IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2008

No. 61

JANE DOE, ET AL.,

Appellants/Cross-Appellees,

v.

MONTGOMERY COUNTY BOARD OF ELECTIONS

*Appellee/Cross-Appellant***.**

On Writ of Certiorari to the Court of Special Appeals

BRIEF OF PUBLIC JUSTICE CENTER, CASA DE MARYLAND, AND MARYLAND DISABILITY LAW CENTER AS *AMICI CURIAE* FOR APPELLANTS/CROSS-APPELLEES

Gregory P. Care
Francis D. Murnaghan, Jr. Appellate Advocacy Fellow
Public Justice Center
One North Charles Street, Suite 200
Baltimore, MD 21201
(410) 625-9409

Counsel for *Amici Curiae*

August 20, 2008

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SUMMARY OF ARGUMENT

This election law case presents an important issue concerning the referendum process in Maryland, namely the ability of referendum opponents to have a meaningful opportunity to challenge a deficient petition for a referendum. Such challenges are statutorily permitted and serve as an important check against petition deficiencies overlooked by a Board of Elections or a mistake made by the Board of Elections itself, both of which occurred in the instant case, according to the findings of the trial court. In order for the statutorily granted right to challenge a referendum petition via declaratory judgment to be anything but a nullity, an extremely short statute of limitations must not be imposed on obtaining such relief. The language of the Election Law article and the doctrine of *res judicata* compel the conclusion that the limitations period applies only to petition sponsors who seek judicial review. Instead, because the Appellants/Cross-Appellees have sought relief that is equitable in nature, the doctrine of laches must apply. Under these principles, the instant challenge should not be barred.

Because referenda run the gamut of subject matter, they implicate a diversity of interests important to a wide range of Maryland voters. Accordingly, many different Marylanders with all manner of political opinions have sought and will continue to seek to challenge referendum petitions that are ineligible to be placed on a ballot. It is important that the ability of would-be referenda petition challengers not be rendered meaningless by the application of an extremely short statute of limitations not intended to be applied to petition challengers.

INTERESTS OF *AMICI*[1]

Amici are three local public interest and advocacy organizations dedicated to protecting civil rights and preserving legal remedies for vulnerable populations in Maryland. *Amici* are familiar with the referendum petition process in Maryland and the real and dire consequences of the circuit court's interpretation of the limitations period language contained in the provisions of the Election Law Article governing referendum petitions. Simultaneous with filing this brief, *Amici* have filed a Motion for Leave to Participate as *Amici Curiae*.

The **Public Justice Center ("PJC")**, a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to ensuring that persons harmed by the government are not denied a judicial remedy. The PJC's programs include its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. The Appellate Advocacy Project recently submitted a brief as *amicus curiae* in a separate case involving a claim by a plaintiff that was alleged to be time-barred. *See Haas v. Lockheed Martin Corp.*, 396 Md. 469, 914 A.2d 735 (2007). The PJC has an interest in this case because the construction given to the judicial review provision of the referendum petition title will have a dramatic direct impact on a wide range of Maryland voters from individual taxpayers concerned about issues of

[1] *Amici* adopt the Statement of the Case, the Question Presented, and the Statement of Facts from the Appellant/Cross-Appellee's brief.

government taxation and spending, to populations that have traditionally been subject to discrimination.

The mission of **CASA de Maryland ("CASA")** is to improve the quality of life and social and economic well-being of the Latino and immigrant communities living in Maryland. CASA facilitates the self-employment, organization and mobilization of the Latino and immigrant community to gain full participation in the larger society. CASA achieves these goals through programs such as education, legal services, social services, housing, employment and health. CASA is concerned that anti-immigrant groups may use the referendum process in Maryland to curtail the rights of immigrants, as has happened in many other states, most notably California. In such a situation, CASA would seek to engage fully in any effort to defeat a referendum that significantly curtailed the rights of immigrants.

