

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

PAUL F. KENDALL,  
Plaintiff – Appellant

v.

HOWARD COUNTY MARYLAND; HOWARD COUNTY  
BOARD OF ELECTIONS; ANN M. BALCERZAK and BETTY L.  
NORDAAS, in their official capacities as members of the  
Howard County Board of Elections; ROBERT L. WALKER  
and LINDA H. LAMONE, in their official capacities as  
members of the Maryland State Board of Elections,  
Defendants – Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MARYLAND

---

APPELLANT'S OPENING BRIEF

---

SUSAN B. GRAY  
LAW OFFICES OF SUSAN B. GRAY  
*6510 Paper Place*  
*Highland, Maryland 20777*  
*(240) 426-1655*  
*Attorney for Plaintiff-Appellant*  
*Paul F. Kendall*

---

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, Paul F. Kendall, who is the appellant in this case, makes the following disclosure:

1. The appellant in this case is an individual and not a publicly held corporation or other publicly held entity.
2. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.
3. The appellant is not a trade association.
4. The case does not arise out of a bankruptcy proceeding.

/s/ Susan Baker Gray

Susan Baker Gray

Law Offices of Susan Baker Gray

*6510 Paper Place*

*Highland, Maryland 20777*

*(240) 426-1655*

*Attorneys for Plaintiff-Appellant*

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE .....	4
STATEMENT OF THE FACTS .....	6
1. Introduction.....	6
2. Factual Background .....	7
SUMMARY OF THE ARGUMENT .....	11
STANDARD OF REVIEW.....	13
ARGUMENT .....	14
1. The district court erred in deciding that Appellant did not demonstrate either the implication of or a violation of the right to vote. ....	14
a. <i>Referendum and initiative</i> .....	14
b. <i>Other cases in district court decision distinguished...</i>	17
2. Right to vote recognized as implicated in Referendum and Petition cases by Supreme Court and Lower Federal Courts .....	24
a. <i>Right of Referendum in Maryland and Howard County</i> .....	24
b. <i>Right to vote is a part of a bundle of fundamental                   rights contained in the power of the referendum.....</i>	29
3. The district court erred in concluding that the signature requirements did not violate Appellant’s rights protected by the First Amendment of the United States Constitution.....	39
4. The district court erred in concluding that the signature requirements and their application did not violate Appellant’s right to equal protection.....	53

5. The district court erred in concluding that the signature requirements and their application did not violate Appellant’s right to substantive due process protected by the 14 <sup>th</sup> Amendment to the United States Constitution.....	56
6. The district court erred in concluding that the signature requirements and their application do not violate Appellant’s right to procedural due process protected by the 14 <sup>th</sup> Amendment to the United States Constitution. ....	60
CONCLUSION .....	62
REQUEST FOR ORAL ARGUMENT.....	64
CERTIFICATE OF COMPLIANCE.....	65
ADDENDUM.....	66
<i>a. Howard County Charter, Article II. The Legislative Branch .....</i>	<i>66</i>
<i>b. Maryland Code, Election Law, Title 6, Petitions .....</i>	<i>68</i>
CERTIFICATE OF SERVICE.....	70

## TABLE OF AUTHORITIES

### CASES

<i>Adkins v. Rumsfeld</i> , 464 F.3d 456, 469 (4 <sup>th</sup> Cir. 2006) .....	53, 54
<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 786, 103 S.Ct. 1564, 1568 (1983).....	30, 35
<i>Anne Arundel County v. Moushabek</i> , 306 A.2d 517, 527 (1973) ....	26
<i>Avery v. State</i> , 15 Md.App. 520, 537, 292 A.2d 728, 741 (1972) .....	32
<i>Beall v. State</i> , 131 Md. 699, 103 A. 99, 102 (1917).....	25
<i>Bonas v. Town of North Smithfield</i> , 265 F.3d 69,75 (2 <sup>st</sup> Cir. 2001). .....	48
<i>Buckley v. American Const. Law Found., Inc.</i> , 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) .....	passim
<i>Bullock v. Carter</i> , 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972) .....	30
<i>Cheeks v. Cedlair Corp.</i> , 287 Md. 595, 613, 415 A.2d 255 (1980) ...	15
<i>Cipriano v. City of Huma</i> , 395 U.S. 701 (1969) .....	16
<i>City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation</i> , 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003) .....	51
<i>City of Eastlake v. Forest City Enterprises, Inc.</i> , 426 U.S. 668, 672 (1976) .....	32, 52
<i>City of Phoenix v. Kolodziejski</i> , 399 U.S. 204 (1970) .....	16
<i>Dixon v. Maryland State Administrative Bd. of Election Laws</i> , 878 F.2d 776, 779 (4 <sup>th</sup> Cir. 1989) .....	35
<i>Doe v. Montgomery County Board of Elections</i> , 406 Md. 697 (2008) .....	10, 41
<i>E.E.O.C. v. Seafarers Intern. Union</i> , 394 F.3d 197 (4 <sup>th</sup> Cir. 2005) 13	
<i>Estate of Bennett v. C.I.R.</i> , 935 F.2d 1285, p. 2 (4 <sup>th</sup> Cir. 1991) .....	61
<i>First Nat. Bank of Boston v. Bellotti</i> , 435 U.S. 765, 776-777 (1978) .....	51
<i>Griffen v. Burns</i> , 570 F.2d 1065, 1078 (1 <sup>st</sup> Cir. 1978) .....	48
<i>Hawkins v. Freeman</i> , 195 F.3d 732, 738 (4 <sup>th</sup> Cir. 1999) .....	57
<i>Heller v. Doe</i> , 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) .....	54

<i>Hoyle v. Priest</i> , 265 F.3d 699, 702 (8th Cir. 2001) .....	17, 23
<i>Hussey v. City of Portland</i> , 64 F.3d 1260 (9 <sup>th</sup> Cir. 1995) .....	34
<i>James v. Valtierra</i> , 402 U.S. 137, 141, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971) .....	52
<i>Kelly v. Macon-Bibb County Bd. of Elections</i> , 608 F. Supp. 1036, 1038-39 (M.D. Ga. 1985) .....	17, 20, 23
<i>Kramer v. Union Free School District No. 15</i> , 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) .....	16, 36
<i>Lemons v. Bradbury</i> , 538 F.3d 1098 (9 <sup>th</sup> Cir. 2008) .....	9, 16, 23, 38
<i>Maryland State Administrative Board of Election Laws v. Talbot County</i> , 316 Md. 332, 349, 558 A.2d 724, 732 (1989) .....	15
<i>McIntyre v. Ohio Elections Commission</i> , 514 U.S. 334 (1995) .....	50
<i>Meyer v. Grant</i> , 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) .....	passim
<i>Moore v. Ogilvie</i> , 394 U.S. 814 (1969) .....	16, 37
<i>Mylan Labs., Inc. v. Matkari</i> , 7 F.3d 1130, 1134 (4th Cir.1993) ....	13
<i>Partington v. Am. Int'l Specialty Lines Ins. Co.</i> , 443 F.3d 334, 338 (4th Cir.2006) .....	13, 34
<i>Petition for Agenda Initiative</i> , 821 A.2d 203 (Pa.Cmwlth. 2003) ...	47
<i>Protect Marriage Illinois v. Orr</i> , 2006 WL 2224059 (N.D.Ill.) .....	47
<i>Ritchmount Partnership v. Board of Supervisors</i> , 388 A.2d 523 (Md. 1978) .....	passim
<i>Save Palisade Fruitlands v. Todd</i> , 279 F.3d 1204 (10 <sup>th</sup> Cir. 2002) 17, 19	
<i>Schweiker v. Hansen</i> , 450 U.S. 785, 791, 101 S.Ct. 1468, 1472, 67 L.Ed.2d 685 (1981) .....	61
<i>Smith Setzer &amp; Sons, Inc. v. S.C. Procurement Review Panel</i> , 20 F.3d 1311, 1320 (4 <sup>th</sup> Cir.1994) .....	53
<i>Spaulding v. Blair</i> , 403 F.2d 862, 865 (4 <sup>th</sup> Cir. 1968) .....	28, 33
<i>State ex rel. Stenberg v. Moore</i> , 258 Neb. 199, 215, 602 N.W.2d 465, 477 (Neb. 1999) .....	53
<i>Stone v. City of Prescott</i> , 173 F.2d 1172 (9 <sup>th</sup> Cir. 1999) 16, 23, 24, 34	
<i>Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.</i> , 471 F.3d 544 (4th Cir. 2006) .....	13
<i>Taxpayers United for Assessment Cuts v. Austin</i> , 994 F.2d 291, 295 (6th Cir. 1993) .....	9, 14
<i>W. &amp; S. Life Ins. Co. v. State Bd. of Equalization</i> , 451 U.S. 648, 668, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) .....	53

<i>West Augusta Development Corp. v. Giuffrida</i> , 717 F.2d 139, 140 (4 <sup>th</sup> Cir. 1983) .....	61
<i>Wheelright v. County of Marin</i> , 467 P.2d 537 (1970).....	47
<i>Williams v. Rhodes</i> , 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).....	36

## STATUTES

28 U.S.C. § 1291 .....	1
28 U.S.C. § 1331 .....	1
28 U.S.C. §§ 1343(a)(3) and (4) .....	1
Md. Code Ann., Elec. Law § 6-203 .....	39, 56
Md. Code, Elec. Law § 6-203(a) (2008) .....	40, 61
Md. Code, Elec. Law § 6-203(a)(1) .....	42
Md. Code, Elec. Law § 6-203(a)(2)(i) .....	45

