IN THE COURT OF APPEALS OF MARYLAND

September Term, 2012

No. ____

NEIL C. PARROTT, *et al.*
Petitioners,

v.

JOHN MCDONOUGH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Court of Special Appeals of Maryland, Case No. 01445

Circuit Court for Anne Arundel County, Case No. 02-C-12-172298

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STATEMENT OF THE CASE

Petitioners seek this Court's review to remedy the illegal November 2012 vote on Maryland's new congressional districts. Maryland's recent congressional redistricting split up its districts into highly unusual shapes, one resembling "a broken-winged pterodactyl, lying prostrate across the center of the State."[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 at all to Maryland's existing congressional districts. Instead, the language of Question 5 suggested that Senate Bill 1 ("SB 1") was a required reauthorization of the existing congressional districts, which otherwise would have sunsetted or expired. Question 5 was, therefore, calculated to mislead.

At a mere 23 words, the substantive portion of Question 5 was far shorter than even the legislative title of SB 1. Question 5, in its entirety, asked Marylanders to vote for or against a "Congressional Districting Plan" described simply as follows:

> 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 dramatically changed congressional districts. It therefore remains unknown whether Marylanders prefer gerrymandered

[1] *Parrott v. McDonough*, Case No. 1445, Court of Special Appeals of Maryland, pp. 3-4 (Slip Op. July 23, 2014), quoting *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 at n.5 (D. Md. 2011).

districts, or if they are concerned whether congressional districts bear any relationship to local communities or geographic county and municipal boundaries.

REFERENCE TO ACTION IN LOWER COURT

The matter was docketed in the Circuit Court for Anne Arundel County as *Parrott*, *et al. v. McDonough*, *et al.*, Case No. 02-12-172298. The plaintiffs were Delegate Neil C. Parrott, a member of the Maryland House of Delegates, and MDPetitions.com, and the defendants were John P. McDonough, in his official capacity as the Maryland Secretary of State, Linda H. Lamone, in her official capacity as State Administrator of Elections, and the State Board of Elections. On September 6, 2012, the circuit court denied plaintiffs' Motion for Summary Judgment and granted defendants' Cross-Motion for Summary Judgment.

STATEMENT REGARDING COURT OF SPECIAL APPEALS

The matter was docketed in the Court of Special Appeals as *Parrott*, *et al. v. McDonough*, *et al.*, Case No. 01445. The parties fully briefed the matter before the Court of Special Appeals, and filed a Joint Record Extract of 212 pages on March 19, 2013. Oral argument was heard on October 1, 2013. On July 23, 2014, the Court of Special Appeals issued an opinion affirming the lower court's judgment in full.

STATEMENT REGARDING FINAL JUDGMENT AND JURISDICTION

The opinion of the Court of Special Appeals affirming the lower court judgment adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action. It is a final judgment. This Court has jurisdiction. Md. Code Ann., Cts. & Jud. Proc. § 12-201; 12-203; Rule 8-301(a)(3).

QUESTIONS PRESENTED FOR REVIEW

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?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

The pertinent constitutional provision and statutes involved in this petition are:

Md. Const. art. XVI, § 5(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.

Md. Election Law Code Ann. § 7-103(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.

Md. Election Law Code Ann. § 9-203

> 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.

STATEMENT OF FACTS

There are no disputed facts relevant to this petition. In 2011, the Maryland General Assembly redrew Maryland's congressional districts into complex shapes that have since garnered national attention. For example, Maryland's Third Congressional District has been described as the "Ugliest Congressional District in America," "The Pinwheel of Death," and a "broken-winged pterodactyl, lying prostrate across the center of the State." *See* Parrott Brief to the Court of Special Appeals, filed March 19, 2013 ("Parrott Br.") at 4-5; *See also* Joint Record Extract ("E-__") at E-166.

