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.

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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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INTRODUCTION

The November 2012 vote on Maryland's new congressional districts was illegal because the ballot failed to inform the voters of what they were voting on. The ballot language was unlawfully misleading because it failed to describe the "true nature" of Senate Bill 1, which was political gerrymandering. To achieve this political gerrymandering, Maryland split up its congressional districts into highly unusual shapes resembling "broken-winged pterodactyls" in the words of the federal court.[1] However, the ballot failed to give voters any inkling of the dramatic changes this gerrymandering made to their congressional districts. Indeed, the ballot did not even inform voters that the gerrymandered redistricting made *any* changes to Maryland's existing congressional districts at all. Instead, the language of Question 5 suggested that Senate Bill 1 merely reauthorized or extended the *existing* congressional districts, which would have otherwise susnsetted or expired. The language of Question 5 was therefore misleading as a matter of law.

Question 5 failed to present voters with the purpose and nature of Senate Bill 1 concisely, or to otherwise permit an average voter to exercise an intelligent choice in a meaningful way. At a mere 23 words, the substantive portion of Question 5 was far shorter than even the legislative title of Senate Bill 1. Question 5, in its entirety, asked Marylanders to vote for or against a "Congressional Districting Plan" described simply as follows:

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[1] *Fletcher v. Lamone*, 831 F. Supp. 2d 887, fn. 5 (D. Md. 2011).

> Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.

Under no credible reading did the above language inform voters – or allow them to infer – that the referendum asked them to approve political gerrymandering. It therefore remains unknown whether Marylanders prefer political gerrymandering, or if they are genuinely concerned with whether the General Assembly draws congressional districts in ways that bear a relationship to local communities or geographic county and municipal boundaries. The voters are entitled to be asked this question directly so that they may accurately express their preferences. Anything less is a denial of the people's referendum rights under the Maryland Constitution. Md. Const. Art. XVI § 5(b).

STATEMENT OF THE CASE

Appellants challenge the Circuit Court's decision to uphold the ballot language for Question 5 on the November 2012 General Election Ballot. Question 5 purports to describe Senate Bill 1, Chapter 1 of the 2011 Special Session of the Maryland General Assembly, also known as the Congressional Districting Plan ("Senate Bill 1" or "Districting Plan"). Appellants allege that the ballot language used to present Question 5 to the voters was unlawfully misleading in violation of Section 9-203 of the Maryland Election Code, which requires that each ballot must "be easily understandable by voters" and must "present all candidates and questions in a fair and nondiscriminatory manner." Appellants are entitled to judgment and relief under Section 9-209 of the Maryland Election Code. Since the relevant legal standard is whether the language informs voters

of the full and complete nature of the enactment on which they are voting, a thorough examination of the nature of the redistricting accomplished by Senate Bill 1 is required.

Following the passage of Senate Bill 1 in 2011, a group of Maryland citizens filed a federal lawsuit to overturn the new congressional districts. The plaintiffs in that federal lawsuit argued, *inter alia*, that the Districting Plan was a political or partisan gerrymander and therefore violated the Equal Protection clause of the Fourteenth Amendment. *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 892 (D. Md. 2011). The federal court found that Senate Bill 1 did in fact constitute "political gerrymandering" under U.S. Supreme Court precedent, but held that there was no judicially manageable remedy available under federal law:

> [P]laintiffs allege that Maryland's redistricting plan is an impermissible partisan gerrymander. . . . [T]his claim is perhaps the easiest to accept factually — Maryland's Republican Party regularly receives 40% of the statewide vote but might well retain only 12.5% of the congressional seats. . . Recent cases have reaffirmed the conceptual viability of such claims, but have acknowledged that there appear to be no judicially discernible and manageable standards for adjudicating political gerrymandering claims.

Fletcher, 831 F. Supp. at 903-904 (internal citations omitted). The concurring opinion was even more blunt: "[I]t is clear that the plan adopted by the General Assembly of Maryland is, by any reasonable standard, a blatant political gerrymander." *Fletcher*, 831 F. Supp. at 905 (Titus, J., concurring).

Following this decision, later in 2011 Appellants initiated a petition drive that ultimately collected over fifty-five thousand signatures from registered Maryland voters in order to put Senate Bill 1 to referendum. On July 20, 2012, the State Board of

Elections certified a statewide referendum on the Districting Plan. Immediately thereafter, the Maryland Democratic Party filed a lawsuit to block the referendum and prevent the people of Maryland from voting on the gerrymandering question. Following a ruling by the Circuit Court rejecting the Maryland Democratic Party's claims, the Court of Appeals affirmed the decision in a *per curiam* order entered on August 17, 2012, clearing the way for placement of Senate Bill 1 on the ballot. Only one business day later, the Secretary of State prepared and certified the referendum ballot language. Appellants initiated this lawsuit challenging the legality of the ballot language on August 29, 2012. On September 6, 2012, the Circuit Court ruled in favor of Defendants, from which this appeal to the Court of Special Appeals was taken.

