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Referenda in Maryland: The Need for Comprehensive Statutory Reform

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REFERENDA[1] IN MARYLAND: THE NEED FOR COMPREHENSIVE STATUTORY REFORM

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The referendum is a much praised, often criticized, frequently misunderstood product of divergent views of the political process, reflecting a profound contradiction between direct and indirect, or representative, democracy.[3] Use of the referendum is "increasingly popular . . . ."[4] The number of recent trial court and appellate decisions, coupled with repeated suggestions for legislative

1. It has been suggested that use of "referendums" is "logically preferable" to the term "referenda." K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1045 n.2 (2007); *accord* MD. CODE ANN., LOCAL GOV'T § 4-412(d)(2). "Referenda" is also properly used as a plural term. Merriam-Webster online dictionary, http://www.merriam-webster.com/dictionary/referendum.

2. The opinions expressed herein are solely those of the authors and not of any organization with which they are affiliated. Mr. Berman has been counsel of record in a number of referendum lawsuits, including Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013); Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam); Citizens Against Slots at the Mall v. PPE Casino Resorts Md., LLC, 429 Md. 176, 55 A.3d 496, (2012); Anne Arundel Co. Taxpayers Ass'n., Inc. v. Anne Arundel Co. Bd. of Elections, 415 Md. 433, 2 A.3d 1095 (2010) (per curiam); and, Gelbman v. Willis, No. C-2001-7340.0C (Cir. Ct. Anne Arundel Co. Oct. 5, 2001), as well as a number of general election cases. Schade v. Md. State Bd. of Elections, 401 Md. 1, 930 A.2d 304 (2007); Liddy v. Lamone, 398 Md. 233, 919 A.2d 1276 (2006); Ross v. State Bd. of Elections, 387 Md. 649, 876 A.2d 692 (2005); Md. Green Party v. Md. Bd. of Elections, 377 Md. 127, 832 A.2d 214 (2003). Ms. O'Toole-Louriero is a graduate of the University of Baltimore School of Law and an associate at Goodell, DeVries, Leech & Dann, LLP.

3. *See* DuVivier *supra* note 1, at 1045–53 (explaining the difference between direct and indirect democracy).

4. Whitley v. Md. State Bd. of Elections, 429 Md. 132, 135, 55 A.3d 37, 39 (2012). *See also* S. Lash, *Capital Punishment Gets a New Lease on Life*, THE DAILY RECORD, May 3, 2013, http://thedailyrecord.com/2013/05/03/md-death-penalty-supporters-to-make-announcement/ (discussing an effort by death penalty supporters to place ban on ballot), *Md. Woman Plans Referendum Petition on Gun Bill*, THE DAILY RECORD, May 6, 2013, http://thedailyrecord.com/2013/05/06/md-woman-plans-referendum-petition-on-gun-bill/ (discussing an effort to place Maryland's gun control bill on ballot). In comparison, between 1916 and 1980, there were only eleven state-wide referenda in Maryland. Note, Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution – Bayne v. Secretary of State, 39 MD. L. REV. 558, 581 (1980).

amendment of the referendum statute, demonstrate the need for comprehensive statutory reform.[5]

Regardless of one's view of the referendum, and its sibling,[6] the initiative, and regardless of which side of the "v." one occupies in a particular case, it is time to clarify the statute so that its administration by boards of election is simplified and so that participants need not engage in costly, accelerated lawsuits over arcane and technical principles such as the "sufficient cumulative information standard," use of nicknames, or whether a circuit court engages in judicial review of an administrative decision of the board of elections.[7] An example of the technical statutory framework is

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5. The statute is a trap for the unwary. DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 275 (2011) (quoting George Liebmann, *Curbing Legislative and Executive Abuse: Referendum and Initiative in Maryland*, MD. B.J. Sept.–Oct. 2000, at 34, 36). Nevertheless, what is "reform" to one person is voter suppression to another. *See* Glynis Kazanjian, Proposed New Referendum Requirements Will Be Amended, Election Law Subcommittee Chair Cardin Says, MARYLANDREPORTER.COM (Mar. 4, 2013, 12:39AM), http://marylandreporter.com/2013/03/04/proposed-new-referendum-requirements-will-be-amended-election-law-subcommittee-chair-cardin-says/.

6. "Referendum" and "initiative" are defined terms. *See infra* note 15. "Recall," in which elected officials are removed from office, has been called "a governmental associative cousin" of referendum and initiative; however, "the power to recall elected officials never has been made a part of the Maryland political scheme." Town of Glenarden v. Bromery, 257 Md. 19, 23, 262 A.3d 60, 62–63 (1970). As such, "recall" is not addressed in this article.

7. Montgomery Cnty. Vol. Fire-Rescue Ass'n. v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 473–74, 15 A.3d 798, 804 (2012); *see also* Swatek v. Bd. of Elections of Howard Cnty., 203 Md. App. 272, 274, 37 A.3d 1045, 1046 (Md. Ct. Spec. App. 2012). The need for clarification is illustrated by signature disqualification rates in recent referenda. For example, in *Swatek*, 203 Md. App. at 274, 37 A.3d at 1046, the court noted that 1,352 signatures on a county petition were invalidated, out of 3,941 that had been submitted. In *Burruss v. Bd. of Cnty. Comm'rs of Frederick Cnty.*, 427 Md. 231, 235, 244, 46 A.3d 1182, 1184–85, 1190 (2012), 1,173 of 2,915 signatures were invalidated. "[M]any of the entries were invalid due to signature defects such as an omitted first or middle name or initial." *Id.* at 244, 46 A.3d at 1190. In *Int'l Ass'n of Fire Fighters, Local v. Mayor & City Council of Cumberland*, 407 Md. 1, 6, 962 A.2d 374, 377 (2008), 3,550 signatures were initially submitted and 2,172 were approved. In *Ferguson v. Sec'y. of State*, 249 Md. 510, 511, 240 A.2d 232, 232–33 (1968), 31,693 signatures were submitted and 28,970 were deemed valid. An 87% rate was described in *Kendall v. Balczerak*, 650 F.3d 515, 519 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 402 (2011). In the past, the State Board of Elections recommended that petitions be signed by at least 20% more than required because of the rejection rate. Roskelly v. Lamone, 396 Md. 27, 32 n.8, 912 A.2d 658, 661 n.8 (2006). Similarly, the dissent in *Fire-Rescue Ass'n*, 418 Md. at 488, 15 A.3d at 813, noted that one "petition solicitor achieved a signature acceptance rate of 84 percent."

provided by the "duplicate" signature rule.[8] Obviously, a voter may sign a referendum petition only one time; however, due to the statutory wording, if a voter's first signature is rejected for technical errors, a second, valid signature is still deemed an invalid duplicate, even though the first signature did not count.[9]

Because the mechanics of referenda are not the stuff of everyday practice, a general understanding is important at the outset. The referendum process permits voters to accept or reject legislation enacted by the General Assembly.[10] The history of the referendum in Maryland is presented in Part I. Referendum by petition, a "facultative" referendum, was unconstitutional in this state until 1915.[11] Under the referendum, the elected legislative body "continues to be the primary legislative organ,"[12] however, the electorate at large exercises a legislative veto.[13] In the main, Maryland has not adopted the "initiative,"[14] a process that permits voters to institute legislation.[15] There are, however, some narrow exceptions where the initiative exists in Maryland.[16]

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8. Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 495, 44 A.3d 1002, 1006 (2012).
9. *Id.* at 495, 498, 44 A.3d at 1006–07. No criticism of the court's decision in that or any other case is implied here or elsewhere herein. The statute compels the result. H.B. 42, introduced in the 2012 Session of the Maryland General Assembly would have, perhaps impractically, provided a process for notice to voters of rejection of their signatures and a process for re-submission of a valid signature. The bill did not pass.
10. FRIEDMAN, *supra* note 5, at 269.
11. *See infra* note 35 and accompanying text.
12. Cheeks v. Cedlair Corp., 287 Md. 595, 613, 415 A.2d 255, 264 (1980).
13. *E.g.*, Save Our Streets v. Mitchell, 357 Md. 237, 247 n.6, 743 A.2d 748, 754 n.6 (2000) (quoting Bd. of Supervisors of Elections of Anne Arundel Cnty. v. Smallwood, 327 Md. 220, 232 n.6, 608 A.2d 1222, 1228 n.6 (1990)).
14. Handgun Control Part of Chapter 533 May Be Petitioned to Referendum, but Rejection of Handgun Control Part Will Render Strict Liability Part of Chapter 533 Ineffective as Well, 73 Md. Op. Att'y Gen. 78, 86 (1988) (citations omitted); *see Save Our Streets*, 357 Md. at 247 n.6, 743 A.2d at 754 n.6 (2000) ("The power to initiate local legislation is repugnant to Art. XI-A, § 3, of the Maryland Constitution . . . .").
15. The court of appeals has frequently emphasized the differences between the two processes:

> Although the processes of initiative and referendum may both require a petition to submit legislation to the electorate, they are distinct with respect to the role they assign to elected government: "Initiative refers to the process by which the electorate petitions for and votes on a proposed law. Referendum is the process by which legislation passed by the governing body is submitted to the electorate for approval or disapproval."

A person seeking to bring a state or county statute to referendum is the "petition sponsor."[17] The state petition sponsor prepares "signature pages," and may submit them to the State Board of Elections (SBE) prior to circulation for an "advance determination" of their sufficiency.[18] Then the pages are presented to the electors by "circulators," who must submit a "circulator's affidavit" attesting (in part) that all signatures were affixed in the circulator's presence.[19] The submitted signature pages are reviewed for legal sufficiency by the Secretary of State and, if sufficient, are transmitted to SBE.[20] SBE engages in two distinct processes, validation and verification.[21] Those processes are governed by statute, regulation, and several decisions of the court of appeals interpreting the applicable principles.[22] If the elections board[23] determines that sufficient valid and verified signatures have been submitted, it "certifies" the petition for the ballot.[24]

Next, a ballot question must be drafted.[25] Sufficiency of the question is governed by statute and a body of case law.[26] Finally, the question is submitted to the electorate.[27]

Legal challenges may be made either before or after the election; however a more stringent standard of review applies to post-election

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Save Our Streets, 357 Md. at 247 n.6, 743 A.2d at 754 n.6 (quoting *Smallwood*, 327 Md. at 232 n.6, 608 A.2d at 1228 n.6).

16. *See infra* Part III.
17. MD. CODE ANN., ELEC. LAW § 6-101 (LexisNexis 2010).
18. *See infra* Part II.A.2.
19. *See infra* Part II.A.2.
20. *See infra* Part II.A.8.
21. *See infra* Part II.A.9.
22. *See infra* Part II.A.9.a–b.
23. SBE generally delegates the validation and verification task for state petitions to the local boards of election. COMAR 33.06.05.01.A ("For a petition filed with the State Board, the State Administrator shall transmit to the election director of each county, for verification under this chapter, all of the signature pages that, in accordance with COMAR 33.06.04.03, the sponsor designated as containing the names of individuals residing in that county.").
24. *See infra* Part II.A.10.
25. *See infra* Part II.A.11.
26. Even the timing of a challenge to a ballot question can be subject to technical rules. Smigiel v. Franchot, 410 Md. 302, 319–20, 978 A.2d 687, 698 (2009) (holding that a challenge is not ripe until question is drafted); *accord* Stop Slots MD 2008 v. State Bd. of Elections, 424 Md. 163, 189, 34 A.3d 1164, 1179 (2012).
27. *See infra* Part II.A.11.

challenges.[28] Appellate review is often on a very-accelerated basis. While much of the attention has focused on state and county referenda, municipal referenda have also been subject to review, even though they are not subject to the Election Law Article of the Maryland Code, and the robust body of regulatory safeguards is not directly applicable to them.[29]

At the state and county level, when a petition sponsor causes signature pages to be circulated, the electors who sign those pages are exercising their reserved[30] legislative power. In short, they are acting as the jurisdiction's largest legislature.[31] At the municipal level, however, voters are often exercising a statutorily-delegated power.[32]

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28. *E.g.*, Whether County's Failure to Comply Fully with Pre-Election Notice Requirements Affects Election Results Concerning Two Proposed Charter Amendments, 94 Md. Op. Att'y Gen. 111, 111–12 (2009) (citing Surratt v. Prince George's Cnty., 320 Md. 439, 449, 578 A.2d 745, 750 (1990)) (opinion limited to post-election challenge).

29. In Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013), the court did not reach the issue of whether state regulatory safeguards applied by analogy; however, it noted that a municipal government may voluntarily incorporate them.

30. MD. CONST. art. XVI, § 1(a). The court of appeals has described the referendum as a "retained, but limited" concept. Koste v. Town of Oxford, 431 Md. 17, 38 n.3, 63 A.3d 582, 584 n.3 (2013).

31. *See* Ficker v. Denny, 326 Md. 626, 634, 606 A.2d 1060, 1064 (1992) (describing the voters' "great rights to legislate . . . .") (citation omitted); Ritchmount P'ship v. Bd. of Supervisors of Elections for Anne Arundel Cnty., 283 Md. 48, 61, 388 A.2d 523, 532 (1978) (stating that county charter's referendum clause established "what is in effect a coordinate legislative entity, that is, the county electorate . . . .").

32. *E.g.*, MD. CODE ANN., art. 23A, § 19 (LexisNexis Supp. 2012).

> The power of annexation may be delegated by the General Assembly to the municipalities of the State and this has been done by Code (1957), Art. 23A, sec. 19. . . . It is apparent from the provision of subparagraph (a) that the power delegated by the General Assembly was not coincident to its own powers.

Mayor & City Council of Rockville v. Brookeville Tpk. Constr. Co., 246 Md. 117, 136, 228 A.2d 263, 274 (1967) (Barnes, J., dissenting). The Ocean City municipal charter "establishes the procedure for petitioning ordinances to referendum vote of the people of the municipality." Inlet Assocs. v. Assateague House Condo. Ass'n, 313 Md. 413, 426, 545 A.2d 1296, 1303 (1988). Please note that, after this article was written but before it went to press, the municipal annexation statute, Md. Code Ann., Art. 23A, §19, was moved as part of the code revision process to the LOCAL GOVERNMENT article. No substantive changes were made during that process.

I. IN MARYLAND, REFERENDUM BY PETITION IS THE PRODUCT OF A 1915 AMENDMENT TO THE CONSTITUTION

There is no fundamental right to a referendum[33] and, on the federal level, there is no right to a referendum at all.[34] Prior to 1915, the referendum on general laws was unconstitutional in Maryland.[35]

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33. Kendall v. Balcerzak, 650 F.3d 515, 521–22 (4th Cir. 2011) (agreeing with the determination of The Hon. J. Frederick Motz that there is no fundamental right to a referendum). The Fourth Circuit wrote that: "Whereas the right to vote is fundamental, the [district] court reasoned, the State-conferred privilege to undertake ballot initiatives and referenda is not." *Id.* at 521; Kendall v. Howard Cnty., No. JFM-09-660, 2009 U.S. Dist. LEXIS 97829, at *12 (D. Md. Oct. 20, 2009) ("There is no fundamental right to initiate legislation as there is a fundamental right to vote."). For example, while there is a statutory right to referenda on municipal annexations, the General Assembly was not required to create that right. *See Mayor & City Council of Rockville*, 246 Md. at 136, 228 A.2d at 274 (Barnes, J., dissenting). The Fourth Circuit has reasoned that "[t]he basis for distinguishing between the right to vote in a representative election, on the one hand, from the right to petition for referendum and initiative, on the other, is a sound one. The referendum is a form of direct democracy and is not compelled by the Federal Constitution." *Kendall*, 650 F.3d at 523, (citing *inter alia*, Doe v. Reed, 130 S. Ct. 2811, 2827 (2010) (Sotomayor, J., concurring)). An alternative analysis might be that, when participating in the referendum process under their reserved right, the people are acting in a legislative capacity. *See supra* note 31. *But cf.* Howard Co Citizens for Open Gov't. v. Howard Co. Bd. of Elections, 201 Md. App. 605, 622, 30 A.3d 245, 256 (2011) ("a voter's right to take a legislative enactment to referendum is fundamental. . . .").

34. "There is no provision for any sort of ballot proposition at the national level in the United States." *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL., http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm#Popular referendum (last visited Aug. 30, 2013).

35. Bayne v. Sec'y of State, 283 Md. 560, 565, 392 A.2d 67, 70 (1978) ("Prior to the constitutional amendment, legislative referendum with respect to a law of general applicability did not exist in Maryland. This Court had consistently held that to condition the operative effect of such a law upon approval by the voters of the State was an improper delegation of legislative authority."); Cole v. Sec'y of State, 249 Md. 425, 434, 240 A.2d 272, 277 (1968) ("Prior to the amendment of our constitution on 2 November 1915, when Art. XVI was ratified, referendum by petition did not exist in Maryland. Legislative referendum was possible only with respect to local laws, since this Court had consistently held that to condition the operative effect of a law of general applicability upon approval by the voters of the State was an improper delegation of legislative authority.") (citing Hammond v. Haines, 25 Md. 541 (1866); Burgess v. Poe, 2 Gill. 11 (1844)); *see* Doe v. Md. State Bd. of Elections, 428 Md. 596, 607, 53 A.3d 1111, 1117 (2012) ("The Referendum Amendment to the Maryland Constitution was first proposed by the General Assembly in Chapter 673 of the Acts of 1914. The Amendment was ratified in 1915 and added to the Constitution during

During the early twentieth century, however, the Populist and Progressive movements viewed many state legislatures as either corrupt, inefficient, or both.[36] The Populists and Progressives began a national drive for direct democracy, particularly in the form of the initiative and referendum.[37] In Maryland, this resulted in article XVI

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the wave of Populist and Progressive Movements sweeping the country at the time."); Camden Yards Stadium Legislative Package Not Subject to Referendum, 72 Md. Op. Att'y Gen. 43, 48 (1987) (explaining that until adoption of Art. XVI, the "people had lived under a well recognized form of representative government"); Beall v. State, 131 Md. 669, 677, 103 A. 99, 102 (1917).

36. Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 450, 530 A.2d 245, 252 (1987) ("The Referendum Amendment to the Maryland Constitution was proposed by ch. 673 of the Acts of 1914 and was ratified on November 2, 1915. It was 'the brainchild of Populist and Progressive Movements which dominated national politics in the late nineteenth and early twentieth centuries' . . . .") (quoting Ritchmount P'ship v. Bd. of Supervisors for Elections for Anne Arundel Cnty., 283 Md. 48, 60 n.9, 388 A.2d 523, 531 n.9 (1978)). The *Kelly v. Marylanders for Sports Sanity* court cited *Beall*, 131 Md. at 677, 103 A. at 102, for the proposition "that after the close of the Civil War, and in particular between the years of 1880 and 1900, 'great abuses began to creep into legislation and into the administration of National and State governments.'" The *Kelly v. Marylanders for Sports Sanity* court noted that there were "charge[s] that the government in all its departments, was prostituted to corrupt and selfish purposes.'" *Kelly*, 310 Md. at 451, 530 A.2d at 252. The Referendum was designed to replace representative government and counterbalance these abuses. *See id.*; *accord Doe*, 428 Md. at 608, 53 A.3d at 1118 (2012) (citing *Beall*, 131 Md. at 676, 103 A. at 102); Town May Amend Charter to Allow for Legislation by Ballot Initiative, 88 Md. Op. Att'y Gen. 156, 157 (2003) (stating that the referendum "sought to limit the influence of wealthy special interests in favor of the electoral power of voters.").

37. *Id.* "Two cornerstones of the populist movement (which stresses the rights and innate wisdom of the common people) are the power of referendum and the power of initiative." MD. DEP'T. OF LEGIS. REFERENCE, REFERENDUM, Vol. 87-1, at 1 (May 21, 1987); *accord see infra* note 622. In *Ritchmount*, the court wrote that the referendum "may have been known in early colonial America and still persists as a feature of the celebrated New England town meeting form of government," thus predating the Populist and Progressive movements. 283 Md. at 60 n.8, 388 A.2d at 531 n.8 (citing E. OBERHOLTZER, THE REFERENDUM IN AMERICA (3d ed. 1912)). Between 1898 and 1918, over half of the states adopted initiative and referenda processes. DuVivier, *supra* note 1, at 1045–46. The Attorney General has noted that, "[d]uring the first two decades of the 20th century, twenty-two states (most of them in the West) adopted constitutional provisions for referendum, initiative, or both." DEP'T OF LEGIS. REFERENCE, UPDATE, Vol. 87-1, at 1 (May 21, 1987). Since then, four more states have added such provisions. *See State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Aug. 30, 2013). A county attorney's letter appended to *Art. 23A § 2(30) Permits but Does not Require Municipal Zoning Regulations to Be Put to Referendum*, MD. OP. NO. 82-021, 1982 WL 195056 (1982),

to the state constitution, authorizing the referendum, but not the initiative.[38] Thus, article XVI and the election law article "set forth the procedures governing the referendum" on State general laws.[39]

A. A Brief Overview of the Populist Drive for the Initiative and Referendum

"By 1900, reformers had organized a Maryland Direct Legislation League, with A. G. Eichelberger as its president. Ten years later the League claimed 'more than 1,000 active, working members.' In 1914, the League promoted an I&R [initiative and referendum] bill sponsored by State Senator William J. Odgen of Baltimore, but the legislature amended it to remove the initiative provision."[40] A year

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after describing the general national history of the referendum movement, states: "With the exception of Alaska in 1959, no state has since adopted or jettisoned the referendum."

38. *See infra* Part I.B.

39. Kelly v. Vote Know Coal. of Md., Inc., 331 Md. 164, 167, 626 A.2d 959, 961 (1993) (addressing the referendum on Maryland's abortion statutes).

40. *See Maryland*, INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL., http://www.iandrinstitute.org/Maryland.htm (last visited Aug. 30, 2013). The initiative, referendum, and recall originated in Switzerland. Town May Amend Charter to Allow for Legislation by Ballot Initiative, *supra* note 35, at 157 n.1 (2003) (citing Town of Glenarden v. Bromery, 257 Md. 19, 23 n.1, 262 A.2d 60, 62 (1970)). See *infra* note 625 for additional petitioning history.

later, an attempt to add the initiative failed,[41] as have more recent attempts.[42]

The philosophy behind the referendum movement reflects a basic distrust of representative government:[43]

> There is a radical difference between a democracy and a representative government. In a democracy, the citizens themselves make the law and superintend its administration; in a representative government, the citizens empower legislators and executive officers to make the law and carry it out.[44]

The referendum is a reservation of power by the people "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."[45] As such, it was a modification of, or supplement to,

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41. Town May Amend Charter to Allow for Legislation by Ballot Initiative, *supra* note 40, at 157–58 n.2. A proposal to include the initiative in the constitution was rejected: "Proposals were made to abolish the principle of representation and to adopt the principle of initiation of legislation by the people, and the principle of referring legislation already adopted by the Legislature to the people. The last of these proposals was adopted by this state in the Referendum Amendment . . . ." Bd. of Educ. of Frederick Cnty. v. Mayor & Aldermen of Frederick, 194 Md. 170, 177, 69 A.2d 912, 915 (1949); *accord* Town May Amend Charter to Allow for Legislation by Ballot Initiative, *supra* note 35, at 156 & n.2 ("[The Maryland Constitution] does not provide for an initiative process at the State level.") (citing MD. CONST. art. XVI; EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND, 1850–1920, 566–70 (1984)). Maryland is one of only three states that have the referendum without the initiative. FRIEDMAN, *supra* note 5, at 269; *Kelly*, 310 Md. at 452 n.7, 530 A.2d at 252 n.7; Camden Yards Stadium Legislative Package not Subject to Referendum, *supra* note, 35 ("Only Maryland and two other states have referendum powers but no initiative provision.") (citing DEP'T OF LEGIS. REFERENCE, UPDATE, Vol. 87-1, at 1 (May 21, 1987)).

42. *See* H.B. 871, 2012 Leg., Reg. Sess. (Md. 2012) (proposal to amend Maryland Constitution to provide for initiative).

43. "When they introduced the initiative process, the Progressives believed that representative government had failed because legislatures were controlled by special interests." DuVivier, *supra* note 1, at 1046.

44. *Id.* at 1045.

45. Beall v. Maryland, 131 Md. 669, 677, 103 A. 99, 102 (1917); *accord* Anne Arundel Cnty. v. McDonough, 277 Md. 271, 283, 354 A.2d 788, 796 (1976) (noting the reservation of right of the people in county charter); Jackson H. Ralston, "To the voters of the State of Maryland," Direct Legislation League of Maryland (circa 1915), 4 ("The referendum, after all, is nothing but the exercise of power by its original possessor."). Ralston suggested that: "Propositions are made in the legislature. . . . Active lobbies and interested speakers support them. Without any popular test at all,

the concept of representative government.[46] It has been described by its advocates as a "new instrument of government . . . ."[47]

Of course, that "division of labor . . . is at the very foundation of our representative democracy."[48] As will be seen in Part I below, the alteration of this foundation has profound impacts on interpretation of the referendum statute. Just as the referendum has many supporters, there are many who oppose or seek to limit it.

B. Article XVI of the Maryland Constitution, Provides for a Referendum on State Legislation, But Not the Initiative

In article XVI, the Maryland Constitution provides for referenda on state legislation with certain express limitations.[49] Curiously, however, "[t]here does not seem to be much available legislative history to inform us about art[icle] XVI."[50] Although the constitutional provision "defines" the referendum power,[51] it has been described as "an introductory general description of the principle of the referendum."[52] The referendum amendment has six sections; however, "[s]ection 1 is at the heart of the amendment."[53] Article

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these propositions become law." *Id.* at 5. He argued that: "The people, taken as a whole, have no axes to grind so far as legislation is concerned. They do not put selfish desires into bills and haunt the halls of the General Assembly until bills become law." *Id.* at 5. In his "Address to the citizens of the state of Maryland upon the initiative and referendum," Ralston argued: "Our whole theory of government is based upon the fact that the people are competent enough to rule themselves and pass on all questions coming before them." For a different perspective, *see infra* note 630.

46. *McDonough*, 277 Md. at 283, 354 A.2d at 796. Most recently, the court described the referendum "as a supplement to the principle of representative government." Doe v. Md. State Bd. of Elections, 428 Md. 596, 608, 53 A.3d 1111, 1118 (2012) (citation omitted).

47. *Beall*, 131 Md. at 678, 103 A. at 102.

48. Smigiel v. Franchot, 410 Md. 302, 313, 978 A.2d 687, 694 (2009).

49. *See infra* Part I.D.

50. Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 478, 530 A.2d 245, 265 (1987) (Adkins, J., dissenting).

51. *Doe*, 428 Md. at 600, 53 A.3d at 1113.

52. FRIEDMAN, *supra* note 5, at 260. A gubernatorial commission recommended deletion of the referendum from the constitution. *Id.*

53. Bayne v. Sec'y of State, 283 Md. 560, 565, 392 A.2d 67, 70 (1978); *accord Doe*, 428 Md. at 607–08, 53 A.3d at 1117. *See generally* Whitley v. Md. State Bd. of Elections, 429 Md. at 138–39, 55 A.3d at 41 (explaining the importance of Section 1). During the 2013 Session of the General Assembly, an amendment to article XVI was proposed. S.B. 706, Reg. Sess. (Md. 2013), *available at* http://mgaleg.maryland.gov/2013RS/bills/sb/sb0706f.pdf. It did not become law and was intended to alter certain dates, alter the number of signatures required to refer a law, and make other changes.

XVI, section 1—"Reservation of power of referendum in people; article self-executing; additional legislation"—provides:

> (a) The people reserve to themselves power known as The Referendum, by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act, or part[54] of any Act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor; (b) The provisions of this Article shall be self-executing; provided that additional legislation in furtherance thereof and not in conflict therewith may be enacted.[55]

The word "referendum" is a term of art: "The Referendum, broadly speaking, 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

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54. A petition sponsor seeking to refer only part of an act should do so expressly. Absent such an expression, the court has viewed the petition as one seeking to refer the entire act. Winebrenner v. Salmon, 155 Md. 563, 571, 142 A. 723, 726 (1928). A referendum on part of a law "has only been sought on very few occasions and the resulting interpretations have not been conclusive." FRIEDMAN, *supra* note 5, at 270. Perhaps that is because of common law constraints on that provision. Part of an excepted law, e.g., part of a Budget Bill, is "ordinarily" not referable. *Bayne*, 283 Md. at 576, 392 A.2d at 76. The Attorney General interpreted this portion of the constitution and addressed a referendum on part of a statute where the two provisions were not severable. Handgun Control Part of Chapter 533 May Be Petitioned to Referendum, *supra* note 14, at 43. The constitutional language "part of any Act" permits a referendum petition on the part that the petitioners found objectionable; however, the Attorney General cautioned that: "Of course, the right to refer a part of a law is not unlimited." *Id.* at 86. He wrote in part: "Moreover, one can imagine referendum attempts that so parse an enactment as to be misleading, too fragmentary, or otherwise beyond the permissible bounds of the referendum. A petition that seeks, through the device of a referendum, merely to tinker with legislative decision is probably invalid." *Id.* For example, a referendum that sought to remove the word "not" would be of doubtful validity. *Id.* In an unpublished order, however, the court of appeals has severed invalid provisions and permitted a referendum on the remainder under MD. CONST. art. XI-A. Balt. Cnty. Citizens for Representative Gov't v. Balt. Cnty., 1990 Md. Lexis 146, *2 (1990). *See generally* Camden Yards Stadium Legislative Package not Subject to Referendum, *supra* note 35, at 43 (discussing "legally inseparable bills" under the appropriation exception).

55. In *Beall v. State*, 131 Md. 669, 678, 103 A. 99, 102 (1917), the court held that Art. XVI did not impliedly repeal MD. CONST. art. III, § 31.

law passed by the law making body."[56] By its express terms, article XVI does not create a right to initiative.[57] Section 2 of article XVI, has been described as "complicated to read" and it, and Section 3, are comprehensively addressed in another recent publication.[58]

C. The Two Types of Referenda

There are two types of referendum and "Maryland law recognizes the distinction between compulsory referendum mandated by a legislative body and optional or 'facultative' referendum [initiated] by citizen petition."[59] Thus, "[i]t is customary to draw a distinction between compulsory referenda on the one hand and optional or 'facultative' referenda on the other. Where the Legislature directs that a given statute not take effect until and unless approved by a vote of the electorate, it is described as 'compulsory.'"[60]

Article XVI of the Maryland Constitution authorized facultative, or optional, referenda on public general laws.[61] In short, after 1915, the people had the right to petition state statutes to referendum.[62]

The compulsory referendum also exists.[63] For example, Maryland Constitution, article XIX, section 1(e), directs a referendum on any act expanding gaming.[64] Article XIV provides that constitutional amendments must be submitted to the voters,[65] stating that, after the General Assembly enacts a constitutional amendment it "shall be

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56. *Beall*, 131 Md. at 678, 103 A. at 102 (1917); *accord* Anne Arundel Cnty. v. McDonough, 277 Md. 271, 283, 354 A.2d 788, 796 (1976).

57. The difference between a "referendum" and the "initiative" is discussed above. *See supra* note 33.

58. FRIEDMAN, *supra* note 5, at 271–75.

59. Kendall v. Howard Cnty., 204 Md. App. 440, 452 n.7, 41 A.3d 727, 735 n.7 (Md. Ct. Spec. App.), *aff'd on other grounds*, 431 Md. 590, 66 A.3d 684 (2012).

60. Ritchmount P'ship v. Bd. of Supervisors of Elections, 283 Md. 48, 60, 388 A.2d 523, 531 (1978).

61. *Id.* ("Prior to 1915, facultative referendum was thought to be impossible in Maryland on the theory that the authority to enact, repeal or amend laws had been vested exclusively in the General Assembly—the people having completely transferred all legislative power to the Legislature."). MD. CONST. art. XI-F, § 7, provides that an action of a code county regarding a public local law "is subject to a referendum of the voters in the county. . . ."

62. *See Ritchmount P'ship*, 238 Md. at 60, 388 A.2d at 531.

63. *See infra* notes 64-65 and accompanying text.

64. The court of appeals recently granted certiorari in a case challenging MD. CONST. art. XIX, § 1. The case was decided, however, under a time bar. Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam).

65. MD. CONST. art. XIV "first appeared in 1864 and remains substantially unchanged today." FRIEDMAN, *supra* note 5, at 260.

submitted, in a form to be prescribed by the General Assembly, to the qualified voters of the State for adoption or rejection." Article XIII, section 1, permits the legislature to create new counties, "but no new county shall be organized without the consent of the majority of the legal voters residing within the limits proposed to be formed into said new county . . . ."[66] Each provision is a compulsory referendum.[67]

Ordinarily, the referendum is limited to legislative matters.[68] In addition to public general laws, adoption of a charter, charter amendments, local laws authorizing issuance of bonds or indebtedness,[69] zoning,[70] annexation,[71] and public local laws[72] are referable.

66. MD. CONST. art. XIII, § 1.

67. While the initiating mechanism is markedly different in facultative referenda, on the one hand, and compulsory referenda, on the other, the post-initiation process is parallel. For example, the Attorney General has stated that, while there is a distinction, "[t]he Court apparently proffered this distinction without intending a difference. . . ." Applicability of Contribution Limitation to Contribution to Governor and Lieutenant Governor Running Mates, 63 Md. Op. Att'y Gen. 291, 292 (1978).

68. Anne Arundel Cnty. v. McDonough, 277 Md. 271, 283, 354 A.2d 788, 796 (1976).

69. *Id.* at 283, 354 A.2d at 796; *see also* MD. CODE ANN., art. 23A, § 32(b) (LexisNexis 2011) (describing how bonds of a municipal corporation shall be authorized by resolution and providing for how such resolutions are to be adopted); City of Frostburg v. Jenkins, 215 Md. 9, 12, 18, 136 A.2d 852, 853, 857 (1957) (upholding a public local law providing for a referendum on industrial development bonds); 63 Md. Op. Att'y Gen. 291 (1978) (discussing county charter amendment, which may provide that bond bills be submitted to voters). In *Mayor of Mount Airy v. Sappington*, the court described a public local law that conferred the power to regulate slaughter-houses within corporate limits, "after a referendum before exercising these powers." 195 Md. 259, 267, 73 A.2d 449, 452 (1950).

70. *McDonough*, 277 Md. at 283–84, 354 A.2d at 796 (noting that the court also assumed that a comprehensive zoning bill was referable); Superior Outdoor Signs, Inc. v. Eller Media Co., 150 Md. App. 479, 489, 822 A.2d 478, 484 (Md. Ct. Spec. App. 2003) ("The Town of Willards is a municipal corporation. Among its enumerated express powers is the power to 'provide reasonable zoning regulations subject to the referendum of the voters at regular or special elections.'" (citing art. 23A, § 2(b)(30)).

71. MD. CODE ANN., art. 23A, § 19(f)–(h).

72. Sufficiency Determination Concerning a Referendum on a Public Local Law Enacted by the General Assembly is to be Made by State Officials, 85 Md. Op. Att'y Gen. 120, 120–22 (2000).

D. The Express Limitations on the Right to a Referendum under Common Law and, article XVI of the Maryland Constitution

In sections 2 and 6 of article XVI, the constitution imposes several express limitations on the right to referendum.[73] There are additional common law exceptions.[74]

1. Exceptions Under Article XVI, Sections 2 and 6

The primary exceptions to the right to facultative referenda are expressly included in article XVI.[75] The "appropriations exception" is stated in article XVI, section 2: "No law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this Section."[76] Article XVI, section 6, states that: "No law, licensing, regulating, prohibiting, or submitting to local option, the manufacture

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73. MD. CONST. art. XVI, §§ 2, 6.

74. *See* discussion *infra* Part I.E.

75. The court of appeals has recently stated that article XVI contains "several" exceptions. Doe v. Md. State Bd. of Elections, 428 Md. 596, 608, 53 A.3d 1111, 1117 (2012) ("The right of referendum is subject to several exceptions . . . ."). In the past, it has variously stated that there are two or three express limitations on the right to referendum. *Compare* Dorsey v. Petrott, 178 Md. 230, 234, 13 A.2d 630, 633 (1940) ("The general application of the Referendum is subject to two express limitations which are found in sections 2 and 6."), *with* Bayne v. Sec'y of State, 283 Md. 560, 566, 392 A.2d 67, 70 (1978) ("The general application of The Referendum is subject to three express limitations."). *Accord* Camden Yards Stadium Legislative Package not Subject to Referendum, 72 Md. Op. Att'y Gen. 43, 49 (1987) ("There are three exceptions to referendum, two of which are set out in Article XVI, §2 . . . . The third is in Article XVI, §6 . . . ."). The apparent discrepancy was resolved by the *Bayne* court, by reference to a study performed in the 1968 Constitutional Convention. *Bayne*, 283 Md. at 566 n.2, 392 A.2d at 70 n.2, and it appears to be of no moment whether there are two or three exceptions. The court has clearly stated that limitations are found in article XVI, section 2, and in article XVI, section 6. *Id.* at 566–67, 392 A.2d at 70; *Doe*, 428 Md. at 608, 53 A.3d at 1117. Thus, "[t]here are exceptions [to the right to referendum], notably those embraced in the sixth section, which indicate clearly that it was not intended that the provisions of the Article should apply to all legislation." Beall v. State, 131 Md. 669, 678, 103 A. 99, 103 (1917). The court has stated, "exceptions from its power are limitations upon the power." *Id.*

76. Article XVI, section 2, also provides that: "The increase in any such appropriation for maintaining or aiding any public institution shall only take effect as in the case of other laws, and such increase or any part thereof specified in the petition, may be referred to a vote of the people upon petition." MD. CONST. art. XVI, § 2. Thus, there is an exception to the limitation.

or sale of malt or spirituous liquors, shall be referred or repealed under the provisions of this Article."[77]

It could be asserted that there is an additional, partial limitation in article XVI, section 2, because emergency laws are not suspended while a referendum is pending.[78] Thus, there are several exceptions to the power to refer under article XVI.[79]

While it is neither a limitation on, nor an exception to, article XVI, it is important to note that, even after enactment of the referendum amendment, the General Assembly cannot *direct* that a public general law be submitted to referendum.[80] There are two reasons. First, because the people have delegated the law-making power to the General Assembly, the legislature cannot re-delegate the power to them.[81] Second, the General Assembly is "not competent" to change by statute the constitutional provisions prescribing how laws may be

77. The "spirituous liquors" limitation was explained in *Beall v. State*, 131 Md. 669, 103 A. 99 (1917), and applied in *Poisel v. Cash*, 130 Md. 373, 100 A. 364 (1917), to a law prohibiting the sale of liquor in Carroll County. *See Beall*, 131 Md. at 676–78, 103 A. at 102–03; *Poisel*, 130 Md. at 374–75, 100 A. at 364. The court held that article XVI did not bar a referendum; however, the statute at issue also appears to be a public local law. *See Poisel*, 103 Md. at 375, 100 A. at 364.

78. *See* discussion *infra* p. 124.

79. *See* discussion *infra* Part I.D.2–3.

80. Bd. of Pub. Works v. Balt. Cnty., 288 Md. 678, 681, 421 A.2d 588, 589 (1980) (citing a line of cases commencing in 1866). As to public local laws, "a public local law may be conditioned upon a referendum of the voters in the area or political subdivision affected by the legislation." *Id.*; *see also* Harford County may by Charter Amendment Provide that Bond Bills be Submitted to County Voters for Approval, 63 Md. Op. Att'y Gen. 291, 291 (1978) (holding that a referendum provision be incorporated into a county's charter for certain public local laws).

81. *Bd. of Pub. Works*, 288 Md. at 681–82, 421 A.2d at 589–90 (citing Brawner v. Supervisors, 141 Md. 586, 595, 119 A. 250, 252 (1922)); *see* Bd. of Supervisors of Elections v. Att'y Gen. of Md., 246 Md. 417, 431, 229 A.2d 388, 396 (1967) (also citing *Brawner*). The re-delegation doctrine is a "dead letter" as to all referenda within the scope of constitutional provisions that authorize referenda. *See e.g.*, MD. CONST. art. XVI, § 1(a); MD. CONST. art. XI–A, § 1; MD. CONST. art. XI–F, § 7; MD. CONST. art. XIX, § 1(e). The decision in *Carrier v. Lynch*, 209 Md. 349, 121 A.2d 246 (1956), appears anomalous. There, a state "blue law" provision, article 27, section 609a, "was made subject to a referendum of the voters of the County at the next general . . . election." *Id.* at 353, 121 A.2d at 248. Such a procedure would appear barred by *Brawner* and the re-delegation doctrine. The court, however, wrote simply: "If the voters are against baseball and motion pictures on Sunday, they may vote to retain the law as presently in effect." *Id.* It would appear that a legislatively directed referendum on section 609a would run afoul of the re-delegation doctrine; however, that was apparently not the case.

enacted.[82] In short, only facultative referenda are contemplated by article XVI.[83]

2. The Appropriations Exception

The constitutional appropriations exception provides that:

> No law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this Section. The increase in any such appropriation for maintaining or aiding any public institution shall only take effect as in the case of other laws, and such increase or any part thereof specified in the petition, may be referred to a vote of the people upon petition.[84]

a. Purpose of the appropriations exception

The underlying purpose of the appropriations exception is to "prevent interruptions of government."[85] The theory is "'that if laws making appropriations for maintaining the state government were subject to referendum, it would be possible, through the exercise of this power by the people, to cause the state serious financial embarrassment in the performance of its various essential functions.'"[86]

In *Kelly v. Marylanders for Sports Sanity, Inc.*, the Maryland Court of Appeals provided the historical context in which to interpret the

82. *Bd. of Pub. Works*, 288 Md. at 681–82, 421 A.2d at 589–90 (citing *Brawner*, 141 Md. at 595, 119 A. at 252). The General Assembly may make a change by constitutional amendment. *See* MD. CONST. art. XIX, § 1(e) (section 1(e) provides that a law expanding gaming be submitted to referendum).

83. *See* Culp v. Comm'rs of Chestertown, 154 Md. 620, 622, 141 A. 410, 412 (1928) (noting that article 16 of the constitution, "makes no provision for a referendum to the voters of any city of the state other than Baltimore City, or any rural section of the state of a less extent than a county").

84. MD. CONST. art. XVI, § 2.

85. *See* Bickel v. Nice, 173 Md. 1, 10, 192 A. 777, 781 (1937); *see generally* Note, Statutes – Referendum – Stadium Enactments Not Subject to Referendum Because They Fall Within Appropriation Exception to the Referendum Amendment, Kelly v. Marylanders for Sports Sanity, Inc., 18 U. BALT. L. REV. 212 (1988).

86. Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 456, 530 A.2d 245, 254 (1987) (quoting Gasoline Tax Law Not Referable, 12 Md. Op. Att'y Gen. 228, 235–36 (1927)).

appropriations exception.[87] When the referendum amendment was ratified in 1915, the Budget Act had not yet been passed and Maryland "had no orderly system of planned public expenditures."[88] The "power to expend public monies was vested solely in the Legislature," and "appropriations for various purposes were made piecemeal by a series of bills . . . each project receiving independent consideration without relation to other claims upon the public purse."[89] As a result, the legislature lacked a "complete picture of the financial condition and needs of the government."[90]

The *Kelly* court observed that it was almost impossible to "glean[] from the literature on the subject" whether, in "proposing the exceptions to the people's right to Referendum" in 1915, the General Assembly "was undertaking to insulate its interest in spending public monies, or [whether it] had some higher purpose in mind[.]"[91] Notwithstanding the inability to discern the General Assembly's initial intentions, the substance of the exception "exclude[s] from [article XVI's] coverage all those bills, with or without revenue-raising provisions, which authorized the expenditure of public money to maintain the State government[.]"[92]

The budget amendment to the Maryland Constitution, ratified in 1916, one year after the referendum amendment, effected "radical change" and addressed the budgetary deficiencies and "dismal fiscal practices of the General Assembly" by "providing for a comprehensive executive budget system for the State."[93] Of note, but simplified greatly, the Budget Amendment specified that "'[e]very appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter provided.'"[94]

Thus, the 1916 budget amendment provided for appropriations and the 1915 referendum amendment made specified appropriations non-

87. *See id.* at 450–59, 530 A.2d at 251–56.
88. *Id.* at 450, 453, 530 A.2d at 251, 252.
89. *Id.* at 453, 530 A.2d at 252–53.
90. *Id.*, 530 A.2d at 253.
91. *Id.* at 454, 530 A.2d at 253.
92. *Id.*
93. *Id.*; *see also* Bayne v. Sec'y of State, 283 Md. 560, 567, 392 A.2d 67, 71 (1978) ("The purpose of the Budget Amendment was to . . . provid[e] an intelligent and definite method of estimating and appropriating the income of the state.")
94. Doe v. Md. State Bd. of Elections, 428 Md. 596, 603, 53 A.3d 1111, 1115 (2012) (quoting MD. CONST. art. III, § 52(2)).

referable.[95] Nevertheless, the word "appropriation" did not have the same meaning in each provision.[96]

b. While budgetary appropriations bills are clearly within the scope of the referendum exception, the exception encompasses much more

The specific language of the referendum amendment, exempting from referendum all laws "making any appropriation for maintaining the State Government,"[97] clearly includes "a Budget Bill or supplementary appropriation bill."[98] The meaning of the word "appropriation," in the referendum amendment, however, is not limited to the term's meaning within the context of the budget amendment.[99]

In 1927, the Attorney General expansively interpreted the appropriations exception.[100] The Attorney General was asked "whether a statute which increased the gas tax and dedicated the proceeds for highway construction and maintenance was a law making an appropriation 'for maintaining the State Government' and thus was not referable under [article] XVI."[101] Opining that the statute was non-referable, the Attorney General interpreted the word "appropriation" in the budget amendment differently than the same word in article XVI, writing:

> As to the exception in the Referendum Amendment, the word "appropriation . . . signifies the act of setting apart or assigning to a particular use or person in exclusion of all other, that is to say, the application to a special use or purpose"; whereas in the Budget Amendment[,] the word

95. *Kelly*, 310 Md. at 450–52, 454, 530 A.2d at 251–53.

96. *Id.* at 456, 530 A.2d at 254 ("[T]he word 'appropriation' is not used in the same sense in the budget amendment and in Article XVI." (quoting Gasoline Tax Law Not Referable, 12 Md. Op. Att'y Gen. 228, 235 (1927)); *cf.* Note, Statutes – Referendum – Stadium Enactments Not Subject to Referendum Because They Fall Within Appropriation Exception to the Referendum Amendment, Kelly v. Marylanders for Sports Sanity, Inc., 18 U. BALT. L. REV. 212, 213 (1988) (noting conflicting definitions of "appropriations" in other constitutional provisions).

97. MD. CONST. art. XVI, § 2.

98. *Kelly*, 310 Md. at 455, 530 A.2d at 253.

99. *See* Gasoline Tax Not Referable, 12 Md. Op. Att'y Gen. 228, 234–35 (1927).

100. *Id.*

101. *Kelly*, 310 Md. at 455, 530 A.2d at 253 (1987) (citing Gasoline Tax Not Referable, 12 Md. Op. Att'y Gen. 228, 228, 233, 235 (1927)).

> "appropriation" "denotes disbursement . . . of appropriated monies from the State Treasury."[102]

Put differently, then-Attorney General Robinson stated that, while "[t]he Budget Amendment prescribes the method whereby appropriated funds may be withdrawn from the State treasury[,]" in contrast, "[a]rticle XVI refers to all laws assigning public monies to a particular use or purpose, regardless of whether such law is adequate or legally sufficient to authorize the payment or disbursement of the appropriated monies."[103]

Thus, "[t]he opinion concluded that 'the broad language of the exception was intended to include all laws providing for revenue for and/or appropriating monies to any organized department of the State . . . [for] the exercise of state functions.'"[104] Obviously, Attorney General Robinson's definition of what constituted an "appropriation" under article XVI was much broader than an "appropriation" under the budget amendment.[105]

The opinion received judicial imprimatur in *Winebrenner v. Salmon*,[106] where the court held that, although a statute dedicating proceeds from the gas tax for highway construction may not be "sufficient in itself to authorize the withdrawal from the treasury of the state the money collected under its provisions [i.e., a budget bill], it was at least a direction to the Governor to make the disbursement in the budget," and as such, was sufficiently an appropriation act to avoid referendum.[107] While the highway construction bill was not a budgetary appropriation, it was nonetheless non-referable under the

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102. *Id.* at 456, 530 A.2d at 254 (quoting Gasoline Tax Not Referable, 12 Md. Op. Att'y Gen. 228, 235 (1927)).

103. *Id.*

104. *Id.* at 457, 530 A.2d at 254 (quoting Gasoline Tax Law Not Referable, 12 Md. Op. Att'y Gen. 228, 236 (1927)).

105. *See supra* text accompanying notes 103–04.

106. 155 Md. 563, 142 A. 723 (1928).

107. *Id.* at 566–70, 142 A. at 724–26. The issue found its way into the court because on May 31, 1927, various residents of Baltimore City and other Maryland counties "filed a petition in due form and with the required number of signatures . . . for a referendum." *Id.* The Secretary of State, after being advised by the Attorney General that the act was non-referable because it fell within the appropriations exception, refused to place the statute on the ballot, and on March 21, 1928, the "appellees filed a petition for mandamus in the Circuit Court for Anne Arundel county" challenging the decision. *Id.* The appellees argued, *inter alia*, that the statute was not an appropriation act exempt from referendum, or, in the alternative, if it was an appropriation act, that it is not one for "maintaining the state government." *Id.*

broader definition of "appropriation" as it appears in the referendum exception.[108] Accordingly, the scope of the appropriations exception has expanded "to cover, in addition to Budget Bills and Supplementary Appropriation Bills, 'that class of money bills[109] or spending measures[110] contemplated by the exceptions to the referendum right under [article] XVI.'"[111]

c. *Courts engage in a multi-step analysis to apply the appropriations exception*

Courts employ a multi-step analysis in applying the exception.[112] The first question is whether the statute is an appropriation within the meaning of article XVI.[113] Next, if it is, a court must ask whether it is an appropriation "for maintaining the State Government."[114] Although an act of the legislature "may be passed for the purpose of maintaining the State government, the act is nevertheless subject to the Referendum, unless it be an act so appropriating public funds for that purpose."[115]

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108. *See id.*

109. A money bill is a revenue-raising measure or a revenue-related measure. *See* Doe v. Md. State Bd. of Elections, 428 Md. 596, 610, 610 n.5, 53 A.3d 1111, 1119 n.5 (2012).

110. The court of appeals defined a spending measure appropriation as any "law[] assigning public monies to a particular use or purpose, regardless of whether such law is adequate or legally sufficient to authorize the payment or disbursement of the appropriated monies." *Id.* at 610, 53 A.3d at 1119 (quoting *Kelly*, 310 Md. at 456, 530 A.2d at 254).

111. *Id.* at 609, 53 A.3d at 1118 (quoting *Kelly*, 310 Md. at 455-56, 530 A.2d at 253–54 (internal quotation omitted)). *Winebrenner* took an expansive view. In Note, Statutes – Referendum – Stadium Enactments Not Subject to Referendum Because They Fall Within Appropriation Exception to the Referendum Amendment, Kelly v. Marylanders for Sports Sanity, Inc., 18 U. BALT. L. REV. 212, 212, 214, 224 (1988), it was argued that the court has taken a "broad" view of the exception. On the other hand, it has been argued that the court of appeals decreased the power of the electorate under the appropriations exception in Bayne v. Sec. of State, 283 Md. 560, 392 A.2d 67 (1978). *See* Note, Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution – Bayne v. Secretary of State, 39 MD. L. REV. 558, 582-83 (1980).

112. *See infra* text accompanying notes 114–25.

113. *See Doe*, 428 Md. at 606, 53 A.3d at 1117.

114. *See, e.g.*, *id.* at 620 n.10, 53 A.3d at 1125 n.10; Bayne v. Sec'y of State, 283 Md. 560, 570, 392 A.2d 67, 72 (1978); Dorsey v. Petrott, 178 Md. 230, 245, 13 A.2d 630, 638 (1940); Winebrenner v. Salmon, 155 Md. 563, 566, 142 A. 723, 725 (1928).

115. *Dorsey*, 178 Md. at 245, 13 A.2d at 638.

Most recently, the Maryland Court of Appeals addressed the exception in *Doe v. Md. State Bd. of Elections* in the context of the Maryland Dream Act.[116] Because the statute was not a budget bill, supplementary appropriation bill, or "money bill," the court stated that, in order to be exempt from referendum, the Act would "need to constitute a spending measure appropriation."[117]

The court then wrote that, to be a spending measure appropriation, the statute's "primary purpose must be to assign the monies for a specified purpose."[118] Importantly, the court distinguished between a statute's "primary purpose" and an incidental provision, writing that general legislation "cannot be converted into an appropriation bill merely because there may be an incidental provision for an appropriation of public funds."[119]

In holding the Dream Act referable, and not within the scope of the exception, the court determined that its primary purpose was "not to appropriate funds from the treasury to support certain classification of students," but rather, to "se[t] eligibility requirements" for higher education that may have an incidental effect on state spending.[120]

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116. The Maryland Dream Act, or Senate Bill 167, "establish[ed] new categories of individuals who may be eligible for in-state tuition rates at community colleges and public four-year colleges and universities in Maryland." *Doe*, 428 Md. at 601, 53 A.3d at 1114. The first category consists of military veterans and the second permits undocumented immigrants "who meet certain conditions to be eligible for the in-statute tuition rate at community colleges in Maryland . . . [and] also includes similar eligibility criteria to qualify for in-state tuition at a four-year public institution in Maryland." *Id.* at 601–02, 53 A.3d at 1114. A summary provided to the Members of the General Assembly by the Department of Legislative Services cautioned that the bill affects a mandated appropriation because "[s]tate expenditures would rise as a result of an increase in the enrollment of qualified in-state students at community colleges." *Id.* at 602, 53 A.3d at 1114. After the enactment of the Maryland Dream Act on May 10, 2011, MDPetitions.com collected enough valid signatures to put the Act to referendum in the November 2012 General Election. *Id.* at 598, 603, 53 A.3d at 1112, 1115.

117. *Id.* at 609–10, 53 A.3d at 1119.

118. *Id.* at 610–11, 53 A.3d at 1119; *accord* Note, Statutes – Referendum – Stadium Enactments Not Subject to Referendum Because They Fall Within Appropriation Exception to the Referendum Amendment, Kelly v. Marylanders for Sports Sanity, Inc., 18 U. BALT. L. REV. 212, 229 (1988) (primary function analysis); *cf.* Note, Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution – Bayne v. Secretary of State, 39 MD. L. REV. 558, 581 (1980) (suggesting that primary function test is "entirely spurious").

119. *Id.*

120. *Id.* at 613, 53 A.3d at 1120–21.

The court specifically recognized that "there is a distinctive difference between referring a bill that, in itself, would stop the state from meeting its financial obligations, and a bill that changes the state's obligations such that at some point in the future, financial adjustments may be needed."[121] Indeed, many, if not a substantial number of, bills passed by the General Assembly may require or call for some unquantifiable future financial adjustment in one way or another.[122] To hold that all such bills are non-referable would, in effect, expand "the exception beyond its intended purpose" and "effectively depriv[e] voters the right to referendum."[123] Thus, to fall within the exception, the law's impact on appropriations cannot be several steps removed from the law's primary purpose.[124]

d. "Package analysis" and the in pari materia *expansion of the appropriations exception*

Just as the Attorney General and *Winebrenner* expanded the appropriations exception beyond budget bills, "package analysis" or the synonymous *in pari materia* doctrine may do the same.[125] Under this doctrine, even though a single law, analyzed in isolation, may not be a non-referable appropriation, the combination of multiple laws considered *in pari materia* may lead to a different result, making an otherwise referable law non-referable.[126] In deciding whether to read separate laws *in pari materia* under the appropriations exceptions,

121. *Id.* at 610 n.5, 53 A.3d at 1119 n.5.

122. *Id.*

123. *Id.* at 613, 53 A.3d at 1121.

124. *Id.* Previously, in *Dorsey*, the court engaged in a parallel analysis and reached a similar result. There, the law at issue concerned conservation of Maryland fisheries and, inter alia, involved the salaries of employees and various additional provisions regarding inspection fines. Dorsey v. Petrott, 178 Md. 230, 235, 246–47, 13 A.2d 630, 638–39 (1940). While the court recognized the subject matter of the law as "undoubtedly a function of the government," *id.* at 235, 13 A.2d at 633, it nonetheless characterized it as a general law and not an appropriation, because the law's primary purpose was to change state policy by "creat[ing] or abolish[ing] an office, or [by] chang[ing] the salary, term or duty of an officer . . . ." *Id.* at 249, 13 A.2d at 639. The *Dorsey* court differentiated a law with the primary purpose of appropriating public funds from general legislation that may happen to contain an incidental provision for an appropriation, the latter of which would not defeat the law's referability. *Id.* at 251, 13 A.2d at 640–41.

125. *See infra* notes 127–45 and accompanying text; *see also* discussion *supra* Part I.D.2.b.

126. *See Doe*, 428 Md. at 615, 53 A.3d at 1122.

courts generally focus on the "interdependency of the two acts."[127] As set forth below, a litigant asserting this limitation on the right to referendum has a heavy burden.

"Package analysis" appeared in *Kelly v. Marylanders for Sports Sanity, Inc.*, where individuals opposing the construction of Camden Yards in Baltimore City undertook to petition two out of three related stadium bills to referendum.[128] The Secretary of State refused to accept the petitions, stating that the bills "fall within an exception to the referendum power and therefore may not be petitioned to a vote."[129]

Suit was filed and the *Kelly* court analyzed each bill in turn, deeming one to contain both revenue and spending provisions, therefore rendering it an appropriation measure not subject to referendum; and, holding that the second neither raised revenue nor appropriated funds, thereby rendering it, in isolation, referable.[130] The problem, however, was that a referendum on the referable bill would, if rejected by electorate, result in defeat of the appropriations bill as a practical matter.[131] The bills had been passed together to establish a common purpose and the court considered them as a "package" in light of "the form, the substance, [and] the legislative history" of the bills indicating that they were to "function in tandem as a unitary solution to" accomplish a singular objective.[132] The bills related to the same subject matter, were enacted during the same legislative session, and, were so mutually dependent upon each other that, to achieve their singular goal, they had to be read together.[133]

The end result, then, was that an otherwise referable bill came within the appropriations exception because it was considered as a part of an inseparable package of bills, one of which was an

127. *Id.* at 616, 53 A.3d at 1122. The court rejected an assertion that four municipal resolutions could be combined in Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

128. 310 Md. 437, 440, 446–47, 450, 530 A.2d 245, 246, 249, 251 (1987). Two separate petitions were circulated.

129. *Id.* at 447, 530 A.2d at 249; Camden Yards Stadium Legislative Package Not Subject to Referendum, *supra* note 35. The opponents then filed suit in the Circuit Court for Anne Arundel County, seeking a writ of mandamus to compel the Secretary of State to accept the petitions. *Kelly*, 310 Md. at 447, 530 A.2d at 249.

130. *Kelly*, 310 Md. at 459–61, 530 A.2d at 255–57.

131. *See id.* at 439–42, 472–73, 530 A.2d at 245–47, 262–63.

132. *Id.* at 473, 530 A.2d at 262–63.

133. *Id.* at 473–74, 530 A.2d at 262–63.

appropriation measure.[134] The *Kelly* court's reasoning was that severing the two interdependent bills would "not just thwart the legislative design but . . . would scuttle the entire project by fatally undermining its dominant purpose[.]"[135]

In *Doe*, the court reached the opposite result (on markedly different facts) when it was asked to consider the Maryland Dream Act *in pari materia* with the Cade Funding Formula and future budget bills.[136] While applying *Kelly*, and reiterating the need to read some bills "*in pari materia* to give the full effect to each statute[,]"[137] the *Doe* court nonetheless declined to do so on the facts presented, holding that the three bills were not so interdependent that together, they "serve as a single solution to a single objective."[138] The court observed that the three statutes "were each enacted separately, at different times, with different purposes, and are not in any way mutually dependent."[139]

Similarly, in *Citizens Against Slots at the Mall v. PPE Casino Resorts Maryland, LLC*,[140] the court held that a local zoning ordinance authorizing video lottery facilities in Anne Arundel County could not be read *in pari materia* with article XIX of the Maryland Constitution, which "provided for licenses to operate video lottery terminals at five locations within the state 'for the primary purpose of raising revenue for'" education, public school construction, and other programs.[141] Again, the court observed that, unlike *Kelly*, the laws at issue "involved different 'legislative bodies, were not enacted' at the same time, and were never treated as a single package."[142]

The court recognized that "many local zoning ordinances may have had a connection with a program under State law involving appropriations."[143] Yet, notwithstanding this potential relationship, the court specifically declined to permit this limited connection to "render a local zoning ordinance and . . . [appropriations] law a single

134. *Id.*; *cf.* Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).
135. *Id.* at 474, 530 A.2d at 263.
136. Doe v. Md. State Bd. of Elections, 428 Md. 596, 607, 53 A.3d 1111, 1117 (2012).
137. *Id.* at 613–16, 53 A.3d at 1121–22 (citing Whack v. State, 338 Md. 665, 673, 659 A.2d 1347, 1350 (1995)); Applestein v. Mayor of Balt., 156 Md. 40, 54–55, 143 A. 666, 672 (1928).
138. *Doe*, 428 Md. at 616, 53 A.3d at 1122.
139. *Id.* at 615, 53 A.3d at 1122.
140. 429 Md. 176, 55 A.3d 496 (2012).
141. Citizens Against Slots at the Mall v. PPE Casino Resorts Md., LLC, 429 Md. 176, 191–93, 55 A.3d 496, 505–07 (2012).
142. *Id.* at 197, 55 A.3d at 509.
143. *Id.* at 198, 55 A.3d at 510.

'package' for purposes of the referendum exception for appropriation acts."[144]

3. The Emergency "Exception"

Under article XVI, section 2 of the Maryland Constitution:

> The effective date of a law other than an emergency law may be extended as provided in Section 3(b) hereof. . . . An emergency law shall remain in force notwithstanding such [referendum] petition, but shall stand repealed thirty days after having been rejected by a majority of the qualified electors voting thereon. No measure changing the salary of any officer,[145] or granting any franchise or special privilege, or creating any vested right or interest, shall be enacted as an emergency law. [emphasis added]

The court has "consistently held that a legislative determination of emergency is conclusive and not reviewable."[146] A finding of emergency, however, is not strictly a limitation on the right of referendum because an emergency bill "is not insulated from referendum. . ., it simply remains in force. . . until 30 days after it has

144. *Id.* at 198–99, 55 A.3d at 510; *accord* Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

145. A person exercising "administrative non-legal duties" was deemed not to be an "officer." First Cont'l Sav. & Loan Ass'n v. Dir., State Dep't of Assessments and Taxation, 229 Md. 293, 304-05, 183 A.2d 347, 352 (1962).

146. Biggs v. Maryland-National Capital Park and Planning Comm'n., 269 Md. 352, 355, 306 A.2d 220, 222 (1973); Wash. Suburban Sanitary Comm'n v. Buckley, 197 Md. 203, 207-08, 78 A.2d 638, 641 (1951) ("We have held in a number of cases that, under these circumstances and under this wording of the Constitution, the courts have no power to pass upon the question whether there is an emergency if the Legislature has made the necessary declaration."); *accord* Hammond v. Lancaster, 194 Md. 462, 476, 71 A.2d 474, 480 (1950) (the legislature's determination of an emergency "is not judicially reviewable"), quoting *Norris v. Mayor and City Council of Balt.*, 172 Md. 667, 686, 192 A. 531, 531 (1937). In *Strange v. Levy*, the court exercised the power to decide whether an emergency declaration was made under Maryland Constitution article XVI, on the one hand, or article III, section 31, and determined that it was made under the latter and therefore reviewable. 134 Md. 645, 107 A. 549 (1919). "If legislation comes within the purview of [article] XVI, it is for the Legislature and not for the courts to determine whether an emergency exists." *First Cont'l Sav. & Loan Ass'n*, 229 Md. at 302, 183 A.2d at 351.

been rejected by a majority of the qualified voters. . . voting thereon, should it be so rejected."[147]

Certain types of laws cannot be deemed emergencies.[148] Generically, they include those creating or abolishing an office, changing the term, salary, or duty of an office, granting a franchise or special privilege, or creating any vested right or interest.[149]

E. Common Law Exceptions

The Maryland Court of Appeals has also referred to "necessarily implied exceptions" in article XVI, section 2,[150] and recognized a common law limitation on the right to referendum under the "redelegation prohibition."[151] An article XVI referendum proceeds under a right "reserved" to the people; however, when the people have delegated legislative power to the General Assembly, the latter may not redelegate it to the people.[152]

147. *Biggs*, 269 Md. at 355, 306 A.2d at 222–23. In, *Wilkinson v. McGill*, the court wrote that "[a]rticle XVI of the [Maryland] Constitution does not apply to such [emergency] public local laws." 192 Md. 387, 390, 64 A.2d 266, 268 (1949). In *Strange*, the court held that article XVI did not apply to a public local law for a city, although subsequent to the enactment of municipal home rule that holding appears to be a dead letter. 134 Md. at 648, 107 A. at 550.

148. MD. CONST., art. XVI, § 2.

149. *Id.* The exceptions apply only to laws under article XVI of the Maryland Constitution. *Strange*, 134 Md. at 645, 107 A. at 550. For an application of this exception to the Attorney General, see *Hammond*, 194 Md. at 477, 71 A.2d at 480 (holding that additional duties placed on the Attorney General regarding the Subversive Activities Act of 1949 did not trigger operation of the non-referability provision).

150. Bd. of Educ. v. Mayor of Frederick, 194 Md. 170, 178, 69 A.2d 912, 915 (1949) ("These are the only specific exceptions, but this court has made a further exception. This exception is of those acts which, although local as distinguished from general, are confined in their operation to part of a county, and should, obviously, not be properly referred to all of the voters of a county, many of whom have no interest in them."); Dineen v. Rider, 152 Md. 343, 354, 136 A. 754, 758 (1927).

151. Stop Slots MD 2008 v. State Bd. of Elections, 424 Md. 163, 186, 34 A.2d 1164, 1177 (2012) (discussing the holding in *Brawner* which prohibited the General Assembly from requiring voter approval for a law to become effective); Smigiel v. Franchot, 410 Md. 302, 311, 978 A.2d 687, 693 (2009) (citing Brawner v. Supervisors of Elections, 141 Md. 586, 119 A. 250 (1922)); *see also* Legality of Referendum on Boundary Change, 67 Md. Op. Att'y Gen. 279 (1982) (explaining that the General Assembly may not delegate power to make law).

152. *See Stop Slots*, 424 Md. at 182–84, 34 A.3d at 1174–76; *Smigiel*, 410 Md. at 311–13, 978 A.2d at 693–94; Legality of Referendum on Boundary Change, 67 Md. Op. Att'y Gen. 279, 290 (1982) ("It is firmly established that the General Assembly has the exclusive power to make laws in the State. That is, the power to legislate may not be

The United States Constitution also limits the right of referendum.[153] State constitutions cannot refer a proposed amendment of the United States Constitution to referendum.[154] In *Leser*, a man challenged the voter registration of two women on the grounds that U.S. Constitution, Amendment XIX, had not been properly ratified because some state legislatures lacked the power to do so.[155] The *Leser* court responded: "The referendum provisions of state constitutions and statutes cannot be applied consistently with the Constitution of the United States in the ratification or rejection of amendments to it."[156]

Although home rule has rendered *Strange v. Levy* largely a historical artifact, the Maryland Court of Appeals held that article XVI of the Maryland Constitution does not apply to a public local law for a city.[157] That could also be viewed as a limitation on the referendum.

F. Amendment or Repeal of a Referred Statute

While it is not viewed as either an express or implied limitation on the right to referendum, the Maryland Court of Appeals has recognized the plenary power of the legislature to amend a referred bill prior to the referendum election.[158] As a practical matter, this

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delegated by the General Assembly to the people. . . . [T]he power . . . may not be [re]delegated.") (citations omitted). In *Smigiel*, the court held that the General Assembly "had the power to enact general legislation before, and contingent on, the adoption of constitutional amendment that it had proposed to the voters." *Smigiel*, 410 Md. at 316, 978 A.2d at 695. The court re-affirmed this holding in *Stop Slots*, 424 Md. at 169, 186, 34 A.3d at 1167, 1177. At first blush, the general holding of *Poisel v. Cash*, 130 Md. 373, 375, 100 A. 364, 364 (1917), may appear to contradict the re-delegation doctrine, in that the court wrote that "it can not be questioned that the General Assembly had the power to submit the Act of 1916 to the approval of the voters of Carroll County," *Poisel*, 130 Md. at 375, 100 A. at 364. However, while not expressly stated, the statute prohibiting the sale of liquor in that county appears to have been a public local law. *Id.*

153. *See* Hawke v. Smith, 253 U.S. 221, 227–29 (1920).

154. *See* Leser v. Bd. of Registry, 139 Md. 46, 70–71, 114 A. 840, 847 (1921), *aff'd sub nom.* Leser v. Garnett, 258 U.S. 130 (1922).

155. *Id.* at 52–53, 114 A. at 841.

156. *Id.* at 70–71 (quoting National Prohibition Cases, 253 U.S. 350, 386 (1920)).

157. *Strange v. Levy*, 134 Md. 645, 646, 107 A. 549, 550 (1919).

158. First Cont'l Sav. & Loan Ass'n, Inc. v. Dir., State Dept. of Assessments and Taxation, 229 Md. 293, 302, 183 A.2d 347, 351 (1962); Hitchins v. Mayor & City Council of Cumberland, 215 Md. 315, 325, 138 A.2d 359, 364 (1958) ("It has long been held that changes which might have the effect of defeating the purpose of a referendum are invalid. . . . [I]t is the general rule that a city may amend an ordinance pending a

power has to some degree impinged on the right of referendum.[159] Thus, where a bill imposing new regulations on savings and loans was petitioned to referendum, and thereby suspended, the court held that the General Assembly had the power to enact a "bill identical in substance," with some variation, as an emergency measure.[160] Because an emergency bill is not suspended by a referendum petition,[161] the second bill operated, as a practical matter, to suspend the suspension of the prior statute.[162] This was determined to be permissible.[163]

The court's rationale was straightforward.[164] It began with the proposition that the General Assembly's powers "are plenary except as restrained by the Federal or State Constitutions."[165] It then noted that "[t]here is no provision in the Maryland Constitution forbidding the Legislature to act on the subject matter of a referred law either during the period between its referral and the vote thereon or after approval or rejection by the voters."[166] Instead, article XVI, section 2, expressly contemplates the enactment of emergency measures that cannot be suspended.[167]

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referendum under some circumstances, as . . . to avoid objections to the original ordinance."). Thus, an amendment that, for example, clarifies procedure is permissible. *Hitchins*, 215 Md. at 325, 138 A.2d at 364; David Potts, *Strict Compliance, Substantial Compliance, and Referendum Petitions in Arizona*, 54 ARIZ. L. REV. 329, 338–39 (2012) (explaining that under a provision that, unlike Maryland, exempts emergency legislation from the referendum, "even if legislation has been referred to the electorate, the legislature can effectively override a referral attempt if it then passes a conflicting emergency measure").

159. *See First Cont'l Sav. & Loan Ass'n.*, 229 Md. at 302, 183 A.2d at 351; Potts, *supra* note 158, at 339–39.

160. *First Cont'l Sav. & Loan* Ass'n, 229 Md. at 299–303, 183 A.2d at 349–51 (discussing how the second bill was "identical in substance . . . except that administration of the law was vested in the State Department of Assessments and Taxation," instead of a Board of Building, Savings and Loan Association Commissioners to be created by the suspended law).

161. MD. CONST. art. XVI, § 2.

162. *First Cont'l Sav. & Loan Ass'n.*, 229 Md. at 302–03, 183 A.2d at 351.

163. *Id.*

164. *See id.*

165. *Id.* at 302, 183 A.2d at 351 (citing Md. Comm. for Fair Representation v. Tawes, 228 Md. 412, 439, 180 A.2d 656, 670 (1962)).

166. *Id.*

167. *Id.* The *First Continental* court relied in part on *Hammond v. Lancaster*, 194 Md. 462, 469–70, 475–77, 71 A.2d 474, 477, 480–81 (1950), where the "Sedition and Subversive Activities" law was petitioned and suspended; however, the legislature's enactment of emergency legislation was held not to have deprived the voters of their right to stay the statute, and in part on *Hitchins v. Mayor & City Council of*

The court emphasized that, on the facts presented, "the right of referendum on the savings and loan regulatory law was not frustrated—only the right to suspend the operation of the law pending the vote thereon" was abrogated by the statutory amendment.[168]

Whether the holding would be extended beyond that context is an open question. A hypothetical scenario where amendments seriatim served to frustrate the right to referendum can, for example, be imagined.[169] Given the cost and difficulty of bringing a statute to referendum,[170] a post-referral amendment with small changes that would require a petition sponsor to engage in an entirely new and costly signature-gathering effort could be viewed as an undue burden on the right.[171]

After *First Cont'l Sav. & Loan Ass'n.*, the Attorney General issued a comprehensive opinion on the power of the General Assembly to repeal, amend, or replace a law petitioned to referendum.[172] He wrote that "[t]he Court of Appeals has never viewed the Referendum Article of the Constitution or similar provisions in municipal charters as creating an inflexible bar to additional legislative action with respect to a referred law."[173] The Attorney General opined that the General Assembly may validly repeal a referred measure and it will then be removed from the ballot.[174] He concluded that the legislature may repeal a referred measure and reenact a law on the same matter "as long as it is done in good faith[175] to accomplish proper and

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Cumberland, 215 Md. 315, 325, 138 A.2d 359, 364 (1958), where it had held that the city "could effectively modify an ordinance after the filing of a referendum against it." *First Cont'l Sav. & Loan Ass'n*, 229 Md. at 303–04, 183 A.2d at 351–52.

168. *First Cont'l Sav. & Loan Ass'n,* 229 Md. at 304, 183 A.2d at 352.

169. *See id.* at 299–303, 183 A.2d at 349–51.

170. *See infra* Part II.A.

171. *See infra* Part II.A.; *supra* notes158–67 and accompanying text.

172. Power of Gen. Assembly to Repeal, Amend or Replace a Law Petitioned to Referendum, 62 Md. Op. Att'y Gen. 405, 405 (1977). That opinion was favorably mentioned in *Roskelly v. Lamone*, 396 Md. 27, 31 n.6, 912 A.2d 658, 660 n.6 (2006) (discussing how if a referred statute is repealed in good faith, it should be removed from the ballot).

173. Power of Gen. Assembly to Repeal, Amend or Replace a Law Petitioned to Referendum, 62 Md. Op. Att'y Gen. 405, 406 (1977).

174. *Id.* at 408 ("There would be no point in giving the opportunity to voters to kill a bill their elected representatives had already killed.").

175. *Id.* at 406, 409 (citing Hitchens v. City of Cumberland, 215 Md. 315, 325, 138 A.2d 359, 364 (1958), for the proposition that amending a referred ordinance "to avoid objections to the original ordinance" may be an example of good faith). The Attorney General cited *Wicomico Cnty. v. Todd*, 256 Md. 459, 467, 260 A.2d 328, 332 (1970), for the rule that "[g]ood faith and proper purpose have been found where the later

appropriate governmental ends . . . ." The opinion concluded, however, that "[t]he General Assembly may not repeal a referred law and reenact the same measure with the intention of frustrating the referendum process."

A subsequent decision of the Maryland Court of Special Appeals may provide additional guidance.[176] In that case, the court held that an amendment to fix a significant defect in an annexation resolution was too substantial under annexation law and was impermissible.[177]

G. Are Advisory Referenda Permissible?

There are two lines of authority regarding advisory referenda.[178] One maintains that there cannot be an advisory referendum.[179] The other is tentative dicta that "it would appear to be constitutionally permissible to use a referendum to measure public opinion concerning a proposed Amendment . . . ."[180] The tentative dicta was written in a challenge to the income tax.[181]

H. Constitutional Procedures

1. Date for Filing of a State Referendum Petition

Under article XVI, section 2, a referendum petition must be filed with the Secretary of State before the first day "of June next after the

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enactment carries changes calculated to meet objections that produced the referendum. . . ." Power of Gen. Assembly to Repeal, Amend or Replace a Law Petitioned to Referendum, 62 Op. Att'y Gen. Md. 405, 407 (1977). He noted that *Todd* implied that an effort "merely to avoid the referendum" might fail.

176. Town of New Market Frederick Cnty. v. Milrey, Inc.-FDI P'ship, 90 Md. App. 528, 545–49, 602 A.2d 201, 210–12 (Md. Ct. Spec. App. 1992).

177. *Id.* The *Milrey* court held that the amendment was not properly enacted under the annexation law. *Id.* at 535, 602 A.2d at 205.

178. *See infra* note 179–80 and accompanying text.

179. "Straw" votes are not authorized. Invalidity of Proposed Montgomery Cnty. Charter Amendment on Tax Increases, 1998 Md. Op. Att'y Gen. No. 98-010, 1998 Md. AG Lexis 10 (1998); Local Straw Votes Not Permitted Absent Gen. Assemb. or Charter Authorization, 61 Md. Op. Att'y Gen. 384, 388 (1976); *accord* Montgomery Cnty. v. Bd. of Supervisors of Elections, 311 Md. 512, 521–22, 536 A.2d 641, 646 (1986) (citing Levering v. Supervisors, 129 Md. 335, 338–40, 99 A. 360, 361 (1916).

180. Scott v. Comptroller, 105 Md. App. 215, 222, 659 A.2d 341, 344 (Md. Ct. Spec. App. 1995) (citing Spriggs v. Clark, 14 P.2d 667, 669, 673 (1932)).

181. *Scott*, 105 Md. App. at 215, 218, 659 A.2d. at 341, 342; *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV., 1249, 1250, 1256–57 (2006).

session at which [the referred law] was passed . . . ."[182] Timing is crucial, and the time for petitioning is not extended if a statute does "not become fully implemented, operational, or effective" until a later date, even if that date is years later.[183] The court of appeals has deemed the June provision in section 2 "in mandatory form . . . ."[184]

2. Number of Signatures Required on State Referendum Petition

The petition "shall be sufficient if signed by three percent of the qualified voters of the State of Maryland,[185] calculated upon the whole number of votes cast for Governor at the last preceding Gubernatorial election, of whom not more than half are residents of Baltimore City, or of any one County."[186] Under specific circumstances, pages may be submitted in two "batches."[187] Signatures must be affixed after the referred act is passed.[188]

182. MD. CONST. art. XVI, § 2. For a recent discussion of how to calculate the number of days, *see* Dan Friedman, "Counting the Days," The Daily Record, Sep. 30, 2013, discussing Hall v. P.G. Co. Democratic Cent. Comm., 431 Md. 108, 64 A.3d 210 (2013).

183. Abell v. Sec'y of State, 251 Md. 319, 327–30, 247 A.2d 258, 263–65 (1968) (holding that challenge to phase out of slot machines was filed five years too late) (citing Mills v. Agnew, 286 F. Supp. 107, 110 (D. Md. 1968); and Winebrenner v. Salmon, 155 Md. 563, 565, 142 A. 723, 724 (1928), as well as *nisi prius* decisions).

184. *Abell*, 251 Md. at 328–29, 247 A.2d at 264.

185. The term "qualified voters" as used in the Prince George's County Charter was defined to mean persons who have the "present capacity to vote" and "therefore . . . must be registered." Bd. of Supervisors of Elections v. Goodsell, 284 Md. 279, 285, 396 A.2d 1033, 1036 (1979); Voter Who Meets Municipality's Qualifications For Voting At Time Petition Is Circulated May Sign Petition, 72 Md. Op. Att'y Gen. 181, 182 (1987) (interpreting the term "qualified voter" under MD. CONST. article 23A, section 19).

186. MD. CONST. art. XVI, § 3(a). There is a specific and different provision governing referenda on Public Local Laws. *See* Bd. of Educ. v. Mayor & Aldermen of Frederick, 194 Md. 170, 175, 177, 69 A.2d 912, 914–15 (1949) (describing what constitutes a public local law for purposes of MD. CONST. article XVI, section 3(a)).

187. MD. CONST. art. XVI, § 3(b); Roskelly v. Lamone, 396 Md. 27, 30–31, 912 A.2d 658, 660–61 (2006).

188. MD. CONST. art. XVI, § 3(d). Signatures must be affixed on a municipal annexation referendum petition after the referred act is passed. Koste v. Town of Oxford, 431 Md. 14, 38, 63 A.3d 582, 597 (2013). The court noted that, if the General Assembly wished to permit earlier signature-gathering, it could do so by amending the annexation statute, article 23A, section 19. *Id.*

3. Contents of a State Referendum Petition

The petition must contain the full text of the act or part thereof to be referred, or an accurate summary approved by the Attorney General.[189] An "affidavit of the person procuring those signatures," often called a "circulator's affidavit," must be "attached to each paper of signatures filed with a petition . . . ."[190] The affiant must state "that the signatures were affixed in his [or her] presence and that, based upon the person's best knowledge and belief, every signature on the paper is genuine and bona fide and that the signers are registered voters at the address set opposite or below their names."[191]

4. Date of the Referendum Election

Pursuant to article XVI, section 2, a referendum question shall be submitted to the electorate "at the next ensuing election held throughout the State for Members of the House of Representatives of the United States."[192] There has been no litigation over that timing provision in section 2, although an attempted legislative end run around the requirement for a referendum on constitutional

189. MD. CONST. art. XVI, § 4. It is not clear whether the Attorney General's approval is subject to challenge or review. The court of appeals has noted, in a different context "that the views of the Attorney General as to compliance with the requirements of [a]rticle XVI of the [Maryland] Constitution are advisory only. . . ." Barnes v. State, 236 Md. 564, 575–76, 204 A.2d 787, 793 (1964) (discussing First Cont'l Sav. & Loan Ass'n, Inc. v. State Dep't of Assessments & Taxation, 229 Md. 293, 301, 183 A.2d 347, 350 (1962)).

190. MD. CONST. art. XVI, § 4.

191. MD. CONST. art. XVI, § 4.

192. MD. CONST. art. XVI, § 2. U.S. CONST. Article I, Section 4, Clause 1 states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Pursuant to 2 U.S.C. § 7 (2006): "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." The Maryland provision for state and local elections mirrors the congressional language. MD. CONST. art. XVII, § 2 (calling for quadrennial elections "on the Tuesday next after the first Monday of November, in the year nineteen hundred and twenty-six, and on the same day in every fourth year thereafter"). *See generally* MD. CONST. Dec. of Rights, art. 7 ("That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent. . . .").

amendments "at the next ensuing General Election" under article XIV, section 1, has generated dispositive litigation.[193]

5. General Law v. Public Local Laws

Generally, there are three classes of laws: special laws; local laws, and general laws.[194] Under article XVI, section 3, the number of signers necessary to refer a petition depends on the nature of the state law being petitioned:

> The referendum petition against an Act or part of an Act passed by the General Assembly, shall be sufficient if signed by three percent of the qualified voters of the State of Maryland, calculated upon the whole number of votes cast for Governor at the last preceding Gubernatorial election, of whom not more than half are residents of Baltimore City, or of any one County.[195]

> However, any Public Local Law for any one County or the City of Baltimore, shall be referred by the Secretary of State only to the people of the County or City of Baltimore, upon a referendum petition of ten percent of the qualified voters of the County or City of Baltimore, as the case may be, calculated upon the whole number of votes cast respectively for Governor at the last preceding Gubernatorial election.[196]

193. MD. CONST. art XIV, § 1; Cohen v. Governor of Md., 255 Md. 5, 7, 255 A.2d 320, 321 (1969). *Cohen* provides a comprehensive analysis of the differences between a special election and a general election. In *Cohen*, the operative constitutional provision, article XIV, section 1, provided for the referendum at the next ensuing general election. The General Assembly essentially sought to create a general election by statute. The Maryland Court of Appeals held that referring to a special election as a general election did not change the function and that substance, not the nomenclature, was dispositive. *Id.* at 21, 255 A.2d at 328.

194. Funk v. Mullan, 197 Md. 192, 200–01, 78 A.2d 632, 637 (1951).

195. MD. CONST. art. XVI, § 3(a). This provision is intended to mandate geographic diversity. Phifer v. Diehl, 175 Md. 364, 367, 1 A.2d 617, 618 (1938). Its requirements are not met if less than half of the signatures are submitted early and the full amount later; half must be submitted by the deadline. *Id.* at 368, 1 A.2d at 618.

196. MD. CONST. art. XVI § 3(a).

This has led to litigation defining what constitutes a public local law.[197] In *Cole v. Sec'y of State*, the legislature enacted a bill transferring jurisdiction from justices of the peace and trial magistrates to the Peoples Court of Cecil County, a court created by the act.[198] A petition was submitted with insufficient signatures to bring a general law to referendum but with an amount sufficient to bring a public local law to referendum.[199] The Secretary of State deemed the statute a general law and rejected the petition.[200] The court of appeals reversed, holding that: "The classification of a particular statute as general or local is based on subject matter and substance and not merely on form."[201] Although enacted under Maryland Constitution article IV, section 41B,[202] the court deemed the act to be local in nature.[203]

197. Cole v. Sec'y of State, 249 Md. 425, 428, 240 A.2d 272, 274 (1968); Ness v. Ennis, 162 Md. 529, 536–37, 160 A. 8, 11 (1932) (overruling Levering v. Bd. Of Supervisors, 129 Md. 335, 99 A. 360 (1916)). In *Steuart Petrol. Co. v. Bd. of Cnty. Comm'rs*, 276 Md. 435, 445, 347 A.2d 854, 860 (1975), the court rejected an argument that a referendum on an environmental amendment to article 66B, section 4.01(e), which was applicable only to one county, was prohibited "zoning by plebiscite" and held that the statute in question was a public local law and, therefore, referable.

198. *Cole*, 249 Md. at 426–27, 240 A.2d at 273.

199. *Id.* at 427, 240 A.2d at 273.

200. *Id.* at 428, 240 A.2d at 274.

201. *Id.* at 433, 240 A.2d at 277. The court wrote "that local laws differ from general laws only in that they are confined in their operation to certain prescribed or definite territorial limits . . . ." *Id.* (citation omitted). The Attorney General has explained the distinction. Sufficiency Determination Concerning a Referendum on a Public Local Law Enacted by the General Assembly is to be Made by State Officials, 85 Md. Op. Att'y Gen. 120 nn.3–4 (2000); Steimel v. Bd. of Election Supervisors, 278 Md. 1, 2–3, 357 A.2d 386, 387 (1976) (stating that a statute applicable only to single county was a public local law, even though it repealed a general law, and was therefore subject to referendum); Kent Island Defense League, LLC v. Queen Anne's Cnty. Bd. of Elections, 145 Md. App. 684, 692, 806 A.2d 341, 346 (Md. Ct. Spec. App.), *cert. denied,* 371 Md. 615 (2002) (holding that environmental ordinances were not public local laws that were referable in code county); 67 Op. Att'y Gen. 279 (1982) (collecting cases holding that public local law, but not general law, may be committed to referendum by act of the General Assembly).

202. *Cole*, 249 Md. at 426–27, 240 A.2d at 273.

203. *Id.* at 435, 240 A.2d at 278. MD. CONST. article XVI, section 3(b) provides for a two-stage filing. If more than one-third of the signatures required to complete the petition are filed before June 1st, the time for the statute to take effect and the date for filing the balance of the signatures is extended to June 30th.