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 to repeal the gerrymandered districts by the editorial boards of the Baltimore Sun, the Annapolis Capital Gazette, the Carroll County Times, the Gazette, the Washington Post, the Washington Examiner, and Washington Jewish Week. Parrott Br. at 5-6. Nearly all editorials pointed out that the gerrymandered map would undermine the accountability of Maryland's congressional representatives to the voters. Appellants are not aware of a single media outlet serving any part of Maryland which endorsed a "Yes" vote on Question 5. In addition, support for repealing the Districting Plan was bi-

partisan, with both Democratic and Republican elected officials urging voters to vote to repeal the redistricting plan at the ballot box.[2]

On August 18, 2012, the Secretary of State prepared and certified the ballot language for Question 5. Newspapers 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 indefensible district lines is a constitutional requirement."[3] Following certification of the language, Delegate Parrott requested the State change the language of Question 5. E-13. Delegate Parrott submitted alternative ballot language, including an analysis comparing Question 5 to the ballot language for the 1962 redistricting. E-34, E-50 to 51, E-62 to 63. Unlike Question 5, the 1962 ballot question language informed Maryland voters with specificity that their congressional district boundaries were being changed. E-14, E-62, E-200. However, the State refused to change the Question 5 language. E-13 to 14.

Appellants filed suit, asking the circuit court to order declaratory and injunctive relief to correct the ballot language. E-9, E-15. Appellants presented six voter affidavits to the trial court attesting that the voters were confused about what the ballot question was asking because of the misleading language. E-55 to 56. The circuit court ruled in favor

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[2] Len Lazarick, *Montgomery County Democrats organize opposition against congressional districts*, Maryland Reporter, Oct. 15, 2012, available at http://marylandreporter.com/2012/10/15/montgomery-county-democrats-organize-opposition-against-congressional-districts/.

[3] 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.

of the State, and an appeal to the Court of Special Appeals was filed. On September 7, 2012, a petition for writ of certiorari for review of the circuit court's decision was also filed with this Court, but that petition was denied. E-212. Thereafter, on November 6, 2012, a majority of Maryland voters voted "yes" on Question 5 as written, upholding the gerrymandered Districting Plan, despite endorsements from virtually every newspaper in the state for a "no" vote on Question 5. On July 23, 2014, the Court of Special Appeals issued the opinion that is now the subject of this petition.

REASONS FOR GRANTING THE PETITION

The granting of this petition is desirable and in the public interest, because it presents a question no less important than whether a lawful election has occurred. Few issues are as important as safeguarding the people's rights to participate in their representative democracy.

Because the Question 5 ballot language was vague and misleading, the November 6, 2012 vote on the question was a nullity. Had the voters voted "no" to Question 5 and repealed the Congressional Districting Plan, the lower court's failure to correctly apply the Maryland Constitution and Election Code might have been harmless error. It was not. The evidence and the appellate record developed in this case amply demonstrate a gross violation of the constitutional right of Marylanders to participate in direct democracy. It must be remedied.

Without redress by this Court, the right of Maryland's citizens to self-governance will be doubly injured. First, Marylanders' constitutional right to approve legislation via the referendum will have been denied. This is injury enough to warrant review by this Court,

although this was not the only right to self-governance abridged here. The denial of the right to referendum in this case also denied Marylanders their right to fairly decide the question of whether they wanted gerrymandered congressional districts that limit the accountability of Maryland's elected representatives. The voters were entitled to have this question posed to them clearly so that they could accurately express their preferences. Anything less would be a denial of the people's right to referendum under the Maryland Constitution. Md. Const. Art. XVI § 5(b).

1. The Illegal Ballot Language Rendered the People's Vote on Question 5 a Nullity

"How an initiative's ballot title is worded can make or break the initiative."[4] This truism makes it critically important that Maryland's ballot language laws be applied strictly. Under Maryland law, the Question 5 ballot language did not "present the purpose of [the] measure... intelligently," Md. Const. art. XVI, § 5(b); did not present the "question[] in a fair and nondiscriminatory manner," Md. Elec. Code 9-203(2); and failed to communicate "the purpose of the question." Md. Elec. Code 7-103(b)(4). This Court should review this matter so that the Question 5 election results may be overturned. Md. Elec. Code § 9-209(b)(3).