STATEMENT OF THE QUESTIONS PRESENTED

This case presents the following two questions for the Court:

1. Was the ballot language of Question 5 impermissibly vague and misleading in violation of Maryland law?

2. Should this Court find the referendum results null and void and order a re-vote on Question 5?

STATEMENT OF THE FACTS

In 2011, the Maryland General Assembly redrew Maryland's congressional districts into shapes that have become comedic fodder. For example, Maryland's new Third Congressional District has alternatingly been described as the "Ugliest

Congressional District in America,"[2] "The Pinwheel of Death,"[3] and a "broken-winged pterodactyl, lying prostrate across the center of the State."[4] *See* Joint Record Extract ("E-__") at E-166 (map showing Maryland's Third District in green). Additional maps illustrating the extremely unusual nature of Maryland's Third District can be found at the links at footnotes 2 and 3 below. As a result of Senate Bill 1, some have suggested changing the word "gerrymandering" to "Marymandering."[5]

Upon placement of the Districting Plan on the ballot for referendum, newspaper editorial support for repealing the gerrymandered districts was overwhelming. Voters were urged to vote "No" on Question 5 by the editorial boards of the Baltimore Sun,[6] the Annapolis Capital Gazette,[7] the Carroll County Times,[8] the Gazette,[9] the Washington

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[2] Ilya Gerner, *America's Ugliest Congressional Districts*, Comedy Central, Sept. 26, 2012, available at www.indecisionforever.com/blog/2012/09/26/americas-ugliest-congressional-districts.

[3] Shira Toeplitz, *Top 5 Ugliest Districts: Partisan Gerrymandering 101*, Roll Call, Nov. 10, 2011, available at www.rollcall.com/features/Election-Preview_2011/election/top-5-ugliest-districts-210224-1.html.

[4] *Fletcher v. Lamone*, 831 F. Supp. 2d 887, fn. 5 (D. Md. 2011).

[5] Martin Austermuhle, *They Should Call It Marymandering*, DCist, Jan. 5, 2012, available at http://dcist.com/2012/01/they_should_call_it_marymandering.php.

[6] Baltimore Sun, *Against Question 5 - Our view: Voters should pick their elected representatives, not the other way around*, Oct. 21, 2012, available at www.baltimoresun.com/news/opinion/bs-ed-redistricting-20121021,0,4931422.story.

[7] Annapolis Capital Gazette, *Our Say: Vote against Question 5 — and gerrymandering*, Oct. 25, 2012, available at www.capitalgazette.com/opinion/our_say/our-say-vote-against-question-and-gerrymandering/article_488a0327-05d8-5513-bd94-a40ba6e861c7.html.

Post,[10] the Washington Examiner,[11] and Washington Jewish Week.[12] Nearly all editorials pointed out that the gerrymandered map would undermine the accountability of Maryland's congressional representatives to the voters through either incumbent protection, reducing competitive congressional races, or dividing communities to prevent unified opinions about representatives. These outcomes hurt citizens and undermine representative democracy in Maryland. Appellants are not aware of a single media outlet serving any part of Maryland which endorsed a "Yes" vote on Question 5.

On August 18, 2012, the Secretary of State prepared and certified the ballot language for Question 5. Newspapers immediately noted that the language was misleading, writing that "politicians are also hoping Marylanders will be confused by the cryptic ballot wording, which implies — falsely — that voting for the current

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[8] Carroll County Times, *Editorial: Vote against gerrymandered map*, Oct. 28, 2012, available at www.carrollcountytimes.com/news/opinion/editorials/editorial-vote-against-gerrymandered-map/article_c048793f-d12e-5446-809a-188692d001e8.html.

[9] The Gazette, *Gazette endorsement: Vote for a fairer redistricting map*, Oct. 24, 2012, available at www.gazette.net/article/20121024/OPINION/710269991/1266/vote-for-a-fairer-redistricting-map&template=gazette.

[10] Washington Post, *Vote against Maryland redistricting*, Oct. 19, 2012, available at www.washingtonpost.com/opinions/vote-against-maryland-redistricting/2012/10/19/dc06c282-1967-11e2-bd10-5ff056538b7c_story.html.

[11] Washington Examiner, *Examiner Local Editorial: On Maryland referenda, just say 'no,'* Oct. 13, 2012, available at http://washingtonexaminer.com/examiner-local-editorial-on-maryland-referenda-just-say-no/article/2510611.

[12] Washington Jewish Week, *Vote 'no on Question 5*, Oct. 24, 2012, available at http://washingtonjewishweek.com/main.asp?SectionID=31&SubSectionID=29&ArticleID=18210.

indefensible district lines is a constitutional requirement."[13] Instead of using the 60 word legislative short title of Senate Bill 1, the substantive portion of Question 5 was a mere 23 words and omitted any reference to the fact that the redistricting made material changes to existing congressional districts. In its entirety, the Question asked voters to vote for or against a law that "Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution." E-200.