6. Proclamation of the Result of the Election

With the exception of emergency legislation, a referred law "shall not become a law or take effect until thirty days after its approval by a majority of the electors voting thereon . . . ."[204] Under Maryland Constitution, article XVI, section 5(b):

> 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.[205]

I. Rules of Construction for Interpretation of Article XVI

By its terms, article XVI is self-executing;[206] and the court of appeals has noted that: "[h]ow it shall be ascertained whether these constitutional requirements have been met by petitions filed, the referendum article has not prescribed."[207] Curiously, although article

204. MD. CONST. art. XVI, § 2.

205. MD. CONST. art. XVI, § 5.

206. MD. CONST. art. XVI, § 1(b). Although article XVI is "self-executing," section 4 provides that: "The General Assembly shall prescribe by law the form of the petition, the manner for verifying its authenticity, and other administrative procedures which facilitate the petition process and which are not in conflict with this Article." MD. CONST. art. XVI, § 4. Thus, even though the constitutional provision is immediately and directly operative, implementing statutes are mandatory. The self-executing provision was intended to address "the fear that the legislature would refuse to enact, or once enacted might repeal, the simple mechanical regulations necessary for the referendum." FRIEDMAN, *supra* note 5, at 270.

207. Sun Cab Co. v. Cloud, 162 Md. 419, 422, 159 A. 922, 923 (1932). Article XVI, section 4, directs the General Assembly to enact implementing legislation, which it has done. MD. CONST. art. XVI, § 4 ("The General Assembly shall prescribe by law the form of the petition, the manner for verifying its authenticity, and other

XVI was ratified in 1915, the implementing legislation was not enacted until 1941.[208]

The purpose of article XVI would "be furthered if, by proper and reasonable means, a referendum petition is to be put upon the ballot only if it has the requisite number of genuine signatures of registered voters."[209] Thus, article XVI is to be construed "in the light of its origin, the purpose it was intended to serve, as well as the evils it was intended or supposed to remedy."[210] It is presumed to contain "careful and measured terms . . . ."[211] The court of appeals has written that a "useful key" to its interpretation is to "inquire[] [w]hat were the evils to be removed, and what remedy did the new instrument propose[.]"[212] The court has clearly delineated those evils:

> When article 16 is examined in the light of this accepted principle it is not difficult to ascertain its meaning and its limitations. From the establishment of the first Constitution of Maryland—and it might be said before that date —until the adoption of this Article its people had lived under a well recognized form of representative self-government. This principle of *representation* had its beginning in the early legal institutions of England, and was brought to America by the colonists. It was incorporated in the governmental systems of all the colonies, and subsequently found its way into the constitutions of the respective States, as well as into the Constitution of the United States. It was for many years looked upon as one of the great principles of popular government, and as necessary and indispensable for the preservation of civil order and popular liberty. After the close of the Civil War great abuses began to creep into legislation and into the administration of the National and

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administrative procedures which facilitate the petition process and which are not in conflict with this Article.").

208. Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 616–18, 30 A.3d 245, 252–53 (Md. Ct. Spec. App. 2011) (citing 1941 Md. Laws 539–40).

209. Barnes v. State, 236 Md. 564, 571, 204 A.2d 787, 791 (1964); *accord* Burroughs v. Raynor, 56 Md. App. 432, 440, 468 A.2d 141, 144–45 (Md. Ct. Spec. App. 1983).

210. Beall v. State, 131 Md. 669, 676, 103 A. 99, 102 (1917); *accord* Doe v. Md. State Bd. of Elections, 428 Md. 596, 608, 53, A.3d 1111, 1118 (2012); Whitley v. Md. State Bd. of Elections, 429 Md. 132, 149, 55 A.3d 37, 47 (2012); Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 450–51, 530 A.2d 245, 251 (1987).

211. *Beall*, 131 Md. at 680, 103 A. at 102.

212. *Id.* at 676–77, 103 A. at 102.

> State governments. Their greatest expansion and evil influences were more marked, perhaps, between the years 1880 and 1900. 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. In this way and by these methods it was charged that the government, in all its departments, was prostituted to corrupt and selfish purposes. To remedy these evils it was proposed by some to abolish the principle of representation, and to introduce the principle of direct legislation by the people; by others to modify the principle of representation by incorporating into the organic law the referendum, together with certain other plans with which we are not here concerned. These proposals promised much, and found favor with a number of States which have adopted them in their organic law.[213]

In short, article XVI was drafted as a potent anti-corruption measure to change or supplement the fundamental structure of government as to matters within its scope.[214]

The court applies the same rules of construction to article XVI that are applicable to statutory interpretation.[215] In a recent decision,[216] interpreting constitutional and statutory provisions of the election laws, albeit not the referendum, a plurality of the court of appeals outlined the parameters governing construction of those provisions. It is "axiomatic" that the words used "should be given the construction that effectuates the intent of the framers" and that "intent is first sought from the terminology used in the provision, with each

213. *Id.* at 677–78, 103 A. at 102.

214. Addressing the right to referendum under a county charter, the court of appeals described the referendum as "a fundamental feature of the overall structure of county government." Ritchmount P'ship v. Bd. of Supervisors of Elections for Anne Arundel Cnty., 283 Md. 48, 61, 388 A.2d 523, 532 (1978) ("[R]eferendum by petition [is] quite clearly a power affecting the form or structure of government. . . ."); Doe v. Md. State Bd. of Elections, 428 Md. 596, 608, 53 A.3d 1111, 1118 (2012) (finding that referendum supplements representative government).

215. Davis v. Slater, 383 Md. 599, 604, 861 A.2d 78, 81 (2004) (citing Fish Market Nominee Corp. v. G.A.A., Inc., 337 Md. 1, 8, 650 A.2d 705, 708 (1994)); *see also Whitley*, 429 Md. at 149, 55 A.3d at 47.

216. Abrams v. Lamone, 398 Md. 146, 150, 172–75, 919 A.2d 1223, 1225, 1239–40 (2007) (plurality opinion) (concerning the constitutional qualifications for the Attorney General of Maryland).

word being given its ordinary and popularly understood meaning . . . ."[217] If those words are clear and unambiguous, they will be given effect as written, without the need to resort to external rules of construction.[218] Forced and subtle constructions that limit or extend the provision's application are to be avoided.[219] Language will neither be added nor deleted by the court.[220] It has been suggested that general administrative law decisions may not be applicable in the context of the statutory referendum process.[221]

The court has noted that, while "the principles of the constitution are unchangeable," when they are interpreted, they may be applied "to changes in the economic, social, and political life of the people which the framers did not and could not foresee."[222] The plurality observed:

> In determining the true meaning of the language used, the courts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the

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217. *Id.* at 173, 919 A.2d at 1239 (quoting Brown v. Brown, 287 Md. 273, 277–78, 412 A.2d 396, 398–99 (1980)).

218. *Id.* at 173–74, 919 A.2d at 1240 (quoting Bienkowski v. Brooks, 386 Md. 516, 537, 873 A.2d 1122, 1134 (2005)). *See generally* Jack Schwartz & Amanda Starem Cone, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432, 446–53, 461–62 (1995) (describing various ways in which the court of appeals uses legislative history in statutory construction).

219. *Abrams*, 398 Md. at 174, 919 A.2d at 1240 (quoting Price v. State, 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003); Condon v. State of Md.-Univ. of Md., 332 Md. 481, 491, 632 A.2d 753, 758 (1993)).

220. *Id.* at 174, 919 A.2d at 1240. Although home rule has rendered it a historical artifact, *Mayor & City Council of Balt. v. Bd. of Supervisors. of Elections of Balt. City*, 156 Md. 196, 143 A. 800 (1928), is illustrative of the court's approach to constitutional interpretation. At that time, MD. CONST. article 11, section 7, provided that Baltimore City could create debt, if: 1) authorized by the General Assembly; 2) authorized by a City ordinance; and, 3) approved by a majority of the voters. *Id.* at 197, 143 A. at 800–01. In an effort to avoid delay and the cost of a special election, the City passed a debt ordinance before the General Assembly authorized it, and the City ordinance provided for a referendum, subject to later action by the General Assembly. *Id.* at 197–98, 143 A. at 801. While the City's approach was logical, it was rejected by the court, stating that the City's view "finds no support in the literal terms of the [constitutional] requirement." *Id.* at 198, 143 A. at 801.

221. Doe v. Montgomery Co. Bd. of Elections, 406 Md. 697, 742, 962 A.2d 342, 368 (2008) (Adkins, J., dissenting).

222. *Abrams*, 398 Md. at 185, 919 A.2d at 1247 (quoting Norris v. Mayor & City Council of Balt., 172 Md. 667, 675, 192 A. 531, 535 (1937) (voting machines are included the statutory term "ballot," even though the machines did not exist when the statute was enacted)).

> time it was framed, the common usage well known to the people, and the history of the growth or evolution. . . [and the] long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.[223]

Thus, the Maryland Court of Appeals "is not averse to looking at the evolution in circumstances," and it is "permissible to inquire into the . . . contemporary history of the people, the circumstances attending the adoption of the organic law, as well as broad considerations of expediency."[224] However, the court will not give a provision a different meaning that would make it "more workable, or more consistent with a litigant's view of good public policy, or more in tune with modern times, or [on the theory] that the framers of the provision did not actually mean what they wrote."[225] Nor will it construe constitutional provisions "as to make that provision 'absurd or unworkable.'"[226] If the burden imposed by a referendum provision is constitutional, the court will not construe it in a way to reduce the burden; that is the province of the General Assembly.[227]

Construction is also impacted by constitutional parameters: "Once the right of referendum has been created, [its] exercise . . . is protected by the First Amendment . . . . Thus, a State may not impermissibly burden the exercise of the right to petition the government by . . . referendum."[228] Obviously, however, regulation is permitted and the Supreme Court has stated:

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223. *Id.* at 185, 919 A.2d at 1247 (alteration in original); *accord* Doe v. Md. State Bd. of Elections, 428 Md. 596, 53 A.3d 1111 (2012).

224. *Abrams,* 398 Md. at 186, 188, 919 A.2d at 1248 (quoting Brown v. Brown, 287 Md. 273, 278, 412 A.2d 396, 399 (1980)).

225. *Id.* at 175, 919 A.2d at 1241 (quoting Bienkowski v. Brooks, 386 Md. 516, 537, 873 A.2d 1122, 1134 (2005)).

226. *Id.* at 187, 919 A.2d at 1248 (quoting Montgomery Cnty. Comm'rs v. Supervisors of Elections of Montgomery Cnty., 192 Md. 196, 208, 63 A.2d 735, 740 (1948)).

227. *See* Ferguson v. Sec'y of State, 249 Md. 510, 517, 240 A.2d 232, 236 (1968) ("If the burden is too heavy, the remedy is by an appropriate amendment to Article XVI."); Abell v. Sec'y of State, 251 Md. 319, 331, 247 A.2d 258, 265 (1968) (quoting *Ferguson*, 249 Md. at 517, 240 A.2d at 236). Roskelly v. Lamone, 396 Md. 27, 47–48, 50, 912 A.2d 658, 670, 672 (2006), provides a recent example setting forth the considerations for construing the timeliness provisions of MD. CONST. art. XVI.

228. Kendall v. Howard Cnty. Md., Civil No. JFM-09-660, 2009 WL 3418585, at *4 (D. Md. Oct. 20, 2009) (citation omitted), *aff'd sub nom*, Kendall v. Balcerzak, 650 F.3d 515 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 402 (2011). Issues such as the right to sign a petition are beyond the scope of this article. *See, e.g.*, Annie Linskey, *Galludet*

> Petition circulation, we held, is "core political speech," because it involves "interactive communication concerning political change." [citation omitted]. First Amendment protection for such interaction, we agreed, is "at its zenith." [citation omitted] We have also recognized, however, that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[229]

II. OVERVIEW OF THE ELECTION LAW ARTICLE AND REGULATIONS GOVERNING STATE REFERENDA

A. The Election Law Article and Regulations Governing Referenda

Title 6 of the election law article of the Annotated Code of Maryland "applies to any petition authorized by law to place the name of an individual or a question on the ballot or to create a new political party."[230] "Title 6 is the latest incarnation of a group of statutes that has been rewritten and/or recodified several times over the years, often without complete consistency or harmony . . . ."[231] "Sections 6-203 and 6-207 have been amended both recently and frequently . . . ."[232]

Subtitle 1 contains definitions[233] and general provisions. Subtitle 2 addresses the substantive content and process of petitions.[234] Both titles provide what are essentially mechanical checklists.[235]

The court has held that the predecessor of Title 6 did not create an independent right to refer legislation and "[i]t was not the purpose of [the general provisions of the elections law] to admit indiscriminately

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Official Suspended for Signing Anti-Gay Marriage Petition, BALT. SUN, Oct. 12, 2012, at 3.

229. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 186–87 (1999) (citations omitted).

230. MD. CODE ANN., ELEC. LAW § 6-102(a) (LexisNexis 2010). *See generally* Whitely v. Md. State Bd. of Elections, 429 Md. 132, 141–44, 55 A.3d 37, 42–44 (2012) (describing relevant statutory provisions).

231. Doe v. Montgomery Cnty. Bd. of Elections, No. 293857-V, 2008 Md. Cir. Ct. LEXIS 7, at *13 (Jul. 28, 2008), *rev'd on other grounds*, 406 Md. 697, 962 A.2d 342 (2008).

232. Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 731 n.24, 962 A.2d 342, 362 n.24 (2008).

233. ELEC. LAW § 6-101 to -103. Code of Maryland Regulations (COMAR) adopts many of the statutory definitions of ELEC. LAW § 6-101 and incorporates them into the regulations verbatim. *See* MD. CODE REGS. 33.06.01 (2010).

234. ELEC. LAW §§ 6-201 to -211.

235. *See id.* §§ 6-101 to -103, 6-201 to -211.

to a place on the official ballots, every issue which any county or municipality of the State might propose to have submitted to a vote of the people."[236] While it applies to state and county referenda, by its terms, Title 6 does not directly apply to municipal petitions.[237]

Section 6-103 authorizes SBE to adopt regulations "consistent with this title, to carry out provisions of this title"[238] and regulations have been adopted.[239] SBE is also authorized to prepare guidelines and instructions, and design and print sample forms.[240] As set forth below, it has done both.[241]

1. Content of Petitions

Pursuant to section 6-201 of the election law article, a petition shall contain an information page and signature pages containing the total number of signatures mandated by law.[242] A petition that fails to comport with the statutory standard may be invalidated.[243]

236. Levering v. Bd. of Supervisors of Elections of Balt. City, 129 Md. 335, 338, 99 A. 360, 361 (1916).

237. ELEC. LAW §§ 1-101(v)(3), 6-102(b); Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sept. 25, 2013) (state law does not apply to municipal annexation referendum); *see* Culp v. Comm'rs of Chestertown,154 Md. 620, 622, 141 A. 410, 412 (1928) (stating that the MD. CONST. art. XVI, "makes no provision for a referendum to the voters of any city of the state other than Baltimore City, or any rural section of the state of a less extent than a county").

238. ELEC. LAW § 6-103(a).

239. CODE MD. REGS. 33.06.01–.02, 33.08.01.11.B, D (regarding certification of official referendum returns).

240. ELEC. LAW § 6-103(b). COMAR requires that forms be adopted. MD. CODE REGS. 33.06.01.02. COMAR also permits a sponsor to use its own forms, if they comply with the statutory and regulatory requirements, contain all of the required information, and are approved by the election authorities. *Id.* at 33.06.01.02(D). The latter provision, which may have free speech implications, has never been challenged in a Maryland appellate court.

241. *See* MD. STATE BD. OF ELECTIONS, PROCEDURES FOR FILING A STATEWIDE OR A PUBLIC LOCAL LAW REFERENDUM PETITION 4–11 (2011), *available at* http://www.elections.state.md.us/pdf/6-201-3a.pdf. *See, e.g.*, Montgomery Cnty. Vol. Fire-Rescue Ass'n. v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 473–80, 15 A.3d 798, 804–08 (2011) (discussing the revised "State of Maryland Petition Acceptance and Verification Procedures: State Wide or Public Local Law Referendum Petition").

242. ELEC. LAW § 6-201(a).

243. *See, e.g.*, City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 449–50, 483 A.2d 348, 354 (1984) (holding that a referendum petition was invalid because it did not properly advise the voters, which violated a mandatory provision under Maryland law).

a. The Information Page

The code requires that the information page shall contain a description of the subject and purpose of the petition, identify the sponsor,[244] and, if the sponsor is an organization, the person who is to receive notices from the election board,[245] the required information relating to the signatures, the required affidavit executed by the sponsor, and any other information mandated by COMAR.[246] The regulatory requirements are detailed.[247] COMAR mandates that the information page indicate that "the petition satisfies all requirements for the: (1) Time of signing and filing, and (2) Number and geographic distribution of signatures."[248] Obviously, one key function of the information page is to provide a "contact point" for the administrative agency.

b. Signature Pages

By statute, each signature page shall contain a description of the subject and purpose of the petition.[249] A ballot question petition must include either a fair and accurate summary of the substantive provisions of the proposal or the full text of it.[250] If the sponsor elects to print a summary of the question, the circulator must have the full

244. COMAR sets forth the identifying information required, such as name, mailing address, telephone number, fax number, and any email address. MD. CODE REGS. 33.06.02.03.

245. *Id.* at 33.06.02.03(C)(2).

246. COMAR provides that every petition, including the information page and signature page, shall conform to its requirements. MD. CODE REGS. 33.06.01.02. Under some circumstances, the information page may be amended: "Subsequent to the filing of a petition under this subtitle, but prior to the deadline for filing the petition, additional signatures may be added to the petition by filing an amended information page and additional signature pages conforming to the requirements of this subtitle." ELEC. LAW § 6-205(d).

247. MD. CODE REGS. 33.06.02.02 (2011).

248. *Id.* at 33.06.04.04(B).

249. ELEC. LAW § 6-201(c)(2).

250. *Id.* § 6-201(c)(2). The importance of the full-text requirement was emphasized in Koste v. Town of Oxford, 431 Md. 14, 37, 63 A.3d 582, 596 (2013) ("The law favors seemingly a presumption that voters will inform themselves fully of all accessible information before making a decision. . . . A corollary to the presumption that voters will inform themselves fully when making a decision is that voters will not be informed fully when making a decision without having access to all pertinent information.").

text available at the time of signing and the signature page must state that the full text is available.[251]

The signature page must include a statement that the signer supports the purpose of the petition and, based on the signer's information and belief, the signer is a registered voter in the county specified on the page[252] and is eligible to have his or her signature counted.[253] It must contain spaces for signatures and the required signer's information.[254] The regulations mandate that the spaces be labeled.[255] The code mandates that there be "a space for the required affidavit made and executed by the circulator,"[256] and any other information required by regulation.[257]

Signature pages must meet the statutory requirements before any signature is affixed and at all "relevant times thereafter."[258] SBE has prepared form signature pages and made them available on its web site.[259]

Regulations applicable to signature pages include each statutory requirement,[260] and some "house-keeping" requirements, such as one-sided printing,[261] and similar descriptions for the information page and signature pages.[262] They also require a circulator to include a zip code, and that requirement is the subject of a pending constitutional challenge.[263]

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251. *Id.* § 6-201(d).
252. *Id.* § 6-201(c)(5) (requiring that a signature page must contain a space for the name of the county).
253. *Id.* § 6-201(c)(3).
254. *Id.* § 6-201(c)(4).
255. MD. CODE REGS. 33.06.03.06(A) (2011).
256. ELEC. LAW § 6-201(c)(6).
257. *Id.* § 6-201(c)(7).
258. *Id.* § 6-201(e).
259. MARYLAND STATE BOARD OF ELECTIONS, LOCAL REFERENDUM PETITION (2012), *available at* http://www.elections.state.md.us/forms/documents/local_referendum_form_FINAL.pdf.
260. *E.g.*, MD. CODE REGS. 33.06.03.01(A), .02B to .03 (specification of county), MD. CODE REGS. 33.06.03.05 (statement of support and eligibility).
261. *Id.* at 33.06.03.02(A).
262. *Id.* at 33.06.03.04(B).
263. Fraternal Order of Police Lodge 35 v. Montgomery Cnty., No. 132 (Sept. Term 2011), 427 Md. 522, 50 A.3d 8 (2012) (*per curiam* order). The issues presented in that appeal were: "1) Is an error in the address information in the sworn circulator affidavits fatal to petition pages containing that error? 2) Does Tyler v. Secretary of State require a circuit court to invalidate each and every signature on an 'imperfect' petition page? 3) Is it constitutional to invalidate petition signatures for 'imperfect'

The signature page must reasonably advise voters what act or part of an act is to be suspended pending a referendum.[264] There must be "a clear, unambiguous and understandable statement of the full and complete nature of the issues undertaken to be included in the proposition,"[265] with sufficient clarity and objectivity to permit an average voter to exercise an intelligent choice in a meaningful way.[266] Representations made to the voters by the petition sponsors, even if made only indirectly, have been judicially enforced.[267]

2. Advance Determinations

Pursuant to election law, section 6-202: "The format of the petition prepared by a sponsor may be submitted to the chief election official of the appropriate election authority, in advance of filing the petition, for a determination of its sufficiency."[268] A request for such a determination must be made within the time prescribed.[269]

The importance of an advance determination becomes apparent if signature pages are filed.[270] At the time of filing, as set forth in Part II.A.7 below, the election official must determine if the petition is sufficient.[271] That determination "may not be inconsistent with an advance determination made under [section] 6-202 of this subtitle."[272]

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information from a circulator? 4) Is a challenge to a Board of Elections decision subject to the rules and tenets of judicial review of an agency decision? 5) Did the circuit court err in finding that Montgomery County, Maryland, lacked standing?"

264. City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 450, 483 A.2d 348, 354 (1984).

265. Stop Slots Md. 2008 v. State Bd. of Elections, 424 Md. 163, 189, 34 A.3d 1164, 1179 (2012) (quoting Anne Arundel Cnty. v. McDonough, 277 Md. 271, 300, 354 A.2d 788, 805 (1976)).

266. *Id.*

267. *See, e.g.*, Ficker v. Denny, 326 Md. 626, 633, 606 A.2d 1060, 1063 (1992) (explaining that petition sponsors have an obligation to put a measure on the ballot when they have indicated that will be the outcome if the requisite number of signatures are gathered).

268. MD. CODE ANN., ELEC. LAW § 6-202(a) (LexisNexis 2010).

269. *Id.* § 6-210(a)(1). The election authority must make the determination within five business days. *Id.* § 6-210(a)(2). The sponsor must be notified within two business days. *Id.* § 6-210(b).

270. *See id.* § 6-206(d) (stating that determinations must be consistent with any advance determinations at the time of filing).

271. *Id.* § 6-206(b).

272. *Id.* § 6-206(d).

Although the election official is bound by the advance determination, a private litigant challenging the form of the signature page is not.[273]

3. When Can Signatures Be Gathered and Affixed?

The Maryland Constitution provides that: "Signatures on a petition for referendum on an Act or part of an Act may be signed at any time after the Act or part of an Act is passed."[274] The Attorney General has opined that petitions may be circulated after a bill has been enacted by the General Assembly, even if it has not been presented to the Governor.[275] Thus, signature by the Governor is not a precondition to circulation and signing.[276] The Attorney General concluded that once the last house of the General Assembly acts, signature-gathering may commence.[277]

In *Town of Oxford v. Koste,*[278] municipal petition sponsors gathered petition signatures before the final enactment of the annexation resolution that was being petitioned to referendum.[279] The court held that was impermissible.[280] *Koste* presented an issue under the annexation statute.[281]

273. *See, e.g.*, Ficker v. Denny, 326 Md. 626, 629–30, 635, 606 A.2d 1060, 1061–62, 1064 (1992).

274. MD. CONST. art. XVI, § 3(d).

275. Referendum Petitions May Be Circulated for Signature and Filed Before Presentment, 63 Md. Op. Att'y Gen. 157, 166 (1978); *see also* MD. CONST. art. XVI, § 3(b) ("If more than one-third, but less than the full number of signatures required to complete any referendum petition against any law passed by the General Assembly, be filed with the Secretary of State before the first day of June, the time for the law to take effect and for filing the remainder of signatures to complete the petition shall be extended to the thirtieth day of the same month, with like effect."); Selinger v. Governor of Md., 266 Md. 431, 437, 293 A.2d 817, 820 (1972) ("A better solution might be found if the constitutional provision could be modified to provide that one-half of the required signatures be filed within 30 days from the date when the Governor signs a bill, the other one-half to be filed within the 30 days next following."). The referendum is on an act, or part, "passed" by the General Assembly and under article XVI, section 3(c), "passed" "means any final action upon any Act or part of an Act by both Houses of the General Assembly; and 'enact' or 'enacted' means approval of an Act or part of an Act by the Governor." MD. CONST. art., § 3(c).

276. Referendum Petitions May Be Circulated for Signature and Filed Before Presentment, 63 Md. Op. Att'y Gen. 157, 165–66 (1978).

277. *Id.*

278. No. 4, 2013 WL 1197204 (Md. Ct. App. Mar. 26, 2013).

279. *Id.* at *1.

280. *Id.*.

281. MD. CODE ANN., art. 23A, § 19.

4. Signature Requirements

a. The Statutory Requirements for a Verified Signature

The right to sign a petition "is an individual one which can only be exercised by the signer."[282] The statutorily-mandated requirements governing signatures by electors are precise:

> (a) In general.—To sign a petition, an individual shall:
> (1) sign the individual's name as it appears on the statewide voter registration list or the individual's surname of registration and at least one full given name and the initials of any other names; and
> (2) include the following information, printed or typed, in the spaces provided:
> (i) the signer's name as it was signed;
> (ii) the signer's address;
> (iii) the date of signing; and
> (iv) other information required by regulations adopted by the State Board.[283]

Regulations require that the signer provide a "[c]urrent residence address, including house number, street name, apartment number (if applicable), town, and zip code."[284]

"The statute affords the signer four options in signing the petition. The signer can: (1) sign his/her name on the petition as it appears on his/her voter registration card; (2) sign his/her full first, middle and last names; (3) sign his/her full first name, middle initial, and last name; or (4) sign his/her first initial, and full middle and last names. A signature in any of those formats is valid for purposes of being a qualified signature on the petition."[285]

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282. Ficker v. Denny, 326 Md. 626, 633, 606 A.2d 1060, 1063 (1992) (citation omitted). Generally, disabled signers are permitted assistance of a trusted person and, in the authors' experience, no issue is made of such assistance.

283. MD. CODE ANN., ELEC. LAW § 6-203 (LexisNexis 2010).

284. MD. CODE REGS. 33.06.03.06(B)(2)(c) (2011). That information is mandatory. *Id.* at 33.06.03.06(B). The regulation also provides that a circulator "shall" ask for the signer's date of birth or, at a minimum, month and day of birth. *Id.* at 33.06.03.06(C)(1). That information, however, is optional and failure to provide it does not invalidate the signature. *Id.* at 33.06.03.06(C)(2).

285. Kendall v. Balczerak, 650 F.3d 515, 526 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 402 (2011). Less clear is how "Luis Ramon Lopez Suarez" would be permitted to sign. *See id.* Certainly, a full signature would suffice. *See id.* Likely, "L. R. Lopez

The Maryland Court of Appeals has repeatedly defined the signature requirements imposed by statute.[286] In *Md. St. Bd. of Elections v. Libertarian Party of Md.*,[287] the court reiterated the holding of *Doe v. Montgomery Cnty. Bd. of Elections*,[288] and *Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections*,[289] which was reaffirmed in *Burruss v. Board of Cnty. Commissioners of Frederick Cnty.*[290] That quartet can be viewed as enunciating the following: 1) the statute means what it says, must be followed, and will be enforced; 2) the statute is constitutional; 3) legible signatures are not required;[291] and 4) a

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Suarez," or "L. Ramon L. Suarez," or "Luis R.L. Suarez," would suffice. "L.R.L. Suarez" would not. *See* MD. CODE ELEC. LAW Art. § 6-203(a)(1), *infra* note 351.

286. Signatures are public records. *See* Doe v. Reed, 130 S. Ct. 2811, 2815 (2010); Melody Simmons, *Judge Releases Zoning Petition Signatures*, DAILY RECORD, Nov. 31, 2012, at 5A ("A list of about 86,000 signatures gathered as part of a petition drive to potentially overturn two new zoning maps in Baltimore County was ordered released . . . to a group that has plans to develop a shopping center anchored by Wegmans at the former Solo Cup site on Reisterstown Road. The petitions will be vetted for accuracy by private sources hired by the group, said Michael Paul Smith, an attorney for the developer, Greenberg Gibbons."); *see* Alison Knezevich, *Judge Allows Release of Petition in Baltimore County Zoning Referendum Drive*, BALT. SUN, Oct. 31, 2012, http://articles.baltimoresun.com/2012-10-31/news/bs-md-co-petition-hearing-20121031_1_petition-partners-signature-gatherers-greenberg-gibbons. Legislation was unsuccessfully introduced to change that. *See infra* Part VII.D.

287. 426 Md. 488, 493, 44 A.3d 1002, 1004 (2012).

288. 406 Md. 697, 732, 962 A.2d 342, 363 (2008).

289. 418 Md. 463, 469, 15 A.3d 798, 801 (2011) (holding "that the particular statutory provision at issue, i.e. section 6-203(a)(1) is clear and unambiguous, notwithstanding the utility of judicial gloss, and therefore we do not defer to the Board's interpretation").

290. 427 Md. 231, 241, 46 A.3d 1182, 1188 (2012); *see also* MARYLAND STATE BOARD OF ELECTIONS, PROCEDURES FOR FILING A STATEWIDE OR A PUBLIC LOCAL LAW REFERENDUM PETITION PRESIDENTIAL ELECTION, 1–11 (2012), *available at* http://www.elections.state.md.us/pdf/6-201-3a.pdf; STATE OF MARYLAND, PETITION ACCEPTANCE AND VERIFICATION PROCEDURES, 1–9 (2012), *available at* http://www.elections.state.md.us/petitions/Petition_verification_Procedures.pdf.

291. More precisely, an "exact match" between the petition signature and the voter registration signature is not required. *Montgomery Cnty. Vol. Fire-Rescue Ass'n*, 418 Md. at 473–74, 15 A.3d at 804. The fact that a signature is illegible is not dispositive. *Id.* at 478, 15 A.3d at 807. A signature is only one of many pieces of identifying information. *Id.* at 479, 15 A.3d at 808; *see also* Barnes v. Maryland, 236 Md. 564, 572, 204 A.2d 787, 791 (1964) (taking judicial notice that many signatures are illegible). Although signatures may have been rejected for illegibility in the trial court in *Gittings v. Bd. of Supervisors of Elections for Balt. Cnty.*, 38 Md. App. 674, 678, 382 A.2d 349, 351 (Md. Ct. Spec. App. 1978) ("In the exercise of its responsibility,

the Board determined that 804 of the signatures were invalid; some of the signatures were of persons who were not qualified voters of Baltimore County; other signatures were illegible and therefore could not be identified as qualified voters. . . ."), *Fire-Rescue* now provides the standard.

Foreign cases demonstrate polar extremes applied to illegible signatures. On the one hand:

> It is urged also "that approximately 200 additional signatures on said petition are illegal and void for the reason that they are illegible." *There is no standard of excellence in penmanship established by the statute* qualifying a voter to sign a referendum petition, and besides, as before stated, the genuineness of the signature is not attacked. *The right of a petitioner to order the referendum cannot be made to depend upon the ability or inability of any person to read the signature.* Many of our best citizens habitually sign their names in a form illegible to anyone not familiar with the writing, and *it would be unreasonable to deny such voters the right of referendum because of their chirographical idiosyncrasies.*

State *ex rel.* v. Olcott, 135 P. 902, 903 (Or. 1913) (emphasis added); *accord* Clark v. City of Aurora, 782 P.2d 771, 779 (Colo. 1989) ("When, as is often the case, a signature is illegible or partially legible, the printing of the name after the signature permits the clerk to determine the identity of the signer and to check the signature on the petition against the voter registration record . . . . The requirement of a printed name after the signature serves not only to guard against fraud in the petition process but also achieves the salutary goal of preventing the invalidation of an otherwise illegible or partially legible signature."); Austinites v. City of Austin, No. A 97-CA-120 SS, 1997 U.S. Dist. LEXIS 22593 at *13, *19 (W.D. Tex. Sept. 12, 1997), *subsequent decision*, 1997 U.S. Dist. LEXIS 22601 (W.D. Tex. Oct. 15, 1997) ("In some instances, deciding whether a signature belongs to a registered voter is a judgment call; for instance, the signer's handwriting may be somewhat illegible, or the signer may not have used his or her full name . . . . Another quarter to a third of the signatures had some legibility problems that could be overcome by using the information provided on the petition . . . ."). This view vigilantly protects the signatory's right to petition against abrogation by the government for a reason that is not expressly contained in the statutes.

The other extreme, however, is exemplified by: "When a signature is illegible, then the identity of the signer cannot be determined and it is impossible to determine whether or not the signer was a registered voter." *In re* Initiative Petition No. 317, State Question No. 556, 648 P.2d 1207 (Okla. 1982); Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 1207, 1215 (Wyo. 1982); Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778, 786 (Wyo. 1982) ("A signer was either a registered voter or not a registered voter. If it was impossible to decipher a signature, it was a nullity. . . . Reason tells us that an illegible name is the same as a blank line, not entitled to recognition and counting."); McCarthy v. Sec'y of Commonwealth, 359 N.E.2d 291, 294, 302 & n.19 (Mass. 1977) ("[The] burden of proof must be placed on the Secretary of the Commonwealth to demonstrate that there were valid reasons for noncertification of signatures. . . . Local registrars have no discretion to require more of signatures on nomination petitions than is specified in § 7 or than is necessary to carry out the clear

second, facially-adequate, duplicate signature will be rejected even if the first has been rejected.[292] The statute is silent as to use of ditto marks and crossed-out names.[293]

A bill was introduced, but not enacted, to permit approval of signatures using a "reasonable certainty" standard.[294] Some of the lay reaction to the statutory signature requirements has been strong.[295] One person whose signature was rejected stated:

> "I dropped my middle initial on my official signature, oh, I don't know, probably 40 years ago," Lindstrom said. "It's my signature. It's acceptable to my bank and everybody else. But not the Board of Elections."[296]

"Lindstrom, known as Dick to his friends, signed the ambulance fee petition as Richard Lindstrom, leaving out his middle initial, M. His signature was thrown out."[297] One activist, Mr. Robin K. Ficker, "said his own signature was thrown out. He signs his name Robin K. Ficker. But his full name is Robin Keith Annesley Ficker. He was dinged for the missing A."[298]

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legislative intent of § 7. . . . Of course, the signature on the petition must be sufficiently legible to allow a comparison to be made . . . . [R]easons for noncertification might include, for example, . . . that the signature is too illegible to enable comparison. . . ."); Whitman v. Moore, 125 P.2d 445, 445 (Ariz. 1942) ("The next class is those where the address of the signer is illegible. We think the same rule should apply in this case and the signature should be stricken unless it be affirmatively shown that the signer is in all respects a qualified elector."). These cases emphasize the need to ensure strict compliance with petition requirements so that the will of the legislature is not frustrated by bogus signatures.

292. The *Libertarian Party* decision rejected the argument that *Fire-Rescue* created a "sufficient cumulative information" standard for name-related defects. 426 Md. at 493, 44 A.3d at 1004–05.

293. Doe v. Montgomery. Cnty. Bd. of Elections, No. 293857-V, 2008 Md. Cir. Ct. LEXIS 7 at *27–28 (Jul. 28, 2008), *rev'd on other grounds*, 406 Md. 697, 962 A.2d 342 (2008).

294. The bill was introduced by Senator Edward Kasemeyer in an emergency session in 2009. *See* Larry Carson, *Assembly Delegation Conflicted over Change in Petition Rules*, BALT. SUN, Mar. 29, 2009, at 2 (Howard County section).

295. *See, e.g.*, notes 296-98 and accompanying text.

296. Michael Laris, *Lawsuits Seek to Restore Md. Ballot Petitions*, WASH. POST, Sep. 1, 2010, at B1, B5.

297. *Id.*

298. *Id.*

Nevertheless, the court has correctly made clear that "[t]he issues before the court are of statutory interpretation."[299]

b. Computer-assisted or web-based signatures pages are permissible

In *Whitley*, the petition sponsor created a website that generated a signature page, complete with the voter's relevant identifying information, which could then be printed, signed, and mailed to the sponsor.[300] One issue was whether the autofilled[301] information was statutorily permitted. The court held that it was.[302] In contrast, "walking petitions" that are pre-filled with blocks of voters' names and addresses in street order are barred by administrative policy.[303] The court noted that computer-generated petitions properly prioritize citizen convenience and permit citizens to seek out a petition, rather than waiting to be sought out by circulators.[304]

c. The Statutory Requirements Are Constitutional

Every constitutional challenge to the statutory signature requirements has been rejected.[305] Succinctly put, the court has determined that requiring a signatory to provide specified information is not unduly burdensome.

5. The Right to Remove a Signature

Under limited circumstances, a signature may be removed by a signer, circulator, or sponsor.[306] Pursuant to section 6-203(c), a

299. Int'l Ass'n of Fire Fighters, Local 1715 Cumberland Firefighters v. Mayor and City Co. of Cumberland, 407 Md. 1, 8, 962 A.2d 374, 378 (2008).

300. Whitley v. Md. State Bd. of Elections, 429 Md. 132, 141, 55 A.3d 27, 43 (2012).

301. The software was linked to a database containing voter registration information. *Id.* at 143, 55 A.3d at 43. Voter registration rolls are public records. *Id.* at 146, 55 A.3d at 46.

302. *Id.* at 145–47, 55 A.3d at 45–46.

303. *Id.* at 151 n.27, 55 A.3d at 49 n.27.

304. *Id.* at 155, 55 A.3d at 51 (citing MD. CODE ANN., ELEC. LAW § 1-201(5) (LexisNexis 2010)). This discussion appears to be the first mention of citizen convenience as a factor.

305. Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 518, 44 A.3d 1002, 1119–20 (2012); Barnes v. Maryland, 236 Md. 564, 571, 204 A.2d 787, 791 (1964).

306. *Libertarian Party of Md.*, 426 Md. at 521, 44 A.3d at 1021 ("[W]e note that § 6-203(c) places the onus on the signer, sponsor, and circulator of the petition to correct

signature may be removed by the signer upon written application to the election authority, "if the application is received by the election authority prior to the filing of that signature."[307]

A signature may be removed by the petition sponsor, or, prior to filing of the signature by the circulator who attested to it, or by the sponsor, "if it is concluded that the signature does not satisfy the requirements of this title."[308]

6. Circulator's Affidavit[309]

Article XVI, the election law article, and COMAR provide that each page must contain a circulator's affidavit.[310] The affidavit must be "made and executed by the individual in whose presence all of the signatures on that page were affixed and who observed each of those signatures being affixed."[311] It also "shall contain the statements, required by regulation, designed to assure the validity of the signatures and the fairness of the petition process."[312] The

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the error of a potentially improper signature by removing the signature from the petition before it is submitted.").

307. ELEC. LAW § 6-203(c)(1)(i).

308. *Id.* § 6-203(c)(2). This power is an exception to the duty of the circulator and sponsor, as agents of the signers, to submit a petition once signed. Ficker v. Denny, 326 Md. 626, 633, 606 A.2d 1060, 1063 (1992). Under the statute, however, it appears to be a discretionary power, because the circulator or sponsor "may" remove the defective signature. *See* ELEC. LAW § 6-203(c)(1)(ii). The motivation for them to do so could be provided by *Tyler v. Sec'y of State*, 229 Md. 397, 184 A.2d 101 (1962). Under *Tyler*, where submitted signatures demonstrate that a circulator's affidavit is false, the presumption of validity evaporates. 229 Md. at 403–04, 184 A.2d at 104–05. A cautious sponsor might choose to remove invalid signatures in an effort to attempt to preserve the presumption. *See* nn. 306-07, *supra*.

309. In *Barnes*, the court of appeals upheld a statutory provision making it unlawful to give or receive money or other consideration for signing a petition or securing signatures on it. 236 Md. at 573, 204 A.2d at 792. Subsequently, in *Meyer v. Grant*, 486 U.S. 414, 424, 428 (1988), the Supreme Court held that it is unconstitutional to preclude the use of paid circulators, and *State v. Brookins*, 380 Md. 345, 373–76, 844 A.2d 1162, 1179–80 (2004), struck down the ban on "walk around" money. That portion of *Barnes* likely is no longer valid to the extent it conflicts with *Brookins*.

310. MD. CONST. art. XVI, § 4; ELEC. LAW § 6-201(c)(6), 6-204(a); MD. CODE REGS. 33.06.03.08. The validity of part of the circulator information provision of MD. CODE REGS. 33.06.03.07 is currently being litigated in the court of appeals. Fraternal Order of Police Lodge 35 v. Montgomery Cnty., No. 132 (Sept. Term 2011) (challenging requirement of correct zip code).

311. ELEC. LAW § 6-204(a).

312. *Id.* § 6-204(b).

requirement of a circulator's affidavit "does not go to the form of the petition to which the affidavit is to be attached."[313]

A signatory may "self-circulate," or, in other words, be the circulator on a page that he or she signed as voter.[314] In *Whitley*, the argument against self-circulation was that it defeated the purpose[315] and intent of the circulator's affidavit, impeded validation, and increased the possibility of fraud.[316] The court, however, held that the constitutional and statutory language was unambiguous and the General Assembly "did not require expressly that the signer and circulator be different persons."[317]

The regulations define the contents of the circulator's affidavit.[318] They provide that the circulator shall provide a printed or typed name, telephone number, residence, including house number, street name, apartment number, if any, town and zip code.[319] The latter requirement has been challenged in the court of appeals.[320]

The circulator "is the agent of the signers."[321] In a referendum under Maryland Constitution, article XI-A, section 5, the court of appeals held that the circulator "has no greater or lesser right of

313. *Barnes*, 236 Md. at 570, 204 A.2d at 790.

314. *Whitley*, 429 Md. at 157, 161, 55 A.3d at 51, 52, 54.

315. *Id.* at 160, 55 A.3d at 54 ("[T]he purpose of the affidavit is to confirm that the signature of the individual appearing on the petition in fact belongs to the person that it purports to represent."). The dissent in *Whitley* ascribed two purposes to the affidavit: "It is designed to prevent fraud in the first place and second, if executed correctly, the affidavit creates a presumption that there is no fraud." *Id.* at 166, 55 A.3d at 58 (Adkins, J., dissenting).

316. *Id.* at 157, 55 A.3d at 52 (majority opinion).

317. *Id.* at 158, 159, 55 A.3d at 53. The dissent wrote: "The existence of the separate circulator provides an independent check on the signer. The circulator is able to vouch that the signer did in fact appear before the circulator and did in fact sign the petition." *Id.* at 166, 55 A.3d at 58 (Adkins, J., dissenting).

318. MD. CODE REGS. 33.06.03.08(B) ("The affidavit shall state that: (1) All of the information given by the circulator under Regulation .07 of this chapter is true and correct; (2) The circulator was 18 years old or older when each signature was affixed to the page; (3) The circulator personally observed each signer as the page was signed; and (4) To the best of the circulator's knowledge and belief, all: (a) Signatures on the petition are genuine, and (b) Signers are registered voters in the State.").

319. MD. CODE REGS. 33.06.03.07(B).

320. *See supra* note 263 and accompanying text (citing Fraternal Order of Police Lodge 35 v. Montgomery Cnty., MD, No. 132 (Sept. Term 2011) (challenging requirement of correctly stating zip code)).