The **Maryland Disability Law Center ("MDLC")** is the federally funded, non-profit legal services organization officially designated by the Governor of the State of Maryland as the Protection and Advocacy System for people with disabilities within the State. Founded in 1977, MDLC's mission is to work with and for people with disabilities in defense of their legal and human rights. MDLC carries out its mission through public education, advocacy, and litigation. In the event that some legislation advancing the rights of the disabled would be the subject of a referendum petition, MDLC would attempt to challenge the referendum.

Each of these organizations is concerned about the consequences of further application of the circuit court's interpretation of the limitations period governing

referenda petition determinations. *Amici* fear that such an interpretation will inequitably deny relief to dutifully pursued challenges to deficient referendum petitions. *Amici*, therefore, respectfully urge this Court to reverse the judgment of the Circuit Court for Montgomery County.

ARGUMENT

I. BECAUSE THE CERTIFICATION OF A REFERENDUM PETITION IS A PURELY NON-PUBLIC PROCESS, IT IS UNREASONABLE FOR THE PUBLIC TO BE EXPECTED TO LEARN OF, AND CHALLENGE, A PETITION WITHIN THE TEN-DAY LIMITATIONS PERIOD IMPOSED ON PETITION SPONSORS SEEKING JUDICIAL REVIEW OF A DETERMINATION MADE BY THE BOARD OF ELECTIONS.

A. The Certification of a Referendum Petition is a Purely Non-Public Process.

Title 6 of the Election Law Article, which governs referenda petitions, reveals that the entire referenda petitioning process, from filing to certifying, is a purely non-public series of events. A petition sponsor begins by creating a petition that contains an information page and proper number of signature pages. Maryland Code (2003), Election Law Article § 6-201(a) (hereinafter "Election Law"). A sponsor is then free to submit the draft petition to the "chief election official of the appropriate election authority, in advance of filing the petition, for a determination of its sufficiency." *Id.* § 6-202(a). After obtaining the requisite number of signatures on the petition, the sponsor files the petition with the proper election authority and that authority makes a determination of the petition's sufficiency. *Id.* § 6-206. The election authority then verifies and counts the signatures on the petition and makes a determination as to whether the whole of the petition complies with the law and should thus be certified. *Id.* § 6-208. Importantly, at

every stage of interaction between the petition sponsor and the election authority, notice of the authority's determinations with respect to the petition are directed solely to the petition sponsor. *Id.* § 6-210(b) ("Within 2 business days after an advance determination under § 6-202 of this subtitle, or a determination of deficiency under § 6-206 or § 6-208 of this subtitle, the chief election official of the election authority shall notify *the sponsor* of the determination.") (emphasis added); *accord* COMAR 33.06.05.05(A)(4) (directing the proper election authority to provide notice of a certification determination "as provided in Election Law Article, §§6-208 and 6-210, Annotated Code of Maryland"). At no point does the referendum petition process provide notification to anyone aside from the petition sponsor of the determinations made by the election authority.

Because of this non-public process, it is likely that the time at which most members of the general public will learn of a referendum petition is after the petition has already been certified and is placed on the ballot. The only notice to the public is issued within a week or so preceding an election. Maryland law requires that the local Board of Election "provide notice of each election in its county to the registered voters of the county by either: (1) specimen ballot mailed at least 1 week before the election; or (2) publication or dissemination by mass communication during the calendar week preceding the election." Election Law § 8-102(a). Included in the notice of the election is any question to be placed on the ballot. *Id.* § 8-102(b)(2). At this stage in the process, which is very likely to be within one week of a referendum, it is almost certainly too late to mount a meaningful challenge to a referendum.

B. The Structure of Election Law § 6-209 Contemplates Judicial Review as the Recourse for Referendum Petition Sponsors and Declaratory Relief for All Other Registered Voters.

