporate tax loopholes, and increasing the tobacco tax, while also making targeted new investments in transportation, education, and health care. (*Id.*) On November 19, 2007, the bills enacted during the Special Session – representing an amended version of the Governor's

[1] "Defendants' Exhibit" refers to the exhibits appended to Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Emergency Motion for Relief (Circuit Court Doc. No. 14).

legislative package – were presented to the Governor, who signed them into law. (Defendants' Exhibit 2 (summarizing enacted legislation).)

The first Special Session enactment at issue in this case, Chapter 5 of the 2007 Special Session (passed as House Bill 4), proposed for adoption by the voters under Article XIV, § 1 of the Maryland Constitution a constitutional amendment on video lottery terminals. (Complaint Exhibit C.) Under Chapter 5, the proposed constitutional amendment will be submitted to the voters in the general election on November 4, 2008. (*Id.* at 4.) If approved, new Article XIX of the Constitution would authorize video lottery terminals, or "slot machines," in the State, but only under a set of constitutional restrictions. Specifically, the number of video lottery operation licenses would be limited to five; there could be no more than 15,000 video lottery terminals; the terminals would be located in up to five areas of the State, which are designated in the constitutional provision; and video lottery facilities would be subject to local planning and zoning laws. (*Id.* at 2-4.) These new constitutional restrictions could be eased only through future legislation that a majority of voters authorize at a referendum. (*Id.* at 4.)

Chapter 5 also addresses the purposes for which video lottery revenues may be used, if the constitutional amendment is approved. Under proposed Article XIX, video lottery licenses issued by the State must be "for the primary purpose of raising revenue" for: (1) public school education in prekindergarten through grade 12; (2) public school

construction and capital improvements; and (3) construction of capital projects at community colleges and public senior higher education institutions. (*Id.* at 2.)

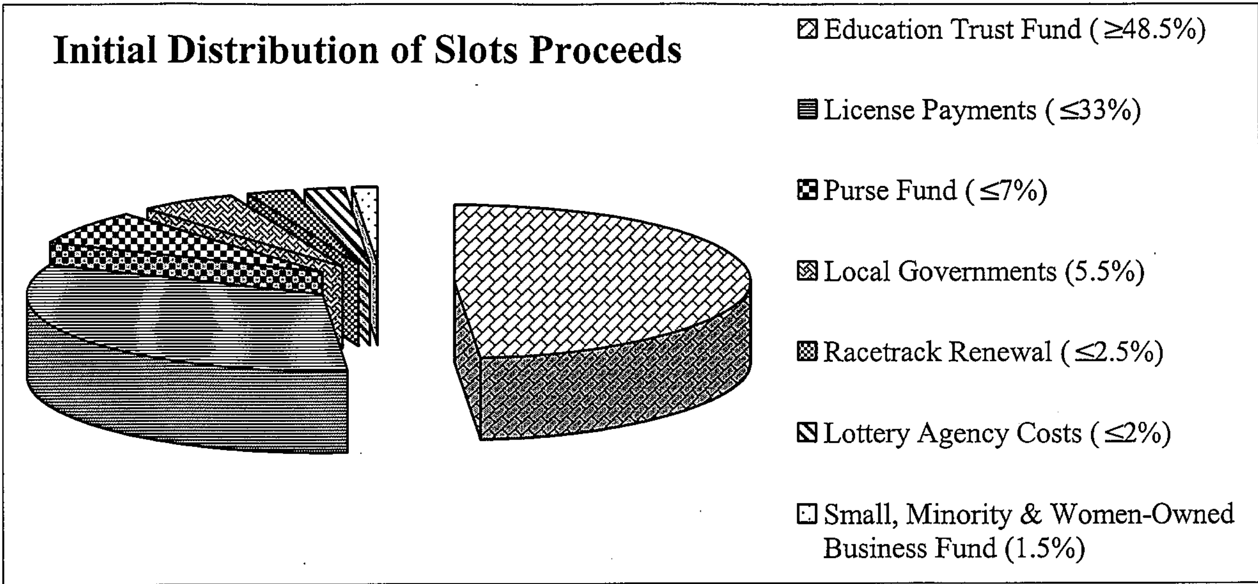
The second enactment at issue in this case is Chapter 4 of the 2007 Special Session (passed as Senate Bill 3), a 74-page law that implements the proposed constitutional amendment if the voters approve the amendment in November. (Complaint Exhibit B.) Chapter 4 specifies how the proceeds from slot machines are to be calculated and distributed consistent with Chapter 5. Chapter 4 requires that, on average, at least 87 cents of every dollar played in a slot machine must be returned as winnings to slots players. (*Id.* at 44.) Of the proceeds that remain, a percentage will be paid to the slots operator to recover its investment and operating expenses. The exact amount paid to the operator will be determined by competitive bidding among the potential operators who seek a license, but may not exceed 33 percent. (*Id.* at 48-49; *see id.* at 66-68 (establishing investment requirements and selection criteria for video lottery licensees).)

Small percentages of the proceeds are distributed for various purposes. The State Lottery Agency, which would own and operate the video lottery terminals, recovers its operating costs, but only up to 2 percent of the proceeds. (*Id.* at 12-13, 48, 49.) The horse racing industry is supported with a purse fund representing as much as 7 percent of gross slots proceeds (up to $100 million annually), and 2.5 percent of the proceeds (up to $40 million annually) for facilities renewal for the first 8 years of video lottery gaming. (*Id.* at 49.) An account benefiting small, minority, and women-owned businesses will

receive 1.5 percent of the proceeds. (*Id.* at 49.) Five-and-a-half percent of the proceeds will be used for local impact grants, mostly for local jurisdictions in which video gaming terminals are located. (*Id.* at 49, 54-57.)

All the remaining proceeds – amounting initially to *at least* 48.5 percent of the total proceeds and rising after the first 8 years to *at least* 51 percent – benefit education. To meet the proposed constitutional mandate that video lottery terminals must be for the primary purpose of raising revenue for specified educational purposes, Chapter 4 establishes a new Education Trust Fund, a dedicated account that, consistent with the constitutional amendment proposed by Chapter 5, may only be used to fund public elementary and secondary education, public school construction and capital improvements, and capital projects at community colleges and public senior higher educational institutions. (*Id.* at 53-54.) After the distributions described above are made, the Education Trust Fund receives all remaining proceeds. (*See id.* at 48-49.) As noted, moreover, many of the statutory distributions involve not-to-exceed percentages. If the actual statutory payment is less than the percentage cap, then the excess is paid into the Education Trust Fund. (*Id.* at 49.)

Graphically depicted, these distributions are:



Contributions into the Education Trust Fund will amount to approximately three-quarters of the proceeds that remain after the video lottery terminal operators and State Lottery Agency are paid to cover the costs of running the gaming operations.

B. *Smigiel v. Franchot*

On December 13, 2007, Delegate Smigiel (a plaintiff here) and other opponents of the Special Session enactments filed a complaint for declaratory and injunctive relief in the Circuit Court for Carroll County, in which they challenged the constitutionality of Chapter 5, Chapter 4, and the other laws of the 2007 Special Session. As in this case, Delegate Smigiel and his co-plaintiffs argued that Chapters 4 and 5 are constitutionally invalid because they constitute "a comprehensive revenue and appropriations package expressly contingent upon voter approval," and supposedly call for an "impermissible referendum." (Defendants' Exhibit 3, at 17 (circuit court decision).)