## OTHER AUTHORITIES

<i>Fluoridation Of Water. Hearings Before The Committee On Interstate And Foreign Commerce, House Of Representatives, Eighty-Third Congress, Second Session on H. R. 2341. A Bill To Protect The Public Health From The Dangers Of Fluorination Of Water. May 25, 26, and 27, 1954. ....</i>	20
Howard County Charter Section 211 .....	7, 31
Rule 26.1 of the Federal Rules of Appellate Procedure .....	i
Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure .....	65
Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure ..	65
Rule. 32(a)(5) of the Federal Rules of Appellate Procedure .....	7, 65
<i>The Federalist No. 39</i> (v. Madison) .....	32

## TREATISES

<i>Equitable Estoppel of the Government</i> , 79 Columbia L.Rev. 551, 558 (1979).....	61
Johnston, Robert D (2004), <i>The Politics of Healing</i> . Routledge. P. 136. ISBN 0415933390 .....	37
Louis W. Ripa, DDS, MS. <i>A Half-century of Community Water Fluoridation in the United States: Review and Commentary.</i> Journal of Public Health Dent. 1993, Vol. 53, No. 1 (Winter): p 37. ....	21

McNeil DR., <i>America’s longest war: the fight over fluoridation, 1950—</i> . Wilson Quarterly 1985: 9 (Summer) .....	20
Pratt, Edwin, Raymond D. Rawson & Mark Rubin, <i>Fluoridation at Fifty: What Have We Learned</i> , 30 J.L. Med. & Ethics 117, 119 (Fall 2002) .....	20

HOWARD COUNTY LEGISLATION

Council Bill 58.....	2
----------------------	---

MARYLAND CONSTITUTIONAL PROVISIONS

§1 of Article XI-A.....	27
Article 25-A of the MD Code Annot .....	26
Article XI-A, §1.....	27
Md. Code Ann., Const. art.16, § 1.....	31
Md. Code Ann., Decl. of Rts. art. 1 .....	31
Md. Code Ann., Decl. of Rts. art. 45 .....	32



## **JURISDICTIONAL STATEMENT**

The basis of this Court's jurisdiction is 28 U.S.C. § 1291, which confers jurisdiction over final decisions of the district courts. The district court entered a final judgment in the defendants' favor on October 19, 2009. The plaintiff timely filed a notice of appeal.

Because this case arose under the United States Constitution and federal civil-rights laws, the bases of the district court's original jurisdiction were 28 U.S.C. § 1331, which confers jurisdiction over federal questions, and 28 U.S.C. §§ 1343(a)(3) and (4), which confer jurisdiction over matters involving civil rights secured by the constitution or laws of the United States.

There is no dispute over the district court's original jurisdiction or this Court's jurisdiction to hear the appeal.

## STATEMENT OF THE ISSUES

1. Whether the district court erred when it concluded that the right of referendum and its invocation in Howard County, a Charter County of Maryland, gave rise to no fundamentally protected rights such that the Howard County Board of Elections' actions rejecting 66% of the signatures of registered voters and invalidating the petition for referendum in Council Bill 58 caused Appellant to suffer no deprivation of his rights including the rights of voting, free speech, association and petitioning of the government for redress of grievances protected by the United States Constitution?

2. Whether the district court erred in concluding that the signature requirements as applied by the Howard County Board of Elections imposed 'no 'impermissibl[e] burden' on Plaintiff's exercise of the people's reserved referendum power set forth in the County Charter (state right of referendum) violating neither the right to vote nor other rights protected by the First and Fourteenth Amendments of the United States Constitution?

3. Whether the district court erred in concluding that Appellant was not denied equal protection as well as his right to substantive and procedural due process?

## STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Northern District of Maryland in a case involving exercise of the power of the referendum reserved by the people of Howard County in their Charter. The Plaintiff in the district court proceeding was a signer of the petition for referendum of a bill passed by the Howard County Council to triple the size of a food store on a property being developed behind his home in Turf Valley. As a result of the increased size of the store, traffic on his street will dramatically increase.

Plaintiff filed this action on March 16, 2009, against Howard County, Howard County Board of Elections and the Maryland State Board of Elections. (J.A. Page 2) Plaintiff filed an amended complaint on March 29, 2009, against Howard County, Ann M. Balcerzak, President, Howard County Board of Elections, Betty L. Nordaas, Director, Howard County Board of Elections, Howard County Board of Elections, Robert L. Walker, Chairman Maryland State Board of Elections, and Linda H. Lamone, State Administrator, Maryland State

Board of Elections. (J.A. Page 3) (Howard County has subsequently been dismissed from this case by stipulation of Appellant and subsequently by order of this Court on January 15, 2010.)

Appellant's complaint challenged the Howard County Board of Elections' recertification and subsequent rejection of an additional 66% of signatures previously certified as valid Howard County registered voters which resulted in a failure of the referendum effort and the placement of the local question on the ballot.

Defendant, Howard County Board of Elections filed a motion to dismiss and the State Board of Elections defendants answered the complaint. On October 19, 2009, the district court issued an opinion and order granting the motion to dismiss of the Howard County Board of Elections. (J.A. Pages 117-135.)

This appeal followed.

## STATEMENT OF THE FACTS

### 1. Introduction

After verifying, certifying, and notifying leaders of the referendum effort, HCCOG, of the determination that 2,603 petition signers were registered voters of Howard County, the Howard County Board of Elections applied a new interpretation of the existing law (J.A. Page 109) for verifying signatures with the result that 66% of previously undisputed valid registered voter signatories of the petition for referendum were eliminated.<sup>1</sup> There is no dispute on this seminal fact.

Appellant is a signatory of the petition for referendum whose signature would not count because he did not sign the petition with his middle initial although all other information required for a valid signature on the petition was included.

---

<sup>1</sup> The actual process employed involved taking the original 3301 signatures and extracting a sample of 1216 signatures. A sample size of 1216 produces a 99% confidence level at a 3% confidence interval for 3301 signatures represented and therefore represents a valid statistical sample.

## **2. Factual Background**

On November 3, 2008 the Howard County Council passed CB58-2008, a bill that substantially increased the size of a grocery store to be built in the Turf Valley community. Believing this bill to have been improvidently passed; and concerned with a series of improprieties associated with the passage of this bill, Howard County Citizens for Open Government (HCCOG) sought to challenge this bill by way of referendum, as permitted by Howard County Charter Section 211. (J.A. Page 28-32.) That section provides any such law or part of any law is subject to the right of the people to petition the law to referendum and will be placed on the ballot providing the signatures of 5000 registered voters are obtained within a specified time period. (Addendum: Copy of 211 Charter provision.)

On November 17 and 19, 2008, HCCOG filed requests with the Board of Elections seeking an advance determination regarding the sufficiency of the proposed referendum petition language and signature sheet. (J.A. Pages 29-32) On December 1, 2008, the Board determined that the proposed petition complied with the requirements of state law, regulations, and the Howard County Charter and Code. (J.A. Page 35.)

On December 10, 2008, the Board provided additional information. (J.A. Page 36.) Once approved, HCCOG began to diligently collect the necessary petition signatures on the approved petition forms. (J.A. Page 11.)

On December 30, 2008, HCCOG delivered to the Board referendum petitions containing 3,301 signatures. (J.A. Pages 11, 40.) The Board acknowledged receipt of these signatures and informed HCCOG it would have an extra 30 days to submit additional signatures. (J.A. Pages 39, 40, 44.) After a careful review of these signatures the Board sent a January 22, 2009, letter notifying HCCOG that it had validated and certified 2,603 signatures as registered voters and gave HCCOG until February 4, 2009, to obtain an additional 2,397 valid signatures. (J.A. Page 40) The rejection rate of signatures on the first round was approximately 21%. Signatures were rejected based on State Board of Elections procedures (these procedures can be found at J.A. 98-101) which invalidated signatures for a variety of reasons related to information (or lack thereof) on the petition related to the petition circulator or signatory; the date the petition was signed; and the fact that the signatory was not a registered voter in Howard County, or



based on all the information on the petition the Board of Elections still could not determine with reasonable certainty whether the signatory was a registered voter in the county. This rejection criteria appears to be similar to that upheld in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 293 (6th Cir. 1993) and *Lemons v. Bradbury*, 538 F.3d 1098, 1101 (9<sup>th</sup> Cir. 2008). From the facts in these cases it would appear that the rejection rate in *Austin* was approximately 18%, and that in *Lemons* approximately 8%. Appellant Kendall does not dispute application of reasonable rejection criteria necessary to insure that signatures are; (1) those of Howard County voters; and (2) collected within the required timeframe.

HCCOG collected almost 7,000 additional signatures and submitted 6,079 to the Board of Elections on February 3, 2009.<sup>2</sup> (J.A. Page 7.) However, without warning on February 12, 2009, the Board announced it would delay further signature verification because of pending legal challenges filed by Greenberg Gibbons on February 4,

---

<sup>2</sup> Due to miscommunication with petition signature gatherers, HCCOG, on its own initiative eliminated approximately 921 signatures.

2009. (J.A. Pages 8, 14.) These challenges had nothing to do with the validation and certification process at issue in this case.

On March 11, 2009, the Board informed HCCOG via email that they were calling a special meeting for the next afternoon. (J.A. Page 42.) That email stated cryptically that the local Howard County Board of Elections wanted to meet with the attorneys involved to provide some additional important information. (J.A. Pages 8, 42.) Every request for information regarding the meeting was firmly refused. (J.A. Page 8.) On March 12, 2009, the Board of Elections announced it was reversing its January 22, 2009 decision to certify and validate the 2,603 signatures. (J.A. Pages 8, 44.) In explaining its actions, the Board of Elections cited the Maryland Court of Appeals decision of *Doe v. Montgomery County Board of Elections*, 406 Md. 697 (2008), which was decided on December 19, 2008. (J.A. Pages 8, 44.) The Board acting upon its own volition, decided to reconsider the petition signatures that HCCOG submitted on December 30.