On or about August 22, 2012, Delegate Neil Parrott spoke with representatives of both the Secretary of State and the State Board of Elections concerning changing the language of Question 5. E-13. The Secretary's representative indicated that the Secretary would not be able to revise the language of the question. *Id.* The representative of the State Board of Elections indicated that the Board also could not change the language of Question 5, which had been prepared and certified by the Secretary. *Id.* Consequently, both representatives effectively confirmed to Delegate Parrott that they would make no changes to the language of Question 5 prior to certification of the full general election ballot on or before September 11, 2012. E-13 to 14.

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[13] Annapolis Capital Gazette, *Our Say: Vote against Question 5 — and gerrymandering*, Oct. 25, 2012, available at www.capitalgazette.com/opinion/our_say/our-say-vote-against-question-and-gerrymandering/article_488a0327-05d8-5513-bd94-a40ba6e861c7.html.

During these discussions with the Secretary and Board, Delegate Parrott submitted alternative ballot language to the State in an attempt to settle this matter, which also was provided to the court below. E-34 (Tr. 15:17-19), E-50 to 51 (Tr. 31:25-32:4, 32:15-19), E-62 to 63. The settlement analysis showed that after passage of the 1962 Maryland redistricting law, a 54-word ballot question was used for the subsequent referendum which effectively described the proposed 1962 redistricting. E-62. The 1962 ballot question language informed Maryland voters with specificity that their congressional district boundaries were being *changed*:

> An act relating to the Congressional Districts in the State of Maryland which provides that the State be divided into eight districts instead of seven and that the Eighth Congressional District shall be composed of Howard and Prince George's Counties and making certain changes in the Third and Fifth Congressional Districts of this State.

E-14, E-62. By contrast, the ballot question language for Senate Bill 1 made no reference to any of the substantial boundary changes to the congressional districts. E-200. Nor does it contain any readily understandable geographic references to the new boundaries created by Senate Bill 1, or any reference to the map prepared by the Governor and approved by the General Assembly depicting these new boundaries.

Appellants filed suit, asking the Circuit Court to order declaratory and injunctive relief to correct the ballot language. E-9, E-15. Appellants presented evidence to the trial court demonstrating that the ballot language was misleading because it failed to describe the nature of the redistricting, and instead included a confusing reference to U.S Constitutional requirements. E-50 (Tr. 31:6-14), E-55 to 56 (Tr. 36:23-37:2); *See also*

Plntfs. Motion for Summary Judgment Memorandum at Exhibit 1. On September 6, 2012, the Circuit Court ruled in favor of the State, from which this appeal to the Court of Special Appeals was taken. E-199. A petition for writ of certiorari was also filed with the Court of Appeals, but that petition was denied on September 7, 2012. E-212. Thereafter, on November 6, 2012, a majority of Maryland voters voted "yes" to Question 5 as written.

STANDARD OF REVIEW

The Court of Special Appeals reviews an order granting summary judgment *de novo*. *Ross v. State Board of Elections*, 389 Md. 649, 658 (2005). This Court must determine whether the Circuit Court ruled correctly on matters of law. *Doe v. Montgomery County Board of Elections*, 406 Md. 697, 711 (2008).

ARGUMENT

The ballot language gave the voters of Maryland no idea they were being asked to approve some of the most gerrymandered districts in the United States. The language (and therefore, the vote) was illegal and in violation of the Maryland Constitution because it failed to apprise voters of the true nature of the redistricting, and because it failed to inform voters of the broad scope of the changes to the existing congressional districts. This Court should remedy the unlawful actions by declaring the referendum void and ordering a re-vote on Question 5 with accurate language.

I. The Ballot Language was Misleading and Insufficient as a Matter of Law

Question 5 was misleading as a matter of law under the holdings of *Anne Arundel County v. McDonough*, 277 Md. 271 (1976) and *Surratt v. Prince George's County*, 320 Md. 439 (1990). Those cases illustrate two established principles of Maryland law which govern ballot language sufficiency: 1) referendum ballot language must apprise voters of the full and complete nature of the proposed law, and 2) referendum ballot language must fairly apprise voters of the *changes* made by the proposed law. *McDonough* and *Surratt* present virtually identical facts to the case at bar. Both cases dealt with language that was misleading by virtue of omitting from the ballot language critical facts and information necessary for voters to understand the nature and purpose of the law. These principles were reiterated in *Kelly v. Vote kNOw Coalition of Maryland, Inc.*, 331 Md. 164 (1993), in which the Court further explained that ballot language must, at a minimum, advise voters of the alterations the referred law has made to the previous law.

In *McDonough*, a complaint over ballot language was filed pre-election and decided post-election. The question at issue in *McDonough* concerned "forty-one different amendments to a comprehensive county rezoning," while the ballot language simply asked voters "to vote for or against the rezoning." *Id*. The Court's ruling was instructive:

> We are convinced that the failure of the ballot question to present a clear, unambiguous and understandable statement of the full and complete nature of the issues included in "Question D," . . . constituted a "deviation from the prescribed forms of the law [and] had so vital an influence as probably to have prevented a free and full expression of the popular will."

