**IN THE COURT OF SPECIAL APPEALS OF MARYLAND**

September Term, 2012
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No. 01445
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NEIL C. PARROTT, *et al.*
*Plaintiffs-Appellants*,

v.

JOHN MCDONOUGH *etc., et al.*,
*Defendants-Appellees.*
_____

**REPLY BRIEF OF APPELLANTS**
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*Trial Court*:
*Neil C. Parrott, et al. v. John McDonough, et al.*
Circuit Court for Anne Arundel County, Case No. 02-C-12-172298
The Honorable Ronald A. Silkworth

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Dated: September 13, 2013

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## INTRODUCTION

Appellants advanced two interrelated arguments demonstrating why Question 5 was misleading as a matter of law. Neither argument was effectively rebutted by Appellees' brief in opposition. As Appellants demonstrated in their initial brief, Question 5 was misleading under *Anne Arundel County v. McDonough*, 277 Md. 271 (1976) and *Surratt v. Prince George's County*, 320 Md. 439 (1990). Those two cases held that ballot language must apprise voters of the "full and complete nature" of a proposed law and also must fairly apprise voters of any *changes made* by a proposed law. Initial Brief of Appellants, March 19, 2013, at 10 ("Parrott Initial Br."). In the present case, these holdings are two sides of the same coin requiring that ballot language not be misleading.

Question 5 misled voters about the Congressional Districting Plan ("SB 1" or "Districting Plan") and therefore was illegal. The language of the question was misleading because it failed to apprise voters of the full and complete nature of the Districting Plan and the changes that the plan made to the existing district boundaries. This illegality can be remedied by a new vote on a ballot question that succinctly apprises voters of the fact that SB 1 changes district boundaries and describes the extent of those changes. Appellees disagree and instead claim that the 23 vague and generic words used in Question 5 were sufficient to inform voters that SB 1 changes existing district boundaries dramatically. Appellees even argue that the use of the phrase "establishes the boundaries" was sufficient to inform voters that the new district boundaries are vastly

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different from the old ones.  Upholding such language would enshrine into law the

State's ability to mislead voters about ballot questions in future referenda.

Question 5 also failed to inform voters about the purpose of SB 1 or the purpose of

the referendum.  In its brief, the State suggests that the purpose of SB 1 was to achieve

population equality among congressional districts and that Question 5 accurately

reflected that purpose.  Brief of Appellees, July 16, 2013, at 2-3, 4, 15 at fn. 1 ("State

Br.").  However, the "full and complete nature" of the Districting Plan was a dramatic

reconfiguration of existing district boundaries far beyond anything that was necessary to

achieve population equality.[1]  Parrott Initial Br. at 1-2, 14-15, 16-17.  This is why over

55,000 Maryland citizens signed a petition to submit SB 1 to a referendum.  At a

minimum, SB 1 had more than one purpose, and any ballot description of the Districting

Plan's "full and complete nature" must reflect the extent of the changes it makes to

existing district boundaries in order not to be misleading.  *McDonough*, 277 Md. at 296.

A ballot question that only apprises voters of the *partial* nature of a proposed law –

instead of advising voters of its full and complete nature – is illegal.  Question 5 did not

inform voters of the purpose of SB 1 or the purpose of the referendum itself.  As a result,

it was in violation of Maryland law.

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[1] *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903-904 (D. Md. 2011); *Fletcher*, 831 F.
Supp. at 905-906 (Titus, J., concurring) ("[I]t is not a well-kept secret that the plan for the
sixth congressional district was developed for the purpose of disadvantaging an
incumbent Republican legislator…").

# ARGUMENT

## I. The State Is Unpersuasive in Arguing That the Ballot Language Meaningfully Informed Voters About the Districting Plan

The State makes several, closely related arguments to try to demonstrate that its ballot language was not misleading. All of them are unconvincing. First, the State's attempts to distinguish *McDonough* and *Surratt* are unpersuasive. In its brief, the State discusses the fact that the ballot language in *McDonough* was found to be misleading because it asked voters to vote "for or against the rezoning" when "the real question before the voters was not the rezoning itself, but 41 separate amendments to a rezoning plan…." State Br. at 11. This quotation does not help the State's argument, however, and the State's description of *McDonough* demonstrates why the lower court's decision here must be reversed. Question 5 essentially asked voters to vote for or against redistricting in general, not any particular redistricting plan. The "real" question before the voters, however, was the drastic changes to existing district boundaries and the non-compact, gerrymandered nature of the new districts under SB 1. The ballot language misleadingly suggested to voters that they were being asked to vote "for or against" the process of establishing districts based on census data and as required by the Constitution, not a drastically reconfigured map of practically non-contiguous districts.