Based upon *Doe*, the Board conducted a second review of a statistically valid sample of 1,216 signatures from the initial 3,301 submitted. After invalidating 1,052, a rejection rate of 87%, the Board of

Elections concluded that HCCOG failed to submit the requisite number of valid signatures (even though an additional 6079 signatures had already be submitted), and would therefore be denied an extension of time to submit the 5,000 total signatures required to place the referendum on the ballot. (J.A. Page 14.)

### **SUMMARY OF THE ARGUMENT**

Elimination of signatures of known, qualified, validated and certified registered voters regardless of the purported legality of the decision represents an obvious unconstitutional disregard of the right to vote and violation of First Amendment protections.

The right to equal protection of the law must not discriminate among valid laws. Although federal, state and local governments are representative democracies, the right of referendum is not inconsistent with a republican form of government and is a right protected in the laws of many states, including Maryland. The power of referendum, expressly reserved by the people in the Maryland Constitution and granted by the people of Howard County to themselves in their Charter, merits the equal protection of the law, and protection under the First and Fourteenth Amendments and the right to vote.

The restrictions and regulations challenged in this case go directly to the heart of the ability of the people to place matters on the ballot for vote in the next general election in Howard County. The exercise of the power of referendum implicates a right to vote. Here, that right was denied as was the right to equal protection and Appellant's First Amendment Rights of free speech, association and petition for redress of grievances.

The fact that standards used in the first review afforded, to a near certainty, sufficient signatures to place the referendum in question on the ballot, and there being no dispute that every single signature eliminated as part of the Howard County Board of Election's second review were valid registered voters, the restrictions and regulations challenged in this case represent a clear denial of the right to vote by application of an irrational and unreasonable regulation to the election process. Although the regulation might be content neutral, it is hardly nondiscriminatory. The interpretation of the regulation as applied denied Appellant substantive due process. The manner in which the decision was made to reject the petition and deny the referendum violated Appellants' right to procedural due process.

## STANDARD OF REVIEW

The Court of Appeals reviews an order dismissing a case under Rule 12(b)(6) *de novo*. *Partington v. Am. Int'l Specialty Lines Ins. Co.*, 443 F.3d 334, 338 (4th Cir.2006); and *Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544 (4th Cir. 2006). In addressing the matters on which a district court rules, the usual appellate standard governing motions to dismiss considers questions of law *de novo* and construes the evidence in the light most favorable to the non-moving party, applying the same criteria that bound the lower court. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993); *E.E.O.C. v. Seafarers Intern. Union*, 394 F.3d 197 (4th Cir. 2005). The threshold for affirming a dismissal is high: “[w]e will affirm a dismissal only if it is transparently clear that the complaint, in light of the facts alleged, engenders no viable theory of liability.” *Id.*

## ARGUMENT

1. The district court erred in deciding that Appellant did not demonstrate either the implication of or a violation of the right to vote.

### a. Referendum and initiative

The district court concluded that “[t]here is no fundamental right to initiate legislation as there is a fundamental right to vote.” (J.A. Page 124.) Relying heavily on *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993), the district court summarized the underlying reasoning of the holding in *Austin* and applied it to Appellant’s case by stating that “the plaintiffs had not demonstrated a violation of the right to vote as the court could identify no decision of the Supreme Court or a lower federal court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote.” Quoting further from *Austin* the district court concluded by holding: “here, and for the same reasons cited by the *Austin* court, Plaintiff has not demonstrated a violation of the right to vote.” (J.A. Pages 125-126.)

Preliminarily, it may be helpful to note that although Maryland has a right of referendum it does not have a right of initiative. In

*Maryland State Administrative Board of Election Laws v. Talbot County*, 316 Md. 332, 349, 558 A.2d 724, 732 (1989), the Maryland Court of Appeals, quoting from its earlier decision in *Cheeks v. Cedlair Corp.*, 287 Md. 595, 613, 415 A.2d 255, 264 (1980), found “repugnant” to the Maryland Constitution, the County Charter provision involved a case granting the right of the people to initiate legislation by explaining this difference:

The powers of referendum and initiative, though each may affect the form or structure of local government, are otherwise distinctly different. Under the referendum power, the elective legislative body, consistent with § 3, continues to be the primary legislative organ, for it has formulated and approved the legislative enactment referred to the people. The exercise of the legislative initiative power, however, completely circumvents the legislative body, thereby totally undermining its status as the primary legislative organ.

However, even though Maryland does not have the long history of judicial treatment equating referenda and initiative is significant for purposes of constitutional analysis. Except for compulsory referenda which do not involve the petitioning process, facultative referenda and initiative both involve the soliciting of signatures to place an issue on the ballot and the ultimate ratification or rejection of the issue by the vote of the People.

The key is whether the right of referendum or initiative has been granted or reserved by the People because, once established, such rights are constitutionally protected.

The district court, despite recognizing the significance of language in *Lemons v. Bradbury*, 538 F.3d 1098, 1102 (9<sup>th</sup> Cir. 2008) (J. A. Page 125), that the right of referendum and initiative once established implicate the fundamental right to vote, nevertheless rejected *Lemons* in favor of *Stone v. City of Prescott, infra*. Suggesting velleity rather than firm reasoning, the district court's choice, like the Austin decision, ignored important Supreme Court precedent analyzing the right to vote as part of state election processes including the referendum. *See Kramer v. Union Free School District No. 15*, 395 U.S. (1969)(state created elections are constitutionally protected); *Moore v. Ogilvie*, 394 U.S. 814 (1969)(signing a petition for ballot access constitutes exercising a right to vote); and *Cipriano v. City of Huma*, 395 U.S. 701 (1969), *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and the 9<sup>th</sup> Circuit case *Stone v. City of Prescott*, 173 F.3d 1171 (1999), all treating the right of referendum or initiative, once established, either as the franchise or impacting the right to exercise the franchise. Together



these cases, with those referenced later in this Brief, demonstrate without reservation that signing a referendum petition in a jurisdiction, where that right is established, is constitutionally protected as part of the right to vote.

**b. Other cases in district court decision distinguished**

Other authorities cited by the district court, including *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir. 2002), *Hoyle v. Priest*, 265 F.3d 699, 702 (8th Cir. 2001), and *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F. Supp. 1036, 1038-39 (M.D. Ga. 1985) stand out as factually and legally distinguishable or rest on dubious or questionable legal foundation, and do not support the district court's decision in this case.

***Save Palisade Fruitlands v. Todd***

Unlike the case *sub judice*, *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204 (10<sup>th</sup> Cir. 2002) involved an attempt to expand the scope of the right of referendum. The Colorado constitution establishes all counties throughout the state initially as statutory counties with a very limited right of referendum. Statutory counties however may become home rule counties which include the right of referendum on all

measures proposed by the local county legislature under the same rules governing state-wide ballot initiatives.

The plaintiffs in *Save Palisade Fruitlands* were residents of a statutory county. They argued that the distinction made between the rights of referendum granted by the Colorado Constitution to statutory counties and home rule counties was a denial of equal protection. The Tenth Circuit rejected this argument concluding that “initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution[],” *id.* at 1211, *citing Taxpayers United for Assessment Cuts v. Austin, supra.*, and *Kelly v. Macon-Bibb County Bd. of Elections, supra.* The Tenth Circuit’s conclusion that the right to free speech and the right to vote were not implicated referred only to plaintiffs’ attempt to imply an inherent right of referendum in statutory counties where it did not exist. The power to differentiate the scope of the referendum as applied to different types of counties was determined to be well within the power of the state and did not give rise to an equal protection claim based on a claim of a general denial of fundamental rights at the state level.

Importantly, the Tenth Circuit concluded that, although “the right to free speech and the right to vote are not implicated by the state’s creation of an initiative procedure... [the right to free speech and the right to vote are implicated] by the state’s attempts to regulate speech associated with the initiative procedure, which is not the case here. [Emphasis added.]” *Id.* If the county in which Fruitlands resided had been a charter or home rule county and had been denied the referendum, it would have “been the case here” that a right to vote was implicated. The analysis then would not have concerned expansion of the right of referendum but examination of restrictions on the right of referendum articulated in the county charter.

By contrast, the people in Howard County, have reserved the full power of the referendum over legislative acts by Section 211 of their Charter. (Addendum.) Appellant then does not need to argue a general right to vote and free speech to establish the full right of referendum in Howard County. It already exists and under *Save Palisade Fruitlands*,

an acknowledged full power of referendum implicates the right to vote and other First Amendment rights.<sup>3</sup>

**Kelly v. Macon-Bibb County Bd. of Elections**

The decision in *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F. Supp. 1036, 1038-39 (M.D. Ga. 1985) is an anomaly. The curious result reached in that case is, perhaps, best explained by the hysteria surrounding the fluoridation efforts in this Country, believed by many to be a communist conspiracy,<sup>4</sup> and most famously parodied in “Dr. Strangelove.” Though not facing the extreme measures undertaken by “General Jack D. Ripper,” Georgia, like many other states sought to

---

<sup>3</sup> Interestingly, it was on this very distinction that the Tenth Circuit based its decision to affirm dismissal of the case in *Save Palisade Fruitlands*. “Perhaps most important, all of these cases [cited by Plaintiffs] involve[d] situations where a political subdivision had already been granted the power of initiative and the state attempted to regulate the speech associated with the initiative process.”