On January 10, 2008, the circuit court entered an Opinion and Declaratory Judgment dismissing *Smigiel v. Franchot* and confirming the constitutional validity of the challenged statutes. The circuit court explained that the bill enacted as Chapter 5 "was introduced and validly passed by both houses of the legislature, and because it is a proposed Amendment to the State Constitution, the measure falls under the guidelines of Article XIV, § I." (*Id.* at 19.) Chapter 4, the court further determined, "is a valid piece of contingent legislation, and as such is not subject to invalidation." (*Id.*) The circuit court accordingly entered a declaratory judgment that both Chapter 5 and Chapter 4 were "enacted in compliance with the Constitution of the State of Maryland." (Defendants' Exhibit 4.)

This Court granted a writ of certiorari to review the circuit court's decision (September Term 2007, No. 121). 403 Md. 304 (2008). On March 12, 2008, this Court issued a per curiam order affirming the judgment of the Circuit Court for Carroll County. 403 Md. 637.

C. The State's Preparation of Ballot Language and a Non-Technical Summary.

With the constitutionality of Chapter 5 thus upheld, the State prepared to present the proposed constitutional amendment to the voters. Although Chapter 5 requires a vote on proposed Article XIX at the general election to be held on November 4, 2008 (Complaint Exhibit C, at 4), it does not establish the language of the ballot question. Under the Election Law Article of the Maryland Code, the Secretary of State is assigned

the task of preparing the text that will appear on the ballot. EL § 7-103(c)(1). This text must contain:

> (1) a question number . . . ;
> (2) a brief designation of the type or source of the question;
> (3) a brief descriptive title in boldface type;
> (4) a condensed statement of the purpose of the question; and
> (5) the voting choices that the voter has.

EL § 7-103(b). When a statewide ballot question is to be presented to the voters in a November general election, the Secretary of State must "certify" this information to the State Board of Elections ("State Board") by the third Monday in August. EL § 7-103(c). On August 18, 2008, the third Monday in August this year, the Secretary of State submitted to the State Board his ballot text for the constitutional amendment on video lottery terminals.

In addition to the Secretary of State's drafting of ballot language, the nonpartisan Department of Legislative Services ("DLS") is charged with preparing a "non-technical summary" of the proposed constitutional amendment, which the Attorney General must approve. EL § 7-105(b); *see also* Md. Code Ann., State Gov't § 2-1204(1). The DLS summary must contain "a brief statement, prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the question." EL § 7-105(b)(1). The DLS summary for Chapter 5 is two pages long. (Complaint Exhibit E.) After describing the provisions of proposed Article XIX in faithful detail, the summary then describes the provisions of the implementing legislation:

> During the 2007 Special Session, the General Assembly also passed companion legislation (Chapter 4 - Senate Bill 3) that provides for a statutory framework for the licensure and regulation of commercial video lottery facility operations by the State Lottery Commission and the award of video lottery facility operation licenses by a Video Lottery Facilities Location Commission. The legislation also provides that the revenues generated by video lottery terminal gaming activities are to be distributed as follows: a minimum of 48.5% to the Education Trust Fund; no more than 33% to the video lottery operating licensees; 7% to horse racing purses (not to exceed $100,000,000 annually); 5.5% in local impact grants; 2.5% to the racetrack facility renewal account, not to exceed $40,000,000 annually (for the first 8 years only); 2% to the lottery agency for costs; and 1.5% to the Small, Minority, and Women-Owned Businesses Account. That companion legislation is contingent on the approval of this constitutional amendment.

(Complaint Exhibit E, at 2.) The local boards of elections will provide DLS's summary to voters along with the ballot question itself, by a specimen ballot mailed at least one week before the election. *See* EL §§ 7-105(a), 8-102, 9-214; COMAR 33.05.07.01.B (requiring pre-election mailing).

The State Board must certify the "content and arrangement" of each ballot style used throughout the State, on a statutory timetable. EL § 9-207(a). The deadline for certifying the content and arrangement of the ballot styles to be used in this year's general election was September 10, 2008, and the State Board met that deadline. *See* EL § 9-207(a)(2)(i) (certification must occur 55 days before date of election in presidential election year).

D. The Circuit Court's Rejection of Appellants' Challenges to Chapters 4 and 5, and Revision of the Ballot Language.

On August 28, 2008, Appellants filed a complaint in the Circuit Court for Anne Arundel County making constitutional and statutory challenges to Chapter 5 (the proposed constitutional amendment), Chapter 4 (the implementing legislation), the Secretary of State's ballot language for the slots amendment, and the DLS summary of the slots question. (Cir. Ct. Doc. No. 1.) Appellants also filed motions for an "emergency" decision on the merits (Cir. Ct. Doc. No. 7) and for a hearing before a three-judge panel of the circuit court under EL § 12-203(a)(2) (Cir. Ct. Doc. No. 9).

After a hearing on September 10, 2008, a three-judge panel of the circuit court (Judges Ronald A. Silkworth, William C. Mulford, II, and Philip Caroom) issued a Memorandum Opinion finding, in accord with the affirmed circuit court declaration in *Smigiel v. Franchot* (Defendants' Exhibit 3), that Chapters 4 and 5 are valid and consistent with the Maryland Constitution (Apx. 7). The panel also held that the title of Chapter 4 is constitutionally sufficient (Apx. 9-10) and the DLS summary of the slots ballot question "is not misleading and does not violate the standards set forth in the Election Law Article" (Apx. 10). The panel further concluded, however, that while the Secretary of State's ballot language described proposed Article XIX as "[a]uthoriz[ing] the State to issue up to five video lottery licenses for the purpose of raising revenue for education," the language should say that Article XIX "[a]uthorizes the State to issue up to five video lottery licenses for the *primary* purpose of raising revenue for education."

(Apx. 7-9 (emphasis added).) The court ordered inclusion of this additional word. (Apx. 2.)

On September 11, 2008, the Secretary of State provided the State Board revised ballot language consistent with the circuit court's decision. (Apx. 12.) The revised ballot question is:

> **Question 2 - Constitutional Amendment**
>
> (Chapter 5, Acts of 2007 Special Session)
>
> **Authorizing Video Lottery Terminals (Slot Machines) to Fund Education**
>
> Authorizes the State to issue up to five video lottery licenses for the primary purpose of raising revenue for education of children in public schools, prekindergarten through grade 12, public school construction and improvements, and construction of capital projects at community colleges and higher education institutions. No more than a total number of 15,000 video lottery terminals may be authorized in the State, and only one license may be issued for each specified location in Anne Arundel, Cecil, Worcester, and Allegany Counties, and Baltimore City. Any additional forms or expansion of commercial gaming in Maryland is prohibited, unless approved by a voter referendum.
>
> (Enacts new Article XIX of the Maryland Constitution)
>
> ☐ For the Constitutional Amendment
>
> ☐ Against the Constitutional Amendment

(Apx. 13.) The revised ballot language has been posted on the State Board's website, where it appears with the DLS summary and the text of Chapter 5. *See* www.elections.state.md.us.

Also on September 11, 2008, Appellants filed a notice of appeal under EL § 12-203(a)(3).

ARGUMENT

This Court's decision in *Smigiel v. Franchot* in part forecloses Appellants' attacks on the video lottery enactments of the General Assembly. Appellants' arguments, moreover, are wrong. No principle of constitutional law prevents the General Assembly from allowing Maryland voters to decide whether to authorize video lottery gaming with constitutional guidelines that will constrain future legislatures. Nor is there any constitutional prohibition on the General Assembly's enactment of implementing legislation that anticipates and is contingent upon the voters' possible approval of the proposed constitutional amendment.

The revised ballot question prepared by the Secretary of State according to the circuit court's instruction, and the non-technical summary of Chapter 5 that DLS prepared, are lawful as well. Each document independently provides voters a clear and understandable summary of the proposed video lottery amendment; together, the ballot language and summary provide voters a robust understanding of the General Assembly's proposal.

I. APPELLANTS' CHALLENGES TO CHAPTERS 4 AND 5 ARE LARGELY FORECLOSED BY *SMIGIEL V. FRANCHOT* AND, IN ANY EVENT, ARE UNFOUNDED.