The State's description of *Surratt* proves Appellants' case. The State correctly points out that the Court of Appeals held there was a substantial difference between what the ballot language described in *Surratt* and the "real purpose" of the law subject to

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referendum. State Br. at 11. The *Surratt* court found that the ballot language provided a factually accurate description of a charter amendment at issue in that case, but that the language was still misleading because it failed to give voters an "inkling" of the impact of the amendment. *Surratt*, 320 Md. at 448. Similarly, while Question 5 may have been factually accurate in informing voters that redistricting was constitutionally required, it failed to give voters any idea that they were being asked to approve a radically gerrymandered map. The *Surratt* court's opinion might as well have been written about this case:

> [T]he verbiage here did not and could not convey to a voter an understanding of the full and complete nature of what the charter amendment involved. In point of fact, it told the voter *nothing* about what really was involved.

*Id.* (internal citations and punctuation omitted). Replace "charter amendment" with "new congressional districts" in the above sentence and the court's description applies perfectly to Question 5. Similarly, just as in *Surratt*, the difference between what Question 5 says and what Districting Plan actually does to existing district boundaries is significant. *Id.* SB 1's spider web of districts will greatly reduce the accountability of Maryland's congressional representatives to Maryland's voters, as Appellants have already shown. Parrott Initial Br. at 18-19, *esp*. fns. 16-18.

The State also tries to argue that Question 5 was factually accurate. The State asserts the language "identified truthfully that the referred law established boundaries for Maryland's eight congressional districts" and that "all elements of [the language] are undeniably accurate…." State Br. at 9, 12. The State's argument ignores the fact that

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language can be misleading by omission even if it is true on its face. *Surratt*, 320 Md. at 448. Question 5 was misleading because it omitted any reference to the new district boundaries or the drastic changes SB 1 made to the old ones. Parrot Initial Br. at 14.

The State's reliance on *Kelly* is similarly misplaced, and the details of that case further undermine its argument. State Br. at 11-12. As stated in *Kelly*, ballot language is sufficient if it "accurately inform[s] the voters of the proposed change in the law." *Kelly v. Vote kNOw Coalition of Maryland, Inc.*, 331 Md. 164, 177 (1993). At issue in *Kelly* was what amounted to concerns about poor sentence and paragraph construction in a ballot question. *Kelly*, 331 Md. at 169. But the *Kelly* ballot language fairly communicated to voters both the purpose and effect of the measure, specifically informing voters that Maryland law would be changed to allow more minors to have abortions without notifying their parents. *Id.* Question 5 did not communicate anything nearly as meaningful about the effect of SB 1. As the *Surratt* court noted, ballot language is misleading if it fails to inform voters of the "real change" of the referred law. *Surratt*, 320 Md. at 448.

The State is also wrong that Question 5 informed voters of the changes that SB 1 made to existing district boundaries. The State argues that the words "*establishes* districts" adequately informed voters that SB 1 changes existing district boundaries and that an "ordinary voter" would understand this was the case. State Br. at 13. The State's argument is unconvincing. The word "Establish" has several possible definitions according to the Merriam Webster dictionary, and not one of these different definitions

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includes "causing changes" as a possible meaning or use of the word.  Rather, the word

overwhelmingly is used to convey a meaning precisely the opposite of change – the

formalization or codification of something that already exists.  Some of the definitions of

"establish" include: "to institute (as a law) permanently," "to make firm or stable," "to

put on a firm basis," "to put into a favorable position," "to gain full recognition or

acceptance of," or "to put beyond doubt."[2]  In contrast, each of Appellants' proposed

language options – and the 1962 Maryland redistricting ballot language – used the phrase

"made changes" or "making certain changes."  Joint Record Extract ("E-__") at E-62 to

E-63.  Even the legislative title for SB 1 uses the phrase "reconfiguration of

congressional districts," which, if used for the ballot question, would have

unambiguously informed voters that changes were being made to existing district

boundaries.  *See* E-62; *see also* E-24 to E-25, E-28, E-50 (Tr. 5:24-6:4, 9:20-21, 31:2-5);

*see also* Parrott Initial Br. at 23, fn. 19.  In any event, the State failed to provide any

explanation for why it used the word "Establish," but did not use the word "change."  The

State also fails to explain why this omission is not misleading.  No defense is possible.