<sup>4</sup> See McNeil DR., *America’s longest war: the fight over fluoridation, 1950—*. Wilson Quarterly 1985: 9 (Summer): pp. 140-153. See also, Johnston, Robert D (2004), *The Politics of Healing*. Routledge. P. 136. ISBN 0415933390; Pratt, Edwin, Raymond D. Rawson & Mark Rubin, *Fluoridation at Fifty: What Have We Learned*, 30 J.L. Med. & Ethics 117, 119 (Fall 2002); *Fluoridation Of Water. Hearings Before The Committee On Interstate And Foreign Commerce, House Of Representatives, Eighty-Third Congress, Second Session on H. R. 2341. A Bill To Protect The Public Health From The Dangers Of Fluorination Of Water*. May 25, 26, and 27, 1954.

mollify an edgy, suspicious public over forced fluoridation, with rights granted to opt out through the process of referendum.<sup>5</sup>

Because of the constitutional implications of the exercise of the police power of the state regarding protection of the health and safety of the population in mandating fluoridation, the option granted the public to opt out by referendum was more likely a sop, than a nod to legitimate process.

More importantly, the district court's interpretation of the signature requirement language in *Kelly* is without parallel. No other published decision in the United States, where the threshold requirement for determining the number of signatures necessary for a petition based on a percentage of the number of voters who voted in the previous election, had ever required that the only persons permitted to sign a petition were those who had voted in the prior election.

Notwithstanding this bizarre interpretation of the statute, the Georgia district court's decision stands as an embarrassing outlier on the distribution of equal protection decisions by its countenance of denial of

---

<sup>5</sup> Louis W. Ripa, DDS, MS. *A Half-century of Community Water Fluoridation in the United States: Review and Commentary*. Journal of Public Health Dent. 1993, Vol. 53, No. 1 (Winter): p 37.

the exercise of the granted right of referendum by eliminating those registered voters who feared the detrimental health effects of fluoridation but who unfortunately had moved to Macon-Bibb County after the previous election more than two years earlier.

But for the timing of the Macon-Bibb County decision (and the lack of more determined litigants), it is inconceivable that the reasoning for finding unconstitutional the restrictions on the referendum process in *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) and *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), would not have provided sufficient incentive for the court in *Kelly* to find, similarly, unconstitutional the requirement that only those who voted in the last election could actually sign a petition to opt out of fluoridation.

It is difficult to imagine on what basis the government could offer as rational, let alone compelling, for denying more recent residents who were registered voters, the right to sign a petition to opt out of fluoridation.<sup>6</sup> The profound flaws in the reasoning of *Kelly v. Macon-*

---

<sup>6</sup> Given the massive movement to fluoridate the supply of drinking water in the United States, it is unlikely that any challenge to

*Bibb* render citation to it questionable in any case, but erroneous in this case.

**Hoyle v. Priest**

*Hoyle v. Priest*, 265 F.3d 699 (8<sup>th</sup> Cir. 2001), stands for no more than the proposition that in order to sign a petition one must be a registered voter. Because there is no dispute on this issue, *Hoyle* has no impact on this case.

**Stone v. City of Prescott**

The district court found the Ninth Circuit's decision in *Stone v. City of Prescott*, 173 F.2d 1172 (9<sup>th</sup> Cir. 1999) more persuasive than *Lemons v. Bradbury*, 538 F.3d 1098 (9<sup>th</sup> Cir. 2008). (J.A. Pages 125-126.) fn. 4. Once again, the district court fails to grasp the essential difference between Appellant's case challenging restrictions on the exercise of the power of referendum reserved by the people or granted by the state and cases restricting attempts to establish or expand the scope of the right of referendum. The plaintiffs in *Stone v. City of*

---

fluoridation was likely to succeed because of the countervailing political and health reasons.

*Prescott* did not challenge regulation of their exercise of the right of referendum.

Instead, plaintiffs seek to expand the scope of the referendum right itself. The people of Arizona did not delegate the referendum power to the legislature they reserved that power to themselves. However, they did not elect to reserve it absolutely. Ariz. Const. art. IV, Part 1, § 1. Instead, they provided in the State Constitution that the referendum power is not applicable to laws passed under declaration of emergency. *Id.* § 1(3).

*Stone v. City of Prescott*, 173 F.2d 1172, 1175 (9<sup>th</sup> Cir. 1999). The district court's mantra from *Stone* and other cases in the case *sub judice* that the exercise of the right of referendum is what gives rise to protections as a fundamental right, ignores the fact that those cases attempted to create or expand the scope of the reserved power of referendum not challenge regulations and restrictions on the exercise of an existing power, such as the power of referendum reserved by the people of Howard County.

- 2. Right to vote recognized as implicated in Referendum and Petition cases by Supreme Court and Lower Federal Courts**
  - a. Right of Referendum in Maryland and Howard County**

Notwithstanding the district court's fatal misapplication of federal precedent in analyzing the issue before it, there are important and



strong reasons why the right to vote is implicated and indeed violated in the People's reserved power of referendum at issue in this case. Historically, the dire circumstances that gave rise to the right of referendum in many states, including Maryland, help explain its evolution and, ultimate ascendance to its preeminent status as a check on the power of legislative action.

After the close of the Civil War great abuses began to creep into legislation and into the administration of the national and 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;

*Beall v. State*, 131 Md. 699, 103 A. 99, 102 (1917).

The power of the people to reserve to themselves the power of referendum is inherent in the Maryland Constitution. *Ritchmount Partnership v. Board of Supervisors*, 388 A.2d 523 (Md. 1978). In *Ritchmount*, the seminal case in Maryland recognizing and defining the right of referendum, the Maryland Court of Appeals carefully

articulated the meaning of the term referendum as “that power of direct legislation through the exercise of which the people of a state or a political subdivision may approve or reject an act or other measure passed by a legislative body.” *Id.* at 531. The precise issue framed by the Maryland Court of Appeals in *Ritchmount*, was whether the People of Anne Arundel County, a Charter County, possessed the power “to repeal or amend legislative enactments of the County Council except that which had been explicitly conferred upon them by organic or statutory law.” *Anne Arundel County v. Moushabek*, 306 A.2d 517, 527 (1973). In likely the most thorough examination of this issue in all of Maryland jurisprudence, the Court of Appeals expressed in unmistakable language, the scope, nature and source of the power and authority of the referendum for charter counties. The Court found that while the authority of local lawmaking bodies arises by a statutory grant of authority (in charter counties such as Howard, through Article 25-A of the MD Code Annot.) and therefore that “the legislative power of a charter home rule county is not and never has been constitutionally secured[,] [t]here are, however, certain powers implicit in Article XI-A [of the Maryland Constitution] which do not qualify as legislative

powers and which do not require implementing legislation to render them operative.” *Id.* at 530.

These powers necessarily proceed from §1 of the Home Rule Amendment and have as their object the initial organization and formation of charter government in the counties. Article XI-A, §1 effectively reserves to the people of this state the right to organize themselves into semi-autonomous political communities for the purpose of instituting self-government within the territorial limits of the several counties. The means by which the inhabitants acquire such autonomy is the charter. Being, in effect, a local constitution, the charter fixes the framework for the organization of the county government. [Citations omitted.] It is the instrument which establishes the agencies of local government and provides for the allocation of power among them.

*Id.*

Determining that the right of referendum is a power arising under §1 of Article XI-A, and that the power of referendum affects “the formation and structure of local government...,” the *Ritchmount* Court found that “we need look no further to identify the grounds for upholding the constitutionality of §308 [referendum provision at issue in Anne Arundel Charter], since the referendum would then have been a power vested directly in the people of Anne Arundel County under the Home Rule Amendment.” *Id.* at 531. Even more significantly for purposes of the case *sub judice*, the Maryland Court of Appeals found

that the right of referendum in Maryland directly affects the allocation of political power in charter counties, which would include Howard County.

It is evident that the referendum power reserved in §308 directly affects the distribution of political power between the people of Anne Arundel County and their elected legislative representative body, the County Council, thus is a fundamental feature of the overall structure of county government. By establishing what is in effect a coordinate legislative entity, that is, the county electorate, the §308 referendum is as much an element of the local political decision-making apparatus as the County Executive or the County Council itself. As such, referendum by petition is quite clearly a power affecting the form or structure of local government and therefore belongs to that class of powers vested directly in the people of the several counties by Article XI-A, §1. As we have previously stated, these powers do not depend for their exercise on the passage of implementing legislation by the General Assembly. [Citations omitted.]”

Id. at 532

Interestingly, Judge Levine in *Ritchmount* cited *Spaulding v. Blair*, 403 F.2d 862 (4<sup>th</sup> Cir. 1968), a case affirming a decision of the Honorable Roszel C. Thomsen, Chief Judge of the Maryland district court for the proposition that the “referendum is an integral component of the legislative process whenever authorized. *See Spaulding v. Blair*, 403 F.2d 862, 863 (4<sup>th</sup> Cir. 1968).’ *Ritchmount Partnership*, at 532. In

this respect, it differs little from other procedural steps in the law-making mechanism, such as the requirement that bills pass the legislative body or provisions for executive veto where the latter exists.”  
*Id.*

Very importantly, the right of referendum, once established in a county’s local constitution, its Charter, cannot be erased or altered in any way by any other branch of state government. *Ritchmount Partnership*, at 530. Thus, other branches of state government cannot in effect change the number of signatures required in a referendum effort for ballot access. This was the effect of the Board of Elections application of the Doe validation standard when it revalidated the first set of signatures submitted in this referendum effort.

**b. Right to vote is a part of a bundle of fundamental rights contained in the power of the referendum**

Why does the power of the referendum implicate the right to vote?

In Maryland, the Court of Appeals explained that:

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 law passed by the lawmaking body. [Emphasis added.]

*Ritchmount Partnership v. Board of Supervisors*, 388 A.2d 523, 532

(Md. 1978). It should be manifestly obvious that the crucial action contemplated by the referendum process is paramount authority to approve or reject legislative actions already taken and that approval or rejection can only be accomplished through the franchise.