As Appellants/Cross-Appellees argue, it is clear from the terminology used in the statutory language establishing judicial review in the referendum petition process that the 10-day limitations period of Election Law § 6-210(e) does not apply to those who wish to file a declaratory judgment action to challenge a referendum petition. Differing terminology also indicates that Election Law § 6-209 sets out two distinct methods of "appealing" a decision made with respect to a referendum petition. The use of the phrases "person aggrieved" and "determination" in § 6-209(a) makes it evident that "judicial review" under that subsection is directed at petition sponsors. Subsection (b) of § 6-209, however, more expansively provides for declaratory relief for "any registered voter" with respect to any provision of law.

Beyond the differing terminology is an additional signal that the two subsections of Election Law § 6-209 contemplate relief for two different groups of voters. A declaratory judgment action under § 6-209(b) could not have also been intended for use by petition sponsors because it would provide a second bite at the apple for those who lost in their petition for judicial review.[2] Not only would this second bite be unfair, it would violate the doctrine of *res judicata* because it would afford an opportunity for

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[2] "As a general rule, courts will not entertain a declaratory judgment action if there is pending, at the time of the commencement of the action for declaratory relief, another action or proceeding involving the same parties and in which the identical issues that are involved in the declaratory action may be adjudicated." *Waicker v. Colbert*, 347 Md. 108, 113, 699 A.2d 426, 428 (1997).

petition sponsors to relitigate a claim that was already decided between the same parties. It is well-established that

> The doctrine of claim preclusion, or *res judicata*, 'bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.'

R & D 2001, LLC v. Rice, 402 Md. 648, 663, 938 A.2d 839, 848 (2008) (quoting *Bd. of Educ. v. Norville*, 390 Md. 93, 106, 887 A.2d 1029, 1037 (2005)). The rationale for disallowing a declaratory judgment action by a petition sponsor is consistent with the policy underlying the doctrine of res judicata: preventing duplicative actions already fairly and fully decided from creating judicial waste. *Norville*, 390 Md. at 107, 887 A.2d at 1037; *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.,* 361 Md. 371, 391, 761 A.2d 899, 909 (2000).

Accordingly, if a declaratory judgment action is not a proper vehicle for a petition sponsor to dispute any adverse determination by the election authority, then it seems obvious that the General Assembly intended that such declaratory relief be available to others with an interest in the referendum, including opponents thereof. As such, an action for declaratory relief cannot be restrained by the exceptionally short 10-day limitations period imposed on actions for judicial review. Rather, declaratory relief is governed by equitable doctrine of laches, which in cases such as this, allows a meaningful opportunity to challenge a petition and at the same time provide the court with the tools necessary to determine whether declaratory relief has been sought too late, given the election schedule at issue.

C. The Equitable Relief Sought by the Appellants/Cross-Appellees via Declaratory Judgment Requires the Application of the Doctrine of Laches, Which is Best Suited for Weighing Case-by-Case Scenarios of Determining Whether a Plaintiff Delayed in Exercising his Rights in Election Scenarios.

The Appellants/Cross-Appellees sought equitable relief in their Complaint in the instant case via declaratory judgment, the statutory vehicle provided by the Election Law Article for their challenge to the petition. Maryland case law establishes that "'[a] declaratory judgment can be obtained either at law or in equity' [and that] 'the determination of whether the action is properly at law or in equity must be made by an examination of the nature of the claim asserted and the relief requested.'" *LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 411, 919 A.2d 738, 750 (2007) (citations omitted); *see also Glorius v. Watkins*, 203 Md. 546, 548, 102 A.2d 274, 275 (1954). The Appellants/Cross-Appellees, in asking for a declaratory judgment that the petition certified by the Board of Elections was so certified contrary to law, sought relief in the nature of an injunction, a traditional equitable remedy.