In *Smigiel v. Franchot*, this Court rejected the constitutional arguments that are here revived, frequently in the exact same words, by the same lawyer, on behalf of at least one of the same clients (Delegate Smigiel). In this case, Appellants have contended that there is something improper about adopting implementing legislation that is

contingent on adoption of a proposed constitutional amendment (Plaintiffs' Emergency Motion for § 12-202 Judicial Relief and for Declaratory Judgment ("Motion for Relief") at 6-11 (Cir. Ct. Doc. No. 7); that placing the proposed constitutional amendment on the ballot is an improper delegation of the legislative function (*id.* at 14); that the proposed amendment violates a constitutional "protocol" for dealing with budget matters (*id.* at 15); and that the proposed constitutional amendment will "clutter" the Maryland Constitution (*id.* at 15-16). All of those arguments were presented to this Court in *Smigiel v. Franchot*. And all of them were rejected when this Court affirmed the circuit court's declaratory judgment upholding both statutes. (*See* Defendants' Exhibit 6 (Appellants' Brief in *Smigiel* (Sept. Term, 2007, No. 121) ("*Smigiel* Brief") at 21-26 (contingent legislation); *id.* at 17-19 (improper delegation); *id.* at 20 (budget "protocol"); *id.* at 20 ("cluttering" the Constitution); *see also* Defendants' Exhibits 4 (circuit court's declaratory judgment) & 5 (order of affirmance).)

Appellants argued in the circuit court that this Court's decision in *Smigiel v. Franchot* has no precedential value "and should be ignored." (Motion to Strike at 4-5 (Cir. Ct. Doc. No. 20.)) Citing the Rule concerning unpublished appellate opinions, Appellants argued that a judgment of this Court carries no weight until it is explained in a published opinion. *Id.* (citing Md. Rule 1-104(a)). That is wrong, as the circuit court recognized. (Apx. 7.) In affirming the trial court's declaratory judgment in *Smigiel v. Franchot*, this Court held that Chapters 4 and 5 of the 2007 Special Session "are enacted

in compliance with the Constitution of the State of Maryland." (Defendants' Exhibit 4 at 1.)

Thus, even though Appellants' counsel now agrees that he overstepped the bounds set by Rule 1-131 by arguing new issues in the *Smigiel v. Franchot* appeal (*see* Motion to Strike at 5), there can be no question that this Court reached a judgment on the merits as to the constitutionality of the slots enactments when it affirmed the circuit court's declaratory judgment in that case. Furthermore, as explained below, the rejection of Appellants' constitutional attacks in *Smigiel v. Franchot* was correct.

A. Video Lottery Gaming Is a Permissible Subject for a Constitutional Amendment under Article XIV.

Appellants pointed out in the circuit court that the Maryland Constitution does not currently restrict video lottery terminals. (Motion for Relief at 16.) From that observation they argued, just as in *Smigiel v. Franchot*, that the General Assembly should not "be permitted to . . . clutter[] up the Constitution with needless amendments." (Motion for Relief at 15-16; *see Smigiel* Brief at 20 (making same argument).) Appellants misunderstand both the proposed video lottery amendment (which would place a new constitutional restriction on the General Assembly), and the State's constitutional law (which does not contain an "anti-clutter" rule).

Article XIV, § 1 of the Constitution requires that each constitutional amendment proposed by the General Assembly must "embrace[] only a single subject." Beyond that, "[t]he legislature is entrusted with broad discretion in proposing amendments to the

Constitution." *Andrews v. Governor*, 294 Md. 285, 297 (1982); *see Hillman v. Stockett*, 183 Md. 641, 648 (1944) ("There is nothing in the Constitution to prevent the Legislature from making as many proposals [under Article XIV] as it chooses."). "[T]here are few, if any, restrictions on what may be included in [the] state constitution." 80 Md. Op. Att'y Gen. 151, 153 (1995); *see* 16 Am. Jur. 2d *Constitutional Law* § 20 (permissible constitutional amendments "cover a wide (if not limitless) range of subjects"). Maryland's Constitution even contains an Article addressing off-street parking. *See* Md. Const. Art. XI-C.

Appellants, moreover, misunderstand the effect of the proposed Article XIX. In addition to authorizing slots, the constitutional amendment, if approved, will restrict the number of video lottery licenses to five, require that the licenses be for the primary purpose of raising revenue for education, limit the total number of video lottery terminals to 15,000, designate the exclusive locations for video lottery terminals, and make video lottery facilities subject to local planning and zoning laws. These restrictions may not be relaxed unless such legislation is authorized by a majority of voters at a referendum. (*See* Complaint Exhibit C at 4.)

The proposed constitutional amendment thus has a greater effect than ordinary legislation could have: If approved by the voters, the amendment will limit the General Assembly's future power to legislate on the subject of commercial gaming, and give the voters an additional referendum power. *See Board of Supervisors of Elections for Anne Arundel County v. Attorney General*, 246 Md. 417, 428-29 (1967) ("[T]he general power

of a state legislature to make, alter and repeal laws, pursuant to the constitution by which the people created the legislature, does not include the power or the right to make or remake the fundamental law, the constitution."). Thus, Appellants' argument that this proposed constitutional amendment is forbidden "clutter" is wrong and should be rejected, as it was in *Smigiel v. Franchot* and by the circuit court in this case.

B. Contingent Legislation Is Constitutionally Permissible.

Appellants also suggest that there is something constitutionally improper about the General Assembly's enactment of a legislative bill that proposes a constitutional amendment on slots (Chapter 5), together with implementing legislation (Chapter 4) that anticipates approval of the proposed amendment. That argument – which Appellants have called their "double billing" claim (Motion for Relief at 4) – is baseless.

Legislation may be contingent on the happening of a future event. *See State v. Kirkley,* 29 Md. 85, 102 (1869). Accordingly, the effectiveness of legislation may be made contingent on the passage of à constitutional amendment. *See Druggan v. Anderson*, 269 U.S. 36, 39 (1925) (stating, in rejecting challenge to National Prohibition Act, that Congress may "enact laws intended to carry out constitutional provisions for the future when the time comes for them to take effect"); *In re Thaxton,* 437 P.2d 129, 131 (N.M. 1968) ("It is generally held that the legislature may pass a statute in anticipation of adoption of an amendment to the constitution and to take effect thereon." (citing cases)); 80 Md. Op. Att'y Gen. 151, 157 (1995) ("[T]he General Assembly has wide latitude in placing contingencies on the effectiveness of legislation."); 2 *Sutherland on Statutory*

Construction § 33:7 (6th ed. 2001) ("A statute may take effect upon the happening of a contingency, such as . . . a vote of the people, or the passage of a constitutional amendment." (footnotes omitted)).