McDonough, 277 Md. at 307. Like the ballot question in *McDonough*, the ballot question for Senate Bill 1 failed to inform voters that the preexisting boundaries of congressional districts in the State had been substantially altered. Indeed, Senate Bill 1 makes numerous and substantial changes to these boundaries, and the Question 5 language "did not present a clear, unambiguous and understandable statement of the full and complete nature of the issues." *McDonough*, 277 Md. at 300. As explained above, pp. 3-6 *supra*, the "full and complete nature" of Senate Bill 1 *was* the creation of a politically gerrymandered map. Because the Question 5 language failed to give voters a clue about that fact with any reference to boundary changes, it was illegal under Section 9-203 of the election code.

In *Surratt*, the ballot language asked voters to vote for or against a law described as: "To provide that in all pending and future claims the County will only waive its immunity in those instances where its officers and employees are liable." *Surratt* at 448. However, the court pointed out that this language ignored the fact that the "real change" of the referred law was its inclusion of a non-severability provision, which "was intended to effect a total repeal of the waiver of governmental immunity." *Id.* Importantly for the present case, the *Surratt* court therefore held that both the effect and *intent* of the referred law is relevant to whether the ballot language accurately describes the law's true nature. Essentially, this is a common-sense test that asks simply whether the voter would know the actual purpose and effect of the law he or she will vote on *just by reading the ballot*. The Court elaborated on this rule:

> A voter who read the ballot language would have no inkling that a vote in favor of the charter amendment could be a vote in favor of repealing absolutely the waiver of governmental immunity that had existed in Prince George's County, in one form or another, since the original charter of 1970. Like the "inaccurate, ambiguous and obtuse" language before us in *McDonough*, the 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.

Surratt, 320 Md. at 448 (internal citations omitted). The court did not mince words in concluding that this language was intentionally deceptive: "It *was* misleading, and it *was* calculated to suggest to the voter that the charter amendment would have virtually no effect. . ." *Surratt*, 320 Md. at 449 (italics in original).

Similarly, Question 5 did not apprise voters of the "full and complete nature" of the Districting Plan, which was a drastic carving-up of county boundaries *far more than required by the 2010 Census or the U.S. Constitution*. Simply put, neither the 2010 Census nor the U.S. Constitution required the legislature to draw the Third Congressional District in the shape of a "broken-winged pterodactyl" which stretches from north of Baltimore to Montgomery County and then winds east to Annapolis. Any language that even *suggests* that the boundaries of the Third Congressional District were required by the U.S. Constitution and Census is deceptive on its face. Just as in *Surratt*, Question 5 was likely understood by voters as describing a law which changed nothing and had "virtually no effect." *Surratt*, 320 Md. at 449. Without reference to the boundary changes Senate Bill 1 made, Question 5 appeared to describe at most minor changes that amounted to a mere reauthorization or extension of the previous districts, which were due

to sunset by federal law. By omitting reference to changes in the boundaries, and including superfluous verbiage about Census and U.S. Constitutional requirements, Question 5 gave voters "no inkling" that they were being asked to vote on gerrymandered congressional districts.

The lower court not only failed to apply *McDonough* and *Surratt* in its holding, but it also applied the wrong holding from *Kelly*. The Circuit Court mistakenly cited an isolated principle of Maryland law articulated in *Kelly* prohibiting courts from rewriting ballot language for the sake of improved grammar. E-202, Memorandum Opinion at 4 ("We are not concerned with the capability of this Court or any of the numerous advocates on either side of this issue to draft better ballot language," citing *Kelly*, 331 Md. at 174); E-209, Memorandum Opinion at 11 ("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," citing *Kelly*, 331 Md. at 174). However, the *Kelly* court upheld the ballot language in that case precisely *because* the language accurately informed voters of the true nature of the referred law.

The language in *Kelly* explicitly stated that referred law was making changes to state abortion policy. While the plaintiffs in *Kelly* wanted the issues explained more clearly on the ballot, that court properly held that the law only requires that the language inform voters, accurately and non-misleadingly, of the purpose and nature of the law. At issue in *Kelly* was legislation that made it easier for Maryland minors to obtain abortions without parental notification. The ballot language made it clear that the referred law *was*

making it easier for children to get an abortion without notifying their parents. The relevant ballot wording in *Kelly* described the referred enactment as follows: "Revises Maryland's abortion law to . . . provide certain exceptions to the requirement that a physician notify an unmarried minor's parent or guardian prior to minor's abortion." *Kelly*, 331 Md. at 168. There was no question that that language informed voters in detail of the true nature of the measure they were voting on. Plain and simple, that language directly informed voters that the law changed state policy to make it easier for minors to get abortions:

> The language used by the Secretary of State accurately informed the voters of the proposed change in the law because it stated that the referred measure creates certain exceptions to the general requirement of parental notification. . . . By indicating that the legislation establishes exceptions to the parental notification provision, the ballot language "concisely and intelligently" summarized that portion of the legislation.

Kelly, 331 Md. at 177.