In the ultimate paragraph of their Complaint, the Appellants/Cross-Appellees requested

> a declaratory judgment of this Court to the effect that the referendum petition submitted by CRG in opposition to Bill 23-07 is invalid and insufficient, that the actions of Defendant Board of Elections in certifying the petition were in violation of applicable Maryland law, *and that the referendum should not be submitted to the voters in the November 4, 2008 general election*, and that the Bill as enacted by the Montgomery County Council shall have immediate force and effect.

Plaintiffs' Complaint ¶ 61 (emphasis added). In particular, the relief requested, that Bill 23-07 should not be referred to the voters, seeks to compel the Board of Elections to not

perform a certain act in the future and is thus injunctive in nature. In *Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705, 922 A.2d 538 (2007), this Court construed a request for a declaratory judgment as more in the nature of a request for an injunction because the defendant asked the trial court to declare that a mortgage servicer could not perform foreclosures under certain circumstances in the future. *Wells Fargo*, 398 Md. at 712 n.4, 922 A.2d at 542 n.4. The *Wells Fargo* Court relied on the purpose of an injunction in deciding that the declaratory relief sought by the defendant was actually injunctive in nature. *Id.* ("'Injunctive relief is relief "prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury . . . [g]enerally, it is a preventive and protective remedy, *aimed at future acts,* and it is not intended to redress past wrongs."'") (citations omitted).

In the instant case, the Appellants/Cross-Appellees sought to prevent the Board of Elections from submitting to voters a ballot containing the referendum question on Bill 23-07. While presented as a request for declaratory relief, as it must and should have been under Election Law § 6-209(b), the Court then considers whether the declaratory relief sought lies in law or equity. *LaSalle Bank*, 173 Md. App. at 411, 919 A.2d at 750. Just as the defendants in *Wells Fargo*, it is clear from the language in the Complaint that the Appellants/Cross-Appellees were asking that a future act not be done, a form of relief squarely addressed by an injunction.

Thus, the relief sought by the Petitioners/Cross-Respondents was essentially injunctive, which is a traditional form of equitable relief. *Wells Fargo*, 398 Md. at 729, 922 A.2d at 552; *Ver Brycke v. Ver Brycke,* 379 Md. 669, 693-94, 843 A.2d 758, 774

(2004) ("First, a claim could be deemed equitable if it sought a coercive remedy like injunction . . . .") (quoting DAN. B. DOBBS, LAW OF REMEDIES § 2.1(2) (2d ed.1993)); *Dundalk Holding Co. v. Easter*, 215 Md. 549, 554, 137 A.2d 667, 669 (1958) ("Injunction is historically and fundamentally a process of equity."); *see also Bowen v. City of Annapolis*, 402 Md. 587, 606, 937 A.2d 242, 253 (2007) ("[T]he Circuit Court could have only acted on Petitioners' complaint to review the Civil Service Board's actions by way of a common law or *equity* writ (e.g., mandamus, *injunction*, certiorari, or *declaratory judgment*).") (emphasis added). As such, the doctrine of laches applies, rather than a statute of limitations. *Towson University v. Conte*, 384 Md. 68, 116 n.2, 862 A.2d 941, 969 n.2 (2004). Because a declaratory judgment action is bound by the limitations period applicable to the underlying relief sought by the action – in this case, injunctive relief – laches should apply here. *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 567-68, 731 A.2d 957, 967-68 (1999). In fact, the equitable doctrine of laches has been applied previously by this Court in the context of a challenge to a nominating petition. *See Parker v. Bd. of Election Supervisors*, 230 Md. 126, 186 A.2d 195 (1962).

"[L]aches 'is a defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society.'" *Liddy v. Lamone*, 398 Md. 233, 243-44, 919 A.2d 1276, 1283 (2007). This Court has said that "[i]n its application, '[t]here is no inflexible rule as to what constitutes, or what does not constitute, laches; hence its existence must be determined by the facts and circumstances of each case.'" *Id.* at 244, 919 A.2d at 1283. Accordingly, the Court will only invoke laches and bar a claim as untimely if, under the unique facts of a case, "there is an

unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party." *Id.* (quoting *Frederick Road Ltd. P'ship v. Brown & Sturm,* 360 Md. 76, 117, 756 A.2d 963, 985 (2000)).