The General Assembly often makes legislation contingent on adoption of a proposed constitutional amendment. *E.g.*, Chs. 422 & 575, *Laws of 2006* (jury trials); Chs. 95, 205 & 206, *Laws of 1998* (civil jury trials); Chs. 81 & 674, *Laws of 1996* (special elections in charter counties); Chs. 62 & 515, *Laws of 1990* (Clerks of Court - employees and funding); Chs. 523, 525 & 526, *Laws of 1980* (Supreme Bench consolidation); Chs. 886, 887 & 974, *Laws of 1978* (temporary replacement of State officers); Chs. 545 & 612, *Laws of 1976* (State Prosecutor); Chs. 364 & 365, *Laws of 1972* (State lottery); Chs. 1 & 532, *Laws of 1970* (Lieutenant Governor). Contrary to Appellants' suggestion in the circuit court, moreover, there is nothing special in this regard about contingent fiscal legislation. (*See* Motion for Relief at 15 (invoking unspecified "protocol for the consideration of budget and appropriations bills"); *Smigiel* Brief at 20 (same).) The contingent lottery legislation in 1972, much like Chapter 4, was fiscal.[2]

[2] During the circuit court's hearing, Appellants invoked *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437 (1987). As the circuit court held in *Smigiel v. Franchot*, however, *Sports Sanity* has no application to the slots enactments because it involved the Article XVI petition-to-referendum process, rather than a proposed constitutional amendment under Article XIV. (*See* Defendants' Exhibit 3 at 17-18.) Petitions taking fiscal legislation to referenda are expressly barred under Article XVI, § 2 to protect against interference with necessary functions of State government, for which the General Assembly has provided funding. *See Sports Sanity*, 310 Md. at 463-64. There can be no similar concern about interference here, because the General Assembly itself has made

The obvious and untenable implication of Appellants' argument is that all of these prior contingent enactments over several decades, which were never challenged on anything resembling a "double billing" theory, are and always have been void. The Court rightly rejected that absurd proposition when Appellants' counsel presented it before (*see Smigiel* Brief at 22-23), and the Court should reject it again this time.

Appellants further argued below, as in *Smigiel v. Franchot*, that the General Assembly's decision to make implementing legislation contingent on approval of a proposed constitutional amendment amounts to an impermissible re-delegation of legislative power back to the people. (*Compare* Motion for Relief at 14-16 *with Smigiel* Brief at 19-20 (making same argument).) This argument is incorrect as well.

All of Appellants' supposed authorities are off-point. *Brawner v. Curran*, 141 Md. 586 (1922), states that the General Assembly "cannot pass a valid act which can only become a law in the event the people of the state approve it." 141 Md. at 599. That rule is inapposite here because Chapter 4 *is* law. Chapter 4 will not have practical effect unless the slots amendment is approved, but laws are not required to have immediate effect. The existence of a contingency does not detract from the legislature's "exclusive power of making laws," which is the power *Brawner* safeguarded. *Id.* at 601; *see Benson v. State*, 389 Md. 615, 641 & n.14 (2005) (discussing *Brawner*). *Brawner*, in fact, distinguishes the situation of a constitutional amendment from ordinary legislation. The

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the fiscal provisions of Chapter 4 contingent on approval of the proposed constitutional amendment.

Court made clear that although voters may not act as legislators, "[t]he people adopted the Constitution and the people alone can change it." 141 Md. at 604.

The constitutional problem in *McKeldin v. Steedman*, 203 Md. 89 (1953), on which Appellants also rely (Motion for Relief at 15), was that the legislature paid for a supplemental appropriation with general funds rather than a designated tax as required by Article III, § 52(8). *See McKeldin*, 203 Md. at 97-101. Chapter 4 is not a supplemental appropriations bill that must be specially funded.

The Maryland Constitution gives the legislature the power to propose constitutional amendments under Article XIV as well as to pass ordinary laws under Article III. During the 2007 Special Session, the General Assembly validly exercised both of these powers.

C. The Legislative Title of Chapter 4 Is Sufficient.

In the circuit court, Appellants went even beyond the unsuccessful constitutional arguments they made in *Smigiel v. Franchot*. They asserted that the words "**Maryland Education Trust Fund – Video Lottery Terminals**," standing alone, make up a constitutionally insufficient title for Chapter 4 under Article III, § 29 of the Constitution. (Motion for Relief at 12.)[3]

[3] Article III, § 29 provides that the "subject" of each law "shall be described in its title." Appellants properly do not suggest any problem with the title of Chapter 5. *See Hillman v. Stockett*, 183 Md. 641, 646-47 (1944) (legislation proposing constitutional amendment is not a law subject to the titling requirement of Article III, § 29).

That argument rests on a basic misunderstanding of Maryland legislative procedure. Contemporary legislative titles consist of three parts: the short title, the purpose paragraph, and the function paragraphs. *See* Dep't of Legis. Servs., *Legislative Drafting Manual* 31-65 (2007), available at http://dls.state.md.us/SIDE_PGS/documents_pub/doc_images/Legislative%20Drafting %20Manual%202007.pdf. The short title, cited by Appellants, is a finding aid that gives a "general indication of the content of a bill." *Id.* at 32. It is the purpose paragraph of the title, not the short title, that "describes in constitutionally acceptable detail what the bill does. . . . This is the part of the title to which the constitutional test of Article III, § 29 of the Maryland Constitution is applied." *Id.* at 32-33. *See, e.g., Board of County Comm'rs v. Donohoe*, 220 Md. 362, 367 (1959) (considering analog to modern "purpose paragraph" in reviewing bill title).

Appellants' argument that the title of Chapter 4 was "designed to conceal the substance of the lengthy appropriations act" (Motion for Relief at 12) is manifestly absurd in light of the purpose paragraph of Chapter 4's title – which spans the first *five pages* of the bill and describes its provisions in extreme detail. (*See* Complaint Exhibit B at 1-5.)

There likewise is no merit to Appellants' claim that the title of the contingent legislation "disguise[s]" a supposed reduction in education funding in the State. (Motion for Relief at 13.) Consistent with its title (Complaint Exhibit B at 1, 4), Chapter 4 creates an Education Trust Fund and dedicates the largest share of the slots revenue to that fund. (*See* pp. 6-8, above.) The dedicated slots proceeds are *in addition to* whatever

educational funding is made available from general State funds. Simply put, the money set aside in the Education Trust Fund is new State money available for education. By segregating the slots-generated education money in a trust fund, the General Assembly insulated those amounts against possible cuts in General Fund spending that may prove necessary in the future to achieve a balanced budget.

Appellants thus have it exactly backwards when they suggest that the overall effect of voter approval of the slots amendment would be a *decrease* in State spending for education. (*See* Motion for Relief at 13.) Under Chapter 4, more money is made available for education and that money is better protected in tough economic times such as these. If General Fund spending is held constant (or increased) in the future, then slots proceeds will guarantee an overall increase in education funding. But if General Fund programs are subjected to future budget cuts, then money from the new Education Trust Fund will be available to offset any cuts to education. The result, if this scenario were to occur, would be that slots-generated revenues would insulate education from budget cuts that affect the rest of State government. Far from supporting Appellants' false implication that slots proceeds will not benefit education (*see* Motion for Relief at 3), the actual operation of Chapter 4 demonstrates that the law fulfills the education-funding mandate of the proposed constitutional amendment.

II. THE BALLOT QUESTION AND THE NON-TECHNICAL SUMMARY FAIRLY AND CONCISELY CONVEY THE SUBSTANCE OF THE PROPOSED CONSTITUTIONAL AMENDMENT.

Appellants have asked, in the alternative, for the Secretary of State's ballot language and DLS's "non-technical summary" of the ballot question to be rejected. This alternative form of relief is equally unwarranted and should also be denied. Particularly in light of the Secretary of State's recent modification of the ballot language in response to the circuit court, there is no credible basis for Appellants to contend that the ballot question and DLS summary will mislead the voters.

Most of Appellants' criticisms of the ballot language in this case simply recast their criticisms of Chapter 5 itself and the actions of the General Assembly in submitting the slots issue to the voters. Those criticisms have no more merit as a basis for requiring a revision of the ballot language than they do as a basis for invalidating the underlying legislation. Once Appellants' arguments for wholesale invalidation of the General Assembly's approach are taken out of the picture, they are left only with arguments for revising the ballot language in ways that are insignificant, unwarranted, or altogether misguided. Appellants have objected to the placement of one comma and the capitalization of the word "State" in two places, and they would prefer to substitute a vague, ten-word phrase, "to be distributed to certain public programs and private entities," for the ballot question's description of the education purposes to which slots proceeds must primarily be directed under the terms of the proposed constitutional

amendment. (Motion for Relief at 17.) Moreover, by confusing the details of the implementing legislation with the broad terms of proposed constitutional amendment, Appellants' proposed approach to drafting the ballot question would itself mislead the voters. Appellants' half-hearted suggestion of revising DLS's non-technical summary is even less meritorious.