Review here would be similar to *McDonough*, where this Court found that the ballot language deficiency meant a voter could not have "knowledgeably exercised his franchise" and declared the referendum results "a nullity and of no effect." *Anne Arundel County v. McDonough*, 277 Md. 271, 307 (1976). Appellants have demonstrated that the

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

ballot language did not permit an average voter to exercise an intelligent choice in a meaningful way. No conclusion can be drawn about 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. Since 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. *Id.*

The proper relief in this case would be for this Court to nullify the results of the referendum and require a re-vote on Question 5 – this time with an accurate description of a law which drastically reconfigured Maryland's congressional districts. This Court could order such a re-vote either as a special election in 2015 or in the 2016 general election. Marylanders' right to decide whether they want gerrymandered districts for the next five years remains critical.

Ordering a new election on Question 5 would not substantially prejudice any party to this litigation. This is particularly true given the unique nature of ballot questions, compared to elections for political office. Whereas ordering a re-vote in an election for office prejudices the presumptively elected representative, no party to this case would be prejudiced by a re-vote. All parties should all want the same thing: 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 officials committed to serve the interests of the citizens of Maryland, they should

welcome the opportunity to remove all doubt as to both the legality and democratic legitimacy of SB 1.

2. The Court of Special Appeals' Opinion Was in Error

The opinion of the Court of Special Appeals upholding the lower court judgment was in error. Question 5 was misleading under *Anne Arundel County v. McDonough*, 277 Md. 271 (1976), *Surratt v. Prince George's County*, 320 Md. 439 (1990), and *Kelly v. Vote kNOw Coalition of Maryland, Inc.*, 331 Md. 164, 177 (1993). These cases hold that ballot language must apprise voters of the "full and complete nature" of a proposed law, and also must fairly inform voters of any changes made by a proposed law. Parrott Br. at 10. For the purposes of considering certiorari, a brief summary of the most significant errors follows.

First, the Court of Special Appeals fails to apply the vagueness holding of *McDonough* to the State's decision to use the word "establish" instead of "reconfigure" or another synonym for "change." As Appellants explained, at a minimum this was an ambiguous word choice, and is therefore vague under *McDonough*. 277 Md. at 307-308; see also Parrott Reply Brief to the Court of Special Appeals, filed September 13, 2013, ("Parrott Reply Br.") at 5-6. Next, the Court of Special Appeals tries to distinguish *McDonough* by arguing that Question 5 did not need to communicate the "why" of the legislature's decision. Slip Op. at 14 ("*McDonough* did not suggest that Question D must explain to voters why some officials and citizens groups supported downzoning and why others did not."). But Appellants argued below that the ballot language must inform voters of "the effect" of the referred legislation, which is precisely what *McDonough*

requires. Parrott Br. at 5. The Court of Special Appeals does not explain how Question 5 communicated the "effect" or impact of SB 1's passage to voters.

The Court of Special Appeals also fails to correctly apply *Surratt*. The ballot language in *Surratt* told voters they were voting on a minor change, concealing the drastic change to existing law the bill actually accomplished.

> 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... [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.

Surratt, 320 Md. at 448. The *Surratt* court concluded the ballot language "*was* calculated to suggest to the voter that the charter amendment would have virtually no effect..." *Surratt*, 320 Md. at 449 (italics in original).