The *Kelly* court emphasized that the ballot language *explicitly* informed voters that passing the referendum would *change existing law* to give minors more opportunities to obtain abortions without parental notification. The court concluded that the referendum language therefore "gives considerable detail about the nature of the issues addressed by the measure. It is neither deceptive, as was the case in *Surratt v. Prince George's County*, *supra*, nor vague as was the case in *Anne Arundel County v. McDonough, supra.*" *Kelly*, 331 Md. at 174.

Unlike in *Kelly*, the ballot question for the Districting Plan was both deceptive and vague. The language failed to inform voters directly or indirectly of the nature of the

referred law – gerrymandering – because it did not say a word about specific changes to the boundaries of the congressional districts. Senate Bill 1 makes numerous and substantial changes to these boundaries. A voter reading Question 5 might have believed Senate Bill 1 "would have virtually no effect." *Surratt*, 320 Md. at 449. Furthermore, the language was deceptive because it suggested that the congressional districts had to be drawn *in the form that they were* in order to comply with the 2010 Census and the U.S. Constitution. Appellants are not suggesting the ballot language needed to use the word "gerrymandering" to satisfy Section 9-203. However, at a minimum the language should have explained that the law was making substantial changes to existing congressional district boundaries without suggesting that the Maryland legislature was compelled to do so by the federal Constitution.

In the proceedings below, Appellees mistakenly argued that "any attempt to be more descriptive would be misleading since voters do not have a choice to return to the former district boundaries." E-205, Memorandum Opinion at p. 7. That argument is a straw man, as demonstrated by the Department of Legislative Services' own summary of Senate Bill 1. The summary explains the consequences of the referendum as follows: "If this question receives a majority of votes at the 2012 general election, the State's plan will remain in force. If, however, the question does not receive a majority of votes, the plan will be repealed 30 days after the official canvass of votes and a different plan will be enacted." E-118. This summary was submitted to the Circuit Court as the State's own Hearing Exhibit C. E-36 (Tr. 17:14-15). Accordingly, if the question had been presented

with fair language, voters would have understood the choice as one between accepting the new gerrymandered map on the one hand, or ordering their elected representatives to draw a different map on the other – exactly as the Maryland General Assembly's Department of Legislative Services stated.

Finally, in order to find that the phrases "based on recent census figures" and "as required by the U.S Constitution" were non-misleading, the Circuit Court mischaracterized the purpose of the *particular* districts drawn by Senate Bill 1 as merely for compliance's sake. The federal court correctly noted that the purpose of drawing the boundaries as they were was political gerrymandering. However, the Circuit Court unjustifiably concurred with Appellees' proffered explanation and wrote that the purpose of the Districting Plan was "to bring the State into compliance with the constitutional requirements per the results of the 2010 census." E-205, Memorandum Opinion at p. 7. This flawed analysis ignored the "full and complete nature" of Senate Bill 1, leading the Circuit Court to uphold the inclusion of phrases which masked the true nature of the referred enactment in violation of Maryland law. *McDonough*, 277 Md. at 307; *Surratt*, 320 Md. at 448. This Court should reverse.

II. The Illegal Ballot Language Delegitimized the Vote on Question 5 and Must Be Remedied

A host of factors in this case dictate that the only sufficient remedy to the illegal ballot language is a decision holding the referendum results a nullity and ordering a re-vote on Question 5. As stated in the Initiative and Referendum Almanac: "How an

initiative's ballot title is worded can make or break the initiative."[14] This reinforces the critical importance that Maryland's ballot language laws be strictly applied. As Appellants argued below, Maryland courts have always held that the way the ballot language is written has the greatest impact on the voter. E-26 to 27 (Tr. 7:24-8:8), E-32 to 33 (Tr. 13:18-14:3), E-33 (Tr. 14:17-22). If that language is drawn illegally so as to obscure the purpose or effect of a law upon which the people are being asked to vote, no amount of mailed publicity will overcome this illegality. *Id*. This illegal ballot language could not have been cured with more explanatory voter guide mailings by the State, because the "moment of greatest impact" is when the voter is confronted with the ballot in the voting booth. *Surratt*, 320 Md. at 450.

Appellants submitted six sworn affidavits from voters demonstrating the ballot language was misleading. E-50 (Tr. 31:6-14), E-55 to 56 (Tr. 36:23-37:2); *See also* Plntfs. Motion for Summary Judgment Memorandum at Exhibit 1. Moreover, a plain reading of the language on its face shows that it apprised voters *not at all* of the *nature* of the law they were voting on. The purpose of Senate Bill 1 – and of this case – was and is gerrymandering. Since the ballot question was almost surgically worded so as not to give voters an "inkling" of what "really was involved" in the referendum, the wording was plainly illegal. *Surratt*, 320 Md. at 447. Seven local newspapers urged Marylanders to vote "no" on Question 5, as a vote for a gerrymandered district is a vote to disempower

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[14] M. Dane Waters, *The Initiative and Referendum Almanac*, p. 16 (Carolina Academic Press 2003).

oneself as a voter.[15] No one should conclude that the people's will was clearly expressed with the vote taken on Question 5 as worded.