321. Ficker v. Denny, 326 Md. 626, 633, 606 A.2d 1060, 1063 (1992); Tyler v. Sec'y of State, 229 Md. 397, 403, 184 A.2d 101, 104 (1962).

control over the petition than any other signer."[322] This has important consequences, at least in the context of a referendum under Maryland Constitution, article XI-A, section 5.[323] If sufficient signatures are gathered, the circulator has a duty to submit the petition,[324] subject to certain exceptions.[325] Additionally, the agency relationship imposes an "implicit" duty of truthfulness on the circulators.[326]

In *Ferguson*,[327] the court re-emphasized[328] that the affidavit requirement will be strictly enforced by its literal terms. "[T]he affidavit is an integral part of the referendum petition."[329] When a circulator's affidavit is false, the presumption that the signatures on

322. *Ficker*, 326 Md. at 632, 606 A.2d at 1063. The court held that, based on article XI-A and the terms of the particular signature pages, the sponsor had a duty to submit the signed pages. *Id.* at 633, 606 A.2d at 1063.

323. *See id.*

324. *Ficker*, 326 Md. at 632, 606 A.2d at 1063. Filing is a ministerial task. *Id.* at 632, 606 A.2d at 1063. The sponsor argued that changed circumstances excused filing and, essentially, that a post-collection agreement rendered filing contrary to the wishes of the signatories. *Id.* at 630–31, 606 A.2d at 1062. The court rejected the argument. *Id.* at 632–33, 606 A.2d at 1063.

325. *Ficker*, 326 Md. at 635 n.5, 606 A.2d at 1064 n.5 (nonexhaustive list of exceptions). The dissent suggested that sponsors have the discretion to refrain from filing if they determine that they lack sufficient signatures. *Id.* at 640, 606 A.2d at 1067 (Chasanow, J., dissenting). It is not suggested in this article, nor in the authors' view is it suggested in *Ficker*, that a sponsor that determines that the number of signatures are insufficient must nevertheless submit the pages. *See generally* nn. 306-07, *supra*, and Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 521, 44 A.3d 1002, 1021 (2012) ("[W]e note that § 6-203(c) places the onus on the signer, sponsor, and circulator of the petition to correct the error of a potentially improper signature by removing the signature from the petition before it is submitted.").

326. *Ficker*, 326 Md. at 633, 606 A.2d at 1063. The duty has also been described by the court as an "implicit pledge. . . ." *Id.*

327. Ferguson v. Sec'y of State, 249 Md. 510, 515, 240 A.2d 232, 234–35 (1968).

328. Tyler v. Sec'y of State, 229 Md. 397, 402, 184 A.2d 101, 104 (1962).

329. *Ferguson*, 249 Md. at 516, 240 A.2d 235 (quoting *Tyler*, 229 Md. at 403, 184 A.2d at 104). In *Montanans for Justice v. Montana,* the Supreme Court of Montana wrote that "it is evident that the circulator's role in a citizen's initiative is pivotal. Indeed, the integrity of the initiative . . . process in many ways hinges on the trustworthiness and veracity of the circulator." 334 Mont. 237, 263, 146 P.3d 759, 777 (2006)(quoting *Maine Taxpayers Action Network v. Sec. of State*, 2002 Me. 64, 80 (2002).) In *San Francisco Forty-Niners v. Nishioka,* the court wrote that "when presented with a petition by a circulator, voters have a right to rely on the integrity of the initiative process and the accuracy of the petition . . . ." 75 Cal. App. 4th 637, 648 (1999). The court further commented that "the people also have a right to rely on the integrity of the initiative process from beginning to end. Because the initiative process bypasses the normal legislative process, safeguards are necessary to prevent abuses and provide for an informed electorate." *Id.* at 649.

the page are valid fails.[330] In *Ferguson*, an affidavit on knowledge, information, and belief was held insufficient[331]; in *Tyler*,[332] an affidavit that falsely stated that all of the signatories were registered in the jurisdiction was rejected.[333]

7. Filing

After signature pages are circulated and signed, they are filed[334] pursuant to election law, section 6-205, "by or on behalf of the sponsor, in the office of the appropriate election authority."[335] SBE has the power to promulgate regulations providing that pages be sent "to the appropriate local board or boards for verification and counting of signatures."[336] It has done so.[337]

The sponsor has a duty to file a proper petition[338] and must sort the pages "[b]y county" before filing and, "[i]f applicable, by . . . district or geographic area . . . ."[339] If a petition fund statement[340] is required,

330. *Id.* at 516–17, 240 A.2d at 235; *Tyler*, 229 Md. at 405–06, 184 A.2d at 105–06. *Tyler* was remanded and one may assume that evidence in support of the challenged signatures could have been offered. *Id.* at 406, 184 A.2d at 105–06 ("[T]he burden is cast upon the proponents to affirmatively show that the remaining signatures on such petition or sheet thereof are genuine and bona fide and that the signers are registered voters as required by law.").

331. *Ferguson*, 249 Md. at 517, 240 A.2d at 235–36.

332. *Tyler*, 229 Md. at 405–06, 184 A.2d at 105–06.

333. In an unreported circuit court decision, Dwight Sullivan, Esquire, formerly of the American Civil Liberties Union, deposed circulators and demonstrated that one had not personally observed signatures being affixed, despite the contrary statements in the circulator's affidavit. Gelbman v. Willis, No. C-2001-7340.0C (Cir. Ct. Anne Arundel Cnty. 2001) (Lerner, J.).

334. Under some circumstances, there may be more than one filing: "Subsequent to the filing of a petition under this subtitle, but prior to the deadline for filing the petition, additional signatures may be added to the petition by filing an amended information page and additional signature pages conforming to the requirements of this subtitle." MD. CODE ANN., ELEC. LAW § 6-205(d) (LexisNexis 2010); MD. CODE REGS. 33.06.04.05 (2011).

335. ELEC. LAW § 6-206(a)–(c).

336. *Id.* § 6-205(b).

337. MD. CODE REGS. 33.06.04.02–.07. COMAR governs local board's reports to the state. *Id.* at 33.06.05.04.

338. *See* Ficker v. Denny, 326 Md. 626, 633, 606 A.2d 1060, 1063 (1992).

339. MD. CODE REGS. 33.06.04.03.

340. A petition fund statement is required for every petition filed under MD. CONST. art. XI-A or XVI. MD. CODE REGS. at 33.06.04.07.

the petition will not be accepted without it.[341] It appears that, like the circulator, the sponsor may be viewed as the agent of the signers.[342]

8. Secretary of State

The official receiving the pages plays an important gatekeeper role: "A petition may not be accepted for filing unless the information page indicates that the petition satisfies any requirements established by law for the time of filing and for the number and geographic distribution of signatures."[343] Pursuant to election law, section 6-206, the receiving official makes a number of key decisions:

> (a) Review by chief election official.—Promptly upon the filing of a petition with an election authority, the chief election official of the election authority shall review the petition.[344]
> (b) Determinations.—Unless a determination of deficiency is made under subsection (c) of this section, the chief election official shall:
> (1) make a determination that the petition, as to matters other than the validity of signatures, is sufficient; or
> (2) defer a determination of sufficiency pending further review.
> (c) Declaration of deficiency.—The chief election official shall declare that the petition is deficient if the chief election official determines that:
> (1) the petition was not timely filed;
> (2) after providing the sponsor an opportunity to correct any clerical errors, the information provided by the sponsor indicates that the petition does not satisfy any requirements of law for the number or geographic distribution of signatures;

341. MD. CODE REGS. at 33.06.04.04.

342. Tyler v. Sec'y of State, 229 Md. 397, 403, 184 A.2d 101, 104 (1962). The court wrote that "the one procuring the petitions or circulating them is the agent of the signers." *Id.* If it intended to point only to the circulators, the court would not have written "the one procuring the petitions or." *Id.*

343. MD. CODE ANN., ELEC. LAW § 6-205(c) (LexisNexis 2010).

344. The election official must provide a receipt to the sponsor. MD. CODE REGS. 33.06.04.06.

> (3) an examination of unverified signatures indicates that the petition does not satisfy any requirements of law for the number or geographic distribution of signatures;
> (4) the requirements relating to the form of the petition have not been satisfied;
> (5) based on the advice of the legal authority:
> (i) the use of a petition for the subject matter of the petition is not authorized by law; or
> (ii) the petition seeks:
> 1. the enactment of a law that would be unconstitutional or the election or nomination of an individual to an office for which that individual is not legally qualified to be a candidate; or
> 2. a result that is otherwise prohibited by law; or
> (6) the petition has failed to satisfy some other requirement established by law.[345]

Although the Secretary of State's role is ministerial,[346] it is significant. The court has squarely held that the Secretary has the power to reject a petition.[347]

9. Validation and Verification

If the receiving election official does not reject the submitted pages under election law, section 6-206, the election board must engage in a two-step process consisting of validation and verification.[348] The court of appeals has emphasized that these are different processes and that they have different purposes.[349]

345. ELEC. LAW § 6-206(a)–(c).

346. Referendum Petitions–Filing–Duties of Secretary of State–Public Inspection, 50 Md. Op. Att'y Gen. 328 (1965) ("We have several times advised that your authority does not go beyond the purely ministerial act of determining whether petitions submitted to you (a) contain the requisite number of signatures, (b) are in the form required by Article XVI, Section 4, of the Constitution and the statutes adopted pursuant to Section 1(b) of that Article. . . and (c) bear valid affidavits which meet the specific constitutional requirements.") (citations omitted).

347. Barnes v. State *ex rel.* Pinkney, 236 Md. 564, 570, 573, 204 A.2d 787, 790, 792 (1964).

348. ELEC. LAW § 6-207(a)(1).

349. Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 732 n.27, 962 A.2d 342, 362 n.27 (2008); Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 619–20, 30 A.3d 245, 254–55 (Md. Ct. Spec. App. 2011). The distinction between the two processes is based on the statute: "Upon the

a. Validation and counting

"The purpose of validation, relating to whether the signature is sufficient, is to 'provide additional means by which fraudulent or otherwise improper signatures upon a referendum petition may be detected.'"[350] Validation and counting of affixed signatures are governed by election law, section 6-203(b).

> The signature of an individual shall be validated and counted if:
> (1) the requirements of subsection (a)[351] of this section have been satisfied;
> (2) the individual is a registered voter assigned to the county specified on the signature page and, if applicable, in a particular geographic area of the county;
> (3) the individual has not previously signed the same petition;
> (4) the signature is attested by an affidavit appearing on the page on which the signature appears;
> (5) the date accompanying the signature is not later than the date of the affidavit on the page; and
> (6) if applicable, the signature was affixed within the requisite period of time, as specified by law.[352]

b. Verification

Verification is mandated by election law, section 6-205(b) and defined in section 6-207 and COMAR 33.06.05.02.[353] "The purpose

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filing of a petition, and unless it has been declared deficient under § 6-206 of this subtitle, the staff of the election authority shall proceed to verify the signatures *and* count the validated signatures contained in the petition." ELEC. LAW § 6-207(a)(1) (emphasis added).

350. *Doe*, 406 Md. at 732, 962 A.2d at 362–63 (quoting *Barnes*, 236 Md. at 574, 204 A.2d at 793).

351. The first part of section 6-203(a) requires "the individual's name as it appears on the statewide voter registration list or the individual's surname of registration and at least one full given name and the initials of any other names." ELEC. LAW § 6-203(a)(1). The second part of section 6-203(a) requires "(i) the signer's name as it was signed; (ii) the signer's address; (iii) the date of signing; and (iv) other information required by regulations adopted by the State Board." *Id.* at § 6-203(a)(2).

352. *Id.* at § 6-203(b).

353. *Id.* at § 6-205(b) ("The regulations adopted by the State Board may provide that the signature pages of a petition required to be filed with the State Board be delivered by the sponsor, or an individual authorized by the sponsor, to the appropriate local board or boards for *verification* and counting of signatures.") (emphasis added); MD. CODE

of signature verification under paragraph (1) of this subsection is to ensure that the name of the individual who signed the petition is listed as a registered voter."[354] The statute authorizes SBE to establish by regulation the process to be followed for verification and counting of signatures.[355] "[V]erification and counting of validated signatures . . . shall be completed within [twenty] days after the filing of the petition."[356]

The election director is required to review all names and accompanying information on each signature page, determine which signers are registered voters who meet petition and criteria and which are not or do not, [357] and indicate next to each name the results of that determination, using uniform codes.[358]

c. Petition processing by the Board of Elections

The Attorney General has provided an overview of referendum processing.[359] When petitions are filed, the election board will review each page, signature-by-signature, placing a code next to each.[360] Acceptance codes include OK, for valid names, CG, for an internet or computer-generated page, INV, for a valid inactive voter, WA-OK for a valid name at a valid new address, WA-INV, for an inactive

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REGS. 33.06.05.02(B) (2011) (verification requires that the election director: "(1) Review all names and accompanying information on each signature page; (2) Determine which signers are registered voters who meet the petition criteria and which are not registered voters or do not meet the petition criteria; and (3) Indicate next to each name the results of that determination, using for that purpose uniform codes specified in the State Board's guidelines and instructions . . . .").

354. ELEC. LAW § 6-207(a)(2).

355. ELEC. LAW § 6-207(b). The statute also permits verification through a process of random sampling. *Id.* at § 6-207(c); MD. CODE REGS. 33.06.05.03.

356. ELEC. LAW § 6-210(c); *see also* MD. CODE REGS. 33.06.05.04.

357. Statutes are generally silent as to when the number of registered voters is to be determined. Doe v. Montgomery Cnty. Bd. of Elections, 2008 Md. Cir. Ct. Lexis 7, at *3 (July 28, 2008), *rev'd on other grounds*, 406 Md. 697, 962 A.2d 342 (2008). Generally, a date at or near the signature-page filing date is selected. *Id.* The voter registration list is "conclusively presumed to be the list[] of all qualified voters at any given point," with an exception not relevant here. Gisriel v. Ocean City Bd. of Supervisors of Elections, 345 Md. 477, 505, 693 A.2d 757, 771 (1997).

358. MD. CODE REGS. 33.06.05.02(B).

359. Sufficiency Determination Concerning a Referendum on a Pub. Law Enacted by the Gen. Assembly is to be Made by State Officials, 85 Md. Op. Att'y Gen. 120, 121–23 (2000).

360. *See supra* note 353; MD. STATE BD. OF ELECTIONS, PETITION ACCEPTANCE AND VERIFICATION PROCEDURES (2012), *available at* http://www.elections.state.md.us/petitions/Petition_verification_Procedures.pdf.

voter at a valid new address, and OK-CT, for a registered signer who provided an out-of-county address.[361] Rejection codes include CI, for circulation issue, PF, for petition format issue, TA, for failure to print text on the back of the signature page, NR, for not registered, DUP, for duplicate signatures, DI, for signer date issues, SI, for signature issues, NS for legibility issues, and WA, for addresses that do not meet petition criteria.[362] It has been argued that these are factual findings, constituting the administrative record, and that on judicial review they must be affirmed if supported by substantial evidence on the record.[363]

Notably, no statutory provision calls for, authorizes, or mandates handwriting analysis.[364] Thus, there is no provision that suggests that the *signature* on a petition page be compared to or with the signature on the voter registration records.[365]

d. There Is No Right to Observe Petition Processing

State law calls for open and transparent local board procedures in elections processes.[366] Nevertheless, participants do not have a constitutional right to observe petition processing by boards of election.[367] The rationale is that an election board must complete

361. *Id.*

362. *Id.*

363. *See* PPE Casino Resorts Md., LLC v. Anne Arundel Cnty. Bd. of Supervisors of Elections, No. 02-C-10-149479, slip. op. at 9–10, 28–31 (June 3, 2010), *rev'd on other grounds sub nom.* Citizens Against Slots at the Mall v. PPE Casino Resorts Md., LLC, 429 Md. 176, 55 A.3d 496 (2012). One of the authors presented this argument. The circuit court conducted signature-by-signature review.

364. In *Doe v. Montgomery Cnty. Bd. of Elections,* 2008 Md. Cir. Ct. Lexis 7, *24 (July 28, 2008), *rev'd on other grounds*, 406 Md. 697, 962 A.2d 342 (2008), the circuit court cited the Department of Legislative Services' Fiscal and Policy Note to MD. CODE ANN., ELEC. LAW § 6-207(a)(2) (LexisNexis 2010), for the proposition that verification is not designed "to verify the authenticity of the signature." FISCAL & POLICY NOTE, S.B. 101, Gen. Assemb., 2006 Sess. (Md. 2006).

365. *See* ELEC. LAW § 6-207; FISCAL & POLICY NOTE, S.B. 101.

366. ELEC. LAW § 2-202(b) states: "Each local board, in accordance with the provisions of this article and regulations adopted by the State Board, shall: (1) oversee the conduct of all elections held in its county and ensure that the elections process is conducted in an open, convenient, and impartial manner. . . ."

367. Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 630–32, 30 A.3d 245, 255 (Md. Ct. Spec. App. 2011). SBE Policy 2001-001 addresses public observation of petition verification and considers verification under ELEC. LAW § 6-207 to be a staff function that is not subject to the Open Meetings Act, Title 10, Subtitle 5 of the State Government article. It provides that "therefore, members of the public are not legally entitled to be present during the

verification within twenty days and the election board's "limited resources should be focused on the 'large and difficult' task of validating and verifying thousands of signatures in this compressed time-frame.[368] Because a sponsor may present challenges to a court sitting in judicial review, it has been held that there is no prejudice as the result of closed processing.[369]

Unlike the statutory provisions for poll watchers and challengers, the election law article does not provide the sponsor, or anyone else, with the right to observe processing of the petition.[370] The safeguard

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verification process. . . ." SBE suggested that, in the interest of uniformity: "Accordingly, the State Board adopted a strong policy against any local board voluntarily permitting members of the public to witness the verification process." The version of the policy that is available online is unsigned.

368. *Id.* (citing *Doe v. Reed*, 130 S.Ct. at 2820).

369. *Id.*

370. In contrast to the petition verification process, ELEC. LAW § 10-311 provides for "challengers and watchers" in connection with registration and voting. It states:

> (1) The following persons or entities have the right to designate a registered voter as a challenger or a watcher at each place of registration and election:
>
> (i) the State Board for any polling place in the State;
>
> (ii) a local board for any polling place located in the county of the local board;
>
> (iii) a candidate;
>
> (iv) a political party; and
>
> (v) any other group of voters supporting or opposing a candidate, principle, or proposition on the ballot.
>
> (2) A person who appoints a challenger or watcher may remove the challenger or watcher at any time.
>
> (b) Rights of challengers and watchers. -- Except as provided in § 10-303(d)(2) of this subtitle and subsection (d) of this section, a challenger or watcher has the right to:
>
> (1) enter the polling place one-half hour before the polls open;
>
> (2) enter or be present at the polling place at any time when the polls are open;
>
> (3) remain in the polling place until the completion of all tasks associated with the close of the polls under § 10-314 of this subtitle and the election judges leave the polling place;
>
> (4) maintain a list of registered voters who have voted, or individuals who have cast provisional ballots, and take the list outside of the polling place; and
>
> (5) enter and leave a polling place for the purpose of taking outside of the polling place information that identifies registered voters who have cast ballots or individuals who have cast provisional ballots.
>
> (c) Certificate. --

is the coding process that creates an administrative record for judicial review.[371]

Whether the closed statutory process is good policy is a matter for the legislature. Boards of election are comprised of humans and errors have occurred. In one case, for example, the Secretary of State

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(1) (i) A certificate signed by any party or candidate shall be sufficient evidence of the right of a challenger or watcher to be present in the voting room.

(ii) The State Board shall prescribe a form that shall be supplied to the challenger or watcher by the person or entity designating the challenger or watcher.

(2) A challenger or watcher shall be positioned near the election judges and inside the voting room so that the challenger or watcher may see and hear each person as the person offers to vote.

(d) Prohibited activities. --

(1) A challenger or watcher may not attempt to:

(i) ascertain how a voter voted or intends to vote;

(ii) converse in the polling place with any voter;

(iii) assist any voter in voting; or

(iv) physically handle an original election document.

(2) An election judge may eject a challenger or watcher who violates the prohibitions under paragraph (1) of this subsection.

(e) Individuals other than accredited challengers or watchers. --

(1) Except as provided in paragraphs (2) and (3) of this subsection, an election judge shall permit an individual other than an accredited challenger or watcher who desires to challenge the right to vote of any other individual to enter the polling place for that purpose.

(2) A majority of the election judges may limit the number of nonaccredited challengers and watchers allowed in the polling place at any one time for the purpose of challenging the right of an individual to vote.

(3) A nonaccredited challenger or watcher shall leave the polling place as soon as a majority of the election judges decides the right to vote of the individual challenged by the challenger or watcher.

(4) In addition to restrictions provided under this subsection, all restrictions on the actions of an accredited challenger or watcher provided under this subtitle apply to a nonaccredited challenger or watcher. [emphasis added].

371. COMAR 33.06.05.01, et seq., implements a verification process. SBE has established detailed "Petition Acceptance and Verification Procedures" that specify acceptance and rejection codes. *Petition Acceptance and Verification Procedures*, SBE http://www.elections.state.md.us/petitions/Petition_verification_Procedures.pdf Each line of each signature page is coded by the local election board, providing a detailed record of administrative findings of fact.

"misplaced in his office" a box containing 5,000 signatures.[372] Thus, in some instances, election officials communicated with sponsors during that process, correcting errors.[373] It would, however, appear that the problems inherent in creating a fully open process during a compressed time frame would be close to insurmountable. Whether a process similar to, but more limited than, poll watching and challenging is viable would be worthy of study. Despite the high level of professionalism, integrity, and competence of Maryland's election officials, persons interested in the referendum process often express a desire to observe petition processing. If it is possible to accommodate that desire without compromising the speed and integrity of petition processing, it would be a beneficial modification.

e. Inactive voters

It is well-settled that inactive voters must be included in the calculation of whether or not sufficient signatures have been gathered.[374] Of course, including inactive voters increases the number of signatures that must be gathered by a petition sponsor;[375] however, inactive voters are permitted to sign petitions.[376]

f. Criminal penalties

Election law, section 6-211 proscribes by incorporation a number of offenses and penalties for violation of the petition laws.[377] Specifically, election law, section 16-401 criminalizes a number of

372. Sec'y of State v. McLean, 249 Md. 436, 439-40, 239 A.2d 919 (1968) ("One of Taxpayers' signature gatherers promptly convinced the Secretary that he had overlooked 5,000 signatures . . . by finding them in a box in a cabinet in the Secretary's office").

373. *Id.*; Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 501, 44 A. 3d 1002, 1009 (2012) ("constructive discussions between the parties" resulted in the board of elections crediting additional signatures); Kendall v. Balczerak, 650 F.3d 515, 519 (4th Cir. 2011) (the Board "sent an email to several persons involved in the referendum process requesting their presence at a meeting of the County Board the following evening.").

374. Int'l Ass'n of Fire Fighters v. Mayor of Cumberland, 407 Md. 1, 14, 962 A.2d 374, 382 (2008) (citing Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 724–26, 962 A.2d 342, 358–59 (2008); Md. Green Party v. Md. Bd. of Elections, 377 Md. 127, 152–53, 832 A.2d 214, 229 (2003)).

375. *See Montgomery Cnty. Bd. of Elections*, 406 Md. at 723, 962 A.2d at 357.

376. *See* PETITION ACCEPTANCE AND VERIFICATION PROCEDURES, *supra* note 360.

377. MD. CODE ANN., ELEC. LAW § 6-211 (LexisNexis 2010).

actions.[378] Obviously, the presence or absence of criminal penalties is a significant anti-fraud measure.[379]

10. Certification

At the conclusion of verification and counting, the chief election official shall determine whether the validated signatures are sufficient to satisfy all legal requirements relating to the number and geographical distribution of signatures.[380] If the official has not previously done so, he or she shall determine whether all other requirements of law have been met "and immediately notify the sponsor[381] of that determination, including any specific deficiencies found."[382]

If the official determines that all requirements have been met, "the chief election official shall certify that the petition process has been completed."[383] The certification places the issue on the ballot.[384]

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378. ELEC. LAW § 16-401 provides that:

> (a) In general. — A person may not willfully and knowingly: (1) give, transfer, promise, or offer anything of value for the purpose of inducing another person to sign or not sign any petition; (2) request, receive, or agree to receive, anything of value as an inducement to sign or not to sign any petition; (3) misrepresent any fact for the purpose of inducing another person to sign or not to sign any petition; (4) sign the name of any other person to a petition; (5) falsify any signature or purported signature to a petition; (6) obtain, or attempt to obtain, any signature to a petition by fraud, duress, or force; (7) circulate, cause to be circulated, or file with an election authority a petition that contains any false, forged, or fictitious signatures; (8) sign a petition that the person is not legally qualified to sign; (9) sign a petition more than once; or (10) alter any petition after it is filed with the election authority. (b) Each violation a separate offense. — Each violation of this section shall be considered a separate offense. (c) Penalty. — A person who violates this section is guilty of a misdemeanor and is subject to the penalties provided in Subtitle 10 of this title.

MD. CODE ANN., ELEC. LAW § 16-401.

379. *See* Whitely v. Md. State Bd. of Elections, 429 Md. 132, 160, 163, 55 A.3d 37, 55–56 (2012).

380. *Id.* § 6-208(a)(1); MD. CODE REGS. 33.06.05.05(A)(1) (2010).

381. The "sponsor" is the person or organization identified on the information sheet. ELEC. LAW § 6-101(j).

382. *Id.* § 6-208(a)(2).

383. *Id.* § 6-208(b).

384. *Id.* ("If the chief election official determines that a petition has satisfied all requirements established by law relating to that petition, the chief election official

A certification decision triggers the right to judicial review.[385] Statutory judicial review is defined by election law, section 6-209, and discussed in Part IV below. The time limits for seeking review are short.[386]

11. Drafting a Ballot Question

Maryland Constitution, article XVI, section 5, provides that:

> (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

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shall certify that the petition process has been completed and shall: (1) with respect to a petition seeking to place the name of an individual or a question on the ballot, certify that the name or question has qualified to be placed on the ballot; (2) with respect to a petition seeking to create a new political party, certify the sufficiency of the petition to the chairman of the governing body of the partisan organization; and (3) with respect to the creation of a charter board under Article XI-A, § 1A of the Maryland Constitution, certify that the petition is sufficient.") Notice is provided pursuant to ELEC. LAW § 6-208(c), which incorporates ELEC. LAW § 6-210.

385. Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 716, 962 A.2d 342, 353 (2008); Roskelly v. Lamone, 396 Md. 27, 44, 912 A.2d 658, 669 (2006); *see also* Stop Slots MD 2008 v. State Bd. of Elections, 424 Md. 163, 178, 34 A.3d 1164, 1172 (2012).

386. ELEC. LAW § 6-210(e); Liddy v. Lamone, 398 Md. 233, 245, 919 A.2d 1276, 1284 (2006); Ross v. State Bd. of Elections, 387 Md. 649, 665, 876 A.2d 692, 701 (2005); *see* Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam); Anne Arundel Cnty. Taxpayers Ass'n, Inc. v. Anne Arundel Cnty. Bd. of Elections, 415 Md. 433, 2 A.3d 1095 (2010) (per curiam).

> referred law" and "Against the referred law," as the case may be. . . .[387]

After a ballot question is drafted, it can be challenged.[388] "There is a small but significant distinction between the standards that govern submission of a proposed constitutional amendment to the electorate for approval under to MD Const. art. XIV, and the General Assembly's authority to submit a law to voters for a referendum pursuant to Art. XVI."[389] The rules governing review also differ.[390]

Under the election law article, a ballot question must contain a brief description of the type or source of the question, a brief descriptive title in bold typeface, a condensed statement of purpose, and the choices being put to the voters.[391] The legislature is permitted, but not required, to enact the ballot language.[392] If no language is directed by the General Assembly, the Secretary of State prepares the question.[393] The question is then certified to the State Board of Elections for inclusion on the ballot.[394]

Questions for constitutional amendments, as opposed to ballot questions, must "be prepared in clear and concise language and devoid of technical and legal terms[, and] [t]he Department of Legislative Services must prepare the 'non-technical summary' which must be submitted to the Attorney General for approval."[395]

The court of appeals has repeatedly enunciated the governing statutory standard.[396] Post-election challenges are decided under a more forgiving standard than pre-election challenges.[397]

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387. MD. CONST. art. XVI, § 5.

388. Smigiel v. Franchot, 410 Md. 302, 319–20, 978 A.2d 687, 698–99 (2009) (holding that a challenge is not ripe until question is drafted).

389. *Stop Slots*, 424 Md. at 191 n.16, 34 A.3d at 1180 n.16. As to the standard for annexation ballots, see Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

390. *Id.* at 191–93, 34 A.3d at 1180–81.

391. MD. CODE ANN., ELEC. LAW § 7-103(b) (LexisNexis 2010).

392. *Id.*, § 7-105(b)(3)(i); *Stop Slots*, 424 Md. at 172, 34 A.3d at 1169.

393. ELEC. LAW § 7-103(c)(1); *Stop Slots*, 424 Md. at 172, 34 A.3d at 1169.

394. *Stop Slots*, 424 Md. at 172, 34 A.3d at 1169. Local boards must give notice of the question by mailing or publication. *Id.*

395. *Id.* at 172–73, 34 A.3d at 1169–70; *accord* ELEC. LAW § 7-105(b). There are also other technical requirements. *Stop Slots*, 424 Md. at 189–92, 34 A.3d 1179–81.

396. *Stop Slots*, 424 Md. at 189–92, 34 A.3d 1179–81 (finding that standards "are clearly set forth in the Constitution, the Maryland Election Law article, and firmly addressed and established by our precedents") (citing Kelly v. Vote Know Coal. of Md., Inc., 331 Md. 164, 171–72, 626 A.2d 959, 963–64 (1993) (abortion); Anne Arundel Cnty. v. McDonough, 277 Md. 271, 300, 354 A.2d 788, 805 (1976) (land use)).

B. Structure of the Boards of Election and Petition Review

1. State Boards/Local Boards

Both the state and local boards of election are created by state law.[398] The latter are "local" in name only.[399] They are subject to "the direction and authority" of the state and are "accountable" to it.[400] The State Administrator of Elections shall "supervise the operations of the local boards . . . ."[401] Although their essential operations are funded by counties,[402] local boards are bound by state

397. *See* Lexington Park Volunteer Fire Dep't. v. Robidoux, 218 Md. 195, 200, 146 A.2d 184, 186 (1958); *see generally infra* Part V. While not squarely a ballot challenge, *Heaton v. Mayor & City Council of Balt.*, 254 Md. 605, 255 A.2d 310 (1969), presents a fascinating throw-back to yesteryear. Baltimore City had placed thirty-nine questions on the ballot and, at that time, "lever" machines were still used. *Id.* at 614, 255 A.2d at 315. In order to make voting simpler, the machines were set up so that a voter could select each question separately, or alternatively, pull a "master lever" and vote "for" or "against" all thirty-nine measures. The court held that, because a master lever was neither permitted nor prohibited by the code, and because adequate measures were provided for a question-by-question vote, the master lever was permissible. *Id.* at 608–09, 614–15, 255 A.2d at 312, 315. Maryland has since adopted a uniform state-wide system of electronic voting. Schade v. Md. State Bd. of Elections, 401 Md. 1, 7, 930 A.2d 304, 308 (2007).

398. MD. CODE ANN., ELEC. LAW § 2-101 (LexisNexis 2010 & Supp. 2012) (State Board); *id.* § 2-201(a)(1) (Local Board); MD. CODE REGS. 33.01.01.01(19), 33.01.01.01(27) (2011).

399. *See* State Bd. of Elections v. Snyder, No. 122, 2013 Md.Lexis 607 *34-35 (county school boards are State agencies) (Md. Sep. 27, 2013) (quoting Chesapeake Charter, Inc. v. Anne Arundel Co. Bd. of Educ., 358 Md. 129, 136-37, 747 A.2d 625, 629 (2000)); Rucker v. Harford Cnty., 316 Md. 275, 558 A.2d 399 (1989). *Rucker* involved a deputy sheriff, not an election board. *Id.* at 277, 558 A.2d at 400. The court held that "particular agencies or officials are State agencies or officials despite the fact that local governments are wholly or substantially responsible for funding those agencies or officials." *Id.* at 283, 558 A.2d at 403. After reviewing a number of cases, the court concluded: "These and other cases teach that the question of whether sheriffs and their deputies are State or local officials primarily depends on whether the creation and ultimate control of the offices of sheriff and deputy lie with the State or with local government." *Id.* at 285, 558 A.2d at 404. While not precisely parallel to boards of election, the court determined that the deputy sheriff was a state official. *Id.* at 302, 558 A.2d at 412.

400. ELEC. LAW § 2-201(a)(2).

401. *Id.* § 2-103(b)(4).

402. *Id.* § 2-203. Counties must appropriate funds for personnel expenses, polling place operation expenses, and prescribed supplies and equipment. *Id.*; *see also* Election Bds. & Judges–Cntys.–Obligation to Fund Essential Bd. Functions, 76 Md. Op. Att'y Gen. 194, 199 (1991); Kenneweg v. Cnty. Comm'rs of Allegany Cnty., 102 Md. 119,

regulations.[403] They must use a uniform, statewide voting system and a statewide voter registration database.[404] In some instances, their employees are part of the state personnel system; in others they are county merit system employees.[405] Their hours of operation are set by state law.[406]

2. By Statute, Membership on the Boards of Elections Is Limited to Members of the Principal Political Parties, i.e., Democrats and Republicans

Maryland is a diverse state with a number of political parties.[407] Recently, for example, both the Libertarian and Green parties have litigated to enforce their perceived or actual rights.[408] Neither, however, is permitted to sit on the state or local boards of election that evaluate their petitions.[409] That may present constitutional questions.[410]

a. Composition of SBE

The State Board of Elections is comprised of five members.[411] The "political party[412] affiliation" of the members is prescribed by statute.[413] "Each member of the State Board shall be a member of

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129, 62 A. 249, 252 (1905). Board members receive salary and expense reimbursement under the county budget. ELEC. LAW § 2-204(a). Local boards are permitted to retain counsel, paid by the county, who are not Assistant Attorneys General. *See id.* § 2-205(a).

403. ELEC. LAW § 2-202(b).

404. *Id.* §§ 3-101(a), 9-101(b).

405. *Id.* § 2-202(b)(2). ELEC. LAW § 2-207 provides personnel system requirements.

406. *Id.* § 2-302(b).

407. *Maryland Political Parties*, MD. STATE ARCHIVES (Feb. 19, 2013), msa.maryland.gov/msa/mdmanual/40party/html/parties.html.

408. Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 518, 44 A.3d 1002, 1020 (2012) (signature requirements); Green Party v. Md. Bd. of Elections, 365 Md. 472, 781 A.2d 778 (2001), *reconsideration granted in part and denied in part,* 377 Md. 127, 137, 832 A.2d 214, 220 (2003) (ballot access).

409. *See* ELEC. LAW §§ 2-101(e), 2-201(b)(2).

410. This issue was presented, but not decided, in *Massey v. Harford Cnty. Bd. of Elections*, No. SPMS-ELEC-10-11-45651, and the text and citations draw heavily from the parties' briefs in that case.

411. ELEC. LAW § 2-101(a) ("There is a State Board of Elections consisting of five members.").

412. "'Political party' means an organized group that is qualified as a political party in accordance with Title 4 of this article." *Id.* § 1-101(hh).

413. *Id.* § 2-101(e) ("Political party affiliation").

one of the principal political parties."[414] "'Principal political parties' means the majority party and the principal minority party."[415] "Majority party means the political party to which the incumbent Governor belongs, if the incumbent Governor is a member of a principal political party."[416] The "principal minority party" is "the principal political party whose candidate for Governor received the second highest number of votes of any party candidate at the last preceding general election."[417]

Appointments to SBE are made by the Governor, who chooses an "individual whose name is submitted to the Governor by the State Central Committee of the principal political party entitled to the appointment."[418] A person "may not be appointed" if it will result in the Board "having more than three or fewer than two members of the same principal political party."[419]

b. Composition of Local Boards of Election

By state law, local election boards are comprised of three regular and two substitute members.[420] State law provides that: "Two regular members and one substitute member shall be of the majority party, and one regular member and one substitute member shall be of the principal minority party."[421]

Nominations to local boards are made by political party affiliation: "The Governor shall request the county central committee representing the majority party or the principal minority party, as appropriate, to submit a list of at least four eligible individuals from which the Governor may make an appointment of a regular member or a substitute member of the local board."[422]

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414. *Id.* § 2-201(e)(1).

415. *Id.* § 1-101(kk).

416. *Id.* § 1-101(dd). "If the incumbent Governor is not a member of one of the two principal political parties, 'majority party' means the principal political party whose candidate for Governor received the highest number of votes of any party candidate at the last preceding general election." *Id.*

417. *Id.* § 1-101(jj).

418. *Id.* § 2-101(c)(2).

419. *Id.* § 2-101(e)(2).

420. *Id.* § 2-201(b)(1).

421. *Id.* § 2-201(b)(2).

422. *Id.* § 2-201(g)(1). The code makes "special provisions" for Baltimore City and several counties. *Id.* § 2-201(j), (k), (l). In Prince George's County:

> Four regular members and two substitute members shall be of the majority party, and one regular member and one substitute member shall be of the principal minority party . . . . If a vacancy

The Governor cannot appoint a member of any other party: "If a list containing the names of four eligible nominees is not submitted within 20 days of a request or if all the nominees on three lists are rejected, the Governor may appoint any eligible person who is a member of the appropriate political party."[423] Vacancies must be filled based on political party affiliation.[424]

c. Effective duopoly

Because Maryland has historically been a duopoly,[425] in practice all board members must be Democrats or Republicans.[426] The court of appeals has recognized that they historically are the two principal parties.[427] Indeed, it has taken note of the duopoly:

> In Maryland since 1896, the two major political parties have had equal representation among election judges and clerks, and unequal representation on Boards of Supervisors. In primary elections a faction of a party or an individual candidate, as such, has no representation at all on Boards of Supervisors or among judges or clerks.[428]

There is disarray, however, as to whether "bipartisan" statutes are permissible, and there is no Maryland decision on point.[429] When the

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> occurs on the local board among the members from the majority party, the Governor shall designate one of the substitute members from that party to fill the vacancy.

Id. § 2-201(j)(2)–(3). Similar party affiliation requirements are contained in subsections (k) and (l) for the remaining counties. Section 2-201 will be amended effective June 1, 2015. The party affiliation provisions remain in the amended statute. *Id.* § 2-201 (effective Jan. 1, 2015).

423. *Id.* § 2-201(g)(3).

424. *Id.* § 2-201(h)(1)(i)–(ii).

425. The majority and principal minority parties have, in Maryland's modern history, been the Democratic and Republican parties. *See* John J. Walters, *The Two-Party System, Pol'y Blog,* MD. PUB. POL'Y INST. (Apr. 19, 2011), http://mdpolicy.org/policyblog/detail/the-two-party-system ("At a time when American citizens are fighting and dying around the world to promote the spread of democracy, is it right for the state of Maryland to rule that the Green and Libertarian parties are no longer considered official?"); Julie Bykowicz, *Rejected as Official, Third Parties Sue*, BALT. SUN WEBLOG (Apr. 15, 2011 11:12 AM), http://weblogs.baltimoresun.com/news/local/politics/2011/04/rejected_as_official_third_par.html.

426. *See* ELEC. LAW § 2-201(b)(2).

427. Suessmann v. Lamone, 383 Md. 697, 707, 862 A.2d 1, 7 (2004).

428. Hammond v. Love, 187 Md. 138, 148, 49 A.2d 75, 79 (1946).

429. *See infra* Parts II.B.2.d–e.

court is "without [the] benefit of any case law," as is often the case, the answer should be found by "reasoning from first principles."[430]

d. Decisions Holding "Bipartisan" Boards to Be Permissible

A number of courts around the nation have upheld what they call "bipartisan composition of. . . election boards."[431] For instance, in *Werme v. Merrill*, members of a minority third political party, the Libertarian party, filed suit against the Governor and Secretary of State of New Hampshire, alleging "that the statutes governing appointment of election inspectors and ballot clerks abridged [plaintiffs'] constitutional rights to free association, due process, and equal protection."[432] Specifically, they "sought an order commanding the appointment of Libertarians to [election related] positions on the

430. Mandel v. O'Hara, 320 Md. 103, 125, 576 A.2d 766, 777 (1990).

431. Vintson v. Anton, 786 F.2d 1023, 1025 (11th Cir. 1986) (Tjoflat, J., concurring) ("Appellants admit that Alabama constitutionally may, as all states do, so far as we are aware, follow the practice of requiring bipartisanship in the composition of election boards. Such adversary partisan confrontation is universally regarded as an effective means of preventing fraud and ensuring honest elections."); Werme v. Merrill, 84 F.3d 479, 481–82 (1st Cir. 1996) (rejecting Libertarian challenge to bipartisan selection for election officials); Gill v. Rhode Island, 933 F. Supp. 151, 155–56 (D.R.I. 1996) (holding that facially neutral statutes governing bipartisan local canvassing authority did not violate constitutional rights despite the fact that the statutes conditioned political party's right to nominate members based on prior success at polls), *aff'd by unpublished opinion*, 107 F.3d 1 (1st Cir. 1997); Coal. for Sensible & Humane Solutions v. Wamser, 590 F. Supp. 217, 218 (E.D. Mo. 1984) (voter registration teams); Pirincin v. Bd. of Elections of Cuyahoga Cnty., 368 F. Supp. 64 (N.D. Ohio 1973) (county school boards), *aff'd*, 414 U.S. 990 (1973); Bishop v. Lomenzo, 350 F. Supp. 576, 588 (E.D.N.Y. 1972) (holding constitutional state statute providing for voter registration by bipartisan teams consisting of one member of each of the state's two largest political parties); MacGuire v. Houston, 717 P.2d 948, 954–55 (Colo. 1986) (upholding law restricting election judges to two major political parties); State *ex rel.* Lockhart v. Rogers, 61 S.E.2d 258, 263 (W. Va. 1950) (citing Hasson v. City of Chester, 67 S.E. 731 (W. Va. 1910)); State *ex rel.* Buttz v. Marion Circuit Court, 72 N.E.2d 225, 231–32 (Ind. 1947); State *ex rel.* State Cent. Comm. of Progressive Party v. Bd. of Election Comm'rs of Milwaukee, 3 N.W.2d 123, 126 (Wis. 1942) (stating that the purpose of the statute providing for appointment of election officials from the two dominant political parties is "not distribution of offices among political parties . . . but merely the maintenance of honest and uncorrupted elections."); *see, e.g.*, Dovel v. Bertram, 34 S.E.2d 369, 370 (Va. 1945) (noting that Virginia's statute requires that the appointment of the electoral board "shall be given to each of the two political parties which, at the general election next preceding their appointment, cause the highest and next highest number of votes").

432. 84 F.3d at 481.

same basis as members of the Democratic and Republican parties."[433] The United States District Court upheld New Hampshire's statutory scheme, ultimately "conclud[ing] that the [State's] interest in the efficient management of election activities justified the small restriction on the plaintiffs' rights that the challenged statutes entailed."[434] The Court of Appeals for the First Circuit affirmed, recognizing that "each state retains the authority to regulate state and local elections and to prescribe the duties and qualifications of persons who work at the polls."[435] The First Circuit noted that this authority is not unfettered; however, it concluded that, because the regulation at issue was "justified by legitimate state interests and impose[d] only a modest burden" on plaintiff's rights, the regulation was constitutional.[436] The court of appeals utilized the Supreme Court's "flexible framework for testing the validity of election regulations."[437] Quoting the Supreme Court in *Burdick v. Takushi*, the First Circuit wrote:

> Under this standard, the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subject to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions.[438]

In analyzing the plaintiffs' arguments within the *Burdick* framework, the court of appeals first concluded that the New Hampshire regulation was nondiscriminatory; second, that the regulation had no direct impact on ballot access, the right to vote, or the right to have one's vote counted; third, that the regulation had indiscernible effects on ballot access and the right to vote and that

433. *Id.* at 481–82.
434. *Id.* at 482.
435. *Id.* at 483, 487.
436. *Id.*
437. *Id.* at 483.
438. *Id.* at 483–84 (citations omitted) (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks omitted)).

there was "no showing of systematic discrimination against minority parties in the casting and tallying of votes[;]" and fourth, that the burden claimed by plaintiffs was purely conjectural.[439] The court then applied the rational basis test to the regulation, finding that the state had a "valid interest in preserving the integrity and reliability of the electoral process" and that the state's method of achieving that valid interest was rational.[440] Thus, the court held that "New Hampshire's grant of a monopoly over the appointment of election inspectors and ballot clerks to the two most popular political parties [wa]s justified by legitimate state interests and impose[d] only a modest burden on the plaintiff's . . . rights."[441]

e. Decisions Prohibiting "Bipartisan" Boards

On the other hand, an Iowa statute limiting the governmental office of mobile deputy registrar to nominees of the two principal parties was declared unconstitutional in *Iowa Socialist Party v. Slockett.*[442] In the court's words, "[p]laintiffs contend that appointment of mobile deputy registrars from persons nominated by the county chairmen of the two major political parties violates plaintiffs' rights to freedom of association, due process, and equal protection under the First and Fourteenth Amendments to the United States Constitution."[443] In effect, the plaintiffs argued that the statute violated the right of non-association.[444] The court reasoned that:

> Given the unlikelihood of unseating either of the traditionally dominant parties, the fate of minor party members or supporters, and also of independents, who desire to serve as mobile deputy registrar lies in the unfettered discretion of the Democratic and Republican chairmen. One can easily imagine the reluctance chairmen

439. *Id.* at 483–85.