The Court of Special Appeals fails to apply *Surratt* when it concludes that the phrase "as required by the U.S. Constitution" did not mislead voters into thinking the gerrymandered congressional districts were constitutionally mandatory. Slip. Op. at 9-10. As Appellants demonstrated below at great length, there is no credible explanation for the State's choice of this phrase other than to mislead or conceal. *See* Parrott Br. at 12-13, 16; *see also* Parrott Reply Br. at 2-5, 8-12. The Court of Special Appeals evades *Surratt* only by redefining the purpose of SB 1, stating that "Question 5... did not misrepresent the ultimate purpose of Senate Bill 1, which was to create congressional districts." Slip Op. at 16. Saying that the purpose of SB 1 was "to create congressional districts," while technically truthful, lacks candor. The purpose of SB 1 was to

substantially change and reconfigure the congressional district boundaries from Maryland's prior districts into new, discretionary shapes. *See* Parrott Reply Br. at 2-5, 7-13. As in Surratt, the Question 5 ballot language is unlawful because it "was calculated to suggest" the district boundary changes were minimal. *Surratt*, 320 Md. at 449.

The Court of Special Appeals also misapplies *Kelly*. *Kelly* held that ballot language is sufficient if it informs voters of the specific change the law makes, even if the language could have been clearer. In *Kelly*, the "language… 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." *Kelly*, 331 Md. at 177.

The Court of Special Appeals incorrectly holds that Question 5 adequately informed voters of changes to existing law. Slip Op. at 8, 17. But in *Kelly*, the ballot language was lawful because it specified that the referred law "revises" and "repeals" existing provisions, thereby directly informing the voters that the law had changed, and how. Slip Op. at 17; *Kelly*, 331 Md. at 168-169, 177. For the Court of Special Appeals to equate Question 5's use of the word "establishes" as similarly adequate in informing voters of how SB 1 changed their congressional districts is a misapplication of this precedent.

Finally, the Court of Special Appeals is wrong to discuss the notices mailed to voters, which are irrelevant here. Slip Op. at 19-21. As *Surratt* explained, the "moment of greatest impact" is when a voter reads a question in the voting booth, and sufficient mailed language cannot make up for defective ballot language. *Surratt*, 320 Md. at 450. Appellants even presented evidence in the form of six voter affidavits demonstrating that voters would not read the mailed information, and therefore would have been confused

by the ballot language. E-50. This is consistent with what independent studies show – most voters generally do not read the mailed information about ballot questions.[5]

3. Illegal Ballot Language Deprives All Maryland Citizens of Their Constitutional Right to Referendum

The need for review here is magnified by the fundamental right that is at stake. Control over governments by the people, through measures including the referendum, is one of the founding principles of American democracy and has been recognized by Maryland courts as a right of paramount importance. *Board of Supervisors of Elections v. Smallwood*, 327 Md. 220, 237-238 (1992) ("Limitations imposed by the people on their government are fundamental elements of a constitution. The Maryland Declaration of Rights and the Bill of Rights to the United States Constitution largely represent limitations on governmental power... The Constitution of the United States, the Constitution of Maryland... are replete with provisions limiting the power of governments..."). So it is that Article XVI of the Maryland Constitution preserves for all Maryland citizens the right to refer laws passed by the legislature to a popular vote.

Maryland's Constitutional amendment recognizing the people's right to use the referendum was secured only after Maryland citizens demanded it. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 60, fn 9 (1978) ("In response to the public outcry over corruption in state government and alleged abuses of

[5] Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, p. 42 (Harvard University Press 1999) ("A recent analysis of California surveys finds evidence that the voter handbooks are not widely read... [N]o more than a third of voters report using the pamphlet as a source of information[]. Thus, it concludes, 'survey evidence indicates that most voters do not read the pamphlet or use it as a source of information for decisions on propositions'").

legislative power, the General Assembly proposed and the people ratified Article XVI, reserving the right of referendum by petition with respect to public general and local laws enacted by the General Assembly.") (internal citations omitted). This outcry came in response to the nationwide corruption at the turn of the 20th century:

> After the close of the Civil War great abuses began to creep into... the administration of the National and State governments... They were alleged to have grown out of the control by corrupt methods of legislation and administration by great corporations and a group of individuals in each State who had taken into their hands the machinery of each of the great political parties... To remedy these evils it was proposed... to modify the principle of representation by incorporating into the organic law the Referendum...