A. The Ballot Language Accurately Summarizes the Proposed Constitutional Question.

Consistent with the Election Law Article, the ballot language that will appear on the November ballot contains a "condensed statement of the purpose of the question" presented to the voters, EL § 7-103(b)(4), in prose that is "easily understandable by voters" and "present[s] . . . the question[] in a fair and non-discriminatory manner," EL § 9-203. The text of the ballot question closely tracks, but condenses, the actual language of the proposed amendment. (*Compare* Apx. 13 (ballot question) *with* Complaint Exhibit C at 2-4 (proposed Article XIV).) In so doing, it "'accurately and in a non-misleading manner apprises the voters of the true nature'" of the proposed amendment. *Kelly v. Vote kNOw Coalition,* 331 Md. 164, 172 (1993) (quoting *Anne Arundel County v. McDonough,* 277 Md. 271, 300 (1976)). The ballot question satisfies the legal standard articulated by this Court by "summarizing in 'understandable language' and with

"'reasonable clarity' the 'actual scope and effect of the measure.'" *Vote kNOw,* 331 Md. at 173 (quoting *Surratt v. Prince George's County,* 320 Md. 439, 447 (1990)).[4]

As this Court has observed, judicial review of ballot language is not "concerned with the question of whether this Court, the trial court, or any of the numerous advocates on either side of this issue are capable of drafting better ballot language." 331 Md. at 174. To be sure, the Secretary of State could have written his "condensed statement" of proposed Article XIX in a number of different ways. EL § 7-103(b)(4). But using words drawn from the constitutional amendment itself is surely a reasonable way to ensure that voters understand how the General Assembly has proposed to amend the Constitution. Moreover, "it is legally irrelevant" whether another version of the condensed statement might in some respect be preferable, because, under the Election Law Article, the "responsibility for th[e] task [of drafting the ballot language] in this State rests with the Secretary of State." *Id.* at 170.

In the circuit court, the three-judge panel questioned whether the Secretary should have used the word "primary" to qualify the word "purpose" in explaining the funding

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[4] *Vote kNOw* involved a referendum on legislation under Article XVI of the Constitution. *See* 331 Md. at 167-69. The Secretary of State's ballot language therefore was required to "present the purpose of [the referred] measure concisely and intelligently." Md. Const. Art. XVI, § 5. Here, the ballot question involves a proposed constitutional amendment under Article XIV. The Secretary's drafting duty is established by the Election Law Article, which requires "a condensed statement of the purpose of the question." EL § 7-103(b)(4). This statutory requirement of stating "the purpose of the question" is no stricter than Article XVI's requirement of a "concise[] and intelligent[]" presentation. Accordingly, if the constitutional test for legal sufficiency that this Court set out in *Vote kNOw* is satisfied, then the requirements of the Election Law Article that apply in this case are satisfied as well.

purposes that slot revenues are intended to benefit, thus matching the language of proposed Article XIX. Although the State expressed concern that this change could potentially cause a voter to think that Article XIX mandates some other funding purpose(s) for slot proceeds – which it does not – the circuit court concluded that the ballot language should track the proposed constitutional language and ordered the addition of the word "primary." (Apx. 2, 8-9.) The Secretary of State has added that word (Apx. 12-13), thus conforming the ballot language to the proposed constitutional language and addressing the concern expressed by the circuit court.

Appellants, however, have made much broader arguments against the ballot language that depend on the allocation of slots proceeds set out *in the implementing legislation*, Chapter 4 of the 2007 Special Session, rather than in the proposed constitutional amendment itself. (*See, e.g.*, Motion for Relief at 3-4, 16-17.) The voters are not being asked whether to enshrine a fully articulated video lottery gaming program in the Constitution. Chapter 4 of the 2007 Special Session, which establishes such a program, could be supplemented or supplanted by new legislation enacted in 2009, 2010, or any subsequent year. Such future legislation could allocate slots proceeds for different purposes than the ones specified in Chapter 4, so long as slots licensing remains "for the primary purposes of raising revenue" for education. (Complaint Exhibit C at 2.) The proposed constitutional amendment is not defined or limited by the first statute implementing it. To paraphrase Chief Justice Marshall, Appellants forget that it is a

constitution on which the people will be voting in November. *See McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

In their proposed rewrite of the ballot question, Appellants would eliminate any reference to the educational funding purpose established in the proposed amendment, and instead tell voters that video lottery licenses would be "for the purpose of raising revenue *to be distributed to certain public programs and private entities.*" (Motion for Relief at 17 (emphasis added).) This language is not only vague, confusing, and generally misleading about the supposed "purpose" of Chapter 5. It also specifically fails to apprise the voters of a central feature of the proposed amendment: The constitutional constraint that slot revenues must be spent for the primary purpose of funding education programs. The ballot language prepared by the Secretary of State identifies this constraint for the voters. (Apx. 13.) By contrast, Appellants' proposed language, in omitting the proposed limitation, would distort the "intent and meaning of the proposed amendment," *Vote kNOw*, 331 Md. at 175 (quoting *Matter of Proposed Constitutional Amendment under the Designation "Pregnancy,"* 757 P.2d 132, 137 (Colo. 1988)). Any further revision to the ballot language would be unwarranted.

B. DLS's Voter Summary Provides an Accurate and Detailed Explanation of the Ballot Question.

Although the ballot question should not be reworded based on the terms of ephemeral implementing legislation, voters are not left in the dark about how the General Assembly initially will dedicate revenues if the amendment is adopted. The non-

technical summary prepared by DLS under EL § 7-105(b) explains that the 2007 Special Session of the General Assembly passed "companion legislation" to Chapter 5 and provides a detailed breakdown of the way "revenues generated by video lottery terminal gaming activities are to be distributed" under Chapter 4. All registered voters will receive this information with their specimen ballots, a statutory protection that further removes any hypothetical possibility of confusion from the ballot question alone. *See* EL §§ 8-102, 9-214; COMAR 33.05.07.01.B; *see also Morris v. Governor*, 263 Md. 20, 27 (1971) (Court, in rejecting a post-election challenge to ballot language, takes into consideration that voters were informed by other sources including "very extensive newspaper, radio and television publicity and public discussion prior to the election").

It is customary for a ballot question to convey the substance of a proposed constitutional amendment, while any contingent, companion legislation is addressed in the lengthier summary prepared by DLS. In the last election cycle, the ballot language for Question 1, which proposed an amendment to Article XII of the Constitution, did not refer to the companion implementing legislation (Chapter 473, 2005 Session), the effect of which was contingent on the voters' approval of the proposed amendment. As here, the DLS summary was the document that described the companion legislation. (*See* Defendant's Exhibit 7 (2006 General Election Voter Notification Mailing – Ballot Style 8.) The same approach to companion legislation was also taken in the ballot materials for proposed constitutional amendments in 1996 (Question 4, concerning special elections for county council members and amendment of Articles XI-A and XVII) and 2002

(Question 1, concerning district court commissioners and amendment of Article IV, § 41G), for instance.

There is no substance to Appellants' suggestion that the voter summary prepared by DLS fails to "fully and fairly disclose the true implications of the plan at issue." (Motion for Relief at 17-18.) In the circuit court, the best Appellants could do was vaguely suggest revision of this document "to the extent that [it] repeats the illusory objectives championed by disingenuous legislators" – that is, insofar as it tracks the language of the valid legislation. (Motion for Relief at 17 (emphasis added).) Appellants overlooked that an entire paragraph of the summary is devoted to a description of the way revenues are to be allocated under the implementing legislation. (Complaint Exhibit E at 2.) The non-technical summary already says what Appellants want it to say.