Although the referendum, practically speaking, represents a process or continuum with moving parts, the fundamental rights implicated by the people's reservation of the power of referendum, and its exercise, are not readily susceptible to segregation. *Anderson v. Celebrezze*, 460 U.S. 780, 786, 103 S.Ct. 1564, 1568 (1983) (citing *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972)). Nor should they be. Indeed, the various parts of the election process are constitutionally protected. Citing *Storer v. Brown*, 415 U.S. 724, 730 (1974), the *Celebrezze* court recognized that 'as a practical matter, 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 process.' Acknowledging that the States enact comprehensive and sometimes complex election law, the court admonished that

Each provision of these schemes, whether it governs the registration and qualification of voters, the selection and

eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. *Id.*

Although the right of referendum is not guaranteed by the Federal Constitution, it is by the Maryland Constitution in Md. Code Ann., Const. art.16, § 1, and in the Howard County Charter, the local constitution of Howard County, in Howard County Charter Section 211. In general, the nature of the right of referendum is derived from the essential character of the people as the undisputed source of power in a republican form of government to establish the extent of their government’s powers.<sup>7</sup> The referendum is a reservation of some measure of power by the people from their reservoir of all power from which legitimate government derives its existence.<sup>8</sup> “A referendum

---

<sup>7</sup> Md. Code Ann., Decl. of Rts. art. 1, provides: “That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their Form of Government in such manner as they may deem expedient.”

<sup>8</sup> Because government exists as a result of a compact with the people, the power of government is not absolute but rather defined by the people in terms which are necessarily limited. Md. Code Ann., Decl. of Rts. art. 3 enshrines this principle providing that: “The powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States respectively, or

cannot...be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, e.g., *The Federalist No. 39* (v. Madison).” *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976).<sup>9</sup>

---

to the people thereof.” Finally, even though the people have by compact established a republican form of government by virtue of their constitution, the reservation of other rights by the people are not to be jeopardized. *Avery v. State*, 15 Md.App. 520, 537, 292 A.2d 728, 741 (1972). Md. Code Ann., Decl. of Rts. art. 45 establishes that “[t]his enumeration of Rights shall not be construed to impair or deny others retained by the People.”

<sup>9</sup> The right of referendum expressly articulated in the Maryland State Constitution and the Howard County Charter is a reserved power of the people and does not achieve its vitality as a right through these constitutions. Indeed the language in the Charter articulates the nature of the referendum as a power reserved outside of the terms of the constitution expressly withheld from those powers given over to the government in the constitution and exercisable by the people. This does not mean that these powers are without significance to a constitutionally formed government for the reservation of the power of referendum expresses a preference by the people respecting their chosen form of government. What duty does the government owe the people to protect exercise of powers reserved by the people as powers outside the scope of the constitution but whose expression achieves full realization only through fundamental guarantees granted by the people in terms of rights expressed within the constitution?

The federal question is not whether the power of referendum is protected as a fundamental right under the United States Constitution



It is difficult, if not impossible, to find legitimate support for exclusion of the right to vote as a necessary component of the proper and legitimate exercise of the right of referendum. Under Maryland law, the right of referendum is a power shared with the legislature. That the legislature has the power to make laws is not license to deny the legislative authority of the people by denying them the right of referendum. Thus, a federal court, in this Circuit at least, has no power to enjoin the exercise of shared legislative power by the people.

*Spaulding v. Blair*, 403 F.2d 862, 865 (4<sup>th</sup> Cir. 1968). This does not mean, however, that a federal court should acquiesce in limitations or regulations that operate so as to deny the right to vote without close scrutiny to determine a compelling interest in any attempt by one or more branches of government to deny the legitimate exercise of this

---

from which such a right might be derived at the local level, which it may not, but whether, where expressly reserved by the people in their local constitution as in Howard County, as a coordinate branch of government, it is protected as an exercise of the fundamental power of the people to choose their form of government and whether its exercise entrusted to a constitutional form of government has been accorded those fundamental rights reasonable and necessary to fulfill its legitimate ends.

shared legislative power and the right to vote by another coordinate branch of government.

In analyzing restrictions on the right of petition and referendum, federal courts have approached the right by separating it into parts and analyzing constitutional implications of the various pieces; (1) the establishment and/or expansion of the right,<sup>10</sup> (2) the circulation of petitions and gathering signatures in the exercise of this right,<sup>11</sup> and (3) the exercise of the franchise.<sup>12</sup>

---

<sup>10</sup> *Stone v. City of Prescott*, 173 F.2d 1172, 1175 (9<sup>th</sup> Cir. 1999).

<sup>11</sup>In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) and *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) the Supreme Court determined unconstitutional certain restrictions placed on circulators of petitions.

<sup>12</sup> In *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 1496 23 L.Ed.2d 1 (1969) the Supreme Court held that the petition nominating process as an integral part of the election process would be reviewed under an exacting scrutiny “against charges of discrimination or abridgment of the right to vote.” In *Hussey v. City of Portland*, 64 F.3d 1260 (9<sup>th</sup> Cir. 1995) a State statute allowed the city to annex property with consent of majority of landowners in territory and majority of electors in territory. A city ordinance required nonresidents to consent to annexation as a condition of receiving reduction in hook-up cost for mandated sewer connection. The Court found that 1) “consents” by voters were the constitutional equivalent of “voting;” 2) once citizens were granted right to vote on a matter, this right become constitutionally protected even if the state was not required to grant such right; 3) the ordinance

Appellant urges that the right to vote is an essential part of the bundle of fundamental rights associated with the referendum. This Court recognized in *Dixon v. Maryland State Administrative Bd. of Election Laws*, 878 F.2d 776, 779 (4<sup>th</sup> Cir. 1989) that “laws that affect candidates always have at least some theoretical, correlative effect on voters.’ *Id.* Indeed, as the Supreme Court has stated emphatically, ‘[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights. *Anderson v. Celebrezze*, 460 U.S. 780, 786, 103 S.Ct. 1564, 1568 (1983).”

The view that the right to vote is nascent or an inchoate aspect of the right of referendum continuum improperly distills out the right to vote as an abstract principle separable from the right of referendum. However, because the exercise of the franchise is the culmination of the people’s expression of choice, there is no reason—indeed it would be improper under the cases cited above—to diminish or dilute recognition of the franchise as an integral part of the right of referendum entitled to

---

was subject to a strict scrutiny analysis for purposes of equal protection analysis; and 4) the ordinance was violative of equal protection. Finally, the Court found that city’s offer of a subsidy to electors who consent to annexation impermissibly burdened the right to vote.

protection as a fundamental right in the same way as those protections afforded other aspects of the right referendum including the rights of free speech, association and petition for redress of grievances under the umbrella of “core political speech.” *See Meyer v. Grant*, 486 U.S. at 422, *supra*. Even if the right to vote were considered a conditional part of the right of referendum, which it is not, any state based restrictions alleged to impinge on the ability of citizens to satisfy the condition for placement of the referendum on the ballot would have to be scrutinized carefully by the courts to insure that the exercise of the power of referendum was not trammelled on or denied on the pre-textual grounds of reasonable restrictions on the process of voting and managing elections. “In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.’ *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).” *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

Indeed, the Supreme Court has come very close to finding that the

proper framework to analyze whether restrictions on the constituent parts of the referendum process pass constitutional muster must consider the implications to the right to vote. In *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), a case involving circulation of a nominating petition for a candidate to office, the Supreme Court declared:

The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. [Citations omitted.] All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.

*Moore v. Ogilvie*, 394 U.S. at 818, 89 S.Ct. 1495-96. Indeed, in *Moore*, the majority opinion of the Supreme Court rejected the dissent's view that the contingent or speculative nature of the effect of the petition as relating only to "prospective candidates," in any way diminished the clear implications to the fundamental right to vote and the appropriate application of an equal protection analysis to the state's restrictions on signatures necessary for a petition to succeed. In the same way, this holding mitigates the significance of any claim that the right to vote is a conditional right whose protection is likewise contingent on satisfying the conditions of submitting a successful petition.

More recently in *Lemons v. Bradbury*, 538 F.3d 1098 (9<sup>th</sup> Cir. 2008), the Ninth Circuit, for the second time relying on *Moore, supra.*, held that “regulations on a state’s initiative process ‘implicate the fundamental right to vote, for the same reasons and in the same manner,’ as regulations on candidate nominating petitions. [Citation omitted.]” *Id.* at 1102. Indeed, this comparison found support in *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). There the Supreme Court noted with approval the Tenth Circuit’s resort to Supreme Court jurisprudence on ballot access to analyze the restrictions on the right of referendum.

That court properly sought guidance from our recent decisions on ballot access, see, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), and on handbill distribution, see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). [Citation omitted.] Initiative-petition circulators, the Tenth Circuit recognized, resemble handbill distributors, in that both seek to promote public support for a particular issue or position. [Citation omitted.] Initiative-petition circulators also resemble candidate-petition signature gatherers, however, for both seek ballot access.

*Buckley v. American Const. Law Found., Inc.*, 525 U.S. 190-91, 119 S.Ct. 641-42.