440. *Id.* at 486–87.

441. *Id.* at 487.

442. 604 F. Supp. 1391, 1398 (S.D. Iowa 1985).

443. *Id.* at 1392.

444. *See id.* The constitutionally protected freedom to associate encompasses the freedom not to associate. *See* Keller v. State Bar of California, 496 U.S. 1, 17 (1990) (declining to answer the question of whether individuals can be compelled to associate in an organization).

> of the dominant parties might have nominating members or supporters of rival parties.[445]

Because this burden "falls unequally on new or small political parties or on independent candidates, [it] impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."[446] The court concluded: "It cannot be said that the only practical way to limit the number of mobile deputy registrars is to deny consideration to all but nominees of the two major [political] parties."[447] It held the statute unconstitutional.[448] Unlike the Maryland statute, the Iowa law "does not require nominees for mobile deputy registrar to be members of a party."[449]

A Missouri statute that compelled selection of school commissioners from the two major political parties was enjoined in *State of Missouri ex rel. Preisler v. Woodward*.[450] There, a nonpartisan candidate wanted to run for election.[451] State law mandated that six of the twelve board members belong to the majority party and the remainder come from the next highest party. In the court's words, "[t]hese provisions are challenged as "impinging upon the constitutional guaranty 'That all elections shall be free and open.'"[452] The court struck down the statute because:

> If the Legislature has the power to attach as a condition of eligibility that members of an elective body, such as the board of education, shall be selected from the two major political parties, then it necessarily follows that it would have the power to prescribe that all the members shall be of one political party, or that its membership be made up of individuals belonging to the political parties casting, respectively, the highest and *third* highest vote at the last

445. *Slockett*, 604 F. Supp. at 1395.
446. *Id.* at 1396.
447. *Id.* at 1397.
448. *Id.* at 1398.
449. *Id.* at 1395; MD. CODE ANN., ELEC. LAW § 2-201(b)(2) (LexisNexis 2010).
450. State *ex rel.* Preisler v. Woodward, 105 S.W.2d 912, 913–14 (Mo. 1937).
451. *Id.* at 913.
452. *Id.* at 914. Maryland has a similar provision. Article 7 of the Declaration of Rights provides that "elections ought to be free and frequent." MD. CONST. DECL. OF RTS. art. 7.

> preceding general election, thus, in both instances, *making ineligible members of the numerically strongest minority party.* To so restrict eligibility would, we think, constitute a violation of the constitutional guaranty mentioned.[453]

In another Missouri case, *Preisler v. Calcaterra*, the court declared that statutes permitting only the two largest and most dominant political parties in the state to have challengers and watchers at the poll unconstitutional as violative of the Equal Protection Clause.[454] While acknowledging the lack of space at polling places and the need to regulate the number of election challengers and watchers, the court nonetheless determined that the "difference in treatment of political parties appear[ed] to be arbitrary and without reasonable basis."[455] Specifically, the court wrote:

> We do not doubt the authority of the Legislature to control this by fixing reasonable standards to be met by parties to be entitled to challengers and watchers or even to get their candidates on the ballot. The validity of such limitations on the basis of requiring more than a small minimum percentage of the vote cast at the last election for such privileges, . . . has become well established.[456]

Yet, given that challengers and watchers are present to secure the purity and fairness of elections on behalf of their political parties, and serve a purely partisan function, the court found that the statute limiting the challengers and watchers to the two dominant political parties only was unconstitutional and an arbitrary violation of the Equal Protection provisions of the state and federal constitutions.[457]

To the same effect is *Rathbone v. Wirth*,[458] where a statute limiting the police board to four commissioners, not more than two of whom could belong to the same party, was held unconstitutional.[459] The purpose of the statute was to equalize power between the two principal parties.[460] Just like *Preisler*, the court wrote that "if the

453. *Woodward*, 105 S.W.2d at 915 (emphasis added).
454. Preisler v. Calcaterra, 243 S.W.2d 62, 63, 66 (Mo. 1951).
455. *Id.* at 65.
456. *Id.*
457. *Id.* at 65–66.
458. 40 N.Y.S. 535 (1896).
459. *Id.* at 537, 561.
460. *Id.* at 540.

object sought can be accomplished in regard to the police department, it can be in relation to all departments of city, village, county and town governments."[461] It held: "This is in violation of the fundamental laws of a republican form of government."[462]

In the words of the Supreme Court in the context of admission to the bar:[463]

> The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he [or she] is a member of a particular political organization or because he holds certain beliefs. Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution.
> When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. . . . And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he [or she] believes.[464]

f. Statutory Powers of the State and Local Boards

By statute, SBE's powers and discretion are substantial.[465] Pursuant to Election Law, Section 2-102:

> (a) In general. — The State Board shall manage and supervise elections in the State and ensure compliance with the requirements of this article and any applicable federal law by all persons involved in the elections process.
> (b) Specific powers and duties. — In exercising its authority under this article and in order to ensure compliance with this

461. *Id.* at 537.
462. *Id.* at 540.
463. Baird v. State Bar of Ariz., 401 U.S. 1, 6–7 (1971) (discussing admission to practice law).
464. *Id.* (citations omitted).
465. *See* MD. CODE ANN., ELEC. LAW § 2-102 (LexisNexis 2010 & Supp. 2012).

article and with any requirements of federal law, the State Board shall:

(1) supervise the conduct of elections in the State;

(2) direct, support, monitor, and evaluate the activities of each local board;

(3) have a staff sufficient to perform its functions;

(4) adopt regulations to implement its powers and duties;

(5) receive, and in its discretion audit, campaign finance reports, independent expenditure reports filed under § 13-306 of this article, and electioneering communication reports filed under § 13-307 of this article;

(6) appoint a State Administrator in accordance with § 2-103 of this subtitle;

(7) maximize the use of technology in election administration, including the development of a plan for a comprehensive computerized elections management system;

(8) canvass and certify the results of elections as prescribed by law;

(9) make available to the general public, in a timely and efficient manner, information on the electoral process, including a publication that includes the text of this article, relevant portions of the Maryland Constitution, and information gathered and maintained regarding elections;

(10) subject to § 2-106 of this subtitle and § 13-341 of this article, receive, maintain, and serve as a depository for elections documents, materials, records, statistics, reports, certificates, proclamations, and other information prescribed by law or regulation;

(11) prescribe all forms required under this article; and

(12) serve as the official designated office in accordance with the Uniformed and Overseas Citizens Absentee Voting Act for providing information regarding voter registration and absentee ballot procedures for absent uniformed services voters and overseas voters with respect to elections for federal office.

(c) Majority vote required. — The powers and duties assigned to the State Board under this article shall be exercised in accordance with an affirmative vote by a supermajority of the members of the State Board.[466]

466. *Id.*

Similarly, by statute a local board's powers and discretion are substantial. Pursuant to election law, section 2-202(b):

> Each local board, in accordance with the provisions of this article and regulations adopted by the State Board, shall:
> (1) oversee the conduct of all elections held in its county and ensure that the elections process is conducted in an open, convenient, and *impartial* manner;
> (2) pursuant to the State Personnel and Pensions Article, or its county merit system, whichever is applicable, appoint an election director to manage the operations and supervise the staff of the local board;
> (3) maintain an office and be open for business as provided in this article, and provide the supplies and equipment necessary for the proper and efficient conduct of voter registration and election, including:
> (i) supplies and equipment required by the State Board; and
> (ii) office and polling place equipment expenses;
> (4) adopt any regulation it considers necessary to perform its duties under this article, which regulation shall become effective when it is filed with and approved by the State Board;
> (5) serve as the local board of canvassers and certify the results of each election conducted by the local board;
> (6) establish and alter the boundaries and number of precincts in accordance with § 2-303 of this title, and provide a suitable polling place for each precinct, and assign voters to precincts;
> (7) provide to the general public timely information and notice, by publication or mail, concerning voter registration and elections;
> (8) make determinations and hear and decide challenges and appeals as provided by law;
> (9) (i) aid in the prosecution of an offense under this article; and
> (ii) when the board finds there is probable cause to believe an offense has been committed, refer the matter to the appropriate prosecutorial authority;
> (10) maintain and dispose of its records in accordance with the plan adopted by the State Board under § 2-106 of this title; and
> (11) administer voter registration and absentee voting for nursing homes and assisted living facilities in accordance

with procedures established by the State Administrator, subject to the approval of the State Board.[467]

3. Unsuccessful Efforts to Amend the Membership Requirement

Introduced in the 2012 session, H.B. 908 would have provided that the five members of the State Board of Elections include three majority and two non-majority party members.[468] The latter term was defined as "a registered voter who was not affiliated with the majority party."[469] Further, appointments would not be made from names provided by a central committee.[470] This would have opened the door to persons who were not part of the duopoly.[471] The Bill did not make it out of the Ways and Means Committee.[472]

4. Political Party Affiliation May Not Be a Legitimate Requirement for Membership on an Election Board

While, in an earlier time, the requirement that both major parties be represented on the boards was an effort to preclude a monopoly, ensure diversity, and foster fairness, times have changed and the political scene is more diverse. As such, the requirement may have become unduly restrictive. The General Assembly may wish to consider whether political party affiliation is an appropriate qualification for office, particularly on boards of election that have broad powers over the electoral process.[473] Abraham Lincoln was a member of a third, minority political party; he was a Republican.[474]

467. *Id.* § 2-202(b) (emphasis added).

468. H.B. 908, 2012 Leg., Reg. Sess. (Md. 2012).

469. *Id.*

470. *See id.*

471. *See id.*

472. *See id.* Question L on the Baltimore City ballot was a Charter Amendment providing "for the purpose of allowing voters registered as unaffiliated or as third party members to sit on City boards and commissions as minority party representatives; defining a certain term; generally relating to minority party representation on City boards and commissions." The question passed. *See* Election Results, BALTIMORECITY.GOV, http://apps.baltimorecity.gov/elections/electionresults/.

473. *See* MD. CODE ANN., ELEC. LAW § 5-203(a)(2)(i) (LexisNexis 2010).

474. "The last successful third party in American politics elected its first President in 1860. The party of course was the Republicans and the President was Abraham Lincoln." J.C. Adamson, *The Last Successful American Third Party*, THE MUSER, http://www.greatreality.com/3p/minority/last3rd.htm (last visited Aug. 30, 2013).

If he were alive today, he could have been precluded from sitting on a state or local board of elections.[475]

Each election board is required to be "impartial."[476] In the court's words, however, "[t]he Supervisors of Elections, while presumed to be impartial, are, in fact, political appointees, a majority of whom always belong to one or the other of the two major parties."[477] Maryland has historically discriminated against minor parties in violation of the state constitution.[478] The exclusion of all except Democrats and Republicans from participation in an important part of the electoral process may not serve a valid or legitimate state interest and can be characterized as discrimination based on political belief and association, designed to protect the monopoly or duopoly.[479] A voter who chooses to exercise the constitutional right to be a member of a third-party, or a non-affiliated independent, becomes, per se, a political outcast, statutorily-barred from participation in the governmental body charged with impartially conducting elections.[480]

If this statute is permissible, it would be equally permissible (albeit hypothetical and implausible) to limit the boards to members of the majority party and the party receiving the *third* or fourth highest number of votes at the prior election.[481] That would exclude, on the current record, Republican participation.[482] It is, on its face, an absurd proposition and the statute is therefore likely impermissible.[483]

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475. *See* ELEC. LAW §§ 1-101(dd), (jj), (kk), 2-101(e)(1), 2-201(b)(1)–(2) (stating that the members of the state and local boards must be from the two principal political parties).

476. *Id.* § 2-202(b)(1).

477. Tawney v. Bd. of Supervisors of Elections, 198 Md. 120, 129, 81 A.2d 209, 213 (1951).

478. *See* Md. Green Party v. Md. Bd. of Elections, 377 Md. 127, 135–37, 152–53, 832 A.2d 214, 218–20, 229 (2003).

479. Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 109 (1996) ("America's courts recognized early the conflict of interest inherent in providing politicians the power to create the electoral laws by which they are elected. . . ."). "[B]arriers to entry created by the major parties in state legislatures contribute to the monopoly enjoyed by the Democrats and Republicans. It is therefore useful to ask whether this disparate treatment is necessary." *Id.*

480. *See id.* at 111–14.

481. *See* ELEC. LAW § 5-203(a)(2)(1) (LexisNexis 2010 & Supp. 2012) (requiring only that an individual be a member of a "political party" and not one of the "majority political parties").

482. *See id.* § 1-101(dd); *Governor*, MD. STATE ARCHIVES, http://msa.maryland.gov/msa/mdmanual/08conoff/html/msa13090.html (last visited Aug. 30, 2013).

483. *Cf.* ELEC. LAW § 2-202(b)(1).

The statute is arguably promoting self-entrenchment and power preservation, goals that are not permissible in a democracy.[484] Individual merit is a more appropriate qualification for office and a number of legislative modifications are available.[485]

III. COUNTY AND MUNICIPAL REFERENDA

Article XVI, is not the sole source of the referendum power at the State, county, or municipal level. For example, article XIX, section 1(e), created a right to referenda on state statutes expanding commercial gaming[486] and, under article XIV, section 1, the people have "retain[ed] the sovereign power to rewrite their constitution" and have not delegated that power to the General Assembly.[487]

A. Referenda in Counties

In code counties, under article XI-F, section 7 of the Maryland Constitution, public local laws are subject to petition.[488] In addition,

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484. This situation is distinct from ballot access restrictions where the state may have legitimate interests to protect in limiting ballot access. Even in that context, however, the Supreme Court has struck down limits that impose a substantially unequal burden and are not supported by a compelling state interest. Williams v. Rhodes, 393 U.S. 23, 24–26, 31 (1968). Because the statute in question gave the Democrats and Republicans a "complete monopoly," it was fatally flawed. *Id.* at 32. Silencing third parties is not a lawful governmental purpose. *See id.* at 39, 41 (Douglas, J., concurring).

485. For example, one less restrictive alternative would be to form a board comprised of the top four parties plus an independent representative.

486. Laurel Racing Assoc., Inc. v. Video Lottery Facility Location Comm'n, 409 Md. 445, 448 n.2, 975 A.2d 894, 896 n.2 (2009) (quoting constitutional provision). That provision was unsuccessfully challenged in *Canavan v. Maryland State Bd. of Elections,* 430 Md. 533, 61 A.3d 828 (2013) (*per curiam*).

487. Smigiel v. Franchot, 410 Md. 302, 314, 978 A.2d 687, 694 (quoting Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Atty Gen., 246 Md. 417, 439, 229 A.2d 388, 400 (1967)); Balt. Cnty. Coal. Against Unfair Taxes v. Balt. Cnty., Md., 321 Md. 184, 189, 582 A.2d 510, 512 (1990) (noting that section 309 of the Baltimore County Charter was promulgated under MD. CONST. article XI-A, and describing differences between Charter § 309 and MD. CONST. article XVI).

488. MD. CONST. art. XI-F, § 7 provides:

> Any action of a code county in the enactment, amendment, or repeal of a public local law is subject to a referendum of the voters in the county, as in this section provided. The enactment, amendment, or repeal shall be effective unless a petition of the registered voters of the county requires that it be submitted to a referendum of the voters in the county. The General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article, except that in any event the number of

people in code counties have a statutory right to referendum under article 25-B, section 10(h).[489]

Under article XI-A, a charter county may, by charter, confer on its citizens the right to petition ordinances to referendum.[490] "Interestingly, the Constitution guarantees the right of referendum over local legislation to the residents of all counties except those opting for a charter form of government. . . ."[491] Thus, for charter counties, the right to referenda is established implicitly in article XI-A and explicitly in a county charter.[492] Charter counties, however, may not amend their charter to provide for the initiative.[493]

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signatures required on such a petition shall not be fewer than five percentum (5%) of the voters in a county registered for county and State elections.

Article XI-F, section 2, makes creation of a code county subject to referendum. *Id.* at § 2.

489. Kent Island Def. League, LLC v. Queen Anne's Cnty. Bd. of Elections, 145 Md. App. 684, 689, 806 A.2d 341, 344 (Md. Ct. Spec. App. 2002), *cert. denied,* 371 Md. 615, 810 A.2d 962 (2002), citing MD. CONST. art. XI-F, § 7, and art. 25B, § 10(h); Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 617, 30 A.3d 245, 253 (Md. Ct. Spec. App. 2011). For commissioner counties, article 25B, section 10(h), creates a right of referendum on public local laws. MD. CODE ANN., art. 25B, § 10(h). A number of statutes create rights to referendum. MD. CODE ANN., AGRIC. §§8-308, 8-401, 10-104; MD. CODE ANN., ENVIR. §§9-711(c), 9-934(a); MD. CODE ANN., HOUS. & CMTY. DEV. §4-232(b); LAND USE §20-607; Art. 2B, §2-202(a)(2); Art. 23A, §13(g, h); Art. 23A, §14; Art. 23A, §16; Art. 23A, §19; See county attorney's letter attached to Md. Op. Att'y Gen. 1982 WL 195056 (1982) (citing to MD. CONST. art. XI-F, art. 33, § 23-3, art. 43, § 425, art. 23A, §§ 14, 19, 25, 34, and 40, as well as § 2(30)). For a listing of various authorities providing for referenda, *see*, HB 493, 2013 Leg., Reg. Sess. (Md. 2013) (Appendix to Dept. of Legislative Servs. Fiscal and Policy Note) http://mgaleg.maryland.gov/2013RS/fnotes/bil_0003/hb0493.pdf.

490. 63 Md. Op. Att'y Gen. 291 (1978) (citing Ritchmount P'ship v. Board of Supervisors, 283 Md. 48, 388 A.2d 523 (1978)). In *Scull v. Montgomery Citizens League*, the court suggested that where a county council acted in an executive, as opposed to legislative role, the charter could not provide for a referendum. 249 Md. 271, 282, 239 A.2d 92, 98 (1968).

491. *Ritchmount P'ship.*, 283 Md. at 55 n.6, 388 A.2d at 528 n.6 (citing MD. CONST. art. XI-A, XI-F, § 7, and XVI, § 3).

492. *Kent Island Def. League*, 145 Md. App. at 692 n.2, 806 A.2d at 346 n.2 ("We note that Article XI-A of the Constitution does not contain an express referendum provision. While speculation, a possible reason is that charter counties can include the right to referendum in their charter."); *Howard Cnty. Citizens for Open Gov't*, 201 Md. App. at 616, 30 A.3d at 253 ("[T]he right of referendum is also conferred by implication to voters in charter counties by Art. XI-A, §1."). "Each of Maryland's eight charter counties also permits referendums as well as provisions for direct amendments of their charters." Survey–Developments in Maryland Law 1988-89, 49 MD. L. REV. 509, 579 (1990) (citation omitted). In 1976, article 25A, section 8, was

Counties do not have the right to veto an annexation of their territory; however, they do have the right to put an annexation resolution to referendum.[494] The Attorney General has stated: "[O]n enactment of the annexation resolution, the county governing body, by at least a two-thirds vote, may petition the municipality for a referendum to be held in the territory to be annexed [sections 19(h) and 19(j)]."[495]

B. Referenda in Home Rule Municipalities

Generally, the right to a municipal referendum is a delegated, not a reserved, power.[496] The Attorney General has noted that "[t]he possibilities for litigation in the area of municipal/county annexation are virtually inexhaustible, especially in the face of legislative silence."[497] The legislature's power to define municipal referenda appears to be plenary.[498] One significant referendum provision is article 23A, section 19, creating a right to petition on municipal annexations.[499] Municipal zoning ordinances may be put to

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amended "in an attempt to give statutory support to the exercise of the right of referendum by citizens of chartered counties." City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 441 n.1, 483 A.2d 348, 350 n.1 (1984) (per curiam). The court of appeals has "recognized that by a county charter provision, the people [of a charter county] may reserve the right of referendum on public local laws enacted by its local legislative body, created pursuant to Article XI-A of the Constitution." Anne Arundel Cnty. v. McDonough, 277 Md. 271, 287, 354 A.2d 788, 797–98 (1976). The *McDonough* court noted that "[i]t is not uncommon for people to write into their basic charter a restriction upon the powers of their legislative body." *Id.* (citations omitted). As of 1995, the Attorney General noted that "every charter subdivision has such a general referendum provision in its charter, except for Baltimore City." 80 Md. Op. Att'y Gen. 151 n.10 (1995).

493. Bd. of Supervisors of Elections of Anne Arundel Cnty. v. Smallwood, 327 Md. 220, 235, 608 A.2d 1222, 1229 (1992) (citations omitted). "We reiterate that the voters of a charter county cannot reserve to themselves the power to initiate legislation because such initiative conflicts with the terms of Art. XI-A, §3, of the Maryland Constitution." *Id.* at 236, 608 A.2d at 1230.

494. Md. Op. Att'y Gen., 1981 WL 163980, at *1 (Sep. 18, 1981) (unpublished).

495. *Id.* at *2.

496. *See id. at *1.*

497. 67 Md. Op. Att'y. Gen. 279 (1982).

498. *See* McGraw v. Merryman, 133 Md. 247, 248, 104 A. 540, 541 (1918). The court reasoned that the legislature need not delegate the right to referendum and therefore "this court has no right to call in question the wisdom or even justice of it." *Id.*

499. Art. 23A, §19. *See supra* note 33 (re: re-codification of Art. 23A). The constitutionality of article 23A, section 19, has not been challenged. Former subsection 19(u) was held unconstitutional under MD. CONST. art. XI-E, § 1. Mayor and Alderman of Annapolis v. Wimbleton, Inc., 52 Md. App. 256, 447 A.2d 509 (Md.

referendum.[500] Municipal charter amendments are subject to referendum by petition.[501]

C. The Municipal and County Initiatives Exception

As noted above, the initiative does not exist at the state level.[502] Recent efforts to create a right to initiative have failed in the General Assembly.[503]

1. Initiative at the Municipal Level

There is a small exception at the municipal level: "The Maryland Constitution explicitly provides for an initiative process for amending a municipal or county charter."[504]

Ct. Spec. App. 1982). Subsection (u) gave Anne Arundel County the power to disapprove of annexation resolutions enacted by its municipalities. *Id.* at 261, 447 A.2d at 511–12. The Court of Special Appeals of Maryland held that the disapproval power in the state code violated the uniformity provisions of MD. CONST. article XI-E, section 1. *Id.* at 267–68, 447 A.2d at 515.

500. Md. Op. Att'y Gen., 1982 WL 195056 (1982) (relying on the home rule provisions in Art. 23A, § 2(30)).

501. Mayor and City Council of Ocean City v. Bunting, 168 Md. App. 134, 140 n.10, 895 A.2d 1068, 1071 n.10 (Md. Ct. Spec. App. 2006).

502. *E.g.*, Town May Amend Charter to Allow for Legislation by Ballot Initiative, 88 Md. Op. Att'y Gen. 156, 157 (2003).

503. *See* H.B. 871, 2013 Leg., Reg. Sess (Md. 2013).

504. Town May Amend Charter to Allow for Legislation by Ballot Initiative, 88 Md. Op. Att'y Gen. 156, 158 (2003) (citing MD. CONST. art. XI-A. § 5; MD. CONST. art. XI-E, § 4); *see also* George Liebmann, *Curbing Legislative and Executive Abuse: Referendum and Initiative in Maryland*, 33 MD. B.J. 34, 34 (2000) ("Maryland, to be sure, has the initiative in one limited context.") (citing MD. CONST. art. XI-A, § 5; MD. CONST. art. XI-E, § 4)). The power to initiate a charter amendment cannot be abused or converted into the power to initiate detailed legislation. Save Our Streets v. Mitchell, 357 Md. 237, 249–53, 743 A.2d 748, 755–57 (2000). It is limited and the subject-matter must be "charter material," and not legislative. Cheeks v. Cedlair Corp., 287 Md. 595, 607–09, 415 A.2d 255, 261–62 (1980) (rent control could not be accomplished by initiative for charter amendment; citizens cannot exercise the police power through plebiscite). Thus, under *Cheeks*, charter amendments are limited to amendments to the form or structure of government. *Id.* at 607, 415 A.2d at 261. A charter amendment "cannot transcend its limited office and be made to serve or function as a vehicle through which to adopt local legislation. *Id.*; *accord* Wicomico Cnty. Fraternal Order of Police, Lodge 111 v. Wicomico Cnty., Md., 190 Md. App. 291, 300, 988 A.2d 555, 560 (Md. Ct. Spec. App. 2010), *overruled by* Atkinson v. Anne Arundel Cnty., 428 Md. 723, 750, 53 A.3d 1184, 1200 (2012) (Charter amendment was a prohibited citizen initiative, not a permissible referendum). While *Cheeks* limited the scope of a charter amendment, *Town of Glenarden v. Bromery*, 257

Nevertheless, a wider initiative door is open at the municipal level.[505] The Attorney General has opined that, subject to some restraints, a town may amend its charter to provide for the initiative.[506] In brief summary, the Attorney General's analysis is that there is no prohibition to such an amendment and home rule was intended to authorize towns to determine the form and structure of their municipal government.[507] The opinion carefully distinguished this municipal power from county governments, which cannot create the initiative.[508] Similarly, in dicta, the court of appeals has suggested that the municipal authorization under the grant of express powers may be sufficient to adopt "a method for exercising the express powers other than by ordinance."[509]

2. Initiative at the County Level

Md. 19, 24, 262 A.2d 60, 63 (1970), made clear that, if an amendment is proper, the fact that it removes elected officials from office, effectively "recalling" them, is of no moment. In *Int'l Assoc. of Fire Fighters, Local 1715 Cumberland Firefighters v. Mayor and City Council of Cumberland,* 407 Md. 1, 15, 962 A.2d 374, 382 (2008), the court reviewed an initiative effort and remanded for, among other things, a determination of whether the scope of the proposal was within the purview of an amendment to a city charter. Thus, while the initiative power exists in that context, it is circumscribed.

505. *See supra* note 504 and accompanying text.

506. Town May Amend Charter to Allow for Legislation by Ballot Initiative, 88 Md. Op. Att'y Gen. 156, 164 (2003).

507. *Id.* at 158–59 (municipal power derives from article XI-E of the Maryland Constitution and article 23A of the Annotated Code of Maryland).

508. *Id.* at 158–61 (municipal power to create the initiative stems from article XI-E of the Maryland Constitution, which does not apply to counties).

509. *Cheeks*, 287 Md. at 609 n.8, 415 A.2d at 262 n.8. The *Cheeks* court also noted precedent to the effect that "the people, in adopting a home rule charter, 'have the right to make provision therein for any form of government they deem suitable for their needs, so long as they do not in the process run afoul of the letter and spirit of the Federal and State Constitutions.'" *Id.* at 611, 414 A.2d at 263 (quoting Ritchmount P'ship v. Bd. of Supervisors of Elections for Anne Arundel Cnty., 283 Md. 48, 59, 388 A.2d 523, 530 (1978)).

Amendment of county charters by initiative is permissible under Maryland Constitution, article XI-A, section 5.[510] Amendments to home rule charters may be proposed by a petition signed by twenty percent of the registered voters.[511] The Talbot County charter authorized "voter-initiated legislation upon petition of ten percent of the County's registered voters . . ."; however, it was held unconstitutional.[512]

At the end of the day, even if one supported it, one may question the value of the initiative: "As with legislation passed by the Town Council, legislation enacted by means of an initiative is subject to future amendment or repeal by the Town Council."[513]

IV. WHO CAN CHALLENGE A DECISION TO CERTIFY OR REJECT A REFERENDUM?

The court of appeals has generally rejected technical, pleading challenges in referendum cases.[514] Substantive pleading challenges are, however, viewed more stringently.[515]

A. Who May Bring Suit?

Under section 6-209(a) of the election law article "[a] person aggrieved by a determination made under [sections] 6-202, 6-206, or 6-208(a)(2) . . . may seek judicial review."[516] "[A]ny registered

510. Pickett v. Prince George's Cnty., 291 Md. 648, 650, 436 A.2d 449, 451 (1981); *see also* Ficker v. Denny, 326 Md. 626, 628 & n.1, 606 A.2d 1060, 1061 & n.1 (1992); Note, Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution – Bayne v. Secretary of State, 39 MD. L. REV. 558, 573 n.127 (1980).

511. *Pickett*, 291 Md. at 650, 436 A.2d at 451 (quoting MD. CONST. art. XI-A, § 5).

512. Md. State Admin. Bd. of Election Laws v. Talbot Cnty., 316 Md. 332, 336, 558 A.2d 724, 726 (1988). In *Talbot County*, a new detention center was authorized by the county council. The citizens initiated a bill that would effectively provide that no such facility could be constructed at that location. *Id.* at 337 & n.2, 558 A.2d at 726 & n.2.

513. Town May Amend Charter to Allow for Legislation by Ballot Initiative, 88 Md. Op. Att'y Gen. 156, 163 (2003).

514. *See* Sun Cab Co. v. Cloud, 162 Md. 419, 431, 159 A. 922, 926 (1932) (rejecting the argument that complaint was "multifarious").

515. *Cf.* Read Drug & Chem. Co. v. Colwill Constr. Co., 250 Md. 406, 412–14, 243 A.2d 548, 552–53 (1968).

516. MD. CODE ANN., ELEC. LAW § 6-209(a) (LexisNexis 2010). Venue is rarely an issue. For a discussion of common-law venue over the state, see *Sun Cab*, 162 Md. at 429, 159 A. at 926 ("But we find no ground for a court's declaring that the public interest always demands that suits against the Secretary of State in his official capacity be

voter" may seek declaratory relief under election law, section 6-209(b).[517]

Thus, petition signatories have brought suit,[518] and a person whose signature was rejected may be able to do so.[519] Petition sponsors[520] and registered voters have maintained referendum lawsuits.[521] It is common to join registered voters and a ballot committee or other organizational sponsor as plaintiffs.[522] Taxpayers have been permitted to file suit, and the court has noted that "taxpayers interested in avoiding the waste of funds derived from taxation, which would be involved in conducting a referendum, have a right to bring such action in representation of all other taxpayers who may be involved."[523] The court has permitted a Mayor and Aldermen to file

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brought in Anne Arundel County . . . ."). Nevertheless, the "regular venue for a suit against a public officer or body is . . . the seat of that branch of the government of which the officer or body is a part." *Id.* at 428, 159 A. at 925. The Maryland Court of Appeals also noted that a local election board is often joined as a defendant and that joinder impacts venue. *Id.* at 430, 159 A. at 926.

517. ELEC. LAW § 6-209(b).

518. Ficker v. Denny, 326 Md. 626, 630, 606 A.2d 1060, 1062 (1992); Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 707, 962 A.2d 342, 348 (2008) (suit filed by twelve county citizens).

519. Kendall v. Howard Cnty., No. JFM-09-660, 2009 WL 3418585, at *9 (D. Md. Oct. 20, 2009) ("As Plaintiff signed the HCCOG petition, and as his signature was, he claims, invalidated by HCBE's final determination, he would be considered 'a person aggrieved by [the] determination' that HCCOG's petition was deficient under Section 6-209, and accordingly, he could have sought state court review of HCBE's determination."). While conceptually logical, to our knowledge no single-signatory suit has been brought and it may be difficult for a single voter to assert injury unless that disqualification was a "swing" vote. The district court was affirmed in *Kendall v. Balcerzak*, 650 F.3d 515, 518 (4th Cir. 2011).

520. City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 444, 483 A.2d 348, 351 (1984) ("Citizens for Decent Government and two individuals, all sponsors of the petitions in question, filed a complaint . . . .").

521. Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 608 n.1, 30 A.3d 245, 247 n.1 (Md. Ct. Spec. App. 2011).

522. *Id.* at 608 & n.1, 30 A.2d at 247 & n.1.

523. Bd. of Educ. v. Mayor & Aldermen of Frederick, 194 Md. 170, 176, 69 A.2d 912, 914–15 (1949) (citing Sun Cab Co. v. Cloud, 162 Md. 419, 159 A. 922 (1932)); *see also* Ness v. Supervisors of Elections, 162 Md. 529, 538, 160 A. 8, 16 (1932) ("A question of the right of the plaintiffs to maintain the suit has been raised, but it is not necessary to dwell upon it. All appear as citizens and taxpayers, and, so long as the individuals may sue in their own right, an objection that they profess to appear as a committee, and by doing so violate the rule against suits at common law by agents or representatives, seems unimportant."); Citizens Planning & Housing Ass'n v. Cnty. Exec., 273 Md. 333, 345, 329 A.2d 681, 687–88 (1974) (taxpayer has standing; however, organizations do not); *Sun Cab*, 162 Md. at 426–27, 159 A. at 925

suit to bar a referendum.[524] "John Doe" suits have been permitted[525] and the challengers often select colorful and descriptive names.[526]

In one case in which a class action suit on behalf of all Maryland citizens, taxpayers, registered voters, signatories, circulators, and proponents was filed,[527] the court did not comment on that aspect of

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(taxpayers have standing to avoid "the waste of funds derived from taxation which would be involved in conducting the void referendum."); Bd. of Supervisors of Elections of Anne Arundel Co. v. Smallwood, 327 Md. 220, 233 n.7, 608 A.2d 1222, 1228 n.7 (1992) (same) (collecting cases); Md. State Admin. Bd. of Election Laws v. Talbot Cnty., 316 Md. 332, 342, 558 A.2d 724, 729 (1988); Hammond v. Lancaster, 194 Md. 462, 475, 71 A.2d 474, 480 (1950) ("[W]e have recognized the right of taxpayers and voters to raise a question of referability."). In *Hammond*, however, the court was faced with the Subversive Activities Act of 1949 and concluded: "We think, however, that none of the other provisions of the Act are properly before us. The only alleged waste of public funds, except in regard to the referendum, is in the expense of enforcing and administering the Act. But we are referred to no Maryland case holding that to be a sufficient interest." *Id.* at 477, 71 A.2d at 481.

524. *Mayor & Aldermen of Frederick*, 194 Md. at 176, 69 A.2d at 914–15.

525. Doe v. Md. State Bd. of Elections, 428 Md. 596, 598–99, 53 A.3d 1111, 1112 (2012) (challenge to the Dream Act); Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 705, 962 A.2d 342, 344–45 (2008) (challenge to bill prohibiting discrimination based on sexual orientation). The Dream Act court rejected a standing challenge in a footnote. *Maryland State Board of Elections,* 428 Md. at 606 n.4, 53 A.3d at 1117 n.4.

526. Petition sponsors often choose colorful names. The "Fighting Taxpayers Association," was one of the sponsors in Ferguson v. Sec'y of State, 249 Md. 510, 511, 240 A.2d 232, 232 (1968). Marylanders for Fair Elections, Inc., petitioned in Roskelly v. Lamone, 396 Md. 27, 30, 912 A.2d 658, 659–60 (2006). The Baltimore County Coalition Against Unfair Taxes brought Balt. Cnty. Coal. Against Unfair Taxes v. Balt. Cnty., Md., 321 Md. 184, 188, 582 A.2d 510, 512 (1990). "Fairness in Taxation" filed one petition, Ficker v. Denny, 326 Md. 626, 629, 606 A.2d 1060, 1061 (1992), and "TRIM" filed another, Pickett v. Prince George's Cnty., 291 Md. 648, 650, 436 A.2d 449, 451 (1981). Other groups use less colorful names. *E.g.*, *Md. State Bd. of Elections*, 428 Md. at 599, 53 A.3d at 1112 (MDPetitions.com was the sponsor); Sec'y of State v. McLean, 249 Md. 436, 438, 239 A.2d 919, 920 (1968) (Maryland Petition Comm., Inc., and Maryland Taxpayers Ass'n).

527. Bayne v. Sec'y of State, 283 Md. 560, 564, 392 A.2d 67, 69 (1978). Similarly, in Mayor & Aldermen of Frederick, 194 Md. at 175, 69 A.2d at 914, the Mayor, Aldermen, and two resident taxpayers "brought on behalf of all other taxpayers desiring to become complainants," a suit to enjoin placement of a referendum question on the ballot. The court held that "proper parties brought the suit." *Id.* at 176, 69 A.2d at 915; *accord Citizens Planning & Hous. Ass'n*, 273 Md. at 334–35, 329 A.2d at 682 (suit was filed by civic organizations, individual residents, citizens, taxpayers, and property owners, "and on behalf of all other residents, citizens, taxpayers and property owners of Baltimore County who are similarly situated and on behalf of similarly situated nonindividual Plaintiffs, as a class action and as a representative thereof of all their claims in accordance with, and as provided in Rule 209 of the Maryland Rules of Procedure."). The court concluded that taxpayers could

the case and it does not appear from the decision that the class was certified.[528] Where a class action is not brought, the plaintiff must show that he or she would suffer irreparable injury in order to obtain equitable relief.[529] Given the complexities of class certification and the accelerated pace of many referendum lawsuits, the General Assembly may wish to consider specifying whether it is necessary or appropriate to file a class action.

The court of appeals has assumed without deciding that a decision not to certify a referendum to the ballot may be challenged in an enforcement action.[530] In *Barnes v. State ex rel. Pinkney*, a restaurant refused to serve an African-American customer, who then filed a complaint with the Commission on Interracial Problems and Relations under the state public accommodations law.[531] In the enforcement action, the restaurant owner admitted to the discrimination; however, he claimed that the public accommodations law should have been suspended under Maryland Constitution, article XVI, because the Secretary of State had erred in refusing to certify a referendum for the ballot.[532] He also challenged the constitutionality of the implementing election code, claiming that the public accommodations law should not have gone into effect.[533] The state argued that "the only proper manner in which this question could have been raised was by a mandamus action, rather than by a collateral attack in enforcement proceedings," and that the attack was

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invoke equity, that the organizational plaintiffs lacked standing, and, likely because the circuit court had dismissed, did not reach class certification when it reversed in part and remanded the action. *Citizens Planning & Hous. Ass'n*, 273 Md. at 338–40, 345, 329 A.2d at 684–85, 687–88. In *Sun Cab*, 162 Md. at 427, 159 A. at 925, the court also suggested that a referendum lawsuit can be "instituted by one or more taxpayers in representation of all . . . ." *Hammond*, 194 Md. at 469, 71 A.2d at 476–77, was a class action to enjoin the Subversive Activities Act of 1949. It was amended to add a referendum count. *Id.* at 469–70, 71 A.2d at 477. The allegation was that the emergency declaration deprived citizens of their right to referendum. *Id.* at 476, 71 A.2d at 480. The court held that emergency declarations are unreviewable, *id.*, and thus the opinion does not shed light on the viability of class actions to challenge referenda in general.

528. *See generally Bayne*, 283 Md. at 575, 392 A.2d at 75 (holding against petitioners based on the fact that state constitutional grant of referendum is superseded by constitutional exemption from such referenda of budgetary appropriations allocated for "primary function[s] of the State.").

529. *Ficker*, 326 Md. at 636, 606 A.2d at 1065 (Chasanow, J., dissenting).

530. Barnes v. State *ex rel.* Pinkney, 236 Md. 564, 568, 204 A.2d 787, 789 (1964).

531. *Id.* at 576, 204 A.2d at 788.

532. *Id.* at 567–68, 204 A.2d at 788–89.

533. *Id.*, 204 A.2d at 789.

barred by laches.[534] The court did not decide these questions and, because the challenge was substantively without merit, simply assumed that the restaurant owner could mount it.[535]

A cautionary note was recently sounded regarding registered voter standing.[536] There, citizens sought a declaration that a panoply of county resolutions, ordinances, and zoning decisions was the result of invalid efforts to circumvent a referendum provision in the county charter.[537] Plaintiff Kendall was a taxpayer, property owner, resident, and registered voter.[538] Nevertheless, the plaintiffs/appellants "disavowed their taxpayer status as a basis for standing in this litigation."[539] Instead, appellants "ground their standing to sue in 'the right to referendum and vote granted to the People of Howard County," arising out of associational and free speech rights "attached to a referendum effort."[540] The intermediate court noted: "For standing purposes, the Kendall appellants have placed all their eggs in a single basket labeled referendum and voting."[541] The court, however, rejected that assertion. "Contrary to the authorities Kendall cites, where, generally, alleged failures in the petition process were at issue, or electoral issues were in the forefront, voting and referendum is decidedly in the background of appellants' action."[542] The intermediate court noted that Kendall had not initiated the referendum process for any of the challenged ordinances, held that appellants' generalized interest in enforcing compliance with the county charter was insufficient to confer voter standing, and the court of appeals affirmed, holding that a "generalized interest" in enforcing the right, *inter alia*, to referendum is insufficient. [543]

534. *Id.* at 568, 204 A.2d at 789.
535. *Id.*
536. Kendall v. Howard Cnty., 204 Md. App. 440, 453, 41 A.3d 727, 735 (Md. Ct. Spec. App. 2012), *aff'd*, 431 Md. 590, 66 A.3d 684 (2013).
537. *Id.* at 442–43, 41 A.3d at 729.
538. *Id.* at 445, 41 A.3d at 730.
539. *Id.* at 445 n.2, 41 A.3d at 730 n.2.
540. *Id.* at 447, 41 A.3d at 731–32.
541. *Id.* at 450, 41 A.3d at 733.
542. *Id.* at 451, 41 A.3d at 734.
543. *Id.* at 453, 41 A.3d at 735; 431 Md. at 615, 66 A.3d at 698. The Kendall plaintiffs did not assert taxpayer standing, perhaps based on the unique issues being raised in that complaint. One might suggest that the Kendall plaintiffs were unsuccessfully attempting to act as private attorney generals.

The court of appeals has declined to reach the issue of whether a county may sue to challenge its own charter provision providing for the initiative.[544]

B. Who May Intervene?

Intervention in a circuit court proceeding is governed by Rule 2-214.[545] A petition sponsor has been granted the right to intervene.[546] Moreover, county governments have been allowed to intervene,[547] and denied permission to intervene.[548] Persons "who were interested in bringing the matter to referendum"[549] were allowed to intervene, while the proponent of a county referendum was denied leave to intervene, and relegated to amicus status, because its interests were identical to the governmental defendants and it failed to provide "sworn facts" sufficient to demonstrate that the proponents were voters in the county.[550]

In allowing a private corporation to intervene as a defendant, however, the court of appeals wrote that the State defendants were merely "that of a passive medium; and it is appropriate that in such a controversy the private individuals or corporations making the claim to the referendum should be admitted as parties defendant."[551] Similarly, the court noted in passing that, in connection with a lawsuit to enjoin a referendum on a statute prohibiting discrimination, "appellants City of Takoma Park, Robert M. Coggin, and the Suburban Maryland Lesbian/Gay Alliance were permitted to intervene as defendants."[552]

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544. Md. State Admin. Bd. of Election Laws v. Talbot Cnty., 316 Md. 332, 337, 342, 558 A.2d 724, 726, 729 (1988).