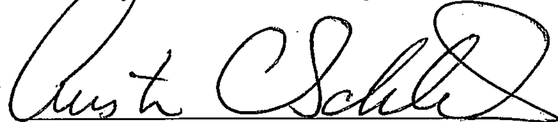
DLS's summary contains all the information required by statute "in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the question" *and* its implications, EL § 7-105(b)(1), and Appellants have suggested no basis for concluding otherwise. Both the text of the ballot question and the voter summary provide voters a clear and understandable view of the proposed video lottery amendment. Together, they provide voters a comprehensive understanding of the choice they are asked to make at the polls.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court for Anne Arundel County should be affirmed.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland



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September 12, 2008

Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman - 13 point.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article XIV, § 1 of the Maryland Constitution provides in part:

The General Assembly may propose Amendments to this Constitution; provided that each Amendment shall be embraced in a separate bill, embodying the Article or Section, as the same will stand when amended and passed by three-fifths of all the members elected to each of the two Houses, by yeas and nays, to be entered on the Journals with the proposed Amendment. . . .

2. Article III, § 29 of the Maryland Constitution provides in part:

[E]very Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title . . . .

3. Section 7-103 of the Election Law Article, Maryland Code, provides in part:

Text of questions.

. . . .

(b) *General guidelines.* — Each question shall appear on the ballot containing the following information:

(1) a question number or letter as determined under subsection (d) of this section;

(2) a brief designation of the type or source of the question;

(3) a brief descriptive title in boldface type;

(4) a condensed statement of the purpose of the question; and

(5) the voting choices that the voter has.

(c) *Duty to prepare question.* — (1) The Secretary of State shall prepare and certify to the State Board, not later than the third Monday in August, the information required under subsection (b) of this section, for all statewide ballot questions and all questions relating to an enactment of the General Assembly which is petitioned to referendum.

. . . .

4. Section 7-105 of the Election Law Article, Maryland Code, provides:

Publication of questions.

(a) *Notice of submitted questions.* — A local board shall provide notice of each question to be submitted statewide and each question to be submitted to the voters of the county, by:

(1) specimen ballot mailed at least 1 week before the general election; or

(2) publication or dissemination by mass communication during the 3 weeks immediately preceding the general election at which a question will appear on the ballot.

(b) *Questions submitted under Article XIV or XVI, Maryland Constitution.* —

(1) For any question submitted under Article XIV or Article XVI of the Maryland Constitution, the notice required by subsection (a) of this section shall contain the information specified in § 7-103(b) of this title and a brief statement, prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the question.

(2) The statement required under paragraph (1) of this subsection shall be:

(i) prepared by the Department of Legislative Services;

(ii) approved by the Attorney General; and

(iii) submitted to the State Board by the fourth Monday in August.

(3) The statement required under paragraph (1) of this subsection is sufficient if it is:

(i) contained in an enactment by the General Assembly, and the enactment clearly specifies that the statement is to be used on the ballot; or

(ii) consistent with some other process mandated by the Maryland Constitution.

(c) *Regulations governing notice of questions.* — The State Board shall adopt regulations governing notice of questions to appear on the ballot, including the use and content of specimen ballots and the publication or dissemination of notice by mass communication.

(d) *Posting text; furnishing copies.* — (1) The complete text of a question shall be posted or available for public inspection in the office of the State Board and each applicable local board for 30 days prior to the general election.

(2) Copies of the complete text of all statewide questions shall be furnished by the State Board to the local boards in quantities as determined by the State Board, including quantities sufficient to provide one copy of each for posting in each polling place and in each local board office.

(3) An individual may receive without charge a copy of the complete text of all constitutional amendments and questions from a local board, either in person or by mail.

5. Section 12-202 of the Election Law Article, Maryland Code, provides:

Judicial challenges.

(a) *In general.* — If no other timely and adequate remedy is provided by this article, a registered voter may seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission:

(1) is inconsistent with this article or other law applicable to the elections process; and

(2) may change or has changed the outcome of the election.

(b) *Place and time of filing.* — A registered voter may seek judicial relief under this section in the appropriate circuit court within the earlier of:

(1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or

(2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.

APPENDIX

STOP SLOTS MD 2008, et al.	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
STATE BOARD OF ELECTIONS, et al.,	*	ANNE ARUNDEL COUNTY
	*	Case No. 02-C-08-134181
Defendants.		

* * * * * * * * * * *

ORDER

Upon consideration of Plaintiffs' Verified Complaint for MD. ELEC. LAW, § 12-202 Judicial Relief and for Declaratory Judgment, Plaintiffs' Emergency Motion for §12-202 Judicial Relief and for Declaratory Judgment, and Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Emergency Motion for Relief, and for the reasons stated in the Court's Memorandum Opinion, it is this 10th day of September, 2008,

ORDERED that Plaintiffs' Emergency Motion for § 12-202 Judicial Relief is hereby **GRANTED** in part and **DENIED** in part; and it is further,

ORDERED that Defendants' Motion for Summary Judgment is hereby **GRANTED** in part and **DENIED** in part; it is further,

ORDERED that in accordance with the Declaratory Judgment Act, MD. CODE ANN., CTS.& JUD. PROC. §§ 3-401—3-415, it is **DECLARED** as follows:

(1) Neither Senate Bill 3[1] nor House Bill 4[2] is invalid as an impermissible delegation of legislative authority to the electorate;

(2) Senate Bill 3 of the 2007 Special Session is not invalid for being contingent upon the voters' approval of the constitutional amendment proposed by House Bill 4 of the 2007 Special Session;

[1] Senate Bill 3 is also referred to by the parties as Chapter 4 of the 2007 Special Session.
[2] House Bill 4 is also referred to by the parties as Chapter 5 of the 2007 Special Session.

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(3) House Bill 4 of the 2007 Special Sessions validly proposes a constitutional amendment under Article XIV, §1 of the Maryland Constitution;

(4) Senate Bill 3 does not violate the titling requirement of Article III, §29 of the Maryland Constitution;

(5) The text prepared by the Secretary of State, in accordance with MD. CODE ANN., ELEC. LAW § 7-103, for Question 2 (referred by Chapter 5 of the 2007 Special Session) for placement on the 2008 general election ballot is misleading and does violate the standards set forth in the Election Law Article and applicable case law. Defendants shall comply with MD. CODE ANN., ELEC. LAW §7-103 by inserting the word "primary" in the first line of the text of Question 2 after the words "for the" and before the words "purpose of raising revenue";

(6) The voter summary prepared by the Department of Legislative Services, in accordance with MD. CODE ANN., ELEC. LAW § 7-105 for Question 2 is not misleading and does not violate the standards set forth in the Election Law Article. The Defendants are entitled to use the voter summary in the manner prescribed by statute at the November, 2008 general election; and it is further,

ORDERED that any and all other requests and motions are hereby **DENIED**.

Judge Ronald A. Silkworth

Judge William C. Mulford, II

Judge Philip Caroom

STOP SLOTS MD 2008, *et al.*	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
STATE BOARD OF ELECTIONS, *et al.,*	*	ANNE ARUNDEL COUNTY
	*	Case No. 02-C-08-134181
Defendants.	*	

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MEMORANDUM OPINION

On September 10, 2008, this matter came before the Court for a hearing on Plaintiffs' Verified Complaint for § 12-202 Judicial Relief and for Declaratory Judgment, Plaintiffs' Emergency Motion for § 12-202 Judicial Relief and for Declaratory Judgment, and Defendants' Motion for Summary Judgment, and Opposition to Plaintiffs' Emergency Motion for Relief. The matter was heard before a Three-Judge Panel pursuant to MD. ELEC. LAW CODE ANN., § 12-203(a)(2).