**3. The district court erred in concluding that the signature requirements did not violate Appellant's rights protected by the First Amendment of the United States Constitution.**

It is important to employ commonsense in order to fully appreciate the absurdity of HCBOE's decisions in this case. HCBOE first carefully verified and certified that 2,603 of the 3301 petition signatures presented to the Board for verification reflected signatures of registered Howard County voters. This represented a rejection rate of 21%. One month later, the Howard County Board of Elections, although the law had not changed, applied a new approach and interpretation to verifying signatures.<sup>13</sup> As a result 66% more of the previously

---

<sup>13</sup> In paragraph 30 of the Answer to Plaintiff's Complaint in this case, the State of Maryland admitted that the law had not changed and that the Court of Appeals rejected the notion that the State Board of Elections was able to determine registered voters under the guidance Plaintiff and others had proceeded:

Defendants Walker and Lamone admit the truth of the allegations in paragraph 30 that —the law“ has not changed —during the referendum effort“ because the signature requirements of Md. Code Ann., Elec. Law § 6-203 have been essentially unchanged for a number of years. Defendants Walker and Lamone admit that Court of Appeals in Doe v. Montgomery County Board of Elections rejected the understanding that election officials had the authority to validate petition signatures on the basis that they could determine with “reasonable certainty” that the person signing was a registered voter. SBE thus changed its guidelines about how election elections should enforce Md. Code Ann., Elec. Law § 6-203. (J.A. Page109.)

undisputed certified valid registered voters who had signed the petition for referendum were eliminated.<sup>14</sup> There is no dispute on this seminal fact.

Moreover, review of a sample of petition sheets shows that the HCBOE did not apply the strict standard they claimed required mandatory adherence. Those sheets revealed signatures of petition signers whose handwriting was utterly incomprehensible, yet were accepted as valid entries on the petition and others whose handwritten signatures were impeccable but whose entries were rejected because they excluded a middle initial. Because no humanly possible way readily suggests how an unrelated person could discern whether the individual signed his or her name or even what alphabet was used, there is no way to determine whether any of the requirements of Md. Code, Elec. Law § 6-203(a) (2008) were met.

If there is no way to determine based on illegible handwriting, if Section 6-203 has been met for signers who were not rejected, HCBOE's

---

<sup>14</sup> The actual process employed involved taking the original 3301 signatures and extracting a sample of 1216 signatures.



enforcement of Section 6-203 was an arbitrary and illegitimate application of discretion contrary to the dictates of a mandatory rule. HCBOE arbitrarily applied a discretionary standard that departed from the asserted mandatory standard.

Whether or not Appellant's First Amendment rights were violated, the district court explained its duty to "determine whether the challenged statute, as applied to Plaintiff, imposes anything other than 'nondiscriminatory, content-neutral limitations' on Plaintiff's right of referendum." (J.A. 126.) The district court, referencing language from *Doe v. Montgomery County Bd. of Elections*, 962 A.2d 342 (Md. 2008), found "that Section 6-203, as interpreted by the Maryland Court of Appeals, is, in fact, non-discriminatory and content-neutral...[and as applied] is reasonably related to the purpose of detecting fraudulent or otherwise improper signatures." (J.A. 127.)

Although the rule as applied might be content neutral, it is hardly nondiscriminatory or reasonable, its effect being the elimination of nearly every signatory to the petition for referendum.<sup>15</sup>

---

<sup>15</sup> The absurdity of the signature requirement applied by the Howard County Board of Election's reaches its apogee in the utterly

The statute as applied discriminates in at least three ways. These are based on qualities or personal characteristics without which a petition signer likely will not achieve the proper level or standard of conduct necessary to survive review and have their signature count.

The first qualification one must possess to sign a petition in Howard County is a good memory. The critical piece of information that must be remembered to successfully sign is contained in Md. Code, Elec. Law § 6-203(a)(1). To sign a petition, a person must “sign the individual’s name as it appears on the statewide voter registration list...” There are minimally acceptable variants such as a surname and a first name spelled out and middle initial or first initial and middle name spelled out and a surname. But the key is how the name appears on the signature card. If the potential signer cannot remember how their voter registration card was signed, the rest of the exercise is no

---

unintelligible handwriting of signers whose names were accepted as valid signatures compared to others whose handwriting was impeccable yet were rejected because they failed to add a middle initial. Consistent application of the purported signature requirement would have resulted in rejection of 100% of the referendum petition signatures.

more than a guess.<sup>16</sup> Because many people who registered to vote did so decades ago, this qualification becomes significantly more important and may discriminate disproportionately against older people whose memories may be more challenged than those of younger voters or who have resided in the same home for many years and have not needed to complete a new voter registration card. Of course, notwithstanding deficiencies in memory, the part played by the point in time one signed their voter registration card is affected by how distant in the past that point in time is relative to the present, regardless of age.

The second qualification, even more fatuous than the first, tests petition signers' ability to follow a set of directions similarly unrelated to determining whether the signer is a registered voter entitled to sign the petition and have the signature count.<sup>17</sup> The signer must print his

---

<sup>16</sup> Axiomatically, an unacceptable basis on which to ground determination of the outcome of whether the exercise of one of the most if not the most important right in a democracy, should be allowed.

<sup>17</sup> Accepted statistical analysis suggests that between 5% and 7% of the voter age population of the United States are affected by Attention Deficit Disorder/Hyperactivity Disorder. And probably even a significantly higher percentage of individuals simply do not follow directions very well, yet are perfectly competent, intelligent and most importantly, registered voters, capable of responsibly exercising the franchise.

or her name in the print name block letter for letter the way their name was signed, which in turn must be signed as it appears on the statewide voter registration list.<sup>18</sup> Petition signers then must keep track of three locations of where their name is represented either by printing, typing (on the voter registration card) and signing and insure consistency among all three. The safest course of action to assure complementarity is reference back to the voter registration card. But as explained above, if the signer cannot remember how their name is set forth on their voter registration card, the exercise is little more than guesswork.

Following directions is complicated further by the fact that the block for printing one's name is about one third the size of the block for

---

<sup>18</sup> The District Court, like the Maryland Court of Appeals described the two variants permitted from the requirement that the signature on the petition must appear as it appears on the statewide voter registration list as if this exception was some great concession on the part of the state rules which would provide more than ample latitude for petition circulators. Except that the state standard is vague at best. Does the requirement that the signature on the petition appear as it does on the voter registration card mean that the signature must look the same as the signature on the voter registration card or does it mean that the signature on the petition must be letter for letter the same as the printed name on the voter registration card? Moreover, are the variants to the first signature option, variants to the signature looking the same as the signature on the voter registration card or to the signature on the petition being letter for letter the same as the printed name on the voter registration card?

signing. (J.A. Page 30.) But even though the signature block is larger, the block is still small (not capable of holding more than one short line of 13 point type), signatures in signature blocks in about 70% of the cases run over the lines of adjacent blocks. The intrusion reduces both the space available for signatures in contiguous signature blocks as well as readability. Confronted with the ineluctable problem of placing lots of information not easily fitting into tiny boxes and intruding lines from adjacent signature blocks, most people default to a strategy optimizing information and space that utilizes abbreviations, nicknames, accepted shortened forms of longer names, elimination of middle initials, etc.,-- all unacceptable for signing a petition for referendum, even though the signatory status as a registered voter is easily validated. There is no reason to suppose this strategy is inconsistent with or thwarts the state's interest in ferreting out fraudulent or otherwise improper signatures.

The third standard of conduct or qualification is perhaps the most irrational of all. In order to sign the petition, one must have legible handwriting. For if they do not it will not be possible to satisfy Md. Code, Elec. Law § 6-203(a)(2)(i), that the printed name be set forth as it

was signed. Appellant suggests there is no legitimate reason to withhold judicial notice of the fact, commonly accepted, that most handwritten signatures are not susceptible to differentiation of each letter used in the signature.<sup>19</sup> If the signatures exhibited on the petition sheets are at least as incomprehensible as collective experience suggests, most signatures will succumb to the inability to determine if the name was printed on the petition as it was signed on the petition, thus transforming achievement of a successful referendum into a political Sisyphean task. And, just because the HCBOE accepted signatures on the petition sheets whose signatures were no more than scribble, should give rise to no more than a vain hope in the possibility of successfully gathering sufficient signatures. In reality it represents a clear warning shot to would be referendum organizers that even if all the printed names matched the voter registration cards, the petition can still fail because of the inability to verify that the individual printed their name as it was signed on the petition.<sup>20</sup>

---

<sup>19</sup> One need go no further than the signatures on the pleading in this case to secure several supporting examples.

<sup>20</sup> The generally illegible signatures makes this process an act of faith on the part of HCBOE. Ironically, the Maryland state and federal

None of the three standards of conduct or qualifications described above bear the slightest relationship to the state's interest in detecting and preventing fraudulent signatures, a problem that has never been recorded in Howard County referendum history.<sup>21</sup> There can be no legitimate dispute whether the actions of HCBOE effectively discriminate against everyone who would sign a petition for referendum and represent constitutional violations of a significant nature, made even more dramatic by the terrible scope of the disenfranchisement.<sup>22</sup> Appellant seeks invalidation of more than just a parochial local election

---

courts do not share any faith in the HCBOE's ability to otherwise verify the validity of signers as registered voters as they did in the past.

<sup>21</sup> Other jurisdictions have rejected the notion of precision in the form of signing a petition for referendum. *Wheelright v. County of Marin*, 467 P.2d 537 (1970)(rejecting perfect match); *Protect Marriage Illinois v. Orr*, 2006 WL 2224059 (N.D.Ill.)(rejecting perfect match); *McClellan v. Meyer*, 900 P.2d 24 (1995)(rejecting perfect match); and, *Petition for Agenda Initiative*, 821 A.2d 203 (Pa.Cmwlth. 2003)(rejecting perfect match).