545. MD. RULE 2-214.

546. Save Our Streets v. Mitchell, 357 Md. 237, 245, 743 A.2d 748, 753 (2000); Phifer v. Diel, 175 Md. 364, 366, 1 A.2d 617, 617 (1938).

547. Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 476 n.6, 15 A.3d 798, 800 n.6 (2011).

548. Fraternal Order of Police Lodge 35 v. Montgomery Cnty., 427 Md. 522, 50 A.3d 8 (2012), *see supra* note 264 (presenting issue of "[d]id the circuit court err in finding that Montgomery County, Maryland, lacked standing?"). Montgomery County orally argued that there was a need to clarify whether a local government, by itself, had standing to prevent suspension of its law. *Id.*

549. Tyler v. Sec'y of State, 229 Md. 397, 400, 184 A.2d 101, 102 (1962).

550. Doe v. Montgomery Cnty. Bd. of Elections, No. 293857-V, 2008 Md. Cir. Ct. Lexis 7, at *1–2 (Jul. 24, 2008), *rev'd on other grounds*, 406 Md. 697, 962 A.2d 342 (2008).

551. Sun Cab Co. v. Cloud, 162 Md. 419, 424, 159 A. 922, 924 (1932).

552. City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 445, 483 A.2d 348, 351 (1984).

Referendum litigation would be simplified by a statutory amendment defining the indispensable and permissible parties.[553]

V. WHEN MUST A CHALLENGE BE MADE?

At common law, the Maryland Court of Appeals held that a challenge must be mounted early, because "stopping a false pretension to a right to a referendum is obviously better done at the start than at some later stage in its career. Not only would expense then be saved, but wrongful immediate suspension of the legislative enactment, awaiting the time for an election, would be avoided."[554] With one exception, the election law article expressly sets the deadline for requesting judicial review as "the 10th day following the determination to which it relates."[555] The sole exception is that, "if [a] petition seeks to place the name of an individual or a question on the ballot at any election, judicial review shall be sought by the day specified in paragraph (1) of this subsection or the 63rd day preceding that election, whichever day is earlier."[556] The time-bar has proven to be a fertile ground for litigation.[557] The court of appeals has, however, recently summarily affirmed two circuit court decisions that plaintiffs had waited too long to file suit.[558]

A. Not Too Early; and, Not Too Late

Essentially, a referendum challenge must be filed in court no more than ten days after the board of elections certifies the question for the ballot.[559] In an older decision, however, a challenge mounted ten months after an election was entertained and rejected on the merits.[560] The court applied the post-modal stringent review analysis and it

553. *See* discussion *supra* Part IV.A.

554. *Sun Cab*, 162 Md. at 425–26, 159 A. at 924.

555. MD. CODE ANN., ELEC. LAW § 6-210(e)(1) (LexisNexis 2010).

556. *Id.* § 6-210(e)(2).

557. *See, e.g.*, Nader For President 2004 v. Md. State Bd. of Elections, 399 Md. 681, 691–92 & n.14, 926 A.2d 199, 205 & n.14 (2007); Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 467, 15 A.3d 798, 800 (2011); Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 632, 30 A.3d 245, 262 (Md. Ct. Spec. App. 2011); Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam).

558. *Canavan*, 430 Md. at 533, 61 A.3d at 828; Anne Arundel Cnty. Taxpayers Ass'n v. Anne Arundel Cnty. Bd. of Elections, 415 Md. 433, 2 A.3d 1095 (2010) (per curiam). One of the authors was one counsel of record in both cases.

559. *See* discussion *supra* Part II.A.10.

560. Pickett v. Prince George's Cnty., 291 Md. 648, 650–51, 436 A.2d 449, 451 (1981).

does not appear that either a statutory or common-law time bar was argued or decided. It is doubtful that such an untimely challenge would be entertained today.[561]

1. Roskelly Was Too Late

In *Roskelly v. Lamone*,[562] the court rejected a challenge as untimely because it was filed more than ten days after the election official determined it was deficient.[563] The facts were complex and perhaps unique. *Roskelly* petitioned, in relevant part, one of the "early voting" provisions. It was enacted in 2005, vetoed, and after the veto was overridden in 2006, it became law on February 16, 2006.[564] Then, a modified early voting bill was enacted as an emergency measure in 2006, vetoed, and after the veto was overridden, it became law.[565]

On April 19, 2006, Marylanders for Fair Elections, Inc. (MFFE), and Mr. Roskelly, its chair, initiated the referendum process, by requesting an advance determination.[566] That determination was

561. *See* ELEC. LAW § 6-201(e)(1) ("(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."); Liddy v. Lamone, 398 Md. 233, 245, 919 A.2d 1276, 1284 (2006) ("[T]his Court has recognized that in the context of election matters, 'any claim against a state electoral procedure must be expressed expeditiously' . . . .") (quoting Ross v. State Bd. of Elections, 387 Md. 649, 671, 876 A.2d 692, 705 (2005)); *Ross*, 387 Md. at 667, 876 A.2d at 703 ("Thus, under the operation of the ten-day time period in Section 12-202, Ross should have filed his petition at least a week before the election, that is, by October 23rd. Instead, he waited until November 5th, a full three days after the election occurred. Therefore, we find that it is barred as a matter of law by the common law doctrine of laches as argued by Respondents in the Circuit Court and before this Court."). "Ross's decision to 'wait and see' until after the election, prejudiced Branch, the State Board of Elections, and the residents of the Thirteenth Councilmanic District." *Id.* at 672, 876 A.2d at 706. *See* Doe v. Montgomery Cnty. Bd. of Elections, No. 293857-V, 2008 Md. Cir. Ct. Lexis 7, at *1–2 (Jul. 24, 2008) (ten-day limit of ELEC. LAW § 6-210(e)), *rev'd on other grounds*, 406 Md. 697 (2008).

562. 396 Md. 27, 912 A.2d 658 (2006).

563. *Id.* at 47–48, 912 A.2d at 670.

564. *Id.* at 28–29, 912 A.2d at 659.

565. *Id.* at 29–30, 912 A.2d at 659. That bill was successfully petitioned; however, it was an emergency measure and therefore not suspended by the petition. *Id.* at 36 n.13, 912 A.2d at 663 n.12.

566. *Id.* at 30, 912 A.2d at 659–60. For a discussion of the advance determination procedure see *supra* Part II.A.2.

provided, however, the Attorney General advised that it was the "office's conclusion 'that a petition drive for referendum must occur immediately after the session of the Legislature at which the bill is initially passed by the Legislature."[567] In short, the Attorney General's letter suggested that Mr. Roskelly should have initiated the referendum process after the 2005 session, even though the bill to be referred had been vetoed and the veto not yet overridden.[568]

MFFE proceeded to gather signatures and submitted 20,221 signatures.[569] On June 8, 2006, however, the SBE responded that the "petition relating to Senate Bill 478 is deficient and may not be referred to referendum," citing the Attorney General's letter.[570] In short, although the timing question was an issue of "first impression,"[571] the petition was deemed to be "too late."[572]

Because of the uncertainly, SBE proceeded with signature verification, determined that the first tier submittal fell 138 signatures short, and, on June 21, 2010, so notified MFFE and called "Roskelly's attention to its [June 8th] deficiency determination . . . pointing out that it had not been challenged within ten days, as required by [section] 6-210(e)(1) of the Election Law Article."[573]

Nineteen days after the SBE's June 8th determination and six days after its June 21 letter, Roskelly sought judicial review.[574] He argued that the veto override was the act that was to be referred and that the June 8, 2006, decision was incorrect.[575]

The court noted that it was undisputed that Roskelly did not seek judicial review within ten days of the June 8th letter.[576] The court analyzed the timeliness issue as a matter of Constitutional interpretation,[577] holding that Roskelly's petition for judicial review was filed too late.

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567. *Roskelly*, 396 Md. at 31, 912 A.2d at 660 (citing 62 Md. Op. Att'y Gen. 405 (1977)).
568. *See id.* at 46, 912 A.2d at 669–70.
569. *Id.* at 32, 912 A.2d at 661.
570. *Id.* at 32–33, 912 A.2d at 661.
571. *Id.* at 35, 912 A.2d at 662.
572. *Id.* at 46, 912 A.2d at 669-70.
573. *Id.* at 35–36, 912 A.2d at 663.
574. *Id.* at 36, 912 A.2d at 663.
575. *Id.* at 37, 912 A.2d at 664.
576. *Id.* at 46, 912 A.2d at 669.
577. *Id.* at 47–50, 912 A.2d at 670–72 ("A common sense reading of Article XVI, §§ 2 and 3 leads to the unmistakable conclusion that a submission containing more than one third, but less than all, of the full number of signatures necessary to complete a referendum petition, submitted to the Secretary of State before June 1 for the purpose of extending the time for filing the signatures to complete the referendum petition

While the court of appeals did not reach the substance of the June 8, 2006 determination, and did not decide whether MFFE and Roskelly were required to, as the Attorney General opined, petition the vetoed bill to referendum, that issue may be juxtaposed against *Maryland-Nat'l Capital Park & Planning Comm'n v. Randall.*[578] If the Attorney General's view was correct, Roskelly was too late because he did not challenge the vetoed statute, even though the veto had not been overridden.[579] In *Randall*, the Secretary of State sued to have a vetoed bill declared null and void, asserting that the veto "probably" would be overridden.[580] The court affirmed denial of relief, noting that "there was no such thing as an unconstitutional bill. The court could not deal with the question constitutionally until a law had been duly enacted and some person had been deprived of his [or her] constitutional rights by its operation."[581] It concluded that granting relief would be an interference with legislative power, violative of separation of powers.[582] Thus, the Secretary's pre-override challenge in *Randall* was a premature request for an advisory opinion, while Roskelly arguably should have petitioned the vetoed statute to referendum.[583] In any event, the question left undecided presents a potential danger to a sponsor wishing to challenge a vetoed bill and *Roskelly* counsels great diligence in determining when a challenge need be commenced.

2. *Doe* Was Not Too Late

The right to judicial relief does not accrue until there is aggrievement by a final decision of the election board.[584] That occurs

within the meaning and contemplation of the Election Law Article, is, indeed, a petition."). Principles of construction are discussed *supra* Part I.I.

578. *Cf. Roskelly,* 396 Md. at 47, 912 A.2d at 670 (court need not decide if June 8, 2006, determination was correct), *with* Maryland-Nat'l Capital Park & Planning Comm'n v. Randall, 209 Md. 18, 120 A.2d 195 (1956).

579. *See supra* notes 562–67 and accompanying text.

580. 209 Md. at 20–21, 120 A.2d at 196.

581. *Id.* at 25, 120 A.2d at 198–99.

582. *Id.* at 26–27, 120 A.2d at 199.

583. Roskelly v. Lamone, 396 Md. 27, 47, 912 A.2d 658, 670 (2006).

584. Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 621, 30 A.3d 245, 255 (Md. Ct. Spec. App. 2011) (citing Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 718, 962 A.2d 342, 354–55 (2008)). In *Doe*, an argument was presented that the ten-day requirement did not apply to a declaratory action. 406 Md. at 713, 962 A.2d at 351. The court did not reach that argument, assuming without deciding that the requirement applied. *Id.*

upon determination that all legal requirements have been satisfied,[585] or upon rejection.[586] In *Doe*, for example, plaintiffs did not file suit to challenge interlocutory determinations of the election officials.[587] Defendants contended that the claims were time-barred; however, the court of appeals held that the interlocutory decisions did not trigger the time-bar.[588] Final certification was the trigger.[589]

B. The Postmodal Challenge Rule and Early Voting

1. The Postmodal Challenge Rule

In *Stop Slots*, the Maryland Court of Appeals reiterated the distinction between the standard of review governing pre-election and post-election challenges to electoral acts or omissions:

> We must also highlight the distinction, when there is a challenge raised in the courts with regard to election procedures, "between the effect given to modal provisions of the election law before election and the effect of the same provisions after election.". . . . Specifically, the rule is, when election procedures are challenged before the election is held, election officials being required to "do what the law tells them to do," a court will require compliance with their statutorily and constitutionally imposed duty. If a challenge is raised after an election has already been held, however, the courts will not disturb the results of said election in the absence of a showing "that the failure of the officials to follow the law has interfered with the full and fair expression of the will of the voters."[590]

Thus, challenges mounted before an election are decided under a different standard than those raised after polling has closed.[591] Before

585. *Doe*, 406 Md. at 718, 962 A.2d at 354–55.

586. Notably, however, in *Howard Cnty. Citizens for Open Gov't*, the court stated that *Doe* "did not identify the point at which the right to judicial review accrues when an election board determines that a petition effort lacks sufficient valid signatures." 201 Md. App. at 621 n.17, 30 A.2d at 255 n.17 (Md. Ct. Spec. App. 2011). It wrote: "This issue is not before us and we express no opinion on the matter." *Id.*

587. *See Doe*, 406 Md. at 707–08, 962 A.2d at 348.

588. *Id.* at 713–14, 718, 962 A.2d at 351–52, 354–55.

589. *Id.* at 718, 962 A.2d at 354–55.

590. Stop Slots MD 2008 v. State Bd. of Elections, 424 Md. 163, 193–94, 34 A.3d 1164, 1181–82 (2012) (internal citations omitted).

591. *Id. See also* MD. CODE ANN., ELEC. LAW § 6-210(e) (LexisNexis 2010).

an election, public agents must do their duty, and after an election if an election "has been honestly and fairly conducted" it will not be set aside "by mere failure to follow the statute precisely unless the result is shown to have been affected or the statute expressly states that such failure renders the election void."[592] In sum, in a post-election challenge, "statutes giving direction as to the mode and manner of conducting it are generally construed as directory unless the deviation [is] so vital" that it "probably . . . prevented a free and full expression of the popular will."[593]

The court's rationale is that "it would be unjustifiable to defeat the expressed will of the electorate if the irregularity did not frustrate or tend to prevent a free expression of the electors' intention or otherwise mislead them."[594] Alternatively, where a procedural defect in the petition process brings into question whether there were sufficient signatures, but voter approval at the polls demonstrates more than adequate support, it would be senseless to void the election based on the defect.[595] Although not in the referendum context, the court has held that it "shall not disturb the results of the direct and energetic participation by the voting citizens" where there was no impact on the outcome of the election.[596] In short, courts are not

592. Lexington Park Volunteer Fire Dep't Inc. v. Robidoux, 218 Md. 195, 200, 146 A.2d 184, 186 (1958).

593. *Id.*; *accord* Dutton v. Tawes, 225 Md. 484, 491, 494, 171 A.2d 688, 690–92 (1961) (holding that substantial achievement of pre-election purpose of notice in post-election challenge was sufficient). The court noted that "[w]e cannot assume that the almost 450,000 people who voted on the [interstate] compact, or any substantial proportion of them, did not understand the issue on which they voted." *Id.*

594. *Lexington Park Volunteer Fire Dept.*, 218 Md. at 200, 146 A.2d at 186.

595. Pickett v. Prince George's Cnty., 291 Md. 648, 659, 436 A.2d 449, 455–56 (1981) ("The evident and only purpose of the constitutional provision was that there be substantial public support for a proposed charter amendment before it was submitted to the voters of a county. The people by their vote have demonstrated that support. Thus, the purpose was satisfied. The challenge here not coming until about ten months after the electorate approved the charter amendment, we have no difficulty in saying the charter amendment was validly adopted.").

596. Town of Glenarden v. Bromery, 257 Md. 19, 21, 29, 262 A.2d 60, 61, 66 (1970) (municipal charter amendment effectively recalling elected officials). On the other hand, a post-election challenge by taxpayers to a special taxing bill was sustained where a serious defect in the pre-election notice did affect the outcome of the election. Graf v. Hiser, 144 Md. 418, 421, 125 A. 151, 152 (1924) ("The evidence in the case proved the facts we have recited, and tended to show that the mistake of the committee in the preparation of the notice, and in the reception and exclusion of votes, had a probably decisive influence upon the election.").

favorably inclined to requests to upset the will of the voters as expressed at the ballot box.[597]

2. The *McDonough* Anomaly

In one older decision, although careful to analyze the issue under both pre-election and post-election standards, the court of appeals apparently accepted—over a strong dissent—the practice of postponing a pre-election challenge until after the election.[598] There, plaintiffs sued thirty-two days before the election, and the court wrote:

> Since the lower court, pursuant to our holdings in *Tyler v. Secretary of State,* . . . in continuing the case for trial to a post-election date, preserved the issues 'as if heard and decided prior to the election,' and adjudicated the matter as if tried prior to the election, we shall make our appraisal of compliance with the modal provisions in ss 16-6(a) and 23-1(a) of Article 33 in the same context.

The dissent, however, expressed "serious reservations about the efficacy of the procedure indicated in *Tyler*," noting that the rationale of the post-modal challenge rule is inconsistent with the procedure employed. It is suggested that, if the postponement process is a viable doctrine, which it should not be, it be reserved for only the most unusual situations. Instead, the more recent decisions indicate that a challenger must timely mount a challenge or be time-barred.[599]

3. Early Voting and the Post-Modal Challenge Rule

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597. *See supra* notes 590–596 and accompanying text.

598. Anne Arundel Cnty. v. McDonough, 277 Md. 271, 279–80, 292, 295, 307–08, 354 A.2d 788, 793–94, 800–02, 809 (1976) (citing Tyler v. Sec'y of State, 230 Md. 18, 22, 185 A.2d 385, 387 (1962)) ("Even if we were to review this case as one where the litigation was instituted after the election . . . we still could not . . . uphold the validity of the referendum."); *McDonough*, 277 Md. at 312, 354 A.2d at 812 (Levine, J., dissenting) ("[T]o stay a challenge until after the election is held and then treat the action as a pre-election challenge is inconsistent with that distinction.").

599. *See* Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam); Anne Arundel Cnty. Taxpayers Ass'n v. Anne Arundel Cnty. Bd. of Elections, 415 Md. 433, 2 A.3d 1095 (2010) (per curiam); Liddy v. Lamone, 398 Md. 233, 245, 919 A.2d 1276, 1284 (2007); Ross v. State Bd. of Elections, 387 Md. 649, 673, 876 A.2d 692, 706 (2005).

A recent lawsuit could have posed the novel issue of how the post-modal challenge rule is applied to early voting.[600] Early voting permits electors to cast their ballot prior to election day.[601] In *Canavan*, plaintiffs filed suit a few days before election day, but after 430,570 electors had cast their early ballots.[602] The case was heard after the election.[603] Defendants asserted that the post-modal challenge standard applied; however, the case was decided under time-bar principles.[604] It remains to be seen whether a lawsuit filed after a substantial number of electors have voted, but prior to the general election, and heard prior to the close of voting, will proceed under the strict post-modal challenge standard.

VI. MARYLAND DOES NOT FOLLOW THE MAJORITY OF STATES BY LIBERALLY CONSTRUING REFERENDUM PROVISIONS; INSTEAD, STRICT COMPLIANCE IS REQUIRED, AT LEAST IN PRE-ELECTION CHALLENGES

While in pre-election challenges[605] the court of appeals has directed strict compliance with the requirements for a referendum, other states call for liberal construction of similar provisions.[606] In fact, Maryland is one of only two states that use the strict compliance standard.[607] The applicable standard is significant, because there is "no second chance . . . for a failed referendum petition."[608] There are two competing canons of construction, liberal construction versus strict compliance.[609]

600. *Canavan*, 430 Md. at 533, 61 A.3d at 828.
601. MD. CONST. art. I, § 3(b).
602. Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam).
603. *Id.*
604. *Id.*
605. *See supra* Part V.B.1.
606. DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 270 (2011).
607. David Potts, *Strict Compliance, Substantial Compliance, and Referendum Petitions in Arizona*, 54 ARIZ. L. REV. 329, 332 (2012). Arizona mandates "absolute compliance." *Id.* at 332.
608. *Id.* at 338.
609. *See infra* Part IV.A.1–2.

A. The Power Reserved by the People Should be Liberally Construed to Effectuate the Right to Referendum

"While the principle that provisions governing referendum petitions are to be liberally construed is generally accepted," it does not appear to have force in Maryland.[610] Nevertheless, in *Kelly v. Marylanders for Sports Sanity*,[611] the dissent argued that the referendum amendment[612] should be liberally construed to effectuate its purposes. The Attorney General has stated that doubts should be resolved in favor of a referendum.[613] A long-time supporter of the referendum movement recently wrote that:

> Marylanders will soon have an opportunity common in a country other than their own: the right to veto a legislature's product. This tool, the voter referendum, is an important right, since two cure-alls of the 1970s, campaign finance "reform" and strict reapportionment, have delivered the legislature into the hands of reliable partisans and the "bundlers" of interest-group campaign contributions."[614]

Proponents of the liberal construction principle assert that the "great power" of the referendum should not be "undermined by a technical failure."[615]

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610. *See* City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 448, 483 A.2d 348, 353 (1984) (quoting Tyler v. Sec'y of State, 229 Md. 397, 402, 184 A.2d 101, 103 (1962)); *cf.* Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

611. Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 479, 530 A.2d 245, 266 (1987).

612. *Id.*

613. Const. Law—Referendum, 73 Md. Op. Att'y Gen. 78, 88 (1988); Const. Law—Referendum Petitions, 63 Md. Op. Att'y Gen. 157, 163 (1978).

614. George Liebmann, *Marylanders Get a Taste of Veto Democracy*, THE BALTIMORE SUN, Oct. 30, 2012, *available at* http://articles.baltimoresun.com/2012-10-30/news/bs-ed-referendums-20121030_1_maryland-live-casino-casino-bill-foreign-policy (Liebman asserted that "Maryland voters will confront four laws. The casino bill and congressional redistricting are striking manifestations of what a notable federal judge recently called 'the culture of corruption in Annapolis.' Gay marriage and the Dream Act are exercises in 'culture warfare' and partisan pandering — trivial in themselves, but of un-discussed larger import."). Liebmann argued that the referendum involves all in civic life. George Liebmann, *Curbing Legislative and Executive Abuse: Referendum and Initiative in Maryland*, 33 MD. B.J. 34, 35 (2000) ("Referenda are seen as a means of combatting civic apathy.").

615. Potts, *supra* note 607, at 342.

B. Persons Seeking a Referendum Must Strictly Comply With the Procedural Requisites of the Constitution and Election Law Article

While the principle of liberal construction is "generally accepted," Maryland has "adopted the view that the referendum is a concession to an organized minority and a limitation upon the rights of the people" and requires strict compliance, at least in a pre-election challenge.[616] There are many sound reasons for the strict compliance rule.[617]

The referendum is "drastic in its effect," and "[t]he very filing of a petition, valid on its face, suspends the operation of any of a large class of legislative enactments and provides for an interim in which the evil designed to be corrected by the law may continue unabated,

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616. Tyler v. Sec'y of State, 229 Md. 397, 402, 184 A.2d 101, 103 (1962) ("We believe that it is clear that . . . those seeking the exercise the right of referendum . . . must, as a condition precedent, strictly comply with the conditions prescribed."); *See* City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 450, 483 A.2d 348, 354 (1984). *See e.g.*, Burress v. Bd. of Cnty. Comm'rs of Frederick Co., 427 Md. 231, 237, 46 A.3d 1182, 1185 (2012) (finding that petition signature requirements pursuant to § 6-203(a) are mandatory); Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 476 n.14, 15 A.3d 798, 805 n.14 (2011) ("We have also consistently stated that constitutional and statutory provisions related to referendum petitions should be followed strictly."); Doe v. Montgomery Co. Bd. of Elections, 406 Md. 697, 962 A.2d 342 (2008) (holding that the statutory provision establishing requirements for valid signatures on referendum petitions was *mandatory* and not *suggestive*); Gittings v. Bd. of Supervisors of Elections, 38 Md. App. 674, 382 A.2d 349 (Md. Ct. Spec. App. 1978) (stating that the constitutional provisions governing referendum petitions are mandatory and "must be strictly complied with"); Ferguson v. Secretary of State, 249 Md. 510, 515, 240 A.2d 232, 235 (1968) ("Stringent language employed in constitutional provision on referendum procedure shows intent that those seeking to exercise right of referendum must, as condition precedent, strictly comply with conditions prescribed."); Bell v. Bd. of Comm'rs of Prince George's Co., 195 Md. 21, 33–34, 72 A.2d 746, 752 (1950); Const. Law—Referendum, 72 Md. Op. Att'y Gen. 43, 48 (1987) (quoting *Tyler*); *but cf.* Koste v. Town of Oxford, 431 Md. 14, 41, 63 A.3d 582, 598-99 (2013) (Adkins, J., dissenting) (suggesting that the court "took a most lenient view of the statutory requirements" in Whitley v. State Bd. of Elections, 429 Md. 132, 55 A.3d 37 (2012)). The dissenting opinion suggested: "This Court should provide consistent guiding principles for interpretation, not act on an ad hoc basis. If we interpret referendum statutes liberally, to favor referendum, as in *Whitley*, let us do that consistently. If we interpret referendum statutes strictly, to favor the legislative will over that of the people, as the majority does here, let us do that consistently. It is not fair to citizens and their legal advisors, for us to hop from one rationale to the other." *Id.* at 41-42, 63 A.3d at 599.

617. *See infra* Part VI.A.2.

or in which a need intended to be provided for, may continue unsatisfied."[618] The referendum has been viewed as anti-democratic[619] and has been described as "a useful veto device by which sufficiently agitated and interested minorities can thwart progressive legislation of increasingly responsible and responsive political leaders."[620] Thus, those supporting strict construction reason that, "[r]eferendum by petition, to be sure, is a negative device—that is, a law enacted by the [legislature] becomes effective unless the voters act negatively, by rejecting it at referendum."[621]

Instituted as a Populist and Progressive check and balance to prevent corruption, the referendum has often been a vehicle to challenge social reform legislation.[622] In the late 1960s, Maryland's

618. *Tyler*, 229 Md. at 402, 184 A.2d at 103–04 (1962).

619. FRIEDMAN, REFERENCE GUIDE, *supra* note 606, at 270.

620. Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law From 1967 to 1998*, 58 MD. L. REV. 528, 549 n.111 (1999).

621. Local Gov't—Charter Cntys., 67 Md. Op. Att'y Gen. 300, 304 (1982). The referendum has been called a "final veto . . . ." Mayor of Rockville v. Brookeville Turnpike Constr. Co., 246 Md. 117, 128–29, 228 A.2d 263, 270 (1967).

622. Friedman, *Magnificent Failure Revisited*, *supra* note 620, at 549 ("The referendum power was . . . [o]riginally conceived in the Progressive era as a way to check conservative legislatures, by the 1960s the referendum had become identified largely as a tool of conservatives to oppose progressive legislation. For example, in 1964, a referendum to repeal an act strengthening state protection against racial discrimination received forty-seven percent of the vote and carried thirteen counties.") (citations omitted); Liebmann, *Curbing Legislative and Executive Abuse*, *supra* note 614, at 36. Curiously, it appears that "[t]he Progressives also had a racist agenda" and sought to disenfranchise African-Americans and Asian Americans. B. Kruse, Comment: *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 80 CALIF. L. REV. 129 n.24 (2001) (citing H. Scheiber, *Forward: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 794-95 (1997)). It has been argued that "an element of this tradition continues today. . . ." *Id.*

Nevertheless, the benefits of referenda also cannot be underestimated. *See supra*, note 37. Referenda have given voice to the disadvantaged and disenfranchised. The concept of petitioning the government preceded the Populists. In December 1725 a letter containing 428 signatures of "people of all ranks and social strata, including day laborers and shoemakers," was presented to the Prince of East Fisia, a Prussian state. CHRIS HAWKINS, A HISTORY OF SIGNATURES 35 (2011). Hawkins also describes a petition by "neoliterate" women in Tamil, India, seeking access to grounds for cremation of their dead. *Id.* at 37 (citing Francis Cody, *Inscribing Subjects to Citizenship: Petitions, Literary Activism, and the Performativity of Signature in Rural Tamil India*, 24 CULTURAL ANTHROPOLOGY 247-380 (2009)). "Cody argues that signatures create the modern citizen" and permitted the signatories to "create their own political power where before they had none. In signing the petition, they took a definitive step towards obtaining a political agency. . . ." *Id.* at 38. Hawkins also

open housing bill was the subject of a referendum petition.[623] Opponents gathered 37,000 signatures.[624] In *City of Takoma Park v. Citizens for Decent Government*,[625] a county anti-discrimination in employment, housing, and public accommodations statute was petitioned. A State bill to prohibit discrimination based on sexual orientation was subject to a referendum attempt,[626] as was a county measure.[627] The Dream Act[628] and the Civil Marriage Protection Act providing for marriage equality[629] were both brought to referendum.[630]

Because of its drastic impact, at least in a referendum under Maryland Constitution, article XVI, a petition sponsor "must, as condition precedent, strictly comply with the conditions prescribed."[631] There is no general equitable power to excuse compliance in a pre-election challenge and a sponsor is not

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suggests that, "[i]n the early nineteenth century, women realized that they could express their political views by petitioning" describing "Women's Antislavery Petitions." *Id.* at 39. "By affixing their signatures to abolition petitions, women defied prescriptions against female public activisim. . . ." *Id.* at 40 (quoting Susan Zaeske, *Signatures of Citizenship: The Rhetoric of Women's Antislavery Petitions*, 88 QUARTERLY J. OF SPEECH,148 (2002)).

623. *See* Sec'y of State v. McLean, 249 Md. 436, 437, 239 A.2d 919, 919–20 (1968).

624. *Id.* at 438, 239 A.2d at 920–21.

625. City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 441, 483 A.2d 348, 349 (1984).

626. Gelbman v. Willis, No. C-2001-734030.OC (Cir. Ct. Anne Arundel Co. 2001) (Lerner, J.). One of the authors represented the State in *Gelbman*.

627. Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 702, 962 A.2d 342, 344–45 (2008).

628. Doe v. Md. State Bd. of Elections, 428 Md. 596, 598–99, 53 A.3d 1111, 1112 (2012). In the 2012 general election, three constitutional amendments, three petitions, and a referendum on gaming were on the ballot. Associated Press, *Secretary of State Certifies Ballot Language*, THE DAILY RECORD, Aug. 20, 2012, http://thedailyrecord.com/2012/08/20/md-secretary-of-state-certifies-ballot-language/.

629. Editorial, *For Question 6*, BALT. SUN, Oct. 30, 2012, http://articles.baltimoresun.com/2012-10-30/news/bs-ed-question-6-20121030_1_gay-marriage-maryland-marriage-alliance-marriage-equality.

630. In the initiative arena, citizens may not be well-suited to drafting legislation. In Colorado, for example, citizens passed an ethics in government measure that prohibited gifts of more than fifty dollars to public officers. DuVivier, *supra* note 1, at 1050–51. The goal was to impose high ethical standards; however, the Colorado Attorney General concluded that it led to "an absurd result" by, for example, prohibiting professors from accepting Nobel prize money and barring scholarships for children of state employees. *Id.*

631. Tyler v. Sec'y of State, 229 Md. 397, 402, 184 A.2d 101, 104 (1962).

"permitted another shot at compliance."[632] The court of appeals has repeatedly held that "there must be a strict compliance with the mandatory provisions of [s]ection 4 of [a]rticle XVI."[633] It has been held that non-compliance with pre-election requirements "divested the electorate of its right to veto by referendum . . . ."[634] Thus, both appellate courts have stated:

> It is understandably disappointing to the residents of Baltimore County who sought to petition this issue to referendum that they are foreclosed by this decision from an opportunity to submit the issue to the electorate of the county. However, where a group of the citizens of the county seek to challenge a decision made by the lawfully designated representatives of the entire body politic, they must *strictly* adhere to those provisions of the law which grants to them the concession of the referendum. Where, as in this case, *they fail to meet* the constitutional and statutory requirements which authorize the exercise of the privilege granted, the proposed referendum *must* fail.[635]

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632. Gittings v. Bd. of Supervisors of Elections for Baltimore Cnty., 38 Md. App. 674, 678–79, 382 A.2d 349, 351 (Md. Ct. Spec. App. 1978).

633. Ferguson v. Sec'y of State, 249 Md. 510, 515, 240 A.2d 232, 235 (1968) (citing *Tyler*, 229 Md. at 402, 184 A.2d at 104 (1962)); *accord* City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 448, 483 A.2d 348, 353 (1984) (quoting *Tyler*, 229 Md. at 402, 184 A.2d at 104).

634. *City of Takoma Park*, 301 Md. at 448, 483 A.2d at 353 (form of petition); Blackwell v. City Council of Seat Pleasant, 94 Md. App. 393, 397 & n.2, 404, 406, 617 A.2d 1110, 1112 & n.2, 1115, 1116 (Md. Ct. Spec. App. 1993) (explaining how resolutions stated that they were effective before the voters were notified of passage and could petition them to referendum and that "the electorate was clearly misled").

635. *City of Takoma Park*, 301 Md. at 449, 483 A.2d at 353–54 (quoting *Gittings*, 38 Md. App. at 680–81, 382 A.2d at 353) (emphasis added). In a related context, the court of appeals wrote:

> > It is unfortunate that voters should lose their votes by oversight of election officials—and by their own failure to notice that they have not been given authenticated ballots. But, as has often been said, it would be a greater evil for the courts to ignore the law itself by permitting election officials to ignore statutory requirements designed to safeguard the integrity of elections, i.e., the rights of all the voters.
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> City of Seat Pleasant v. Jones, 364 Md. 663, 682, 774 A.2d 1167, 1178 (2001) (denying relief in an election that was decided by a single vote, and holding that "*innocent voters may be adversely impacted and without recourse, by the actions and*

In short, in a pre-election challenge, a failure of compliance "render[s] . . . the petition nugatory and prevents a referendum on it . . . ."[636] The strict compliance rule is premised on the view that the referendum process was not intended to be easy.[637] A requirement may be difficult to meet, however, "[i]f the burden is too heavy," the remedy is legislative.[638]

C. Can Pre-Election Publicity Cure a Defect in Signature Pages?

One issue that has sporadically arisen is the question of whether extensive publicity regarding a referendum can cure defects in a signature page. Sponsors may assert that publicity corrects a petition defect by supplying missing information. While not squarely decided, it appears that such arguments will be rejected, especially in a pre-election challenge analyzed under the strict compliance doctrine. For example, in *City of Takoma Park*, the Board of Supervisors of Elections for Montgomery County found that a petition for referendum did "not comply with relevant legal requirements as to form."[639] The court held that the petition "fail[ed] to inform the voters precisely what portions of the act the petition sponsors proposed for deletion."[640] Thus, the court concluded that voters were "left to [their] imagination" to determine the precise details of the petition and what exactly they are signing their name to accomplish,[641] despite clear statutory authority requiring "that potential voters be reasonably advised of what act or part of an act enacted by the County Council is to be suspended in its operation pending decision of the voters at the succeeding general election."[642] In response to arguments pointing to extensive publicity, the court

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conduct of election officials" (emphasis added)) (citing Hammond v. Love, 187 Md. 138, 149, 49 A.2d 75, 80 (1946)).

636. Phifer v. Diehl, 175 Md. 364, 365–66, 1 A.2d 617, 617 (1938) (interpreting MD. CONST. art. XVI).

637. Town of Oxford v. Koste, 204 Md. App. 578, 588–89, 42 A.3d 637, 643–44 (Md. Ct. Spec. App. 2012), *aff'd*, 431 Md. 14, 63 A.3d 582 (2013).

638. *Ferguson*, 249 Md. at 517, 240 A.2d at 236; *Gittings*, 38 Md. App. at 678–79, 382 A.2d at 351 (explaining why the request for referendum "for reasons of equity" was rejected); *see* Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

639. 301 Md. 439, 444, 483 A.2d 348, 351 (1984).

640. *Id.* at 449, 483 A.2d at 353.

641. *Id.* at 449-50, 483 A.2d 354.

642. *Id.* at 450, 483 A.2d 354.

stated that "no amount of publicity could supply" the requisite information to cure the petition's defect in a "pre-election setting."[643]

In *Bell v. Bd. of Comm'rs of Prince George's Co.*, the court reiterated that "[i]t is no answer to a failure to obey [the constitutional provision] to say . . . that the act was subject to a referendum, that it was widely discussed in newspapers circulated by the County affected, and that there was an active campaign for and against its adoption."[644]

Under the rule of strict construction,[645] that appears to be the only defensible conclusion in a pre-election challenge. Where petitions "fail to meet the [c]onstitutional or statutory requirements which authorize the exercise of the privilege granted, the proposed referendum must fail."[646]

VII. THE METHOD OF REVIEW

Challenges to referenda have been filed as petitions seeking judicial review, complaints for injunctive relief, requests for a writ of common-law or administrative mandamus, complaints for declaratory judgment, and, as a mixture of some or all of the foregoing.[647] At its core, however, a circuit court is evaluating an administrative decision made by an elections board or official to certify or reject a petition. The administrative coding process was described in Part II.A.9.c.

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643. *Id.*

644. 195 Md. 21, 33-34, 72 A.2d 746, 752 (1950).

645. *See* cases cited *supra* note 619.

646. Gittings v. Bd. of Supervisors of Elections for Baltimore Cnty., 38 Md. App. 674, 681, 382 A.2d 349, 353 (Md. Ct. Spec. App. 1978).

647. For example, frequently, plaintiffs bracket the field and seek an injunction, writ of mandamus, and declaration. International Assoc. of Fire Fighters, Local 1715 Cumberland Firefighters v. Mayor & City Co. of Cumberland, 407 Md. 1, 6, 962 A.2d 374, 377 (2008); *City of Takoma Park*, 301 Md. at 444, 483 A.2d at 351; Town of New Market Frederick Cnty. v. Milrey, Inc., 90 Md. App. 528, 532, 602 A.2d 201, 203 (Md. Ct. Spec. App. 2008) (complaint for declaratory, injunctive, and "other" relief). In *Doe v. Maryland State Bd. of Elections*, the amended complaint initially sought declaratory and injunctive relief. 428 Md. 596, 604, 53 A.3d 1111, 1115 (2012). It was resolved on summary judgment. *Id.* at 598, 53 A.3d at 1112. In Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013), the court held that common-law mandamus and the declaratory judgment statute provided the grounds for review in the context of a municipal annexation referendum. One of the issues presented in Fraternal Order of Police Lodge 35 v. Montgomery Cnty., No. 132 (Sept. Term 2011) (*sub curia*), is: "Is a challenge to a Board of Elections decision subject to the rules and tenets of judicial review of an agency decision?"

It is clear that such decisions, when final, are reviewable: "Election supervisors are empowered to execute, not to make, election laws. Their decisions are at least as fully subject to review as decisions of administrative agencies."[648] Thus, "[t]he election laws do not purport to make conclusive any decisions of supervisors misconstruing the law or their own powers. Decisions contrary to law or unsupported by substantial evidence are not within the exercise of sound administrative discretion and of the legislative prerogative, but are arbitrary and illegal acts."[649] Courts have the inherent power to review decisions of administrative agencies to determine if they are arbitrary or capricious.[650] For reasons set forth more fully below, however, the procedural vehicle through which the administrative decision is viewed may be important.

A. The Election Law Article Provides For Judicial Review And Complaints for Declaratory Judgment

For petitions governed by state law, election law section 6-209 provides for ""[j]udicial review."[651] Thus, under subsection (a)(1), a "person aggrieved" by certain specified[652] determinations "may seek judicial review." Under subsection (b), however, "any registered

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648. Hammond v. Love, 187 Md. 138, 144, 49 A.2d 75, 77 (1946).

649. *Id.*

650. Schade v. Md. State Bd. of Elections, 401 Md. 1, 37–38, 930 A.2d 304, 326 (2007). Even absent statutory authority, "the judiciary has an undeniable constitutionally-inherent power to review" administrative decisions, especially quasi-judicial ones, and ensure that the agency below was properly empowered and its responsibilities "have been performed within the confines of traditional standards of procedural and substantive fair play." Anne Arundel Co. v. Halle Dev., Inc., 408 Md. 539, 556, 971 A.2d 214, 224 (2009) (quotation and citation omitted).

651. MD. CODE ANN., ELEC. LAW § 6-209 is captioned "[j]udicial review." Under MD. CODE ANN., article 1, section 18: "The captions or headlines of the several sections of this Code which are printed in bold type, and the captions or headlines of the several subsections of this Code which are printed in italics or otherwise, are intended as mere catchwords to indicate the contents of the sections and subsections. They are not to be deemed or taken as titles of the sections and subsections, or as any part thereof; and, unless expressly so provided, they shall not be so deemed or taken when any of such sections and subsections, including the captions or headlines, are amended or reenacted."

652. The specified determinations are ones made under ELEC. LAW § 6-202 (advance determination), ELEC. LAW § 6-206 (determinations at the time of filing), or ELEC. LAW § 6-208(a)(2) (the chief election official shall "determine whether the petition has satisfied all other requirements established by law for that petition and immediately notify the sponsor of that determination, including any specific deficiencies found").

voter" may file a "complaint" under the Maryland Uniform Declaratory Judgments Act. Often, a single challenge seeks both a declaration and judicial review.[653]

In general, under these provisions a petition sponsor or similar interested person[654] could seek "judicial review," under subsection (a)(1) of determinations of legal insufficiency, such as an advance determination, or a decision regarding the form of the petition page or lack of referability under, *e.g.*, the appropriations exception. Any registered voter could challenge sufficiency decisions and signature "counts" in a declaratory action. In doing so, the voter would be challenging a decision[655] of an administrative agency under a code provision captioned "[j]udicial review."[656] As noted in Part IV.A, however, taxpayers and petition sponsors, who may not be voters, may also file suit.

B. Mandamus Has Been Used to Challenge Referenda

1. Common-Law Mandamus

Petitions for common-law mandamus were typically utilized to challenge referenda in older cases, but still make an appearance today.[657] In *Gisriel*, for example, the Maryland Court of Appeals held

653. Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 467, 15 A.3d 798, 800 (2011) (seeking judicial review and a declaration). In *Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections*, 201 Md. App. 605, 608, 614, 30 A.3d 245, 247, 251 (Md. Ct. Spec. App. 2011), the plaintiffs filed a "petition" for "judicial review." The challenge was heard on "memoranda" submitted to the court. *Id.* at 614, 30 A.3d at 251.

654. It is often the case that the entity aggrieved is not a natural person. ELEC. LAW § 6-209(a)(1) permits a "person" who is aggrieved to seek judicial review. "Person" is not defined in ELEC. LAW § 1-101 or § 6-101. Pursuant to MD. CODE ANN. art. 1, § 15: "Unless such a construction would be unreasonable, the word person shall include corporation, partnership, business trust, statutory trust, or limited liability company."

655. For a discussion of the nature of an election official's decision, *see infra* text accompanying note 664.

656. The standard for review of other petitions may not be statutorily-specified. *E.g.*, MD. CODE ANN. art. 23A, § 19 (annexation petitions). In Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013), the court held that common-law mandamus and the declaratory judgment statute provided the mechanism for review in the context of a municipal annexation referendum.

657. *See, e.g.*, Int'l Ass'n of Fire Fighters v. Mayor of Cumberland, 407 Md. 1, 6, 962 A.2d 374, 377 (2008); Gisriel v. Ocean City Bd. of Supervisors of Elections, 345 Md. 477,

that the election officials "had a non-discretionary duty to delete from the Ocean City registered voter list the names of unqualified voters before determining the percentage of voters who had signed the petition."[658] Their failure to do so was subject to a common law mandamus action.[659]

Although not a referendum case, in *Seat Pleasant,* the court wrote: "The writ of mandamus has been utilized in cases involving a variety of election challenges."[660] The court noted that where election officials have "made an obvious mistake of law in counting or rejecting ballots, the court has the power to correct such mistake."[661] The *Seat Pleasant* court wrote: "*[J]udicial review* is properly sought through a writ of *mandamus* where there is no statutory provision for hearing or review and where public officials are alleged to have abused the discretionary powers reposed in them.... Stated differently, a clear mistake of law, however honest, is an arbitrary action, reviewable on mandamus and illegal action is reviewable, as such, without characterizing it as arbitrary."[662]

Prior to issuing a writ of mandamus for "discretionary acts" there must be both lack of an available procedure for obtaining review and an allegation that the action complained of is illegal, arbitrary, capricious, or unreasonable.[663]

2. Administrative Mandamus

Administrative mandamus is an action for judicial review of a quasi-judicial[664] order or action of an administrative agency where

496, 693 A.2d 757, 766 (1997); Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 447, 530 A.2d 245, 250 (1987); Bayne v. Sec'y of State, 283 Md. 560, 563, 392 A.2d 67, 68 (1978); Ferguson v. Sec'y of State, 249 Md. 510, 514, 240 A.2d 232, 234 (1968); Cole v. Sec'y of State, 249 Md. 425, 428, 240 A.2d 272, 274 (1968).