BACKGROUND

On October 15, 2007, Maryland Governor Martin O'Malley issued Executive Order 01.01.2007.23 proclaiming the convening of the General Assembly in special session. Governor O'Malley explained that Maryland faced a projected $1.7 billion structural deficit for the 2009 Fiscal Year and similar budget shortfalls in the coming years. In response, the Administration introduced in both chambers of the legislature, six bills that would generate budget savings and raise revenue. On November 19, 2007, the bills enacted during the Special Session, amended versions of the Governor's legislative package, were presented to the Governor, who signed them into law.

The first Special Session bill at issue in this case, House Bill 4, is proposed for adoption by the voters under Article XIV, §1 of the Maryland Constitution a constitutional amendment to approve video lottery terminals. House Bill 4 submits the proposed constitutional amendment to the voters in the general election on November 4, 2008. If approved, the amendment would authorize video lottery terminals ("slot machines") in the State, but only under a set of constitutional restrictions. The proposed amendment also addresses the purposes for which the video lottery revenues may be used if the amendment is approved by the voters.

The second Special Session bill at issue in this case, House Bill 3, implements the proposed constitutional amendment if so approved by the voters in November, 2008. House Bill 3 specifies, in greater detail than House Bill 4, how the proceeds from slot machines are to be calculated and distributed. House Bill 3 requires that, on average, 87 cents of every dollar played in a slot machine must be returned as winnings to players. Of the proceeds that remain, up to 33 percent (33%) would be returned to the slot machine operator as compensation for its investment and operating expenses; the exact amount returned to the operator is determined by competitive bidding among the potential operators who seek a license.

House Bill 3 establishes a new Education Trust Fund to comply with the proposed constitutional mandate that video lottery terminals should be for the primary purpose of raising revenue for specified education purposes. This is to be a dedicated account that, consistent with the constitutional amendment proposed by House Bill 4, may only be used to fund elementary and secondary education, public school construction, and capital projects at community colleges and public senior higher educational institutions. The

Education Trust Fund would initially receive forty eight and one-half percent (48.5%) of the slot proceeds, and increase to fifty one percent (51%) after eight (8) years.

The remaining gross proceeds from slot revenue would be distributed for various purposes. Two percent (2%) will be provided to the State Lottery Agency for costs it incurs in assigning with the implementation of video lottery gaming. The horse racing industry is supported with a purse fund representing a seven percent (7%) share of gross slots proceeds up to a total of $100 million annually, as well as two-and-a-half percent (2.5%, up to $40 million annually) for facilities renewal for the first eight (8) years of video lottery gaming. In addition, an account benefiting small, minority, and women-owned businesses would receive one and one-half percent (1.5%) of the proceeds. Finally, five and one-half percent (5.5%) of the gross proceeds would be used for local impact grants, mostly for local jurisdictions in which slot machines are located.

APPLICABLE LAW

A. Declaratory Judgment Standard

The Court may grant a declaratory judgment in a civil case if:

> it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if: (1) An actual controversy exists between contending parties; (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

MD. CODE ANN., CTS. & JUDC. PROC. § 3-409

B. Summary Judgment Standard

Md. Rule § 2-501(e) sets forth the standard by which this Court must review a Motion for Summary Judgment:

The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

The threshold question is whether, based upon all the pleadings, discovery, and affidavits, there exists a genuine dispute regarding a material fact.[1] The Maryland Court of Appeals has held that a material fact is one that will "somehow affect the outcome of the case."[2] Therefore, if there is a dispute as to a fact, the resolution of which will impact the outcome of the case, the motion for summary judgment should be denied. Additionally, the Maryland Court of Appeals has held that in resolving a motion for summary judgment, the Court must construe the facts, and all inferences reasonably drawn from those facts, in the light most favorable to the non-moving party.[3]

C. Judicial Review

The Court's review of the ballot title and text is "limited to discerning whether the language certified 'convey[s] with reasonable clarity the actual scope and effect of the measure." *Kelly v. Vote kNOw Coalition, Inc.*, 331 Md. 164, 174 (1993) (*quoting Surratt v. Prince George's County*, 320 Md. 439, 447 (1990); also see MD. ELEC. LAW §§ 7-103, 7-105, and 12-202.

We are not concerned with the ability of the Court or any other of the numerous advocates on either side of this issue to better draft the ballot language. *Vote kNOw Coalition, Inc.*, 331 Md. at 174–75. The Court is not in the business of rephrasing the language of a ballot title and summary "to achieve the best possible statement of the

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[1] *Syme v. Marks Rentals, Inc.*, 70 Md. App. 235, 238 (1987).
[2] *King v. Bankerd*, 303 Md. 98, 111 (1985). *See also Mandl v. Bailey*, 159 Md. App. 64, 82 (2004)(*citing Arroyo v. Bd. of Educ. of Howard County*, 381 Md. 646, 654 (2004).
[3] *Dobbins v. Washington Suburban Sanitary Comm'n.*, 338 Md. 341, 345 (1995). All counsel agreed on the record that this case is appropriate for consideration of summary judgment. And that there are no material facts in dispute.

intent of the amendment. If the chosen language fairly summarizes the intent and the meaning of the proposed amendment, without arguing for or against its adoption, it is sufficient." *Matter of Proposed Constitutional Amendment Under the Designation "Pregnancy,"* 757 P.2d 132, 137 (Colo. 1988) (cited in *Kelly*, 331 Md. at 174–75). Instead, the Court turns its focus to the "substantive meaning of the language and the ability of the average voter to understand the referred measure." *Kelly*, 331 Md. at 175.

DISCUSSION

I. Constitutionality of House Bill 4 and Senate Bill 3 Issues

In *Smigiel v. Franchot*, the Circuit Court for Carroll County entered an opinion and Declaratory Judgment Order, ordering that, among other Bills, Senate Bill 3 and House Bill 4 were "enacted in compliance with the Constitution of the State of Maryland." The Court of Appeals of Maryland affirmed, by per curiam order, the Carroll County Circuit Court judgment. Adopting by reference the opinion of Judge Stansfield of the Circuit Court for Carroll County, this Court finds that neither Senate Bill 3 nor House Bill 4 is invalid as an impermissible delegation of legislative authority to the electorate, Senate Bill 3 is not invalid for being contingent upon the voters' approval of the constitutional amendment proposed House Bill 4, and House Bill 4 validly proposes a constitutional amendment under Article XIV, §1 of the Maryland Constitution.

II. Text of the Ballot: MD. CODE ANN., ELEC. LAW § 7-103

This Panel considered whether the ballot text is misleading and whether it violates the standards set forth in the Maryland Election Law Article and applicable case law. MD. ELEC. LAW, § 7-103 (b) states:

(b) Each question shall appear on the ballot containing the following information:

(1) a question number or letter as determined under subsection (d) of this section;

(2) a brief designation of the type or source of the question;

(3) a brief descriptive title in boldface type;

(4) *a condensed statement of the purpose of the question*; and

(5) the voting choices that the voter has. (emphasis added).

Moreover, where the ballot question used is not the legislative title, but instead a brief summary of the contents or purpose of the proposed act, "the standard by which the question's validity will be judged, as with a legislative title, is whether the question posed, accurately and in a non-misleading manner, apprises the voters of the true nature of the legislation upon which they are voting." *Kelly v. Vote kNOw Coalition of Maryland, Inc.*, 331 Md. 164, 172 (1993).

The text prepared by the Secretary of State, in accordance with MD. CODE ANN., ELEC. LAW § 7-103, for Question 2 for placement on the 2008 general election ballot is misleading and does violate the standards set forth in the Election Law Article and applicable case law. In oral argument, Assistant Attorney General Austin Schlick conceded for the State that, other than the word "primary," no other word or phrase in either proposed Maryland Constitutional Art. XIX or the related proposed ballot title informs a voter of any purpose for video lottery revenues other that education funding. Based on this admission, this Court must find that the ballot title's omission of the word "primary" may mislead voters.