<sup>22</sup> "Ah that's one thing about our Harry, doesn't play any favorites! Harry hates everybody...."—Actor, John Mitchum in the role of Inspector Frank DiGiorgio explaining to a new recruit how Harry Callahan got the name "Dirty Harry," in the movie *Dirty Harry* (1971).

matter, but rather “broad gauged unfairness.” *Griffen v. Burns*, 570 F.2d 1065, 1078 (1<sup>st</sup> Cir. 1978).<sup>23</sup>

Appellant asks this Court not to overlook the practical implication of the signature requirements as applied by HCBOE which in reality restricts exercise of the power of referendum so severely it is effectively eliminated. Well settled Supreme Court authority states unequivocally that once the referendum is established, states may not unduly burden or impose unreasonable restrictions on its exercise. In *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 and *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), the Supreme Court made abundantly clear that the right of referendum once granted assumes a mantle of protection under

---

<sup>23</sup> This Court is, therefore, not being asked to weigh some limitation on the process of voting against the inconvenience imposed on the opposing parties if the limitation were eliminated but whether the process in this case has reached “the point of patent and fundamental unfairness.” *Bonas v. Town of North Smithfield*, 265 F.3d 69, 74 (1<sup>st</sup> Cir. 2001) *citing Griffen v. Burns*, 570 F.2d at 1077. Like the Court in *Bonas*, this case concerns the rarer and more severe situation caused by complete denial of that right to vote. “In this chiaroscuro corner of the law, one thing is clear: total and complete disenfranchisement of the electorate as a whole is patently and fundamentally unfair (and, hence, amendable to rectification in a federal court).” *Bonas v. Town of North Smithfield*, 265 F.3d 69,75 (2<sup>nd</sup> Cir. 2001).



the First Amendment from impermissible burdens on its exercise. In *Meyer v. Grant*, the Court held that the challenged law restricted political expression in two ways. “First, it limits the number of voices who will convey appellees’ message... Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot...” *Id.* at 423.

Applying these standards to the present case should be embarrassing to the HCBOE and repugnant to the clear pronouncement in *Meyer v. Grant* that although the state has no obligation to afford its citizens an initiative procedure, “having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution.” *Meyer v. Grant*, 486 U.S. at 420.

The Supreme Court applied the same analysis in scrutinizing burdens placed on initiative and referenda efforts as on candidate-petition signature efforts. In *Buckley v. American Constitutional Law Foundation, supra.*, a non-profit organization challenged six Colorado laws that required, among other things, that petition signature gatherers disclose in advance to potential petition signers, whether they were paid or volunteer by wearing a name tag stating same. Although

not reaching the specific issue of whether their status as being paid or volunteer was crucial to the outcome of the case, the Buckley Court nevertheless agreed with the lower court and held that “[t]he added benefit of revealing the names of paid circulators and amounts paid to each circulator, the lower courts fairly determined from the record as a whole, is hardly apparent and has not been demonstrated.” *Id.* at 203. Compared to the burden of effectively disenfranchising every petition signer and thus effectively blocking access to the ballot by application of the matching signature requirement in Howard County, the disclosure of amounts paid to individual signature gatherers held impermissible in *Buckley* pales in a comparison of constitutionally violative actions.

In *Buckley*, the Supreme Court found solid support in its previous decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where the Court considered application of a state requirement that unsigned leaflets violated an Ohio ordinance prohibiting anonymous handbills circulated for the purpose of influencing any voter in any election. The Court struck down the requirement as a clearly impermissible burden on First Amendment rights. The Court explained:

Of course, core political speech need not center on a candidate for office. The principles enunciated in *Buckley* extend equally to issue based elections such as the school tax referendum that Mrs. McIntyre sought to influence through her handbills. See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978) (speech on income tax referendum "is at the heart of the First Amendment's protection"). Indeed, the speech in which Mrs. McIntyre engaged--handing out leaflets in the advocacy of a politically controversial viewpoint--is the essence of First Amendment expression. ..No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's.

When 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. See, *e.g.*, *Bellotti*, 435 U. S., at 786. Our precedents thus make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind.

*McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 344-45 (1995).

At other times, in other cases, the Supreme Court has expressed reasons for the importance of non-interference with the referendum that accord with traditional First Amendment jurisprudence. In *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003), the Court, faced with a challenge to invalidate a referendum, explained that "by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests. In assessing the referendum as a 'basic instrument of

democratic government,’ *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976), we have observed that ‘[p]rovisions for referendums demonstrate devotion to democracy....’ *James v. Valtierra*, 402 U.S. 137, 141, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).” *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196, 123 S.Ct. 1389, 1395, 155 L.Ed.2d 349 (2003). Here, the restrictions imposed on the signatures undermine the ability to exercise the referendum. By eliminating so many legitimate certified valid signatures in the petition for referendum, the restrictions severely limit the ability to freely associate to urge political change. They also place a severe chilling effect on the ability to effectively speak freely, because if referenda are so easily denied, then access to the ballot and free and open public debate is quashed.

The conclusion of the district court that the restriction was a reasonable, nondiscriminatory and content-neutral restriction clearly fails to square with the law and facts in this case. The signature requirement as applied in the present case constitutes an impermissible burden on Appellant’s First Amendment rights. “[s]uch a provision does

not facilitate the initiative process because it hampers the ability of the public to engage in the initiative process and does not act to prevent fraud.” *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 215, 602 N.W.2d 465, 477 (Neb. 1999).<sup>24</sup>

**4. The district court erred in concluding that the signature requirements and their application did not violate Appellant’s right to equal protection**

Although the district court erred in its Equal Protection analysis because it failed to utilize a fundamental rights framework, assuming, arguendo, this case did not involve exercise of fundamental rights the district court erred in applying the laxer rational basis test. In *Adkins v. Rumsfeld*, 464 F.3d 456, 469 (4<sup>th</sup> Cir. 2006), this Circuit explained the rational basis test:

Under the rational basis test a court must determine (1) “whether the purpose that animates [the challenged] laws and regulations is legitimate,” *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1320 (4<sup>th</sup> Cir.1994), and (2) whether it was “reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose,” *id.* (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981)).

---

<sup>24</sup> A comprehensive analysis on the impact of exact signature requirements on the right of the referendum.

A “classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Adkins v. Rumsfeld*, 464 F.3d at 469, quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). If there is any reasonably conceivable state of facts then the disparity in treatment will be upheld. In this case, the disparity in treatment constitutes elimination of 87% or more of the total signatures on a petition for referendum, 66% of which were initially certified with “reasonable certainty” as being the signatures of Howard County registered voters. (If the mandatory requirement that the printed name match the signature had been applied, 100% of the signatures would have been eliminated.) The district court concluded that “there is a rational relationship between separating those signatures which meet Section 6-203’s requirements from those which do not and the legitimate governmental purpose of detecting fraudulent or otherwise improper signatures upon a referendum petition.” (J.A. Page 129.) First this assumes incorrectly a rational reason exists to distinguish signatures meeting Section 6-203 requirements and those that do not. Second, it assumes application of the requirements as

interpreted by the Maryland Court of Appeals actually improve the chances of detecting fraudulent or otherwise improper signatures. Finally, the district court's misapplication of the rational basis test would countenance the absurd result that the government's purpose in detecting fraudulent or otherwise improper signatures on a referendum petition would be most successfully achieved where application of Section 6-203 resulted in elimination of 100% of the signatures in every case.

The district court's attempts to uphold the government's regulations, admirable as they may be, unfortunately sanction consequences that have become, as the Montgomery County Board of Elections predicted in the Doe case, nothing short of absurd. There is no basis rationally related to any governmental interest for the distinction made between individual registered voters whose signatures were thrown out because they were not exactly as written on their voter registration card and those individual registered voters whose signatures were accepted because they were written exactly as stated

on their voter registration cards.<sup>25</sup> In fact, the actions of all Appellees bear no rational relationship whatsoever to any legitimate state concern of detecting fraudulent or otherwise improper signatures.

**5. The district court erred in concluding that the signature requirements and their application did not violate Appellant's right to substantive due process protected by the 14<sup>th</sup> Amendment to the United States Constitution.**

The district court found that “the HCBE Defendants’ application of Section 6-203 to Plaintiff’s signature and others on the HCCOG petition did not violate a fundamental right of Plaintiff’s, created by the federal Constitution.” (J.A. Pages 125-127, 129.) Because Appellant failed to identify a substantive constitutional right contravened by the Defendants, “[he] thus cannot claim the freedom from arbitrary state action which such a right generates.<sup>[26]</sup> [Citation to unpublished per curiam opinion omitted.]” (J.A. Page 129.)

---

<sup>25</sup> In fact, in the most recent amendment to Section 6-203, the Maryland General Assembly stated its purpose in “requiring election authority staff to verify signatures on a petition... is to ensure that the names of the individuals who signed the petition are registered voters, not to verify the authenticity of the signature.” Department of Legislative Services, Maryland General Assembly, Fiscal and Policy Note regarding Senate Bill 101, 2006 Session.

<sup>26</sup> Apparently, subjection of Appellant to ordinary arbitrary state action being a prerogative of the governing over the governed.



Analysis of substantive due process rights depends on whether the conduct complained of was an act undertaken by the executive or legislative branch of government. *Hawkins v. Freeman*, 195 F.3d 732, 738 (4<sup>th</sup> Cir. 1999). Substantive due process claims against executive action must pass a threshold criterion that the complained of conduct shocked the conscience. Though ‘conscience shocking’ in this case, action complained of is legislative, arising from the interpretation of the law as applied to the validation process of signatures on a the petition for referendum. In challenges to legislative conduct as violative of substantive due process rights, a different two step analysis applies. *Id.* at 739. First a court must determine whether the challenged action concerns “fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition...’” *Hawkins v. Freeman*, 195 F.3d 732, 739 (4<sup>th</sup> Cir. 1999) citing “*Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. 2258 (quoting *Moore*, 431 U.S. at 503, 97 S.Ct. 1932)...” *Hawkins v. Freeman*, 195 F.3d at 739.