658. *Gisriel*, 345 Md. at 497–98, 693 A.2d at 767.

659. *See id.; accord* Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013) (mandamus and declaratory judgment held proper).

660. City of Seat Pleasant v. Jones, 364 Md. 663, 675, 774 A.2d 1167, 1174 (2001).

661. *Id.*.

662. *Id.* at 674, 774 A.2d at 1173 (citations, quotations, and brackets omitted) (emphasis added).

663. *Id.* at 688–89, 774 A.2d at 1182; *see* Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

664. In Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013), the court held that a town official's review of a referendum petition was not quasi-judicial. A quasi-judicial action occurs when an executive branch official determines the rights of a single matter by reviewing the evidence before him/her. *See*

other review is not expressly authorized.[665] The recent decision in *Town of La Plata* appears to foreclose the use of administrative mandamus to review certification decisions of election officials.[666]

C. Requests for Injunctive Relief Have Been Permitted

In *Sun Cab Co. v. Cloud*, a litigant argued that a court of equity cannot enjoin "the holding of a statewide election upon a question concerning the state as a whole"[667] and that the referendum must be "dealt with under a [common law] writ of mandamus. . . ."[668] The court rejected the argument, concluding that a court of equity may issue an injunction against a statewide referendum on the ground that the petitions for referendum were insufficient.[669] The court noted that "stopping a false pretension to a right to a referendum is obviously better done at the start than at some later stage in its career" and wrote that although the "writ of mandamus in [Maryland] is one which may be resorted to in some cases for preventative relief . . . mandamus has not displaced injunction as the ordinary preventative remedy."[670]

Lewis v. Gansler, 204 Md. App. 454, 42 A.3d 63 (Md. Ct. Spec. App. 2012), *cert. denied*, 427 Md. 609 (2012) (holding that quasi-judicial decisions concern "'who did what, where, when, how, why, [and] with what motive or intent,' while legislative facts 'do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.'"). In *Gisriel*, the plaintiff sought review of a decision of a city board of elections' refusal to authorize a referendum petition. 345 Md. at 483–84, 693 A.2d at 760. The court wrote that Gisriel "was seeking review of *the non-legislative decision* refusing to submit the zoning ordinance to the electorate." *Id.* at 500 n.16, 693 A.2d at 768 n.16 (emphasis added). Similarly, in *Doe v. Montgomery Cnty. Bd. of Elections,* the circuit court wrote that the General Assembly has delegated review of the petitions to the election board and cited a decision stating that quasi-judicial authority was being exercised. 2008 Md. Cir. Ct. Lexis 7, *25 (Montg. Co. Jul. 24, 2008), *rev'd on other grounds,* 406 Md. 697 (2008). In *Schultz v. Cuyahoga Cnty. Bd. of Elections,* 361 N.E.2d 477, 480 (Oh. App. 1976), *aff'd,* 357 N.E. 2d 1079, 1081 (Oh. 1976), the court wrote that a county board of elections' review of a petition for sufficiency and validity is a quasi-judicial action.

665. MD. CODE ANN. Rule 7-401.

666. Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013), *see* note 664, *supra.*

667. 162 Md. 419, 425, 159 A. 922, 926 (1932).

668. *Id.*

669. *Id.*

670. *Id.* at 425–26, 159 A. 926.

D. Dangers Presented by the Referendum Process

The referendum is a "basic instrument of democratic government."[671] However, despite its many benefits, such as encouraging citizen participation and providing checks and balances, the referendum process may present many concerns.[672]

The threat of referendum fraud is not hypothetical.[673] For example:

> Dead men don't vote. And they can't sign their names to voter petitions, either. But one did in the town of Greene last year. The signature of a deceased town resident was discovered by an alert town clerk on a petition asking voters if they wanted the tax reform bill to go to a people's veto referendum in June . . . .[674]

Fraud allegations are often presented as rapidly as signatures are collected.[675] Circulator misconduct was uncovered in *Gelbman v. Willis*.[676] While not reflected in the special master's report, one

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671. Elections-Referendum-Chartered Counties, 63 Md. Op. Att'y Gen. 291, 292 (1978) (quoting, *inter alia*, Ritchmount P'ship v. Bd. of Supervisors of Elections of Anne Arundel Cnty., 283 Md. 48, 61, 388 A.2d 523, 531 (1978)).

672. *See id.* at 294–95.

673. Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 628 n.22, 30 A.3d 245, 259 n.22 (Md. Ct. Spec. App. 2011) (quoting John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010)); Tyler v. Sec'y of State, 229 Md. 397, 405, 184 A.2d 101, 105 (1962) (false circulator affidavits "gives rise, at least, to a presumption of fraud").

674. John Christie, *Forgeries Raise Questions about Role Money Plays in Petition Process*, BANGOR DAILY NEWS (Feb. 3, 2010), http://bangordailynews.com/2010/02/03/politics/forgeries-raise-questions-about-role-money-plays-in-petition-process/.

675. *E.g.*, Citizens Against Slots at the Mall v. PPE Casino Resorts Md., LLC, 429 Md. 176, 199 & n.12, 55 A.3d 496, 510 & n.2 (2012) (noting failure to preserve claims of fraud and misrepresentation on appeal); Motion to Dismiss and Brief of Appellees-Cross-Appellants at 14–15, Town of La Plata v. Faison-Rosewick, LLC, No. 68, 2012 WL 8020918 (Md. Sept. Term 2012) (Town reported "possible perjury" and citizens reported misrepresentation), subsequent opinion, Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013); Alison Knezevich, *Balt. Cnty. Referendum on Zoning Gets Legal Challenge*, BALT. SUN, Nov. 10, 2012, at 4 ("[A]ttorneys say that petition circulators 'were flown here by signature-collecting companies . . . put up in hotels and motels, and paid a bounty for each signature they could obtain.' . . . ."). Generally, petitioning does not present the danger of quid pro quo misconduct. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

676. Report of Special Master at 1–3, Gelbman v. Willis, No. C-2001-7340.0C (Cir. Ct. Anne Arundel Cnty. Oct. 5, 2001) (Lerner, J.). In *Town of La Plata*, the municipal report stated that a town official observed signature pages that were left unattended.

circulator signed an affidavit stating that the circulator had observed signatures being affixed when the pages had been left unattended.[677]

It is common practice to use a telephone book or directory to commit circulator and petition fraud[678] and in some petition drives, signatures are gathered by "round tabling." [679] For example, in one instance, circulators reportedly sat at a table, passed around a phone book, and signed voters' names to the petitions.[680] Similarly, the North Dakota Attorney General's office described names being taken out of a phone book.[681] In one nearby jurisdiction:

> [T]he Board "gave some credence" to reports of a "signing party" at the Red Roof Inn where names and addresses were allegedly copied from the telephone books onto petition sheets.[682]

In another case, a Montana trial court described multiple details of a referendum "bait and switch" scheme.[683] Quoting the Maine Supreme Court,[684] the Montana court wrote that "it is evident that the circulator's role in a citizen's initiative is pivotal. Indeed, the

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Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

677. Report of Special Master at 1–3, Gelbman v. Willis, No. C-2001-7340.0C (Cir. Ct. Anne Arundel Cnty. Oct. 5, 2001) (Lerner, J.). One of the authors was counsel of record in that case.

678. Whitley v. Md. State Bd. of Elections, 429 Md. 132, 155, 55 A.3d 37, 51 (2012) (citing Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 492 & n.6, 15 A.3d 798, 815 & n.6 (2011) (Harrell, J., dissenting)).

679. Christie, *supra* note 674..

680. *Id.*

681. *Id.*

682. Citizens Comm. for the D.C. Video Lottery Terminal Initiative v. D.C. Bd. of Elections & Ethics, 860 A.2d 813, 816 (D.C. 2004). The court noted that "irregularities in the petition circulation process so 'polluted' the signature-gathering operation conducted by a subcontractor, Stars and Stripes, Inc. (Stars and Stripes), as to require invalidation of *all* petition sheets circulated and signatures gathered by the Stars and Stripes circulators." *Id.* at 813 (emphasis added).

683. Montanans for Justice v. Montana *ex rel.* McGrath, 146 P.3d 759, 775 (Mont. 2006).

684. Me. Taxpayers Action Network v. Sec'y of State, 2002 Me. 64, 795 A.2d 75, 82 (noting that 3,054 signatures gathered by imposter were invalidated). The Maine statute did not provide specific grounds for invalidating signatures. *Id.* at 79–80. It merely directed validation. This created a *broad authority to disqualify* signatures. *Id.* The court considered the circulator's affidavit indispensable, and invalidation of any signatures lacking that prerequisite was "necessary to preserve the integrity of the initiative and referendum process." *Id.* at 80.

integrity of the initiative . . . process in many ways hinges on the trustworthiness and veracity of the circulator."[685] The Montana trial court wrote that "the people have a right to rely on the integrity of the initiative process from beginning to end."[686] The Montana court then invalidated all signatures and petitions tainted by or associated with the fraud in order to preserve the integrity of the process.[687]

Similarly, in *San Francisco Forty-Niners v. Nishioka*,[688] an injunction against an initiative "on the ground that the circulating initiative petition contained false statements intended to mislead voters and induce them to sign the petition" was affirmed.[689] In short, "when presented with a petition by a circulator, voters have a right to rely on the integrity of the initiative process and the accuracy of the petition . . . ."[690] In the court's words:

> Nevertheless, the people also have a right to rely on the integrity of the initiative process from beginning to end. Because the initiative process bypasses the normal legislative process, safeguards are necessary to prevent abuses and provide for an informed electorate. Ordinary citizens with a sense of trust should be able to believe in the accuracy of what they are signing.[691]

This presents a potential dilemma. On the one hand, the people have reserved an important power and there is a constitutional right that must be zealously protected. On the other, there is a risk of abuse in invoking a "drastic"[692] tool, and the integrity of the electoral process and principle of representative government must be reasonably protected. It is in this context that the procedural

685. *Montanans for Justice*, 146 P.3d at 777.

686. Montanans for Justice v. State, No. CDV-06-1162(d) (Mont. 2006), *available at* http://www.yellowstonepublicradio.org/documents/Initiatives.pdf.

687. *Montanans for Justice*, 146 P.3d at 777–78.

688. San Francisco Forty-Niners v. Nishioka, 89 Cal. Rptr. 2d 388 (Cal. Ct. App. 1999).

689. *Id.* at 390. While the ballot box may be the "sword of democracy," and courts "jealously guard" the "people's right" to the referendum, it is clear that election officials have a ministerial duty to reject initiative petitions which suffer from a substantial defect that directly affects the quality of information provided to the voters. *Id.* at 393. Petition deficiencies that threaten the proper operation of the process justify rejection. *Id.*

690. *Id.* at 397.

691. *Id.*

692. Tyler v. Sec'y of State, 229 Md. 397, 403, 184 A.3d 101, 104 (1962) (citations omitted).

mechanism to review the action of the administrative agency must be deployed.

E. The Twin Goals of the Validation and Verification Process Should Be to Ascertain that a Sufficient Number of Actual Voters Knowingly Affixed Their Signatures to Signature Pages in a Process That Contained Sufficient Safeguards Against Fraud, Misrepresentation and Mistake

The goals to be protected by State election officials and courts are well defined: "Clearly, the provisions of [Article XVI] will be furthered if, by proper and reasonable means, a referendum petition is to be put upon the ballot only if it has the requisite number of genuine signatures of registered voters."[693] The "overarching goal of the entire Petition Subtitle is to ensure that only eligible voters sign petitions . . . ."[694] The process is designed to ensure "a sufficiently extensive demand by voters of more than one of the designated political subdivisions of the state."[695]

Validation and verification should be defined to ensure that a sufficient number of actual voters knowingly affixed their signatures to pages in a process that contained sufficient safeguards against fraud, misrepresentation, and mistake. The process mandates that either the full text, or a fair and accurate summary, of the measure to be referred be printed on or attached to the pages. This provides sufficient information to a potential signer and meets the requirement of "knowingly" affixed.[696] Cross-checking the voter registration rolls

693. Burroughs v. Raynor, 56 Md. App. 432, 440, 468 A.2d 141, 144 (Md. Ct. Spec. App. 1983) (quoting Barnes v. Pinkney, 236 Md. 564, 571, 204 A.2d 787, 791 (1964)); Burruss v. Bd. of Cnty. Comm'rs, 427 Md. 231, 267, 46 A.3d 1182, 1203 (2012).

694. Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 618, 30 A.3d 245, 254 (Md. Ct. Spec. App. 2011) (quoting Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 473, 15 A.3d 798, 801 (2011)). The *Fire-Rescue* dissent noted: "We disagree. The express goal of §6-207 'is to ensure that the name of the individual who signed the petition is listed as a registered voter.'" *Volunteer Fire-Rescue Ass'n*, 418 Md. at 488–89, 15 A.3d at 813 (citing MD. CODE ANN., ELEC. LAW § 6-207(a) (LexisNexis 2010)).

695. Phifer v. Diehl, 175 Md. 364, 367, 1 A.2d 617, 618 (1938).

696. In *Mich. Civil Rights v. Bd. of State Canvassers,* one justice wrote: "A necessary assumption of the petition process must be that the signer has undertaken to read and understand the petition. Otherwise, this process would be subject to perpetual collateral attack, and the judiciary would be required to undertake determinations for which there are no practical legal standards and which essentially concern matters of political dispute." 475 Mich. 905, 905 (2006).

ensures that only the names of registered voters will be counted. Requirements such as the circulator's affidavit create a presumption that the signature was affixed by the voter, not by improper procedures such as forgery. As a matter of policy, the General Assembly may wish to evaluate whether this is sufficient in light of the procedures of the boards of election, standards applicable to circulators' affidavits, and the applicable standard of adjudication in the courts.

F. The Statute Could Provide A More Comprehensive Framework for Review

The General Assembly may choose to specify an explicit paradigm explaining the canons of construction.[697] Rather than applying either a liberal or strict construction, the legislature may choose to specify that petitions are to be construed to effectuate two consistent purposes.[698]

There may[699] be significant differences between a petition for judicial review, a request for mandamus, and a complaint for injunctive and declaratory relief. In some referenda challenges, evidentiary hearings have been held and testimony taken. For example, in one mandamus proceeding, a sponsor's "representative testified" about signatures.[700] In *Gelbman*, circulators were deposed.[701] In a recent judicial review case, however, testimony was excluded.[702]

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697. The court of appeals has noted: "The primary issue before us is one of statutory construction." Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 512 n.11, 44 A.3d 1002, 1016 n.11 (2012); *accord* Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 469, 15 A.3d 798, 804 (2011) ("In the instant case, we concluded that the particular statutory provision at issue, i.e., §6-203(a)(1), is clear and unambiguous . . . ."). Therefore, nothing prevents the legislature from setting forth rules of construction.

698. *See* Whitley v. Md. State Bd. of Elections, 429 Md. 132, 166, 55 A.3d 37, 57–58 (2012); Town of La Plata v. Faison-Rosewick, LLC, No 68, 2013 WL 5354355 (Md. Sep. 25, 2013).

699. In many instances, there may be no factual dispute and the differences between procedural mechanisms may be non-existent.

700. Sec'y of State v. McLean, 249 Md. 436, 441, 239 A.2d 919, 922 (1968) ("Albritton testified"); Bd. of Educ. of Frederick Cnty. v. Mayor & Aldermen of Frederick, 194 Md. 170, 176, 69 A.2d 912, 915 (1949).

701. *See supra* note 333 and accompanying text.

702. Citizens Against Slots at the Mall v. PPE Casino Resorts Md., LLC, 429 Md. 176, 199 & n.12, 55 A.3d 496, 510 & n.2 (2012).

If a circuit court entertains a challenge to the administrative decision of an election board under principles of judicial review, the standard of review may be deferential and the ability to introduce evidence during the judicial review process limited.[703] If, however, the rubric is a complaint for declaratory judgment, injunctive relief, or mandamus in their conventional sense, discovery and an evidentiary hearing may be permissible. Thus, especially in the context of a challenge filed shortly before an election, the choice of procedural mechanism may have significant ramifications.

It might be helpful if the General Assembly were to set forth a uniform standard or standards for review of referendum petitions. In *Citizens Against Slots at the Mall*, for example, the circuit judge "reviewed the entire agency record" that consisted of 40,408 signatures on 4,998 pages.[704] That type of painstaking review, while appropriate in that case, should be rendered unnecessary in a review proceeding. It may be beneficial to define procedures to address allegations of petition misconduct in light of the accelerated pace of State and county referendum litigation and the policies and procedures of boards of elections in addressing such issues.

G. State Constitutional Parameters for Legislation Governing Referenda.

Legislation implementing the right to referendum must be reasonable and avoid undue burden.[705] The court of appeals, faced with a state constitutional challenge to the signature statute, stated that it must "first consider, in a realistic light, the extent and nature of the burden placed upon voters when determining what level of scrutiny to apply to a constitutional challenge that implicates voting

703. MD. CODE. ANN. ST. GOVT. section 10-222(f)(1) provides that judicial review "shall be confined to the record for judicial review supplemented by additional evidence taken pursuant to this section." Subsection (2) authorizes a reviewing court to order that an agency take additional evidence under specified circumstances. *Id.* Under §10-222(g)(2), a party may offer evidence outside the record that relates to irregularities in procedure. The court of appeals interpreted the predecessor statute in *Consumer Protection Div. v. Consumer Pub. Co.*, 304 Md. 731, 749, 501 A.2d 48, 57 (1985). For a more complete discussion, see A. ROCHVARG, PRINCIPLES AND PRACTICE OF MARYLAND ADMINISTRATIVE LAW § 13.22 at 176-77 (Carolina Academic Press 2011). As noted *supra* at note 647, a pending decision may clarify the standard of review.

704. PPE Casino Resorts Maryland, LLC v. Anne Arundel Co. Bd. of Supervisors of Elections, Case No. 02-C-10-149479, slip op. at 31 (Cir. Ct. Anne Arundel Co. Jun. 25, 2010), *rev'd on other grounds*, 429 Md. 176, 55 A.3d 496 (2012).

705. Barnes v. State *ex rel.* Pinkney, 236 Md. 564, 573, 204 A.2d 787, 791–92 (1964).

and associational rights."[706] Where, as in the case of signature requirements, it is minimal, the court applied rational basis scrutiny and held the requirement constitutional.[707] The statute arrived in court with "a strong presumption of constitutionality . . . ."[708] That presumption was not overcome in the context of a challenge under Articles 7 and 24 of the Declaration of Rights[709] and a "reasonable non-discriminatory measure" will be sustained.[710]

While the United States Constitution does not require that a state create a right of referendum, "if a State does create such a procedure, the State cannot place restrictions on its use that violate the federal Constitution."[711] Once the right is created, "the exercise of that right is protected by the First Amendment applied to the States through the Fourteenth Amendment."[712] Thus, neither state law nor a state constitution may impermissibly burden the right.[713]

Generally, however, signing a petition is not entitled to the same protection as exercising the right to vote.[714] Thus, in rejecting claims that the signature statute violated the right of protected political speech, right to petition, and right to associate, it has been held that the requirement is content-neutral, non-discriminatory, and permissible under the First Amendment to the United States Constitution.[715] Equal protection, as well as procedural and

706. Burruss v. Bd. of Cnty. Comm'rs, 427 Md. 231, 253, 46 A.3d 1182, 1195 (2012).

707. *Id.*; Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 732 n.28, 962 A.2d 342, 363 n.28 (2008) ("[T]he mandatory signature requirements of Section 6-203(a)(1) are not unduly burdensome, requiring a signer to provide only a surname, one full given name, the initials of any other names, the signer's address and date of signing.").

708. *Burruss*, 427 Md. at 263, 46 A.3d at 1201.

709. *Id.* at 265, 46 A.3d at 1202. The court also rejected a challenge under the Maryland Constitution, article XI-A, sections 1A and 7. Because of the specific nature of that provision, it is not discussed in this article.

710. *Id.* at 253, 46 A.3d at 1195.

711. Kendall v. Howard Cnty., No. JFM-09-660, 2009 WL 3418585, at *4 (D. Md. Oct. 20, 2009) (citing Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 295 (6th Cir. 1993), *aff'd,* Kendall v. Balcerzak, 650 F.3d 515 (4th Cir. 2011)). The circuit court in *Petition of Howard Cnty. Citizens for Open Gov't*, No. 13-C-076855AA (Cir. Ct. How. Co. Apr. 27, 2010), *aff'd,* 201 Md. App. 605 (Md. Ct. Spec. App. 2011), also relied on *Austin*.

712. *Kendall*, 2009 WL 3418585 at *4 (citing Stone v. City of Prescott, 173 F.3d 1172, 1175 (9th Cir. 1999)).

713. *Id.* (citations omitted).

714. *Id.*

715. *Id.* at *5–6.

substantive due process challenges to validation and verification, have been rejected.[716]

Thus, "[w]hile the referendum process enjoys a considerable degree of constitutional protection, the State may regulate the referendum process in reasonable, content neutral, nondiscriminatory manner."[717] Signature requirements have been repeatedly upheld against challenge.[718]

Participants do not have a constitutional right to observe petition processing by boards of election.[719] Procedural due process does not confer a right to participate.[720] The rationale is that an election board must complete verification within twenty days and, because a sponsor may present arguments to a court sitting in judicial review, there is no prejudice.[721] As noted above, the election board's "limited resources should be focused on the 'large and difficult' task of validating and verifying thousands of signatures in this compressed time-frame" and that presents a policy question.[722]

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716. *Id.* at *6–9. On the procedural due process issue, the District of Maryland quoted *Protect Marriage Illinois v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006), for the proposition that: "The cost of allowing tens of thousands of people to demand a hearing on the validity of their signatures would be disproportionate to the benefits, which would be slight because the state allows the organization orchestrating a campaign to put an advisory question on the ballot . . . to challenge the disqualification of any petitions. Nor is it clear to us what right of liberty or property (an essential predicate of a due process claim) the plaintiffs have been deprived of by being required to comply with the requirements of state law." *Id.* at *8. The District of Maryland noted that, under MD. CODE ANN., ELEC. LAW § 6-209(a)(1), any person aggrieved by a deficiency determination may seek judicial review. *Id.* at *9.

717. Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 623, 30 A.3d 245, 256 (Md. Ct. Spec. App. 2011).

718. *Id.* at 623, 30 A.3d at 256 ("[Section] 6-203[, which imposes signature requirements,] is a reasonable and content neutral regulation of the referendum process."); Barnes v. Maryland, *ex rel* Pinkney, 236 Md. 564, 571–72, 204 A.2d 787, 791 (2008); Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 729–32, 962 A.2d 342, 361–62 (2008).

719. *See supra* Part II.A.9.d; Preisler v. Calcaterra, 243 S.W.2d 62, 65–66 (1951).

720. *Howard Cnty. Citizens for Open Gov't.*, 201 Md. App. at 631–32, 30 A.3d at 261–62.

721. *Id.*

722. *See supra* Part II.A.9.d, citing Sec'y of State v. McLean, 249 Md. 436, 439–40, 239 A.2d 919, 921 (1968) ("One of Taxpayers' signature gatherers promptly convinced the Secretary that he had overlooked 5,000 signatures . . . by finding them in a box in a cabinet in the Secretary's office[, discussing] a meeting [with the] Secretary."); Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 501, 44 A.3d 1002, 1010 (2012) ("constructive discussions between the parties" resulted in the board of elections crediting additional signatures); *Howard Cnty. Citizens for Open Gov't.*, 201 Md. App. at 610–11, 30 A.3d at 249; Kendall v. Balczerak, 650 F.3d 515, 519 (4th

VIII. RECENT LEGISLATIVE PROPOSALS TO AMEND THE REFERENDUM AND INITIATIVE PROCESSES

Proposals to change the referendum and introduce the initiative process have been introduced in three recent sessions of the General Assembly. Proponents of legislative change contend that the process, "designed in the era before electronic signatures needs a fresh look."[723] Some have opined that the law makes it "too easy" to petition.[724] Others have vigorously disagreed[725] and appellate courts

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Cir. 2011) ("[The Board] sent an email to several persons involved in the referendum process requesting their presence at a meeting of the County Board the following evening."); Anne Arundel Cnty. v. McDonough, 277 Md. 271, 286, 354 A.2d 788, 797 (1976).

723. Erin Cox, *Petition Process Under Scrutiny*, BALT. SUN, Jan. 9, 2013, A3. "State leaders contemplate changes to referendum process." *Id.* Gov. O'Malley stated that it has "probably been made a little too easy" to refer laws. *Id.* The comments were apparently in response to Del. Neil Parrott "who developed the website mdpetitions.com that allowed voters to download petitions and submit them. . . . Some described him as having granted the minority party its most effective tool against the Democratic supermajority that dominates both chambers of the General Assembly." *Id.* As indicated in note 5, above, however, what is "reform" to proponents may constitute suppression to opponents. Thus, for example, while a sponsor of the Referendum Integrity Act described it as a fraud-prevention measure, an opponent described it as "death by a thousand cuts. . . ." Associated Press, "Bill could make it tougher for Md. ballot measures," The Daily Record, Mar. 20, 2013, http://thedailyrecord.com/2013/03/20/death-penalty-referendum-seems-unlikely/.

724. Erin Cox, *Petition Process Under Scrutiny*, BALT. SUN, Jan. 9, 2013, A3.

725. Editorial, "A Referendum on Referendums," BALT. SUN, Nov. 12, 2012, http://www.baltimoresun.com/news/opinion/editorial/bs-ed-petition-20121112,0,1385554.story#sthash.oVWGav7Y.dpuf. The editors responded:

> Our view: The criticism by Gov. O'Malley and others in Annapolis that petitioning a law to referendum has become 'too easy' is a bit too easy, too. . . . We don't blame supporters of the Dream Act and same-sex marriage for lamenting the inconvenience of a referendum. After working so hard for so long to win General Assembly approval, they had to mount expensive campaigns to keep the laws on the books. But not to be too Pollyannaish about this, what they ended up with — laws that everyone now knows have the support of a majority of voters — actually benefits their causes. . . . Obviously, a balance must be struck over how difficult it is to petition a new law to ballot. Too easy and people would do it on everything just to be contrarian; too hard and a state already dominated by one party would truly be without a viable option to express dissent. What Maryland has now seems entirely reasonable and perhaps improved by Mr. Parrott's efforts. Legislators are welcome to explore the

have described the petition process as one that is not easy.[726] In response to calls to make it more difficult, a news editorial replied: "Let's not discourage participatory democracy quite so quickly. There might actually be something to it."[727]

Recent legislative proposals regarding direct democracy may be grouped into three broad categories: (A) expansion such as eliminating the "appropriations exception" and establishing the initiative;[728] (B) increased regulation by imposing additional requirements and providing additional safeguards against fraud in the

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> subject when they reconvene in January, but they should be reluctant to deny voters this periodic chance to make their voices heard."

Id.; *see infra* note 731.

726. Town of Oxford v. Koste, 204 Md. App. 578, 588–89, 42 A.3d 637, 643–44 (Md. Ct. Spec. App. 2012), *aff'd*, 431 Md. 14, 31,63 A.3d 582, 594(2013) ("We echo the Court of Special Appeals's sentiment that the referendum process is intended to be a rigorous one to complete and the hurdles that stand in the way of a referendum are meant to be cleared only by voters who demonstrate a high level of diligence."). In *Koste,* the court noted "the legitimate concern that legislative governance could be slowed down dramatically if referendum elections were too frequent occurrences. If referendum elections were to become a more routine occurrence, it would take substantially longer and exhaust substantially more resources for laws to become enacted (if at all), thus stagnating potentially the legislative process." *Id.* at 33-34, 42 A.3d at 594.

727. The Editorial stated:

> "Clearly, what concerns Mr. O'Malley and others are the efforts of Del. Neil Parrott, the Washington County Republican who brought referendums to the Internet age. Instead of relying entirely on the manpower-intensive process of collecting signatures on the street, he set up a website that made the signature collection process more convenient and accurate. . . . We'd rather have Mr. O'Malley and others, Democrat or Republican, looking for ways to encourage public participation in government decisions rather than looking into ways to discourage it. "

Editorial, "A Referendum on Referendums," BALT. SUN, Nov. 12, 2012, http://www.baltimoresun.com/news/opinion/editorial/bs-ed-petition-20121112,0,1385554.story#sthash.oVWGav7Y.dpuf.

728. H.B. 43, 2012 Leg., Reg. Sess. (Md. 2012); H.B. 871, 2012 Leg., Reg. Sess. (Md. 2012) (proposed establishing the initiative); H.B. 10, 2011 Leg., Reg. Sess. (Md. 2011); H.B. 31, 2010 Leg., Reg. Sess. (Md. 2010) (proposed abolishing the appropriations exception). See also *supra* notes 41-42, regarding proposed amendments to MD. CONST. art. XVI.

referendum petition circulation process;[729] and (C) accelerated disclosure of financial contributions and expenditures.[730]

A. Unsuccessful Efforts to Expand the Referendum by Elimination of the "Appropriations Exception," and Establish the Initiative

In recent legislative sessions, some Republican[731] members of the House of Delegates have sought to expand direct democracy through proposed constitutional amendments eliminating the appropriations exception and establishing the initiative.[732] Proposals to eliminate the appropriations exception[733] have not made it out of Committee, each year receiving an unfavorable report from the House Appropriations Committee.[734] In the 2012 session, many of the same sponsors introduced House Bill 871, which would have amended the constitution by establishing an initiative process.[735] House Bill 871 was submitted to the House Rules and Executive Nominations Committee, but also failed to make it out of Committee.[736]

729. *See, e.g.*, Maryland Referendum Integrity Act, H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012).

730. *See* H.B. 1275, 2012 Leg., Reg. Sess. (Md. 2012) (bills on public reporting for referendum petitions). *See* Campaign Finance Reports, H.B. 378, Ch. Law 409, 2010 Leg., Reg. Sess. (Md. 2010) (effective law on reporting of expenditures and contributions of Ballot Issue Committees).

731. Expansion of direct democracy may be viewed as shifting the balance of power. *See supra* note 5 and text accompanying notes 723-27 and 737-41.

732. H.B. 43, 2012 Leg., Reg. Sess. (Md. 2012); H.B. 871, 2012 Leg., Reg. Sess. (Md. 2012); H.B. 10, 2011 Leg., Reg. Sess. (Md. 2011); H.B. 31, 2010 Leg., Reg. Sess. (Md. 2010).

733. *See* H.B. 43, 2012 Leg., Reg. Sess. (Md. 2012); H.B. 10, 2011 Leg., Reg. Sess. (Md. 2011); H.B. 31, 2010 Leg., Reg. Sess. (Md. 2010). Substantively, the proposed bill would have amended the operative clause for the appropriations exception in article XVI, section 2, to provide: "A law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this section." H.B. 43, 2012 Leg. Reg. Sess. (Md. 2012).

734. *See* Maryland Department of Legislative Affairs, 2012 Session, Fiscal and Policy Note, House Bill 42. For the procedural history of H.B. 43 (2012 Sess.), *see*, http://mlis.state.md.us/2012rs/billfile/hb0043.htm.

735. *See* H.B. 871, 2012 Leg. Reg. Sess. (Md. 2012).

736. *See* H.B. 871, 2012 Leg. Reg. Sess. (Md. 2012).

B. The Push for Further Regulation of the Referendum Process and The Maryland Referendum Integrity Act

In an effort to further regulate the referendum petition circulation process, a group of House Democrats proposed the Maryland Referendum Integrity Act as House Bill 127 during the 2012 session, and House Bill 493 during the 2013 session.[737] The Maryland Referendum Integrity Act (the "Proposed Integrity Act") would have engrafted additional requirements on the current framework for direct democracy.[738]

The Proposed Integrity Act would have addressed some areas of the referendum petition process where there is a high perceived potential for misconduct.[739] Specifically, it would have required more of signatories and circulators than currently is necessary,[740] while extending the period within which to seek judicial review of referendum petition sufficiency, making challenges easier.[741] While they parallel each other in many ways, H.B. 127 and H.B. 493 differed in significant ways.

For example, H.B. 127 would have required signatories to personally handwrite identifying information to be provided with the signed petition;[742] a heightened requirement from the current provision that simply requires the identifying information to be

737. *See* H.B. 493, 2013 Leg., Reg. Sess. (Md. 2013); Maryland Referendum Integrity Act, H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012).

738. H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012)..

739. *Id.*

740. Other jurisdictions have imposed higher requirements in different ways. Voters in Howard County, MD, approved a measure increasing the number of votes necessary to refer a county measure. Arthur Hirsch, *Howard Voters Raised Bar for Petitions, but Did They Know It?*, BALT. SUN (Nov. 8, 2012), http://articles.baltimoresun.com/2012-11-08/news/bs-md-ho-results-resultsballot-20121107_1_signatures-charter-change-charter-review-commission.

741. Untimely challenges have been universally rejected. *E.g.*, Canavan v. Md. State Bd. of Elections, 430 Md. 533, 61 A.3d 828 (2013) (per curiam).

742. This proposed requirement was likely in response to the advent of computer-facilitated signature pages. In *Whitely v. Md. State Bd. of Elections,* 429 Md. 132, 55 A.3d 132 (2012), and *Doe v. Md. State Bd. of Elections*, 428 Md. 596, 53 A.3d 1111 (2012), the court described the use of these techniques. Specifically, in *Whitely*, the court of appeals stated: "The site's computer software allowed a user to generate electronically a petition signature page by entering his or her identifying information in specified fields on the website. The registered voter then could print the page, affix his or her signature, complete the required petition circulator's affidavit attesting to the genuine nature of his or her signature, and submit it to the petition sponsor in support of referring SB 1 to the ballot." *Whitely*, 429 Md. at 135–36, 55 A.3d at 39–40.

included with the petition in "printed" or "typed" form.[743] The proposal also would have added a requirement that the circulator's affidavit be notarized when the petition circulator signs the affidavit attesting that the circulator was in the presence of the signatories to the petition when the petition was signed.[744] Additionally, it would have extended the period of time within which to request judicial review of a petition sufficiency determination, from ten to thirty days after a sufficiency determination.[745]

H.B. 493 would have added technical requirements. For example, in addition to the current requirements, signatories would have been required to affix their date of birth and address, "as the address appears on the statewide voter registration list."[746] Notably, under the proposal, the signature pages would be required to contain "[a] statement notifying signers that information provided on a petition is subject to public disclosure. . . ."[747] Instead of the single affidavit now required, circulators would have been required to write their initials next to each signature "at the time that the signature is affixed. . . ."[748] "Self-circulation," a process currently permissible,[749]

743. *See* H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012). House Bill 127 proposed a change to MD. CODE ANN., ELEC. LAW § 6-203(a)(2) (2010) that would have required each signatory to a referendum petition to "provide" identifying information required by the current statutory framework "in the individual's own handwriting." *Id.*

744. *See id.*

745. *See id.* House Bill 127 proposed a change to ELEC. LAW § 6-210(e)(1) to allow judicial review to be "sought by the 30th day following the determination to which it relates." H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012). The current language allows judicial review to be "sought by the 10th day following the determination to which it relates." ELEC. LAW. § 6-210(e)(1).

746. H.B. 493. Interestingly, the House Ways and Means Committee bill file to H.B. 493 indicates an "Amendment to H.B. 493" that would have provided after the word "signed," "but a common law name shall suffice for the purposes of signing a petition in accordance with the right to use one's common law name under the Maryland Constitution."

747. *Id.* This requirement could make it more difficult to obtain signatures. Recently, media reports indicated that an employee was disciplined for signing a referendum petition. *See, e.g.*, Annie Linskey, *Galludet Official Suspended for Signing Anti-Gay Marriage Petition*, BALT. SUN, Oct. 12, 2012, at 3. The proposed warning may be contrasted with other bills introduced to provide a degree of confidentiality. *See infra* notes 833-34.

748. *Id.*

749. Whitely v. Md. State Bd. of Elections, 429 Md. 132, 55 A.3d 37 (2012). One proponent of permitting self-circulation analogized it to submittal of an absentee ballot. Written testimony of Mr. Steve Struharik on HB 493. Testimony of Paul Jacob, President of Citizens in Charge & Citizens in Charge Foundation, provided additional reasons for permitting self-circulation. Whether or not those arguments are sound is a policy question.

would have been prohibited.[750] Circulators would be required to take an "online training course," provided free of charge.[751] Restrictions would have been placed on computer-facilitated signature pages and the petition sponsor would have been required to form a ballot committee before soliciting signatures, and file campaign finance reports.[752] The Bill also would have provided that the "responsible officers of a petition sponsor's ballot issue committee shall be a party to any proceeding to test the validity of the petition."[753]

The Proposed Integrity Act would have prohibited certain practices in the petition circulation process by codifying new criminal violations of the election law article and also prohibited individuals convicted of criminal violations of the election law article from serving as referendum petition circulators.[754] It would have criminalized the act of promising compensation or bonuses to petition circulators based on the number of petition signatures collected, while also criminalizing the act of willfully or knowingly accepting such compensation.[755]

House Bill 127 from the 2012 legislative session and House Bill 493 from the 2013 legislative session are among the most extensive attempts to substantially change the framework through which referendum petitions are circulated and signatures gathered.[756] House Bill 127 was set for hearing in the House Ways and Means Committee, but the Bill did not make it out of committee.[757] Per the Maryland General Assembly website, House Bill 493 was set for a

750. H.B. 493.

751. *Id.* In its testimony in support of S.B. 673, the companion to H.B. 493, Maryland Common Cause supported the "increase[d] transparency" under the Proposed Integrity Act, but suggested that "[t]here should be a de minimus threshold of names the circulator must gather before being required to complete the online training course. . . ."

752. *Id.*

753. *Id.*

754. *See* H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012).

755. *Id.* The same language was carried over into the 2013 legislative session. *See* H.B. 493, 2013 Leg., Reg. Sess. (Md. 2013)

756. *See* H.B. 123, 2001 Leg., Reg. Sess. (Md. 2001). Aside from the referendum petition bills proposed in the 2012 and 2013 legislative sessions, the most recent alteration of this election law was in 2001, but involved only the method in which these referendum questions were identified and presented to SBE and to the public. *See id.*

757. H.B. 127, 2012 Leg., Reg. Sess. (Md. 2012). The Maryland Senate did not take action on the bill. *See id.*

hearing and debate on February 21, 2013; however, it was not enacted.[758]

The prohibition on "bounties," i.e., paying circulators per signature gathered, is illustrative of the difficulty in developing regulatory systems.[759] It seems intuitively plausible that the state should be permitted to ban a process that, on its face, appears similar to unlawful vote buying.[760] That conclusion, however, is not free from doubt and "bounties," or pay-per-signature plans have been supported as nothing more than reasonable, well-accepted productivity incentives.[761]

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758. Referendum Integrity Act, H.B. 493, 2013 Leg., Reg. Sess. (Md. 2013)

759. *See* Erin Cox, *State Leaders Contemplate Changes to Referendum Process,* BALT. SUN (Jan. 8, 2013), http://articles.baltimoresun.com/2013-01-08/news/bs-md-referendum-reform-proposed-20130108_1_petition-process-website-mdpetitions-com-petition-drives (discussing how "bounty systems" which pay circulators for signatures collected can be beneficial to the democratic system but may also lead to fraud).

760. There are other similar prohibitions codified within Maryland's election law. *See* MD. CODE ANN., ELEC. LAW § 16-401(a) (LexisNexis 2010) (prohibiting a person from willfully and knowingly offering anything of value for the purpose of influencing another's decision to sign a petition). A violation of section 16-401 is a misdemeanor, punishable by "a fine of not less than $10 nor more than $250 or imprisonment for not less than 30 days nor more than 6 months or both." *Id.* Moreover, a convicted violator is permanently disqualified from serving in a decision-making capacity in the election process and ineligible to work within a public office for five years after conviction. *See id.* at § 16-1001 (LexisNexis 2010).

761. *See supra* note 768; Jay M. Zitter, *Validity, Construction, and Application of State Statutes Regulating or Proscribing Payment in Connection with Gathering Signatures on Nominating Petitions for Public Office or Initiative Petitions*, 40 A.L.R. FED. 317, 326 (2008) (featuring a discussion of the necessity and value of paid signature gatherers in modern democracy). Mr. Paul Jacob suggested that per-signature payment is a productivity measure and "there is absolutely no evidence to suggest that a criminal ban on productivity pay has any effect in reducing fraud." Testimony of Paul Jacob, President of Citizens in Charge & Citizens in Charge Foundation. He rhetorically asked: "How would a petition company lawfully let go an hourly worker for not gathering enough signatures or not gathering any signatures at all? . . . Would it be illegal. . . for a petition company to raise their [sic] compensation of a professional petition circulator in the future based on the good job that person did in Maryland. . . .?" He suggested that similar bans have been struck down in five states. In Independence Inst. v. Buescher, 718 F.Supp.2d 1257, 1262-63 (D. Col. 2010), there was evidence that hourly payment doubled the cost over per-signature payment, and "[b]ased on the evidence presented at the hearing, the Court finds that the effect of § 1-40-112(4) is to raise the cost per signature for a ballot petition campaign by at least 6% to 18% and potentially as much as a dollar per signature." Based on the evidence presented, the *Buescher* court found "that pay-per-signature compensation is no more likely than pay-per-hour compensation to induce fraudulent signature gathering or to increase invalidity rates." *Id.* at 1267. Three years of litigation followed. 2010

Before the Supreme Court's decision in *Meyer v. Grant*,[762] many jurisdictions banned professional, or "paid," circulators.[763] After all, paid interlopers did not fit the mold of the Populist and Progressive petitioners, i.e., citizens seeking to thwart corrupt legislatures that were influenced by special interests.[764] The Supreme

U.S.Dist.Lexis 92946, *30 (D.Col. Aug. 13, 2010) (reiterating holding), subsequent decision, 2010 U.S.Dist.Lexis 10082 (D.Col. Sep. 10, 2010) (attorneys' fees), subsequent decision, 2011 U.S.Dist.Lexis 26848 (D. Col. Mar. 2, 2011) (discovery order), 2011 U.S.Dist.Lexis 75074 (D. Col. Jul. 6, 2011) (same), subsequent decision, 2012 U.S.Dist.Lexis 38025 (D. Col. Mar. 21, 2012) (motion to exclude expert on grass roots organizing and direct democracy), subsequent decision, 2012 U.S.Dist.Lexis 38028 (D. Col. Mar. 21, 2012) (motion to disqualify expert on pay-per-hour signature petition drives and impact of hourly compensation), subsequent decision, 2012 U.S.Dist.Lexis 38029 (D. Col. Mar. 21, 2012) (motion to exclude expert on economic impact of ban on pay-per-signature scheme), subsequent decision, 869 F.Supp.2d 1289, 1297, 1309 (D. Col. 2012) (motion for summary judgment reiterating prior holding enjoining ban and noting need for "fact-intensive inquiry"), subsequent decision, 936 F.Supp.2d 1256 (D. Col. 2013) (deciding after trial that evidence demonstrated that pay-per-signature ban raised cost of petitioning by at least 18%, reduced circulator efficiency, had no measurable impact on validity rates, and did not impact the rate of fraud), subsequent decision, 2013 U.S. Dist.Lexis 81833, *2 (D. Col. Jun. 11, 2013) (concluding three years of litigation). After trial, the *Buescher* court concluded that "[f]rom a theoretical standpoint pay-per-hour signature gathering, rather than pay-per-signature gathering, incentives fraud. However, the evidence at trial of actual fraud was minimal and established that fraud occurs under both pay-per-hour and pay-per-signature systems because some individuals are simply prone to commit fraud." *Id.* The *Buescher* court also found that the evidence relied on by the Colorado legislature was insufficient to justify the ban. *Id.* As such, if future legislative action is contemplated, the pay-per-signature issue may be worthy of empirical study. *see, id.* at 1272, 1277 ("failure of proof is a common theme in the cases on pay-per-signature petition circulating," and there has been fraud under both models); Term Limits Leadership Council, Inc. v. Clark, 984 F.Supp. 470, 472-73 (S.D. Miss. 1997) (requiring more than "legislators' perception that payment per signature encouraged fraud," and noting: "[U]ncontroverted evidence that out-of-state circulators have not been willing to work on any basis other than a payment per-signature basis. Additionally, there was uncontroverted evidence that payment of a flat daily rate to Mississippi circulators had yielded poor results. That is, they collected far fewer signatures than those paid per signature. On the basis of this proof, it is apparent that the statutes under consideration make it 'less likely' that plaintiffs will be able to garner a sufficient number of signatures to place their initiative on the ballot, and that the statutes 'thus limit[] their ability to make the matter the focus of statewide discussion.' *Meyer*, 486 U.S. at 423, 108 S. Ct. at 1892. Thus, according to the analysis in *Meyer*, the statutes burden plaintiffs' political expression.").