Next, the State weakly argues that it simply could not have described the new,

gerrymandered district boundaries without violating Maryland law, and, therefore, it was

not required to do so:

> Given the limitations on word count, any attempt to summarize the content
> would necessarily have been highly selective, and thus potentially unfair,

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[2]  Merriam-Webster Dictionary, entry for "establish," available at http://www.merriam-webster.com/dictionary/establish (visited Sept. 9, 2013).

subjecting the language to attack for having left out important content or improperly emphasized certain content.

State Br. at 14. History shows that this statement is demonstrably untrue. In 1962, voters were presented with a ballot question regarding proposed changes to the boundaries of Maryland's congressional districts. As Appellants have already shown, the Secretary of State described the reconfigured boundaries at issue in that referendum concisely and within the space limitations required by the law. Parrott Initial Br. at 8. In the case at bar, the State did not even attempt to describe the district boundaries on which the voters were asked to vote. Appellants provided four examples of sample ballot language that provided a complete description of the nature of the SB 1 and the changes that it made to district boundaries without being "unfair." *Id.*; *see also* E-62 to E-63. The State does not elaborate on what might have been "unfair" about any of the descriptions Appellants offered, and Appellants can imagine no such explanation. What was unfair was not informing the voters about the "real question" on which they were voting. State Br. at 11.

II.     **The State Puts Forth Half-Truths in Support of Its Argument That the Ballot Language Was Non-Misleading**

Despite the State's claim, Question 5 did not "fairly summarize the intent and the meaning" of SB 1. State Br. at 8, *citing Kelly*, 331 Md. at 174-175. While the State argues that Question 5 truthfully described the purpose of SB 1, it does so by claiming that the purpose of SB 1 was to achieve "one person, one vote" proportionality in congressional districts. Appellants do not dispute that one aim of any redistricting

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legislation is to comply with constitutionally-required proportional representation. However, the argument that compliance with a "one person, one vote" mandate fully and completely described the purpose of SB 1's gerrymandered map is a false one and cannot support upholding Question 5. *McDonough*, 277 Md. at 296. Moreover, it is beyond dispute that the purpose of the referendum was to challenge the gerrymandered map, not "one person, one vote" proportionality. Accordingly, Question 5 failed to inform voters of both the full purpose of SB 1 and the purpose of the referendum itself. As a result, it violated Maryland law. Md. Const. art. XVI, § 5 (b); Md. Election Law Code Ann. § 7-103(b)(4).

The only way that the 23 words of Question 5 could *not* have been misleading is if the changes and effects of SB 1 on the boundaries of Maryland's congressional districts were as trivial as the State portrays. The State seems to suggest that the full and complete nature of SB 1 was to achieve proportional representation. State Br. at 2-3, 15 at fn. 1. Under this view, SB 1's only purpose was to ensure that congressional districts had equal populations: "seven districts containing 721,529 people each and one district containing 721,528 people." State Br. at 4. The State appears to suggest that the best or only way to achieve population equality among Maryland congressional districts was to draw a map that looks like this:

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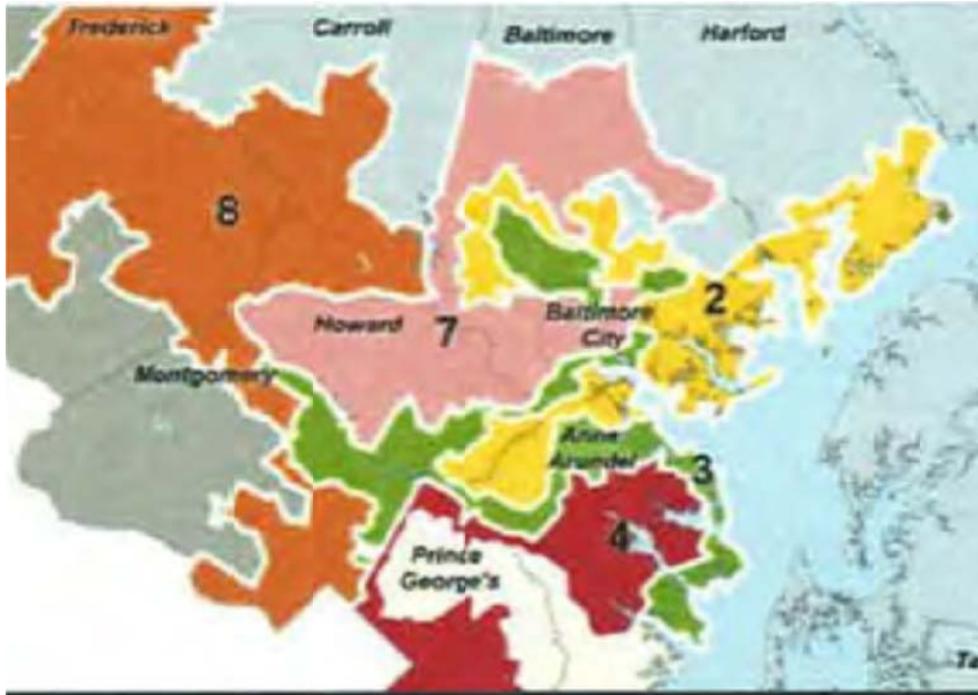
E-166.