The facts of the instant case do not present a situation where laches should be invoked. Looking at the first element of laches, it is beyond cavil that there was no unreasonable delay in the Appellants/Cross-Appellees asserting their rights to challenge the invalid referendum petition. The petition sponsors, Citizens for Responsible Government, filed their petitions on February 4 and February 19, 2008. The Montgomery County Board of Elections informed the County Executive and County Council President on March 6, 2008 that the petition was sufficient to be placed on the ballot. Just eight days later, on March 14, 2008, the Appellants/Cross-Appellees filed their lawsuit challenging the validity of the referendum petition. The Appellants/Cross-Appellees did anything but delay, challenging the referendum in very close temporal proximity to the certification of the referendum petition. It is also notable that the Appellants/Cross-Appellees did not wait to challenge the referendum until the eleventh hour before the election, as some challengers have done. *See Schade v. Bd. of Elections*, 401 Md. 1, 40, 930 A.2d 304, 327 (2007). Rather, the lawsuit was filed in March, some seven and a half months before the general election when the referendum was to take place. This fact establishes not only that no delay existed, but also that any delay purported by the Board of Elections would not have prejudiced or harmed it because it would have had, and still possesses, ample time to prepare proper ballots for the general election.

Any delay that might be perceived, however, cannot be ascribed to the Appellants/Cross-Appellees in light of the purely non-public process of certifying referenda petitions. It cannot be expected that the Appellants/Cross-Appellees would have challenged the referendum petition as soon as it was filed because there was no way for them to learn of such a filing. It is impressive enough that the Appellants/Cross-Appellees were able to challenge the referendum petition as early as they did. One cannot be held responsible for failing to exercise rights one does not know one yet possesses. *Parker*, 230 Md. at 131, 186 A.2d at 197 ("[S]ince laches implies negligence in not asserting a right within a reasonable time after its discovery, a party must have had knowledge, or the means of knowledge, of the facts which created his cause of action in order for him to be guilty of laches."). The Appellants/Cross-Appellees raised all of their objections to the referendum petition, including their dispute of the proper denominator figure, in the most expeditious manner as they discovered, or could discover, the information relating to their challenges. Under the circumstances of this non-public process, any minute delay is certainly excusable and should not invoke laches. *See Schaeffer v. Anne Arundel County,* 338 Md. 75, 83, 656 A.2d 751, 755 (1995) ("[L]aches is an *inexcusable* delay, without necessary reference to duration in asserting an equitable claim.") (emphasis added).

Moreover, the Maryland Uniform Declaratory Judgments Act, which is the source of relief named under Election Law § 6-209(b), is "remedial [and] shall be liberally construed and administered." Maryland Code (1974, 2006 Repl. Vol.), Courts & Judicial Proceedings Article § 3-402. Accordingly, in the spirit of remedial legislation, the Court

should hold that Appellants/Cross-Appellees' request for declaratory relief was timely as it was initiated at the soonest possible time to remedy the evil it was intended to remedy: allegedly invalid referendum petitions.

II. REFERENDUM PETITIONS COVER A WIDE ARRAY OF LEGISLATIVE ISSUES AND IMPLICATE THE INTERESTS OF A DIVERSITY OF MARYLAND VOTERS SUCH THAT CHALLENGES TO SUCH PETITIONS MAY COME FROM ALL QUARTERS OF THE ELECTORATE.