The irony of the fact that the State used confusing ballot language for a referendum question about *gerrymandering* should not be lost on this Court. The misleading language prevented Marylanders from fully exercising their right to an informed vote on the question of how responsive Maryland's elected representatives should be to the people they represent. This fact militates strongly in favor of a re-vote. The question of gerrymandering – when fairly asked – is ultimately one of how accountable elected legislators should be to their constituents. The reason why gerrymandering is so disfavored is because it is widely considered to undermine representatives accountability to those who elect them.[16] If voting districts are "safe" and uncompetitive for an elected representative, the representative does not need to fear losing office and has less incentive to be responsive to the genuine interests of his or her

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[15] *See supra* at p. 6.

[16] *Vieth v. Jubelirer*, 541 U.S. 267, 319-320 (2004) ("We explained that legislatures . . . should be bodies which are collectively responsive to the popular will, and we accordingly described the basic aim of legislative apportionment as achieving . . . fair and effective representation for all citizens. Consistent with that goal, we also reviewed claims that the majority had discriminated against particular groups of voters by drawing multimember districts that threatened to minimize or cancel out the voting strength of racial or political elements of the voting population. Such districts were vulnerable to constitutional challenge if racial or political groups had been fenced out of the political process and their voting strength invidiously minimized.") (internal citations and punctuation omitted).

constituents.[17] Instead, representatives may focus merely on advancing the interests of their political party, or may simply promote their own agendas.

In contrast, the purpose of Marylanders' right to referendum is to increase the accountability of legislative bodies to the interests of their constituents.[18] Since the Question 5 ballot language gave voters no inkling that they were being asked to vote on gerrymandering, the people's right to referendum was effectively denied. This denial ensured passage of a law that will allow the General Assembly to become even more insulated from the interests of the people. The only sufficient remedy for this illegality is voiding the referendum results and ordering a new election using ballot language that informs voters of the true nature of Senate Bill 1.

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[17] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 615 (December 2002) ("Representatives remain faithful to the preferences of the electorate and responsive to shifts in preferences so long as they remain accountable electorally. Thus, while we do not enforce campaign promises within the normal bounds of contract law, the same function is performed - if imperfectly - by the accountability of individual representatives for their success or failure in accurately representing their constituents' preferences. To the extent that elections are structured to limit accountability, whether it be by inordinately high filing fees, by restrictive petitioning requirements to get on the ballot, or by gerrymandered districts, the key role of accountability is compromised.").

[18] Jack Benoit Gohn, *Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution – Bayne v. Secretary of State*, 39 Md. L. Rev. 558, 572 (1980) ("The period during which the [Maryland] referendum amendment was being formulated and ratified, 1914 to 1915, was the heyday of the Progressive movement. One of the principal programs of the Progressives was so-called direct legislation, lawmaking by the electorate. The theory - and indeed the reality in those times - was that laws passed by legislatures were likely to reflect the will of political bosses rather than that of the electorate. The vehicles of direct legislation, the initiative and the referendum, were designed to wrest control of the processes of legislation from the distrusted legislatures. . . .").

This Court should therefore award relief similar to that awarded in *McDonough*. In *McDonough*, the court found that the ballot language deficiency meant a voter could not have "knowledgeably exercised his franchise" and so declared the referendum results "a nullity and of no effect." *McDonough*, 277 Md. at 307. Accordingly, the proper relief in this case is to nullify the results of the referendum and require a re-vote on Question 5 – this time with an accurate description of a law whose purpose was gerrymandering.

Given the unique nature of ballot questions compared to elections for political office, ordering a new election on Question 5 would be the relief least likely to prejudice any party. Whereas ordering a re-vote in an election for office prejudices the winning candidate by favoring the loser, all parties to the present case should want the same thing – namely, an accurate assessment of the will of the people, taken by ballot without confusion or controversy. If Marylanders indeed favor the new gerrymandered districts, it could not possibly harm anyone to ask the people to confirm their preference with language that accurately reflects the law's purpose and effect. Indeed, since the Appellees in this case are public servants who must place the interests of the citizens of Maryland above all else, they should welcome the opportunity to remove all doubt as to both the legality and democratic legitimacy of Senate Bill 1.

This Court may review the validity of Question 5 and award the requested relief. *McDonough*, 277 Md. at 305. Appellants have demonstrated that the ballot language did not permit an average voter to exercise an intelligent choice in a meaningful way. It

therefore necessarily follows that the illegal language affected the outcome of the election. *Seussman v. Lamone*, 383 Md. 697, 716-721 (2004). Because the voters were not exercising an intelligent choice, the "outcome" of the election is itself a "nullity," which literally means that the election *never happened*. *McDonough*, 277 Md. at 307. No conclusion can be drawn from whether the outcome would have been "different" had the voters been asked to vote on the law subject to referendum, because they were never asked. Instead, they were asked a different question about a different law. At most, the voters were asked whether Maryland should comply with its obligation to ensure each congressional district has roughly the same population. This is the "one person, one vote" rule, and unlike gerrymandering, it actually *is* required by the U.S. Constitution. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Even though the language would affect the election outcome under Sections 7-103, 12-202 and 12-204 of the Election Code, the Circuit Court accepted the case as a request for relief under Section 9-209 of the Election Code, which applies to violations whether or not the violations will affect the outcome of an election. The Circuit Court stated: "[p]laintiffs have standing to seek judicial review under § 9-209 of the Election Law Article and therefore are not required to establish that the outcome of the election would be affected absent the grant of relief." E-201, Memorandum Opinion at p. 3, fn. 1. Importantly, either avenue of appellate review in this case will lead to the same result. *See McDonough*, 277 Md. at 307 ("We are convinced that the failure of the ballot question to present a clear, unambiguous and understandable statement of the full and