Beall v. State, 131 Md. 669, 677-678 (1917); *see also Board of Education v. Frederick*, 194 Md. 170, 176-177 (1949). By their right to referendum, all Marylanders have reserved to themselves a larger share of legislative power in their representative government. *Beall v. State*, 131 Md. 669, 677-678 (1917) ("The Referendum... is the reservation by the people of a State, or local subdivision thereof, of the right to have submitted for their approval or rejection, under certain prescribed conditions, any law or part of a law passed by the law making body."). Without review and clarification of the law here, the people's right to referendum may be rendered useless for all but those capable of making large television advertising purchases. This Court should accept review to uphold Maryland citizens' fundamental right to approve or reject legislation.

4. The Gerrymandered Districts Harm Marylanders' Right to Fair Representation in Congress

The need for review is further compounded by the nature of the particular referendum question in this case. The irony of the State's use of confusing ballot language for a

referendum about gerrymandering should not be lost on this Court. The misleading language prevented Marylanders from fully exercising their right to an informed vote on a question of utmost importance: how responsive Maryland's congressional representatives should be to the people they represent. This fact militates strongly in favor of review.

The question of gerrymandering – when fairly asked – is ultimately one of how accountable elected officials should be to their constituents. The primary effect of gerrymandering is to diminish representatives' accountability to those who vote for them. By means of gerrymandering, elected officials acquire an inordinate say in deciding who will win the elections they themselves compete in. Not surprisingly, elected representatives exercise this power to ensure their own reelections, and to ensure the reelection of other members of their party. In this way, gerrymandering transfers electoral power from voters to elected representatives, and therefore it diminishes representatives' need to be responsive to their constituents' concerns.

Gerrymandering also limits voters' ability to gather information about candidates. Gerrymandered districts typically combine voters who reside in widely dispersed areas and communities. Indeed, it is common for voters in heavily gerrymandered districts to not know which electoral districts they are supposed to vote in or who represents them. When voters have a harder time getting and sharing information about elected representatives, those representatives are less accountable. *See In re Legislative Districting of the State*, 370 Md. 312, 368-369 (2002). Non-compact, gerrymandered districts empower elected representatives at the expense of voters, separate communities

to prevent the exchange of information about representatives, and confuse citizens, thereby insulating politicians from the will of the people.[6] In light of these considerations, this Court routinely accepts gerrymandering cases for review. *See Legislative Redistricting Cases*, 331 Md. 574 (1993); *In re 2012 Legislative Districting of the State*, 436 Md. 121 (2013).

In contrast to these effects of gerrymandering, the purpose of Marylanders' right to referendum is to increase the accountability of legislative bodies to their constituents.[7] Since the Question 5 ballot language was calculated to conceal from voters the fact that the underlying bill effected dramatic changes to Maryland's previous congressional districts, the people's right to consider this change was effectively denied. This denial ensured passage of a law that will allow Maryland's elected representatives to become more insulated from the interests of the people. The Court should now accept review to make certain that there were no flaws in the legal grounds for this weakening of the institutions of democracy in Maryland.

CONCLUSION

For the foregoing reasons, the Court should grant the instant Petition.

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[6] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 615 (December 2002) ("To the extent that elections are structured to limit accountability, whether it be by inordinately high filing fees… or by gerrymandered districts, the key role of [representative] accountability is compromised.").

[7] 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).

Dated: August 22, 2014

Respectfully submitted,

s/ Chris Fedeli

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* Specially admitted to appear in *Parrott v. McDonough* by Court of Special Appeals Order dated Oct. 1, 2013, pursuant to Md. R. Gov'g Admis. Bar 14(a) and Md. Rule 8-402(b); Appearance continues before Court of Appeals pursuant to Md. Rule 8-402(a).

CERTIFICATE OF SERVICE

I hereby certify that on August, 22, 2014, I caused a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI to be served, via email and first-class U.S. mail, postage prepaid, on the following:

Julia Bernhardt
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
200 St. Paul Place, 20th Floor
Baltimore, MD 21202-2021

s/ Chris Fedeli
_____
Chris Fedeli