If a fundamental right is implicated, then the challenged conduct is subjected to further review under the strict scrutiny standard to determine if the legislation, or its application, is sufficiently

circumscribed or precise to discharge a compelling state interest. *See id.* at 739. To satisfy the compelling state interest test, the regulation must be reasonable and nondiscriminatory. In the case of First Amendment rights the restriction must be content neutral. In this case, the district court erred in its analysis by determining there was no violation of a substantive due process right because it erred in determining that no fundamental right was implicated. The fact that standards used in the first review afforded, to a near certainty, sufficient signatures to place the referendum in question on the ballot, and there being no dispute that every single signature eliminated as part of the Howard County Board of Election's second review were valid registered voters, the restrictions and regulations challenged in this case represent a clear denial of the right to vote by application of an irrational and unreasonable regulation to the election process.

The application of the signature requirement in the manner demonstrated by the HCBOE required the district court to undertake a substantive due process analysis to determine if eliminating validated and certified signatures of registered voters serves a compelling state interest. Appellant urges that the clarity of the right implicated and its

obvious violation warrant a reversal of the district court's opinion and determination by this Court that the right to vote was violated and that the elimination of the certified valid signatures of registered voters violated substantive due process rights of Appellant.

Similarly, the district court erred in determining that Appellant had not demonstrated a violation of his substantive due process rights as implicated by a violation of his First Amendment rights. The district court conceded the First Amendment concerns. The severe impact on the election process, the elimination of 87% of the total signatures collected, and the ultimate rejection of signatures of 66% of those signatures first certified as being those of qualified registered voters, should have triggered a strict scrutiny review to determine whether the so called non-discriminatory, content neutral restrictions as applied impermissibly burdened the right of free speech. As discussed above, the conclusion that the challenged statute and its interpretation as applied to the exercise of the referendum was reasonable and nondiscriminatory when the result eliminated nearly all, and indeed potentially all, signatures on a petition for referendum unhinges the law from any notion of justice.

6. **The district court erred in concluding that the signature requirements and their application do not violate Appellant's right to procedural due process protected by the 14<sup>th</sup> Amendment to the United States Constitution.**

The district court analysis of the procedural due process claims of the Appellant acknowledged that "Plaintiff does possess a state-created right to petition legislation to referendum." (J.A. Page 130.) The district court, however, misunderstands Appellant's case by limiting characterization of Appellant's challenge to the process surrounding the March 12, 2009, meeting. The obvious and far more serious aspect to Appellant's procedural due process challenge concerns the fact that the second review was done at all. There are simply no articulated procedures for HCBOE's decision to invalidate already certified validated signatures on a referendum petition, especially where, as here, no allegations or evidence existed that any of the signatures certified in the first review were in fact fraudulent. The Appellees made the decision certifying as valid sufficient number of signatures to allow the petition for referendum to move forward.

In reliance on that determination, an additional 6,079 signatures were submitted. The government should be estopped from claiming the petition for referendum failed.

The status of the general rule that estoppel cannot be asserted against the government is in some flux, *Schweiker v. Hansen*, 450 U.S. 785, 791, 101 S.Ct. 1468, 1472, 67 L.Ed.2d 685 (1981) (dissenting opinion of Marshall, J.) and the lower federal courts in particular are in disagreement about the applicability of estoppel in cases involving failure to file timely proof of loss. [Footnote omitted.] But even those authorities that urge a liberalization of the traditional rule denying estoppel would require that a private party asserting estoppel against the government establish as an absolute pre-condition all the elements of equitable estoppel especially, "... conduct by a government agent or entity that has induced reasonable, detrimental reliance by a private party." Note, *Equitable Estoppel of the Government*, 79 Columbia L.Rev. 551, 558 (1979).

*West Augusta Development Corp. v. Giuffrida*, 717 F.2d 139, 140 (4<sup>th</sup> Cir. 1983). *See also Estate of Bennett v. C.I.R.*, 935 F.2d 1285, p. 2 (4<sup>th</sup> Cir. 1991) (unpublished disposition). Appellant urges that the fundamental unfairness in reversing a decision on which Appellant and others relied without any articulated process or justification in exigent circumstances constituted a denial of procedural due process.

Finally, if it cannot be determined based on illegible handwriting, if Section 6-203 was met for signers who were not rejected, HCBOE's enforcement of Section 6-203 constitutes an arbitrary and illegitimate application of discretion contrary to the dictates of an alleged mandatory rule. The fact of the matter is that HCBOC waited until after the second batch of over 6000 signatures was submitted to inform

the organizers that they were not counting the first batch. HCBOE simply implemented a rule contrary to statutory authority and applied it to Appellant and others that resulted in a deprivation of the constitutional right to procedural due process.

## CONCLUSION

The district court erred in failing to find that the referendum as a power reserved by the people to participate as a coordinate branch of government in the legislative process with the power to approve or reject legislation passed by the Howard County Council, encompasses a bundle of fundamental rights, including the right to vote and First Amendment rights protected by the First and Fourteenth Amendments to the United States Constitution, and that upon invocation of the power of the referendum the First Amendment protects the people's choice of process to advocate and exchange of core political speech.

The signature requirements imposed by Appellees bear no rational relationship to a reasonable government purpose and certainly did not serve a compelling state interest in that the requirements imposed were so unreasonable that Appellant and nearly all others were effectively prohibited from exercising the franchise in support of

the referendum. Appellant and those registered voters who signed the petition and whose signatures were rejected were subjected to impermissible restrictions on their right to vote as well as on the right of free speech, association and petitioning the government for the redress of grievances. The district court erred in finding that Appellees' application of the signature requirements of Section 6-203 represented a reasonable, nondiscriminatory and content-neutral restriction on the exercise of the referendum, and in failing to find that the strict application of the statute denied Appellant equal protection under the law and the right to due process under the Fourteenth Amendment.

The Court should reverse the judgment of the district court.

## REQUEST FOR ORAL ARGUMENT

The Appellants submit that this case warrants at least ten minutes of oral argument per side for the following reasons:

- (1) This is a case of first impression;
- (2) This case implicates fundamental political rights; and
- (3) This case involves a challenge to the constitutionality of several state statutes.

/s/ Susan Baker Gray

Susan Baker Gray

Law Offices of Susan Baker Gray

*6510 Paper Place*

*Highland, Maryland 20777*

*(240) 426-1655*

*Attorneys for Plaintiff-Appellant*



## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 13,459 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief also complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Century.

/s/ Susan Baker Gray

Susan Baker Gray

Law Offices of Susan Baker Gray

*6510 Paper Place*

*Highland, Maryland 20777*

*(240) 426-1655*

*Attorneys for Plaintiff-Appellant*

## ADDENDUM

### a. Howard County Charter, Article II. The Legislative Branch

#### Section. 211. The referendum.

(a) *Scope of the referendum.* The people of Howard County reserve to themselves the power known as "The Referendum," by petition to have submitted to the registered voters of the County to approve or reject at the polls, any law or a part of any law of the Council. The referendum petition against any such law shall be sufficient if signed by five per centum of the registered voters of the County, but in any case not less than 1,500 nor more than 5,000 signatures shall be required. Such petition shall be filed with the Board of Supervisors of Elections of Howard County within sixty days after the law is enacted. If such a petition is filed as aforesaid, the law or part thereof to be referred shall not take effect until thirty days after its approval by a majority of the qualified voters of the County voting thereon at the next ensuing election held for members of the House of Representatives of the United States; provided, however, that if more than one-half but less than the full number of signatures required to complete any referendum petition against such law be filed within sixty days from the date it is enacted, the time for the law to take effect and the time for filing the remainder of signatures to complete the petition shall be extended for an additional thirty days. Any emergency measure shall remain in force from the date it becomes law notwithstanding the filing of such petition, but shall stand repealed thirty days after having been rejected by a majority of the qualified voters voting thereon. No law making any appropriation for current expenses shall be subject to rejection or repeal under this section.

(b) *Form of petition.* A petition may consist of several papers, but each paper shall contain a fair summary of the Act or the part of the Act petitioned upon; and there shall be attached to each such paper an affidavit of the person procuring the signatures thereon that, to the said

person's own personal knowledge, each signature thereon is genuine and bona fide, and that to the best of his or her knowledge, information and belief the signers are registered voters of the State of Maryland and Howard County, as set opposite their names. The Board of Supervisors of Elections shall verify the registration of said petitioners.

Editor's note: An amendment to § 211(b) proposed by Res. No. 126, 1996 was approved at an election held Nov. 5, 1996, and became effective Dec. 5, 1996.

**b. Maryland Code, Election Law, Title 6, Petitions**  
**§ 6-203. Signers; information provided by signers.**

(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.

(b) *Validation and counting.* - The signature of an individual shall be validated and counted if:

(1) the requirements of subsection (a) 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.

(c) *Removal of signature.* -

(1) A signature may be removed:

(i) by the signer upon written application to the election authority with which the petition will be filed if the application is received by the election authority prior to the filing of that signature; or

(ii) prior to the filing of that signature, by the circulator who attested to that signature or by the sponsor of the petition, if it is concluded that the signature does not satisfy the requirements of this title.

(2) A signature removed pursuant to paragraph (1)(ii) of this subsection may not be included in the number of signatures stated on the information page included in the petition.

[An. Code 1957, art. 33, § 6-203; 2002, ch. 291, §§ 2, 4; 2005, ch. 572, § 1.]

## CERTIFICATE OF SERVICE

I hereby certify that, on this 26<sup>th</sup> day of January, 2010, the foregoing Appellants' Opening Brief was served on all parties or their counsel through the CM/ECF system.

/s/ Susan Baker Gray

Susan Baker Gray

Law Offices of Susan Baker Gray

*6510 Paper Place*

*Highland, Maryland 20777*

*(240) 426-1655*

*Attorneys for Plaintiff-Appellant*