complete nature of the issues . . . had so vital an influence as probably to have prevented a free and full expression of the popular will."). This Court may therefore reach the same result whether it decides this case as an appeal authorized either by Sections 12-202 and 12-204 of the Elections Code, or by Section 9-209 of the Elections Code and Section 12-301 of the Courts and Judicial Proceedings Code. *Citizens Against Slots v. PPE Casino Resorts*, 429 Md. 176, 190 (2012).

Furthermore, it is well within this Court's powers to remand this case with instructions for the Circuit Court to order a new election on Question 5 pursuant to Section 9-209(b)(3), with easily understood, fair and nondiscriminatory ballot language pursuant to Sections 9-203(1) and (2). *See Surratt*, 320 Md. at 447. Although the question of which of the alternate ballot language proposals Appellants submitted below is ultimately one for this Court, Appellants believe that language option Number 4 is the most compliant with Maryland law. E-63. Within the constraints of the word limits and the obligation to be concise, the law should always favor ballot language that most fully describes the true nature and purpose of a law submitted for referendum.

Finally, no matter what relief this Court decides to order, at a minimum this Court should rule in favor of Appellants on the legal question presented because it is one that is "capable of repetition, yet evading review." *Green Party v. Maryland Board of Elections*, 377 Md. 127, 138 (2003). In *Green Party*, the Court of Appeals invalidated a Board of Elections rule requiring 1% of active voter signatures for nominating a candidate for the ballot, holding that the Board's failure to count *inactive* voters signing

the petition violated the Maryland Constitution. *Green Party*, 377 Md. at 152-153 ("[W]e hold that any statutory provision or administrative regulation which treats "inactive" voters differently from "active" voters is invalid."). However, the court did not order a re-vote so that the Green Party could be placed on the ballot for the election in question.

Since the Circuit Court failed to apply *McDonough* and *Surratt* and misapplied *Kelly*, an unambiguous ruling by the Court of Special Appeals now reversing the Circuit Court will ensure that future referenda are not put to the voters of Maryland with patently non-descriptive and misleading ballot language.[19] At a minimum, since the congressional districts in Maryland could be even further gerrymandered again in the future, a decision correcting the lower court's opinion is needed to ensure that the people's right to referendum on redistricting policy is not forever lost.

[19] For example, this Court could rule that, in this case, the law required the Board of Elections to use the legislative title in place of the language it prepared because "the legislative title shall be sufficient" for ballot questions, and so is therefore presumptively reasonable. Md. Const. art. XVI, § 5(b). *See also McDonough*, 277 Md. at 296. *See also Morris v. Governor of Maryland*, 263 Md. 20, 24 (1971) ("If the legislative titles had been used on the ballots it could hardly be argued that the legislature, as a result of what it specified in each bill . . . did not fully meet the constitutional directives. . .").

CONCLUSION

There is a wide difference between what Senate Bill 1 actually accomplished and the way it was described on the ballot. The illegal ballot language therefore deprived Maryland voters of a fair opportunity to approve or reject the law, and therefore justifies a re-vote on Maryland Question 5. It is within this Court's broad powers to order such a remedy, and no party to this case is likely to be prejudiced by such an outcome. Whatever the remedy, the Court should unequivocally find that the lower court ruling was in error and reverse it.

For all the foregoing reasons, the decision of the Circuit Court should be REVERSED and REMANDED.

Dated: March 19, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Maryland Rule 8-112, 8-503 and 8-504. The brief has been prepared in a 13-point, proportionally spaced Times New Roman font with 2.0 spacing between lines, pursuant to Rule 8-112(c).

s/ Chris Fedeli
Chris Fedeli

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2013, I caused a true and correct copy of the foregoing BRIEF OF APPELLANTS to be served, via email and courier, on the following:

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APPENDIX

CITATION AND VERBATIM TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

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Md. Const. art. XVI, § 5

Section 5. Text of measures to be furnished to voters; ballots; proclamation of result of election

(a) The General Assembly shall provide for furnishing the voters of the State the text of all measures to be voted upon by the people; provided, that until otherwise provided by law the same shall be published in the manner prescribed by Article XIV of the Constitution for the publication of proposed Constitutional Amendments.