Schlick also conceded that this Court has the power under Election Article, §12-204(c) to provide appropriate relief by directing that Maryland's Secretary of State

should restore to the ballot text the word "primary," which was deleted from the legislative text. Having found this omission misleading, the Court will so direct.

The Court, in making this decision, follows the precedents of Maryland's Court of Appeals: we seek to avoid a misleading ballot title but "it is not the function of this court to rephrase the language of the summary and title to achieve the best possible statement of the intent of the amendment. *Matter of Proposed Constitutional Amendment Under the Designation "Pregnancy,"* 757 P.2d 132, 137 (Colo. 1988) (cited in *Kelly*, 331 Md. at 174–75). After reviewing the requirements of §7-103, the Court finds that the ballot does not fairly summarize House Bill 4, which was enacted for the "*primary* purpose of raising revenue...." (See Exhibit 3). The proposed ballot omits the word "primary" and instead states that the video lottery licenses are for "the purpose of raising revenue for education...." (See Exhibit 1). Accordingly, the Court finds that such an omission is misleading based on the statutory requirements of §7-103. The best possible understanding of such legislation can be obtained by voters who seek full information from other sources, such as newspapers and other media, including Maryland government websites. As the Court of Appeals has acknowledged, we may presume that voters also should be informed of "what they [are] voting for or against, informed as they presumably had been by the very extensive newspaper, radio and television publicity and public discussion prior to the election." *Morris v. Governor of Md.*, 263 Md. 20, at 26 (1971).

III. Titling Requirement of Article III, §29 of the Maryland Constitution

One issue presented by this case is whether the title language summarizing Chapter 4 of the 2007 Special Session is in violation of the title requirements of Article III, §29 of the Maryland Constitution. Article III, § 29 reads, in pertinent part, "Law

enacted by the General Assembly shall embrace but one subject, and that shall be described in its title...."

In this case, the title sets forth the subject of the legislation. The title at issue in this case does not misstate the true nature of the bill. House Bill 3 does not violate the titling requirement of Article III, §29 of the Maryland Constitution.

IV. Voter Summary: MD. CODE ANN., ELEC. LAW § 7-105

MD. CODE ANN., ELEC. LAW § 7-105(b) states:

(b) Questions submitted under Article XIV or XVI, Maryland Constitution.-

(1) For any question submitted under Article XIV or Article XVI of the Maryland Constitution, the notice required by subsection (a) of this section shall contain the information specified in § 7-103(b) of this title and *a brief statement, prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the question.* (emphasis added).

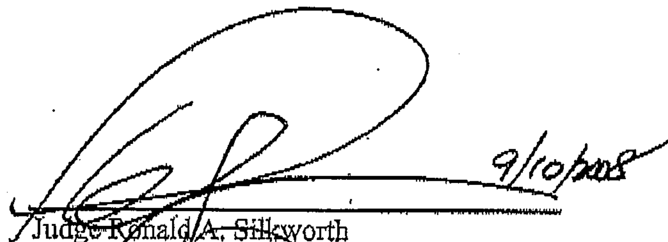
The Court finds that the statement summarizes the question in "clear and concise language," and is "devoid of technical and legal terms to the extent practicable." MD. CODE ANN., ELEC. LAW § 7-105(b)(1).

Therefore, the voter summary prepared by the Department of Legislative Services, in accordance with MD. CODE ANN., ELEC. LAW § 7-105 for Question 2, is not misleading and does not violate the standards set forth in the Election Law Article.

Defendants are entitled to use the voter summary in the manner prescribed by statute at the November, 2008 general election.

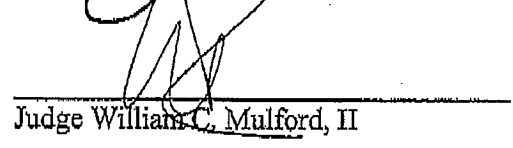
CONCLUSION

For the reasons stated above, the title of Chapter 4 and Chapter 5 of the 2007 Special Sessions, certified by the Secretary of State, are not misleading and do not violate ART. III, §29 of the Maryland Constitution, ART. XIV, §1 of the Maryland Constitution, ART. or MD. ELEC. LAW, § 7-105. However, the text prepared by the Secretary of State, in accordance with MD. CODE ANN., ELEC. LAW § 7-103, for Question 2 for placement on the 2008 general election ballot is misleading and does violate the standards set forth in the Election Law Article and applicable case law. Defendants shall comply with MD. CODE ANN., ELEC. LAW §7-103 by inserting the word "primary" in the first line of the text of Question 2 after the words "for the" and before the words "purpose of raising revenue."

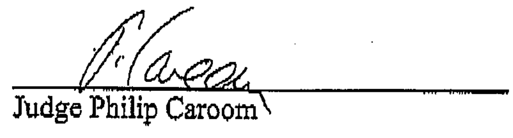


9/10/2008

Judge Ronald A. Silkworth



Judge William C. Mulford, II



Judge Philip Caroom

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GOVERNOR
ANTHONY G. BROWN
LT. GOVERNOR

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FAX: 410-974-5190
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September 11, 2008

Ms. Linda H. Lamone
State Administrator of Elections
151 West Street, Suite 200
Annapolis, Maryland 21401

<u>*BY HAND DELIVERY*</u>

Dear Ms. Lamone:

In accordance with my duties under § 7-103(c) of the Election Law Article of the Code, and the September 10, 2008 Order of the Circuit Court for Anne Arundel County in Case No. 02-C-08-134181, I have prepared and hereby certify revised text of statewide ballot Question 2 to appear on the ballot for the November 4, 2008 general election. The revised text is attached. As directed by the Court, the only revision made is insertion of the word "primary" in the first line of the question. This question was referred to the voters as a proposed constitutional amendment by Chapter 5 of the Acts of the 2007 Special Session.

Very truly yours,

John P. McDonough
Secretary of State

Attachment

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STATE BOARD OF ELECTIONS

* * * REVISED SEPTEMBER 11, 2008 * * *

Question 2 – Constitutional Amendment

(Chapter 5, Acts of 2007 Special Session)

Authorizing Video Lottery Terminals (Slot Machines) to Fund Education

Authorizes the State to issue up to five video lottery licenses for the primary purpose of raising revenue for education of children in public schools, prekindergarten through grade 12, public school construction and improvements, and construction of capital projects at community colleges and higher education institutions. No more than a total number of 15,000 video lottery terminals may be authorized in the State, and only one license may be issued for each specified location in Anne Arundel, Cecil, Worcester, and Allegany Counties, and Baltimore City. Any additional forms or expansion of commercial gaming in Maryland is prohibited, unless approved by a voter referendum.

(Enacts new Article XIX of the Maryland Constitution)

For the Constitutional Amendment
Against the Constitutional Amendment

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STATE BOARD OF ELECTIONS

IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2008

No. 87

STOP SLOTS MD 2008, *et al.*,

Appellants,

v.

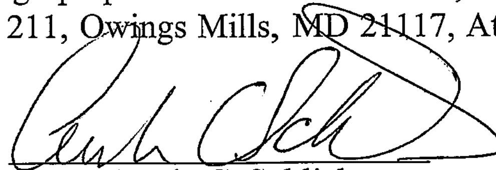
STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

On Appeal from the Circuit Court for Anne Arundel County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2008, a copy of the foregoing Brief of Appellees was mailed, postage prepaid to Irwin R. Kramer, Esquire, Kramer & Connolly, 500 Redland Court, Suite 211, Owings Mills, MD 21117, Attorney for Plaintiff.



Austin C. Schlick