762. Meyer v. Grant, 486 U.S. 414 (1988).

763. *See* Zitter, *supra* note 761, at 326.

764. *See The Populist and Progressive Era*, CITIZENS IN CHARGE, http://www.citizensincharge.org/learn/history/the-populist-and-progressive-era (last visited Aug. 30, 2013).

Court, however, held those bans to be unconstitutional[765] and proponents of referenda and initiatives around the country have often turned to professional signature collectors as a means by which to obtain the requisite number of votes.[766] Maryland is no exception.[767]

The Proposed Integrity Act, however, would not present an outright ban on paid circulators.[768] Proponents might describe the criminal prohibition on providing and receiving compensation or bonuses on the basis of number of signatures gathered as a limited regulation that fosters the important state interest of discouraging fraud in the referendum petition circulation process.[769]

In *Meyer v. Grant*, proponents of an amendment to the Colorado Constitution contended that "they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time,"[770] but the statute at issue rendered it a felony to pay petition circulators.[771] In holding the statute to be unconstitutional, the Court reasoned that "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change."[772] Thus, during the petition circulation process, an "interactive

765. *Meyer*, 486 U.S. at 428.

766. Zitter, *supra* note 761, at 317.

767. *E.g.*, Alison Knezevich, *Baltimore County Zoning Referendum Fight Puts Spotlight on Hired Petition Companies*, BALT. SUN (Jan. 31, 2013), http://www.baltimoresun.com/news/maryland/baltimore-county/bs-md-co-petition-companies-20130114,0,1437012.story (describing a recent referendum petition drive in Maryland in which paid professional circulators were accused of lying to gain signatures and inspiring at least one physical altercation). Del. Eric Luedtke sponsored HB 493 in an attempt to eliminate these alleged or perceived types of misconduct. *See* HB 493, 2013 Leg., Reg. Sess. (Md. 2013), at 1.

768. *See* Referendum Integrity Act, H.B. 493, 2013 Leg., Reg. Sess. (Md. 2013); Referendum Integrity Act, S.B. 673, 2013 Leg., Reg. Sess. (Md. 2013).

769. *See* Knezevich, *supra* note 767 (noting that other states have tried to regulate the petition industry).

770. *Meyer*, 486 U.S. at 417. The text of the statute at issue stated:

> Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. (1973).

Id. at 416 n.1 (citing COLO. REV. STAT. § 1-10-110 (1980)).

771. *Id.* at 416–17.

772. *Id.* at 421.

communication" takes place between petition circulators and prospective signatories that involves "core political speech."[773]

The supporters of the ban on paid circulators argued that even if the statute imposed some limitation on First Amendment expression, because other avenues of expression remained open, the burden was permissible.[774] The Court was not persuaded, reasoning that "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."[775] Justice Stevens explained how the ban on paid petition circulators restricted political expression, stating:

> First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.[776]

The Court's reasoning was rooted in the idea of "quantity of expression,"[777] meaning that payment to circulators allows an individual to engage more people in core political speech than if such payment were prohibited.[778] Thus, the blanket prohibition of payment to circulators was unconstitutional because the statute "restrict[ed] access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication."[779]

A few years later, the Supreme Court was faced with the question of whether another Colorado statute requiring, *inter alia*, that proponents of an initiative report names and addresses of all paid circulators and the amount paid to each violated the First Amendment.[780] Although not directly on point, the Court rejected proponents' argument that disclosure of the identities of paid circulators and not volunteers acted as a "control or check on

773. *Id.* at 421–22.
774. *Id.* at 424.
775. *Id.*
776. *Id.* at 422–23.
777. *Id.* at 419–20.
778. *See id.* at 419–22.
779. *Id.* at 424.
780. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 186, 188–89 (1999).

domination of the initiative process by affluent special interest groups."[781] The Court reasoned that "[t]he added benefit of revealing the names of paid circulators and amount paid to each circulator . . . is hardly apparent and ha[d] not been demonstrated."[782] Additionally, the Court reasoned that that ballot initiatives simply "do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates."[783] Moreover, the Court recognized the "arsenal of safeguards" already employed by Colorado to deter fraud and diminish corruption in the electoral process.[784] Taken together, *Meyer* and *Buckley* would appear to indicate that restrictions on payment of circulators may be rigorously examined because of their possible interference with core political speech.[785]

Similarly, in *State v. Brookins*, the Maryland Court of Appeals held unconstitutional a statute prohibiting payment to campaigners conducting election day related services such as "walk around services or any other services as a poll worker or distributor of sample ballots."[786] The court reasoned that, "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."[787] The court recognized that the State's interest in preventing "real or apparent corruption of the electoral process" was a compelling one; however, it did not accept the State's assertion that the statute was sufficiently narrowly tailored to accomplish that interest.[788]

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781. *Id.* at 202. Essentially, the proponents argued that the disclosure requirements allow voters to be "informed of the source and amount of money spent by proponents to get a measure on the ballot." *Id.* at 203.

782. *Id.*

783. *Id.*

784. *Id.* at 205.

785. *See id.* at *passim*; Meyer v. Grant, 486 U.S. 414, 420–24 & n.5, 428 (1988).

786. State v. Brookins, 380 Md. 345, 350, 884 A.2d 1162, 1165 (2004).

787. *Id.* at 355, 884 A.2d at 1168 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)).

788. *Id.* at 372, 884 A.2d at 1178. The State argued that the statute was narrowly tailored because (1) the provision was limited to a single day when "the danger of corruption and its appearance are at their height"; (2) the "prohibition applies only to those whose partisan election day activities are motivated by the potential corrupting influence of money"; and (3) the statute leaves open the ability to pay for "other political campaign activities that are less likely to be corrupt or appear corrupt, including providing meals for workers," transporting workers to polls, and telephoning voters. *Id.* at 370–73, 884 A.2d at 1177–79. The court disagreed with the state's analysis and concluded that the statute is not "necessary to accomplish the" goal of eliminating real or apparent corruption from the electoral process, nor was it

In some other jurisdictions, courts have held a ban on per-signature payment to circulators to be unconstitutional.[789] In *Initiative & Referendum Inst. v. Maine*, campaigners moved to invalidate the ban, arguing that their initiative petition failed because they were unable to pay professional circulators on a per-signature basis.[790] The State disagreed, pointing out that a number of other petition campaigns had been successful and blamed the circulators' lack of effort for the failure to obtain a sufficient number of signatures.[791] Because this case was decided on cross motions for summary judgment, the court accepted the campaigner's version of events, and held that the ban on per-signature payment "severely burdened their attempt to circulate an initiative petition."[792]

Of note, however, is the fact that the *Initiative & Referendum Inst.* court recognized that on its face, a pay-per-signature scheme "creates a temptation to engage in unseemly behavior (including falsifying signatures) to boost a circulator's income" and that the "[p]reservation of the integrity of the political process, including prevention of the appearance of fraud and corruption . . . is an important regulatory interest."[793] Indeed, the court went on to explain that it reached the conclusion it did in light of the standard of review at the summary judgment phase and highly disputed facts but that at trial, the ban on per-signature payments could certainly pass muster if it were "found to impose little or no burden on the initiative-petition process."[794]

In *On Our Terms '97 PAC v. Sec'y of State of Maine*, a case involving many of the same parties as *Initiative & Referendum Inst.*, the United States District Court for the District of Maine held a statute "prohibit[ing] payment to circulators of initiative and referendum petitions for the collection of signatures if that payment is based on the number of signatures collected" unconstitutional as

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"narrowly tailored to punish the targeted action without needlessly infringing the First Amendment rights of others." *Id.*

789. *See* Initiative & Referendum Inst. v. Maine, No. CIV 98-104-B-C, 1999 WL 33117172, at *1 (D. Me. April 23, 1999).

790. *See id.*

791. *See id.* at *11. The State pointed to the "brevity of the campaign (approximately three weeks), the tiny fraction of the budgeted monies expended for circulators' services . . . and the passing up on an opportunity to collect signatures during" the previous elections. *Id.*

792. *Id.* at *12.

793. *Id.* at *13.

794. *Id.*

violative of the First Amendment.[795] Discussing *Meyer*, the *Our Terms '97* court compared the pay-per-signature ban to the complete payment ban held unconstitutional in Colorado and stated that while the statute "did not completely stifle initiative and referendum activity,"[796] Maine's "supposition that professional petition circulators are more likely to commit fraud than volunteers cannot carry its burden of proving that its regulation is narrowly tailored to meet a compelling need."[797]

Citizens for Tax Reform v. Deters, involved a similar, yet distinguishable statute.[798] The challenged provision, designed to reduce the number of fraudulent signatures, made it a felony to "pay anyone for gathering signatures on election-related petitions on any basis other than time worked."[799] In short, it banned all forms of compensation other than payment on an hourly basis. Specifically, the statute at issue rendered it a felony to "receive compensation on a fee per signature or fee per volume basis for circulating any declaration of candidacy, nominating petition, initiative petition, referendum petition, recall petition, or any other election-related petition[.]"[800] The Sixth Circuit, recognizing that the elimination of fraud was certainly a compelling state interest, ultimately held that the statute was not narrowly drawn and therefore was unconstitutional.[801] While "not as draconian as the complete ban in *Meyer*," restricting circulators to volunteers and hourly workers nonetheless placed an undue burden on core political speech.[802]

Thus, a number of decisions following *Meyer* bring into question the validity of the Proposed Integrity Act's suggested ban on bounties.[803] At the other end of the spectrum, however, courts have distinguished *Meyer* and upheld statutes prohibiting pay-per-signature schemes in light of the compelling state interest in preserving the integrity of the referendum, initiative, and electoral

795. 101 F. Supp. 2d 19, 20 (D. Me. 1999). The wording of the Maine statute was similar to the Proposed Integrity Act provision; however, it is one of a few cases that considered a law similar to that proposed in Maryland and reached this result. *See id.*

796. *Id.* at 26.

797. Zitter, *supra* note 761.

798. *See* Citizens for Tax Reform v. Deters, 518 F.3d 375, 377 (6th Cir. 2008).

799. *Id.*

800. *Id.*

801. *See id.* at 387–88.

802. *Id.* at 385.

803. *See supra* text accompanying notes 780–802.

process as a whole.[804] For example, *Person v. New York State Bd. of Elections*[805] involved a statute that prohibited the payment of signature gatherers on a per-signature basis.[806] The Second Circuit distinguished a pay-per-signature prohibition from the outright ban in *Meyer* and held that "a state law prohibiting the payment of electoral petition signature gatherers on a per-signature basis does not per se violate the First or Fourteenth Amendments."[807] The court found "insufficient support for a claim that a ban on per-signature payment is akin to the complete prohibition" found unconstitutional in *Meyer* concluding that the statute leaves open sufficient alternative methods of payment.[808]

Similarly, in *Initiative & Referendum Institute v. Jaeger*, the court held that, because the "statute at issue . . . only regulates the way in which circulators may be paid" and did "not involve the complete prohibition of payment that the Supreme Court ruled unconstitutional," the State had "produced sufficient evidence that the regulation [was] necessary to insure the integrity of the initiative process."[809] Indeed, the State had produced "sufficient evidence regarding signature fraud" and "appellants [had] produced no evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures."[810]

Finally, in *Prete v. Bradbury*, the court upheld a statute prohibiting the payment to electoral petition signature gatherers on a piecework or pay-per-signature basis.[811] It found that the challengers had failed to demonstrate that the statute significantly burdened First Amendment rights in circulating the petitions and that the State had sufficiently established an important regulatory interest in preventing fraud and forgery in the electoral process.[812] Importantly, the court explained that the "First Amendment does not . . . prohibit all restrictions upon election processes" and states "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to

804. *See* Person v. N.Y. State Bd. of Elections, 467 F.3d 141, 143 (2d Cir. 2006); Prete v. Bradbury, 438 F.3d 949, 968, 970–71 (9th Cir. 2006); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 617–18 (8th Cir. 2001).

805. *Person*, 467 F.3d 141.

806. *Id.* at 142–43.

807. *Id.* at 143.

808. *Id.*

809. 241 F.3d at 618.

810. *Id.*

811. 438 F.3d 949, 951 (9th Cir. 2006).

812. *Id.* at 968, 970–71.

reduce election[] and campaign-related disorder."[813] Many other courts have reached the same result.[814]

It is against this backdrop that, if enacted, the ban on bounties in the Proposed Integrity Act would be evaluated. A ban may be deemed similar to the "arsenal of safeguards" discussed in *Meyer* and *Buckley*[815] or, alternatively, an interference with core speech. Perhaps it is possible to analyze it by harkening back to one's basic philosophy regarding direct democracy.[816] To the Populist and Progressive supporters (and to petition sponsors), while paid circulators and bounties may appear antithetical to their philosophy, a mechanism that furthers direct democracy should be permitted.[817] To proponents of representative government (and opponents of a particular petition), bounties conjure up images of the wild, wild west and should have no part in the process.[818]

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813. *Id.* at 961 (quoting Timmons v. Twin Cities New Party, 520 U.S. 351, 358 (1997)).

814. *See, e.g.*, Busefink v. State, 286 P.3d 599, 601 (Nev. 2012) (finding that a statute prohibiting compensation based on the number of voters registered did not violate First Amendment); Bernbeck v. Gale, No. 4:10CV3001, 2011 WL 3841602, at *6 (D. Neb. Aug. 30, 2011) (upholding state statute banning per-signature payment because plaintiffs "have presented no evidence which would establish that the ban . . . burdens their ability to gather signatures"); Project Vote v. Kelly, 805 F. Supp. 2d 152, 181 (W.D. Pa. 2011) (holding that a statute prohibiting the acceptance of payment based on number of voter registrations obtained did not violate First Amendment).

815. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 204–05 (1999) (citing Colorado's "arsenal of safeguards" outlined in *Meyer* that already made petition fraud illegal); *Meyer*, 486 U.S. at 425–27 (noting that under Colorado law, it was already illegal to forge signatures, make false or misleading statements about the substance of a petition, or bribe people to sign petitions).

816. *See* Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic is It?*, 64 MONT. L. REV. 35, 58 (2003) ("Allowing rich individuals or well-financed special interests to qualify measures for the ballot almost regardless of either the depth or intensity of popular support seems to violate the original vision of direct democracy. Grassroots democracy degenerates into 'greenback democracy'; a system designed to save us from the special interests becomes captured by those very same interests.").

817. *Id.; see* K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1046 (2007) (noting that the Progressives supported citizen-initiated ballot referenda because they felt that such changes would allow citizens to exert more direct control in government).

818. *See* Ellis, *supra* note 816, at 37 (stating that paid signature collectors are essentially "mercenaries, bounty hunters, paid by the signature, and largely indifferent to the substance of the petition"). The authors take no position on this policy question.

C. Financial Reporting and Efforts to Make the Numbers Available Quickly

The third area of recent legislative attention has centered on disclosure of efforts to fund referenda.[819] Two recent referenda triggered massive expenditures.[820] For example, supporters and opponents of Question No. 7 (concerning the expansion of gaming) spent approximately $92 million on the campaign.[821] The practice of using professional, i.e., paid, circulators is constitutionally-protected[822] and frequent.[823]

In 2010, House Bill 378 was signed into law by Governor O'Malley as chapter 409 of the 2010 legislative session.[824] The Act amended election law section 13-309(a)(3) to require ballot issue committees, defined as committees organized to support or defeat a referendum that makes its way onto the ballot, to file a campaign finance report "on or before the fourth Friday immediately preceding a General Election."[825] One practical result was to make public last-minute contributions and expenditures for the November 2012 referendum on the expansion of gaming.[826] SBE published the campaign finance reports for various ballot issue committees on its

819. *See* Eric G. Luedtke, *Bill is not Designed to Stop Referendums*, BALT. SUN, Mar. 3, 2013, at 24 (noting that the Referendum Integrity Act would require petition sponsors to file a campaign finance report in the interest of full disclosure of sources of funding).

820. *See* Nathon Rott, *Slots Casino Approved Despite Fears for Horse-Racing Industry*, WASH. POST, Nov. 3, 2010, at A31 (reporting that campaign spending in 2010 regarding Question A, which allowed a large slot machine parlor to be built in Anne Arundel County, exceeded eight million dollars); John Wagner, *Question 7 Spending Tops $40 Million*, WASH. POST, Oct. 12, 2012, at B3 (reporting that campaign spending on Question 7, which allowed a casino to be built in Prince George's County as well as table games to be instituted at existing slot parlors, hit $40 million almost a month before the election actually took place).

821. *See* Alexander Pyles, *$92M Spent on Maryland Gambling Campaigns*, DAILY RECORD, Nov. 28, 2012 *available at* http://thedailyrecord.com/2012/11/28/92m-spent-on-maryland-gambling-campaigns.

822. *See* Meyer v. Grant, 486 U.S. 414 (1988) (holding that statutory prohibitions against the use of paid circulators abridged the right to engage in political speech in violation of the First and Fourteenth Amendments).

823. *See, e.g.*, Knezevich, *supra* note 767.

824. H.B. 378, 2010 Leg., Reg. Sess. (Md. 2010).

825. *Id.*

826. *See* Pyles, *supra* note 821.

website.[827] Almost all of these reports were made available prior to the general election.[828]

Currently, the Election Law Article requires the person filing a referendum petition to also file a "signed statement, under the penalties of perjury, showing the contributions and expenditures of the petition . . . ."[829] During the 2012 session, House Bill 1275 (cross-filed in the Senate as Senate Bill 982) proposed an addition to the election law article that would require SBE to make the financial statement filed pursuant to section 7-104 available online.[830] House Bill 1275 received a favorable committee report in 2012 and the House of Delegates voted to pass the bill; however, the bill did not make its way through the Senate.[831] As noted above, however, SBE generally posts such information.[832]

D. The 2013 Legislative Session and Forward

Likely partially in response to a Supreme Court decision under a state freedom of information act and a nisi prius decision,[833] both of which held that signature pages must be disclosed under "sunshine acts," Delegate Robinson pre-filed a bill that proposed the establishment of certain measures to protect petition confidentiality.[834] Introduced in the 2013 session, House Bill 49 would have prohibited petition sponsors or circulators from

827. *See Reporting Requirements for Persons Supporting or Opposing the Question Related to Senate Bill 1*, MD. ST. BD. OF ELECTIONS, http://www.elections.state.md.us/campaign_finance/2012_gaming_reporting.html (last visited Aug. 30, 2013).

828. *See, e.g.*, *Get the Facts – Vote No on Question 7 Political Action Committee Original Campaign Finance Statement*, https://campaignfinancemd.us/Public/ ViewFiledReports (enter "Get the Facts" on the "Committee Name" search name box). The report was filed on October 26, 2012, eleven days before the General Election. *Id.*

829. *See* MD. CODE ANN., ELEC. LAW § 7-104(C)(1) (LexisNexis 2010).

830. *See* H.B. 1275, 2012 Leg., Reg. Sess. (Md. 2012).

831. *See id.*

832. *See Campaign Finance*, MD. ST. BD. OF ELECTIONS, http://www.elections.state.md.us/campaign_finance/index.html (last visited Aug. 30, 2013).

833. *See supra* note 747; *e.g.*, Alison Knezevich, *Judge Allows Release of Petition in Baltimore County Zoning Referendum Drive*, BALT. SUN, Oct. 31, 2012, *available at* http://articles.baltimoresun.com/2012-10-31/news/bs-md-co-petition-hearing-20121031_1_petition-partners-signature-gatherers-greenberg-gibbons. The court held that the names of people who signed petitions are "clearly a public record." Lawyers for parties opposing the referendum drive sought the signature pages to investigate alleged misrepresentations during signature gathering. *Id.* Lawyers for the sponsors argued that disclosure during the pendency of signature gathering would have a chilling effect on signature gathering. *Id.*

834. H.B. 49, 2013 Leg., Reg. Sess. (Md. 2013).

disclosing the names and address of signatories to the public.[835] The Bill was set for hearing in the House Ways and Means Committee during the 2013 Legislative Session; however, the hearing was cancelled and not rescheduled.[836]

In *John Doe No. 1 v. Reed*, the Supreme Court was faced with the question of whether the disclosure of referendum signatory information under a public information act violated the signatory's First Amendment rights.[837] En route to holding that disclosure requirements did not violate the First Amendment, the Court first stated that the "compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment" because an "individual expresses a view on a political matter" when he or she signs a referendum petition.[838] Thus, as in *Meyer* and *Buckley*, supra, review of First Amendment challenges to disclosure requirements in the electoral context must withstand "exacting scrutiny."[839]

The respondents asserted two interests to justify burdening First Amendment rights: (1) to preserve the integrity of the electoral process by "combating fraud, detecting invalid signatures, and fostering government transparency and accountability"; and (2) providing information to the electorate.[840] The Court agreed, holding that public disclosure maintains the integrity of the electoral process by ensuring that only those signatures that should be counted are, promoting transparency and accountability, and curing the inadequacies of the verification and canvassing process.[841] The Court also found that the burden asserted by the plaintiffs was not heavy—indeed, several other petitions had been disclosed in recent years, with modest burdens on First Amendment rights.[842] Thus, the State met its burden of demonstrating that the disclosure of signatory information on referendum and initiative petitions did not violate the First Amendment.[843] Other courts are in accord, although, given that

835. *Id.*

836. *HB0049 – History*, MD. GEN. ASSEMBLY, http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=hb0049&tab=subject3&ys=2013RS (last visited Aug. 30, 2013).

837. 130 S.Ct. 2811 (2010).

838. *Id.* at 2817.

839. *Id.* at 2818.

840. *Id.* at 2819.

841. *Id.* at 2820.

842. *See id.* at 2820–21.

843. *See id.* at 2821.

the Supreme Court's decision in *Doe* is fairly recent, case law on the subject is not nearly as well-developed as other referendum issues.[844]

News reports indicate that a number of petition sponsors and circulators have complained of interference from "blockers." H.B. 221 would have criminalized certain conduct, such as prohibiting a person from or hindering a person from signing a petition.[845] It remains to be seen if a similar proposal will be introduced again.

IX. THE NEED FOR A CLEAR AND SIMPLIFIED, STATUTORY SIGNATURE MANDATE

The statute provides precise parameters for a verifiable signature.[846] Boards of elections do not compare the voter's signature on the petition against the voter registration signature on file in MD Voters.[847] There are no trained handwriting analysts on the payroll of the elections boards.

The value of a signature that meets the statutory parameters is debatable and its importance a matter of policy for determination by the General Assembly:

> For several centuries, a personal, handwritten signoff has been an integral aspect of commercial, legal and social intercourse.
>
> But before widespread literacy in Western civilization, writes Stephen Mason, "there was no value placed on a personal signature." Documents were often ratified with a cross, symbolizing a Christian oath of truthfulness.
>
> Sometimes various objects were used as symbols of authenticity — especially when property was being bought or sold. In 1147, for instance, a pair of British brothers gave a gift to a priory and offered locks of hair from their heads as proof of their gift.
>
> By the 14th century, Mason writes, many people were using seals and sealing wax to signify the conveyance of property.

844. *See, e.g.*, Many Cultures, One Message v. Clements, 830 F. Supp. 2d 1111, 1162, 1187, 1193 (W.D. Wash. 2011) (holding that Washington statutes imposing disclosure requirements on grassroots lobbying groups did not violate First Amendment); Shepherdstown Observer, Inc. v. Maghan, 700 S.E.2d 805, 813–15 (W. Va. 2010).

845. H.B. 221, 2013 Leg., Reg. Sess. (Md. 2013).

846. MD. CODE ANN., ELEC. LAW § 6-207(b) (LexisNexis 2010).

847. *See* MD. CODE REGS. 33.06.05.02 (2010).

> Members of royal families and eventually upper-crusty folks began signing their names on important documents.
> During the Renaissance, writes Chris Hawkins in his book, *A History of Signatures: From Cave Paintings to Robo-Signings*, artists signed their works. A signature became known as part of a piece of art — sometimes with an artistic flourish or ornate underscore.
> In the 18th century, Mason writes, cases concerning valid signatures started cropping up in British courtrooms. The practice crossed the sea to the New World, where the core documents of the American experiment were signed by Founders and Framers. The distinct signatures of Thomas Jefferson, Benjamin Franklin, John Hancock and others are part of our visual heritage.
> And by the 20th century, Americans were routinely signing their names — in their particular hands — on all essential legal documents, checks, credit card payments and other binding agreements.
> . . . .
> [Nevertheless, the] signature has become a rushed and atavistic formality. We haphazardly scrawl our ways through checkout lines and mortgage refinancings. We don't write — or sign — as many handwritten notes as we once did because we send emails and e-messages. We don't write — or sign — as many checks because we pay bills online.
> And no one seems to care anymore if our signature is legible or consistent or even our signature. We might as well all be a doctor dashing off an unreadable prescription.
> The once-sacrosanct signature has become in our time an object of ridicule . . . . At the prank site Zug, you can see the zany steps that writer John Hargrave takes to point out the absurdity of providing a signature these days. As part of his experiment, Hargrave signed credit card receipts with, among other things, artistic expressions, boxy grids, an X, stick figures, hieroglyphics and other people's names (such as Mariah Carey, Beethoven and Zeus). He said all his signings were accepted.
> Credit card signatures "are designed to make you *feel* safe," Hargrave observes. But ultimately they are "useless."
> So today we print our names. We sign online petitions with typed-in signatures. We offer voice authorization for two-year contracts read over the telephone. President Obama

> even signs key legislation — such as the fiscal cliff deal — with an autopen.
> We no longer just rely on traditional signatures to work as assurances any more. Whole industries are springing up around alternatives. More and more we use personal identification numbers, or PINS, as methods of authentication. Verification technology is able to recognize us by our voices, our eyes, our fingerprints, our DNA and other means.
> . . . .
> So, will the centuries-old handwritten signature eventually disappear from everyday life? "Likely," says Hawkins. "But probably not until after a generational shift."
> Children born in 2013, Hawkins adds, "will probably not share our generation's emotional attachment to a signature."[848]

Experience demonstrates that a "substantial number" of signatures will be invalidated in even a well-run petition drive.[849] The Maryland Court of Appeals has repeatedly interpreted the applicable statute.[850] As noted above, it has stated that "[h]ow it shall be ascertained whether these constitutional requirements [Maryland Constitution, article XVI] have been met by petitions filed, the referendum article has not prescribed."[851] That gap is filled by legislation and SBE regulations.[852] It may be time to consider whether less restrictive requirements, such as permitting use of "common law names,"

848. Linton Weeks, *The Great American Signature Fades Away*, NAT'L PUB. RADIO (Jan. 14, 2013, 12:36 PM), http://www.npr.org/2013/01/14/169233647/the-great-american-signature-fades-away?sc=ipad&f=1019.

849. *See supra* note 7; *E.g.*, Roskelly v. Lamone, 396 Md. 27, 32 n.8, 912 A.2d 658, 661 n.8 (2006). The State Board of Elections made the 20% suggestion and also noted that, "[i]n jurisdictions where residents move frequently, the invalidity rate may be higher." *Id.*

850. *See, e.g.*, Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 507, 44 A.3d 1002, 1013 (2012); Montgomery Cnty. Volunteer Fire-Rescue Ass'n v. Montgomery Cnty. Bd. of Elections, 418 Md. 463, 469–71, 15 A.3d 798, 801–02 (2011); Doe v. Montgomery Cnty. Bd. of Elections, 406 Md. 697, 731–32, 962 A.2d 342, 362 (2008).

851. Sun Cab Co. v. Cloud, 162 Md. 419, 422, 159 A. 922, 923 (1932). Of course, Maryland Constitution, article XVI, section 1(b), authorizes the General Assembly to enact implementing legislation, which it has done. *See* ELEC. LAW §§ 6-102, 6-206, 6-207; MD. CODE REGS. 33.06.01.02, 33.06.05.02.

852. *See, e.g.*, ELEC. LAW §§ 6-102(c), 6-206, 6-207; MD. CODE REGS. 33.06.01.02, 33.06.05.02.

nicknames in signatures or eliminating some of the more arcane requirements, would in any way lessen the protections against fraud.[853]

By the same token, the legislature may wish to clarify the election boards and courts' roles in connection with ferreting out fraudulent signatures. Present administrative practice relies on validation and verification, without, for example, a comparison of the petition signature against the signature on voter registration records. It may be that elections officials have neither the expertise nor the resources for such a comparison, and they apparently do not make a comparison. Nor does the statute direct or compel them to do so.

On the other hand, one circuit judge, citing an opinion of the Attorney General, has stated that even though elections officials are not handwriting experts, their "role is something more than a bean-counter."[854] The Attorney General opined that, if the board can determine with a reasonable degree of certainty that a signature was made by a person other than the purported signer, it should reject the signature.[855] If that is the rule—and it is not suggested either that it is or should be—it should be made clear by the legislature.

X. THE NEED FOR A CLEAR AND SIMPLIFIED CIRCULATOR'S AFFIDAVIT ENUNCIATING A STANDARD FOR ADDRESSING ALLEGED CIRCULATOR FRAUD, MISREPRESENTATION, AND MISTAKE IN THE CONTEXT OF POLITICAL SPEECH

The Maryland Court of Appeals has interpreted the circulator's affidavit a number of times.[856] In *Tyler*, for example, it addressed

853. *See* Weeks, *supra* note 848 (explaining how traditional perceptions of signatures are changing). Media reports indicate that there may be an effort to relax the signature requirement introduced during the next legislative session. D. Jacobs, "Referendum on referendums still on hold," The Daily Record, June 13, 2013 (Del. Cardin "wants to make easier the signature requirement for referendum. . . .").

854. *Doe v. Montg. Co. Bd. of Elections,* 2008 Md. Cir. Ct. Lexis *7, *26 (Jul. 28, 2008), *rev'd on other grounds*, 406 Md. 697 (2008).

855. *Id.* at *25. In *Sun Cab Co.*, the plaintiff sued to enjoin a referendum, alleging that many signatures were forgeries, others were fictitious names, some signatories were deceased, and others were not qualified to sign. 162 Md. at 421, 159 A. at 922. The court's opinion, however, addressed arguments presented by the intervening defendant and did not resolve the allegations of these irregularities. *Id.* at 431,159 A. at 926.

856. *See, e.g.*, Whitley v. Md. State Bd. of Elections, 429 Md. 132, 163, 55 A.3d 37, 56 (2012); Tyler v. Sec'y of State, 229 Md. 397, 401, 184 A.3d 101, 103 (1962); Ferguson v. Sec'y of State, 249 Md. 510, 515, 240 A.2d 232, 234–35 (1968).

non-compliance with the precise rubric of Maryland Constitution, article XVI.[857] In *Whitley*, it held that the statute does not preclude "self-circulating."[858] In *Fraternal Order of Police*, it may address the zip code requirement in COMAR.[859]

The state has a legitimate interest, not only in rooting out fraud, but also in "ferret[ing] out invalid signatures caused . . . by simple mistake."[860] "[V]erification and canvassing will not catch all invalid signatures" and "[t]he job is large and difficult . . . ."[861] The circulator's affidavit is "integral."[862]

It is not a criticism of the appellate courts, which have interpreted statutory language, to suggest that important policy choices are presented by the current situation. "Self-circulation" is not prohibited by statute, and therefore is permitted under *Whitley*, but it may be counter-intuitive.[863] It is an area that should be addressed by the General Assembly. It may be that permitting self-circulation, unless there is an indicator of invalidity, remains the better course of action.

An earlier version of the election laws provided that any question concerning the invalidity of a signature "affects that signature only and does not affect or impair any other portion of the petition or petitions."[864] That provision was removed in 1998.[865] One circuit court, relying on SBE Guidelines, has held that "only questioned signatures that are individually infirm" may be rejected.[866]

The legislature may wish to specify the effect to be given to a defect or defects in a circulator's affidavit.

857. *Tyler*, 229 Md. at 401, 184 A.2d at 103.

858. *Whitley*, 429 Md. at 163, 55 A.2d at 56.

859. *See supra* notes 260–263, 318–320 and accompanying text.

860. Doe No. 1 v. Reed, 130 S. Ct. 2811, 2819 (2010).

861. *Id.* at 2820.

862. *Tyler*, 229 Md. at 403–04, 184 A.2d at 104.

863. *Whitley*, 429 Md. at 161, 163, 55 A.3d at 54, 56.

864. Doe v. Montgomery Cnty. Bd. of Elections, No. 293857-V, 2008 Lexis 7, at *18 (Md. Cir. Ct. July 24, 2008), *rev'd on other grounds*, 406 Md. 697, 962 A.2d 342 (2008).

865. *Id.*

866. *Id.* at *18–19. This would seem at odds with *Tyler*, where a defective circulator's affidavit removed the presumption of validity of all signatures. 229 Md. at 404, 184 A.2d at 104–05. *See supra*, note 330. The latter would appear logical.

XI. FINANCING OF REFERENDUM CAMPAIGNS

Just as campaign financing, in general, has become a significant legal and policy issue,[867] financing of referendum campaigns has exploded.[868] Issues related to it are beyond the scope of this article.

Long before *Citizens United*, the Attorney General concluded that a statutory limit on contributions by individuals, corporations and others on efforts to promote or defeat a referendum question unconstitutionally infringed on the federal constitutional rights of freedom of speech and association.[869] The Attorney General relied on *Citizens Against Rent Control v. City of Berkley*,[870] a referendum decision in which the Supreme Court struck down contributions limits in ballot question elections.[871] There, distinguishing between candidate campaigns and ballot questions, the Supreme Court concluded that "[t]here is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions, which in turn limit expenditures, plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed."[872]

The *Berkely* Court's distinction is based on the analysis of *Belotti*.[873] There, the Supreme Court concluded that ballot questions do not present the risk of quid pro quo corruption that is present in candidate elections.[874]

867. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886 (2010).

868. *See e.g.*, Pyles, *supra* note 821, at 10A (noting that media reports indicate that $92 million was spent on the 2012 gaming referendum); Alexander Pyles, *Petition Website Under Fire*, DAILY RECORD, Oct. 29, 2012 ("A Republican lawmaker's business venture, which successfully helped to petition three state laws to referendum over the last year, is being accused of campaign finance violations by the Maryland Democratic Party. In an email sent Friday, Democrats said MDPetitions.com was in violation of campaign finance laws because it sent out a mailer urging a 'no' vote on several laws subject to voter approval on Nov. 6 without registering as a ballot issue committee with the Maryland State Board of Elections." The disposition, if any, of those allegations is not known).

869. Elections—Political Contributions, 67 Md. Op. Att'y Gen. 192, 192 (1982).

870. *Id.* at 196.

871. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299–300 (1981).

872. *Id.*

873. *Id.* at 297–99.

874. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

XII. CONCLUSION

Depending on one's philosophy, referenda may be the bulwark of democracy or a threat to our system of representative government.[875] Perhaps because of these competing views, the Maryland Court of Appeals has struggled heroically with a statute lacking in clarity.[876] The solution, however, may be somewhere in between. If there is to be a referendum process, as there is under the Maryland Constitution, the courts and electorate deserve a simplified, easily-followed procedure that will avoid expensive, accelerated litigation and decisions based on technical requirements that may no longer be necessary, while providing adequate safeguards against petition misconduct and preserving and protecting the important role of representative democracy.

875. *See supra* text accompanying notes 43–48; *see also* Part VI.B.

876. *See supra* notes 850–852 and accompanying text.

SUPPLEMENT

After this article went to print, the Maryland Court of Appeals issued its decision in *Fraternal Order of Police Lodge 35 v. Montgomery Co, MD.*[1] Montgomery County enacted a bill that limited the right to collective bargaining by public employees. The Fraternal Order of Police ("FOP") petitioned it to referendum under article XI-F of the Maryland constitution and the Montgomery County charter.[2] The court of appeals held that erroneous circulators' zip codes did not invalidate certified petition signatures.

The county board of elections determined that the FOP had submitted approximately 4,600 more signatures than were required to place the question on the ballot. Of those approved signatures, however, 6,136 had been collected by two circulators, Messrs. Head and Rowe, each of whom had submitted circulators' affidavits containing incorrect zip codes on 1,961 signature pages. Mr. Head, for example, wrote his zip code as "49008" when, in fact, it was "49006." The FOP argued that this was "an unintentional mistake of no consequence."[3] In all other respects, the circulators' affidavits complied with the statute and regulations. If the zip code defect invalidated the voters' signatures, the FOP's petition would have lacked sufficient signatures to place the question on the ballot.

Section 6-204 of the election law article provides that the circulator's affidavit "shall contain the statements, required by regulation, designed to assure the validity of the signatures and the fairness of the petition process."[4] The relevant regulations and affidavit required that circulators provide their correct zip code in the circulators' affidavit.[5]

Montgomery County and the staff director of the county council, a registered voter,[6] filed a complaint seeking judicial review and

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1. No. 132 (Sept. Term, December 2, 2013) (hereinafter "*FOP*"). The pending case was discussed at several points in the article. *See* notes 263, 310, 320, 548, 647, and 859.
2. *See* Part III.A and text accompanying note 488.
3. *FOP*, Slip Op., 15.
4. MD. CODE ANN., Elec. Law §6-204(b).
5. MD. CODE REGS. 33.06.03.07.B.(2). COMAR 33.06.03.08.B amplified this requirement, providing that the circulator's affidavit must state that "[a]ll of the information given by the circulator under Regulation .07 of this chapter is true and correct." In accord with that regulation, FOP's circulators' affidavits provided, under penalties of perjury, that "the information given to identify me is true and correct. . . ." *FOP*, Slip Op., 7.
6. *See* Part IV.A, discussing "[w]ho [m]ay [b]ring [s]uit?"

declaratory judgment[7] to invalidate the petition on grounds later abandoned. The circuit court held that the county lacked standing; however, because one plaintiff was a registered voter with standing, the court of appeals held that it was unnecessary address that issue.[8] The FOP, "as proponents of the petition to referendum," was granted leave to intervene in support of its petition.[9] It moved to dismiss the complaint, asserting failure to follow administrative procedures; however, the motion was denied and the circuit court granted the right to conduct discovery.[10] The county and staff director then amended their complaint to seek a declaration that the board of elections erred by counting signatures on pages with the erroneous circulators' zip codes.

The circuit court held that the erroneous zip codes were fatal. The Maryland Court of Appeals reversed, holding that "minor errors in the circulator affidavit will not invalidate petition signatures already[11] certified by the appropriate administrative body."[12] It reasoned that "[t]here is simply no call among the controlling authorities for invalidating otherwise valid petition signatures in the absence of fraud because a petition circulator failed to dot an 'i' or cross a 't'."[13] The court wrote that misstating one or two digits in a circulator's zip code did not defeat the purpose of a circulator's affidavit, which was

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7. *See* Part VII, discussing the method of review.

8. *FOP,* Slip Op. at 13 n. 13; *see generally* Part IV.

9. *See* Part IV.B discussing "[w]ho [m]ay [i]ntervene?"

10. *FOP,* Slip Op., 10 n. 12; *see* Part VII.E ("If, however, the rubric is a complaint for declaratory judgment, injunctive relief, or mandamus in their conventional sense, discovery and an evidentiary hearing may be permissible. Thus, especially in the context of a challenge filed shortly before an election, the choice of procedural mechanism may have significant ramifications."). The FOP objected to the county's efforts to expand review beyond the administrative record and the circuit court's decision to permit discovery. The court of appeals held that it was not necessary to reach this issue. *Id.* at 10 n. 12. Because the appeal presented a question of law, i.e., whether the incorrect zip code invalidated certain signatures, the court did "not address the issue of whether the Circuit Court erred in granting the right to conduct discovery." *Id.*

11. *See* Part V.A.2 ("The right to judicial relief does not accrue until there is aggrievement by a final decision of the election board."). The FOP decision states: "Despite the incorrect zip codes in the circulator affidavits, the [county board of elections] checked each signature and certified that 34,828 of the 48,935 signatures were those of registered voters of Montgomery County." *FOP,* Slip Op., 7.

12. *FOP,* Slip Op., 21. It is noteworthy that the holding referred to "already certified" signatures. *See id.*

13. *Id.*, citing Montgomery Co. Fire-Rescue Ass'n v. Montgomery Co. Bd. of Elections, 418 Md. 463, 470-71, 15 A.3d 798, 802 (2011).

to permit circulators to be located and, if necessary, served with process.[14]

The *FOP* court reiterated the *Tyler* analysis that, "while provisions pertaining to ballot referendums are to be liberally construed, a referendum valid on its face carried the drastic effect of suspending legislation designed to correct a particular evil."[15] The *Tyler* court had held that an affidavit that falsely stated that all of the signatories were registered voters was defective, removing the presumption that the signatures were valid.[16] The *FOP* court noted that Maryland election law had changed "significantly" since *Tyler*, deciding it was inapplicable.[17]

Instead, the *FOP* court looked to the purpose of the election law regarding ballot referenda.[18] It reasoned that voters "should be given every opportunity" to have their votes counted and "common sense" should be employed.[19] It looked to out-of-state decisions holding that "the voter's right to have their signatures counted on a petition outweighs objections related to immaterial irregularities."[20] The court quoted a Missouri decision for the proposition that "procedures designed to effectuate these democratic concepts should be liberally construed to avail the voters with every opportunity to exercise these rights."[21] The Maryland Court of Appeals noted that the Missouri court "refused to find fatal an irregularity not specified as fatal by statute. . . ."[22] It also noted that other jurisdictions "have held that technical deficiencies in referendum petitions will not invalidate the petitions if they substantially comply with statutory and constitutional requirements."[23]

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14. The dissent cited Doe v. Montgomery Co. Board of Elections, 406 Md. 697, 962 A. 2d 342 (2008), for the proposition that an affidavit "contrary to the clear and unambiguous statutory mandate . . . should be rejected." *FOP,* Slip Op., (Battaglia, J., dissenting). *Doe,* addressing voters' signatures, stated that "a signer is required to comply with the signature requirements governing petitions for referendum." *Id.* at 733, 962 A.2d at 56-57.
15. *FOP*, Slip Op. 17, citing Tyler v. Sec. of State, 229 Md. 397, 184 A.2d 101 (1962); *see* Part VI.
16. *Tyler* is discussed at page 153. The insufficient affidavit in *Ferguson v. Sec. of State*, 249 Md. 510, 517, 240 A.2d 232, 235–36 (1968), is discussed at pages 152-53.
17. *Id.* at 18.
18. *Id.* at 19.
19. *Id.*
20. *Id.*
21. *Id.* at 20, quoting United Labor Comm. of Missouri v. Kirkpatrick, 572 S.W.2d 449, 454 (1978); *see* Part VI.
22. *Id.*
23. *Id.* at 21 (citations omitted).