(b) All laws referred under the provisions of this Article shall be submitted separately on the ballots to the voters of the people, but if containing more than two hundred words, the full text shall not be printed on the official ballots, but the Secretary of State shall prepare and submit a ballot title of each such measure in such form as to present the purpose of said measure concisely and intelligently. The ballot title may be distinct from the legislative title, but in any case the legislative title shall be sufficient. Upon each of the ballots, following the ballot title or text, as the case may be, of each such measure, there shall be printed the words "For the referred law" and "Against the referred law," as the case may be. The votes cast for and against any such referred law shall be returned to the Governor in the manner prescribed with respect to proposed amendments to the Constitution under Article XIV of this Constitution, and the Governor shall proclaim the result of the election, and, if it shall appear that the majority of the votes cast on any such measure were cast in favor thereof, the Governor shall by his proclamation declare the same having received a majority of the votes to have been adopted by the people of Maryland as a part of the laws of the State, to take effect thirty days after such election, and in like manner and with like effect the Governor shall proclaim the result of the local election as to any Public Local Law which shall have been submitted to the voters of any County or of the City of Baltimore.

Md. Courts and Judicial Proceedings Code Ann. § 12-301

§ 12-301. Right of appeal from final judgments -- Generally

Except as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

Md. Election Law Code Ann. § 7-103

§ 7-103. Text of questions

(a) “County attorney” defined. -- In this section, “county attorney” means:

(1) the attorney or law department established by a county charter or local law to represent the county generally, including its legislative and executive officers; or

(2) if the county charter or local laws provide for different attorneys to represent the legislative and executive branches of county government, the attorney designated to represent the county legislative body.

(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.

(2) The State Board shall prepare and certify to the appropriate local board, not later than the second Monday in August, the information required under subsection (b) of this section for all questions that have been referred to the voters of one county or part of one county pursuant to an enactment of the General Assembly.

(3) (i) The county attorney of the appropriate county shall prepare and certify to the appropriate local board, not later than the third Monday in August, the information required under subsection (b) of this section for each question to be voted on in a single county or part of a county, except a question covered by paragraph (1) or paragraph (2) of this subsection.

(ii) If the information required under subsection (b) of this section has not been timely certified under subparagraph (i) of this paragraph, the clerk of the circuit court for the jurisdiction shall prepare and certify that information to the local board not later than the fourth Monday in August.

(iii) A local board shall provide a copy of each certified question to the State Board within 48 hours after receipt of the certification from the certifying authority.

(d) Numbering or lettering. --

(1) Each statewide question and each question relating to an enactment of the General Assembly which is petitioned to referendum shall be assigned a numerical identifier in the following order:

(i) by years of sessions of the General Assembly at which enacted; and

(ii) for each such session, by chapter numbers of the Session Laws of that session.

(2) A question that has been referred to the voters of one county or part of one county pursuant to an enactment of the General Assembly shall be assigned an alphabetical identifier in an order established by the State Board.

(3) Questions certified under subsection (c)(3)(i) or (ii) of this section shall be assigned an alphabetical identifier in an order established by the certifying authority, consistent with and following the questions certified by the State Board.

Md. Election Law Code Ann. § 9-203

§ 9-203. Standards

Each ballot shall:

(1) be easily understandable by voters;

(2) present all candidates and questions in a fair and nondiscriminatory manner;

(3) permit the voter to easily record a vote on questions and on the voter's choices among candidates;

(4) protect the secrecy of each voter's choices; and

(5) facilitate the accurate tabulation of the choices of the voters.

Md. Election Law Code Ann. § 9-209

§ 9-209. Judicial review

(a) Timing. -- Within 2 days after the content and arrangement of the ballot are certified under § 9-207 of this subtitle, a registered voter may seek judicial review of the content and arrangement, or to correct any other error, by filing a sworn petition with the circuit court for Anne Arundel County.

(b) Relief that may be granted. -- The circuit court may require the State Board to:

(1) correct an error;

(2) show cause why an error should not be corrected; or

(3) take any other action required to provide appropriate relief.

(c) Errors discovered after printing. -- If an error is discovered after the ballots have been printed, and the State Board fails to correct the error, a registered voter may seek judicial review not later than the second Monday preceding the election.

Md. Election Law Code Ann. § 12-202

§ 12-202. 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.

Md. Election Law Code Ann. § 12-204

§ 12-204. Judgment

(a) In general. -- The court may provide a remedy as provided in subsection (b) or (c) of this section if the court determines that the alleged act or omission materially affected the rights of interested parties or the purity of the elections process and:

(1) may have changed the outcome of an election already held; or

(2) may change the outcome of a pending election.

(b) Act or omission that changed election outcome. -- If the court makes an affirmative determination that an act or omission was committed that changed the outcome of an election already held, the court shall:

(1) declare void the election for the office or question involved and order that the election be held again at a date set by the court; or

(2) order any other relief that will provide an adequate remedy.

(c) Act or omission that may change outcome of pending election. -- If the court makes an affirmative determination that an act or omission has been committed that may change the outcome of a pending election, the court may:

(1) order any relief it considers appropriate under the circumstances; and

(2) if the court determines that it is the only relief that will provide a remedy, direct that the election for the office or question involved be postponed and rescheduled on a date set by the court.

(d) Clear and convincing evidence. -- A determination of the court under subsection (a) of this section shall be based on clear and convincing evidence.