The State correctly points out that Appellants view this map as a political

gerrymander. State Br. at 10. This "view" is also shared by just about every major

newspaper in Maryland and by the U.S. District Court for the District of Maryland.

Parrot Initial Br. at 3-7. Perhaps wisely, the State never disavows this view itself, nor

does it argue that Appellants' view is inaccurate. By refusing to rebut this claim, the

State appears to concede that *one* of the purposes of SB 1 was political gerrymandering.

The other purpose was to comply with the requirement that congressional districts be

equal in population.

If SB 1 indeed had two interrelated purposes, the Maryland Constitution requires

that both be captured by the ballot language. *See* Md. Const. art. XVI, § 5 (b) ("[T]he

Secretary of State shall prepare and submit a ballot title of each such measure in such

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form as to present *the purpose of said measure* concisely and intelligently.") (italics added).  The State appears to believe it may pick and choose among the purposes of a bill and submit only the least offensive purpose to voters.  This view does not comport with Maryland law.

The fact that SB 1 accomplished a dramatic act of political gerrymandering while still technically complying with the U.S. Constitution was a legislative necessity.  Laws enacted by the Maryland general assembly must comply with the U.S. Constitution. Informing voters of this fact does not inform them of the "true nature" and "intent and meaning" of a law, especially where a law has another purpose as well.  *McDonough*, 277 Md. at 296; *Kelly*, 331 Md. at 174.

Furthermore, while SB 1 may have achieved population equality, there were several ways to achieve this equality without drawing districts into the amoebic shapes shown on the map reproduced above.  As the State points out, SB 1 was only one of several possible maps considered by the Redistricting Advisory Committee.  State Br. at 4.  In its brief, the State never explains why one of these more reasonable and compact district maps was not used to achieve proportional "one person, one vote" congressional districts.[3]

For example, the redistricting proposal submitted by Timothy Hruz would have produced eight reasonable, compact, non-gerrymandered districts with population

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[3]  Maryland Department of Planning, Third Party Redistricting Plans, available at http://planning.maryland.gov/redistricting/2010/3rdpartyplans.shtml (visited Sept. 9, 2013).

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variances of no more than 118 people between districts.[4] Similarly, Steve Shapiro's plan

would have resulted in compact, geographically practical districts with population

differences of no greater than 417 people between districts.[5] Importantly, the State never

claims that one of these other reasonable, more compact maps could not have been

adjusted using precise software to achieve districts with the same degree of population

equality as SB 1, but without grotesquely-shaped district boundaries of SB 1.[6] Indeed, it

appears that any third party map with compact, non-gerrymandered district boundaries

could have been fine-tuned by reallocating census blocks along the boundaries until all

[4] Maryland Department of Planning, Third Party Redistricting Map of Timothy Hruz, September 19, 2011, available at http://planning.maryland.gov/PDF/Redistricting/3rdPartyPlan2010/map091911-CDHruz.pdf (visited Sept. 9, 2013); Supporting Documentation for Timothy Hruz' Redistricting Plan, September 19, 2011, available at http://planning.maryland.gov/PDF/Redistricting/3rdPartyPlan2010/doc091911-CDHruz.pdf (visited Sept. 9, 2013).