In recent decades, there has been a wide array of local and statewide referenda presented to Maryland voters. The issues covered in these referenda range from tax policy, to zoning laws, to individual civil rights. Recently, there were several important local referenda in Eastern Shore counties that touched on the way of life in those areas. One referendum in 2000 involved increases in both the transfer and property taxes in Wicomico County. Chris Guy, *Eastern Shore tax fight heats up*, BALT. SUN, Oct. 19, 2000, at 1B. Two referenda in Talbot County in 2002 and 2004 involved changes to the county's zoning laws concerning the building of "big-box" stores in a certain area. Chris Guy, *Rural growing pains*, BALT. SUN, June 5, 2001, at 1B; *Talbot County voters approve limit to size of retail buildings*, DAILY REC. (MD.), Nov. 8, 2004.

There have also been several statewide referenda that involve weighty issues. In 1964 and 1967, there were referendum petitions filed that addressed race discrimination in Maryland's public accommodations and housing, respectively. GEORGE H. CALLCOTT, MARYLAND & AMERICA, 1940 TO 1980, at 157 (1985). In 1974, there was a statewide referendum on a law that would have provided textbooks and other instructional materials to nonpublic school children. RICHARD WALSH & WILLIAM LLOYD FOX, MARYLAND - A

HISTORY, 1632-1974, at 895 (1974). A statewide referendum on a law directed at banning small, easily concealable handguns was held in 1988. Irvin Molotsky, *Gun Control Backers Say Maryland Victory Will Spread to Other States*, N.Y. TIMES, Nov. 13, 1988, at 1. Four years later, a statewide referendum was held on a law codifying the holding of *Roe v. Wade*. Sandy Banisky, *New Abortion Law In Effect With Clinics Little Changed*, BALT. SUN, Dec. 4, 1992, at 1C. In 2006, there was a statewide referendum on a law permitting early voting. Andrew A. Green & Tom Pelton, *Md. Ballot Language Questioned*, BALT. SUN, Aug. 25, 2006, at 1A.

Accordingly, the questions raised by these referenda have affected Maryland voters from every walk of life. The tax referendum concerned all voters, rich and poor. The zoning referenda affected proponents of slow-growth and those who wished to preserve the rural feel of the Eastern Shore. The statewide referenda spanned issues important to minority groups, gun owners, abortion advocates, and families with children in private schools. In every such case, it is easy to conceive that concerned voters may have wished to challenge the referendum petition that sought to overturn the product of their representatives' law-making duties. In some cases, it was clearly important to ensure that vital protections afforded to a vulnerable minority were not overridden by a hostile majority. *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304-05, 120 S. Ct. 2266, 2276 (2000). Whatever the motivation, there have been and will continue to be referenda proposed that will be antithetical to the interests of a segment of Maryland voters who would seek to challenge the petition for such a referendum if they were aware of its existence. It is important that this Court not foreclose relief for those would-be

challengers by affirming the decision of the circuit court in this case. Would-be challengers of referendum petitions must not be denied their reasonable opportunity to participate in this particular part of our democratic process by a flawed and unreasonable interpretation of the applicable statute.

CONCLUSION

For the foregoing reasons, and for the additional reasons cited in the Brief of Appellants/Cross-Appellees, *Amici* respectfully request that this Court reverse the judgment of the Circuit Court for Montgomery County.

Respectfully submitted,

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Gregory P. Care
Francis D. Murnaghan, Jr. Appellate Advocacy Fellow
Public Justice Center
One North Charles Street, Suite 200
Baltimore, MD 21201
(410) 625-9409

Counsel for *Amici Curiae*

August 20, 2008
Times New Roman, 13 Point

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2008, I mailed first class, postage prepaid, two copies of the foregoing brief to:

Kevin Karpinski
Karpinski, Colaresi & Karp, P.A.
120 E. Baltimore Street, Suite 1850
Baltimore, Maryland 21202

Counsel for Appellee/Cross-Appellant

Jonathan S. Shurberg
Jonathan S. Shurberg, P.C.
8720 Georgia Avenue, Suite 703
Silver Spring, MD 20910

Susan L. Sommer
Natalie Chin
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street, Suite 1500
New York, NY 10005

Joseph S. Kakesh
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Counsel for Appellants/Cross-Appellees

____
Gregory Care