[5] Maryland Department of Planning, Third Party Redistricting Map of Steve Shapiro (corrected), September 21, 2011, available at http://planning.maryland.gov/PDF/Redistricting/3rdPartyPlan2010/map092111-CDShapiro-A.pdf (visited Sept. 9, 2013); Supporting Documentation for Steve Shapiro's Redistricting Plan (corrected), September 21, 2011, available at http://planning.maryland.gov/PDF/Redistricting/3rdPartyPlan2010/doc092111-CDShapiro-A-A1.pdf (visited Sept. 9, 2013).

[6] *See* Maryland Department of Planning, Redistricting Data Maps and Tables, Report of Maryland Precinct Population Data (the Green Report), p. viii, available at http://planning.maryland.gov/PDF/Redistricting/2010data/GreenReport_web.pdf (visited Sept. 9, 2013) ("[T]he Maryland Department of Planning used Census Bureau's MAF/TIGER Partnership software to delineate and verify the boundaries of voting districts/precincts on census maps . . . [T]he precincts had to follow census tabulation block boundaries (census tabulation blocks are the smallest geographic areas for which the Census Bureau reports population data).").

districts had equal populations.[7]  Such adjustments are accomplished using commercial

software such as Maptitude for Redistricting,[8] and the website for Maptitude identifies

Maryland as a customer.[9]  Indeed, SB 1 only achieved population equality by splitting up

dozens of Maryland's census precincts in this fashion.[10]  To the extent that Question 5

suggests that the purpose of SB 1 was to achieve population equality, the question was

misleading.

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[7]  Consider, for instance, that the 2010 census identifies 145,248 census blocks in Maryland, 9,840 of which have populations of between 11 and 20 people, and another 20,298 of which have populations of between 1 and 10 persons.  An additional 64,304 Maryland census blocks have a population of 0, consisting only of empty land which can be moved from district to district to establish contiguity between census blocks that do have populations.  *See* Maryland Department of Planning, Redistricting Data Maps and Tables, 2010 Adjusted Block Level Excel (Total Pop), available at http://planning.maryland.gov/PDF/Redistricting/2010Block/2010_Adjusted_BlockLevel_ Excel.zip (visited Sept. 9, 2013).

[8]  Maptitude for Redistricting website - Features ("Add areas to a target district using feature selection tools. . . Select features in any geographic layer, such as Census block, voting district, county, or town. Limit the selection to unassigned areas, one district, or the entire jurisdiction. As you add areas to a district, Maptitude for Redistricting redraws the district boundaries and updates the control and summary fields to reflect the changes to the current plan."), available at http://www.caliper.com/RedistrictingFeatures.htm (visited Sept. 9, 2013).

[9] Maptitude for Redistricting website – Clients, available at http://www.caliper.com/MTRNews/clients.htm (visited Sept. 9, 2013).  The website also quotes Karl Aro, Director of the Maryland Department of Legislative Services, as saying of the Maptitutde software: "It's light years ahead.  The software can do so much more, so much more quickly." *See* Maptitude for Redistricting website – Features, available at http://www.caliper.com/RedistrictingFeatures.htm (visited Sept. 9, 2013).

[10]  *See* Maryland State Archives, Congressional Election Districts 2012-2020, available at http://msa.maryland.gov/msa/mdmanual/39fed/dist/html/2012.html (visited Sept. 9, 2013).

In light of the foregoing, it is obvious that the State failed in its obligation to describe the "true nature" of SB 1, and also in its obligation to describe the purpose of the *question* being submitted to the voters. *See* Md. Election Law Code Ann. § 7-103(b)(4) (questions on the ballot must contain "a condensed statement of *the purpose of the question.*") (italics added). Whatever purpose the State claims for SB 1, there is no dispute that Appellants did *not* collect over 55,000 signatures to submit to referendum the question of whether Maryland should strive for "one person, one vote" proportionality in its congressional districts. Rather, Appellants and the 55,000 signers of the petition sought to submit to the voters the question of whether the gerrymandered districts drawn by SB 1 should become law or whether the State should be required to re-draw its congressional districts. *See* Parrot Initial Br. at 15, *citing* E-118, Maryland Department of Legislative Services Summary of Question 5. Voters had no inkling that this was the purpose of the question.

# CONCLUSION

For all the foregoing reasons, the decision of the Circuit Court should be reversed

and the case remanded.

Dated: September 13, 2013

Respectfully Submitted,

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Pursuant to Maryland Rule 8-112, 8-503 and 8-504, this brief has been prepared in a 13-point, proportionally spaced Times New Roman font with 2.0 spacing between lines.

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2013, I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS to be served, via email and first class mail, on the following:

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