IN THE

Court of Appeals of Maryland

SEPTEMBER TERM 2007

Docket No. 121

MICHAEL D. SMIGIEL, SR., *et al.*,

Petitioners

v.

PETER V. R. FRANCHOT, *et al.*,

Respondents

On Writ of Certiorari from
the Court of Special Appeals

PETITIONERS REPLY BRIEF

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ARGUMENT

Rather than address the merits of Petitioners' arguments, Respondents have chosen to re-write them. Recasting them as unpreserved "straw men" which this Court should ignore on procedural grounds, the Attorney General ignores what Petitioners wrote and, instead, purports to tell this Court "[w]hat petitioners *mean*." Respondents' Brief at 19 (emphasis added). Without viewing the evidence in the light most favorable to Petitioners, he summarily dismisses all evidence favoring these taxpayers, remains indignant to disclosed improprieties, and emphasizes that the lower court's summary judgment opinion "is riddled with factual errors and imprudent dicta." *Id*. at 14.

Chanting his familiar mantra of morality, the Attorney General stubbornly relies upon documents which have long been discredited by the uncontroverted testimony of his own client – all while citing pages of the record which confirm the frivolity of his assertions. Challenging this Court's authority to "say what the law is," the Attorney General champions the power of legislative leaders to manipulate the Constitution, to deceive the electorate, and to race through the bicameral process whenever they deem it politically expedient.

I. UNABLE TO DISPUTE THE CONSTITUTIONAL DEFECTS IN THE SLOTS PACKAGE, RESPONDENTS URGE THIS COURT TO IGNORE THE DUPLICITOUS NATURE OF THIS PROPOSAL ON SIMILARLY DISINGENUOUS PROCEDURAL GROUNDS

Acting on behalf of legislative leaders who would prefer to avoid this controversial decision, the Attorney General urges this Court to ignore their deceptive delegation of duties without considering the merits of taxpayers' objection. Unable to refute the impropriety of this legislative bait-and-switch scheme, the Attorney General would excuse this act of electoral deception on the basis of procedural technicalities which are similarly contrived.

Asking this Court to reject Petitioners' claims without reviewing the constitutionality of the Legislature's acts, the Attorney General distorts the record to

claim that these taxpayers failed to preserve their objection, waived arguments asserted below, or raised points which are not ripe for review.

Hardly a new issue, Petitioners objected to the Legislature's duplicitous delegation of legislative duties at the commencement of this action and throughout these proceedings. Alleging that "the Legislature's attempt to shift the burden of approving or rejecting the slots package amounts to an unconstitutional delegation of their legislative duties," Petitioners filed suit to challenge efforts to make "such revenue and appropriations bills contingent on voter approval," and sought to enjoin a plan "which establishes an unconstitutional voting process." E. 57. "Rather than fulfill their legislative duties in debating, approving or rejecting the Governor's proposed revenue plan," the Complaint alleged that these legislators approved a plan for "[a]voiding a vote on this politically-sensitive subject." E. 15.

To support the emergency relief requested, Petitioners' memoranda in the lower court raised the same objection as that raised on appeal. Warning the circuit court that "THE GENERAL ASSEMBLY MAY NOT AVOID UNPLEASANT LEGISLATIVE DUTIES BY DELEGATING THEM TO THE PUBLIC AT LARGE," Hearing Memorandum at 29 (capitalized heading in original), Petitioners raised their constitutional objection with much of the same language used in their Brief and Petition for Writ of Certiorari:

> To avoid a lengthy and rancorous debate on slot machines, the Legislature attempted to shift their work on this controversial revenue plan to the public at large. In a representative democracy, the people delegate power to legislators – not the other way around. "The general powers of legislation being conferred exclusively upon the Legislature, that body may not escape its duties and responsibilities by delegating such legislative power to the people at large."

Id. at 29 (citations omitted). Emphasizing the disingenuous nature of this scheme, Petitioners questioned the Legislature's true purpose for proposing the constitutional

amendment at issue. Observing that these same lawmakers "used their legislative power to expand the use of slot machines on repeated occasions," Petitioners vehemently objected to the Legislature's manipulation of the amendment process and of the electorate. Memorandum in Support of Plaintiffs' Motions for Emergency Injunctive and Declaratory Relief at 21-22. Urging the lower court to see this legislative scheme "for what it really is," Petitioners sought to enjoin legislators' "disingenuous effort to avoid this politically-sensitive issue, abandon their fiscal duties, and shift these duties back to the taxpayers who hired them." *Id*. at 21-22.

Petitioners have raised the very same issue on appeal. Distilling their objections in the concise form required by Maryland Rule 8-504(a)(4), Petitioners have asked this Court whether lawmakers may "delegate decisions, which they are fully empowered to make themselves, to voters by passing statutes which are contingent upon the popular approval of duplicitous constitutional amendments?" Brief of Petitioners at 3; Petition for Writ of Certiorari at 2.

Like the lawmakers he defends, the Attorney General would prefer that this Court avoid a vote on the slots question. But, in urging this Court to ignore the merits of this issue, he offers grounds which are just as duplicitous as those contained in the challenged bills.

Contrary to the Attorney General's strained arguments, there is no basis for dismissing Petitioners' challenge under Maryland Rule 8-131. Apparently frustrated by a brief that reinforces their position, the Attorney General would twist distinctions in emphasis, authorities, language and footnote selection into a procedural ground for overruling this constitutional objection. Even if these refinements gave rise to what Respondents characterize as "old arguments" and "new arguments," Rule 8-131(a) does not prevent parties from fortifying the merits of their appeals. "The Court of Appeals has recognized the distinction between a new issue, as the term is used in Rule 8-131(a), and a new argument, and the Court has held that Rule 8-131(a) does not preclude the latter."

State v. Greenstreet, 162 Md. App. 418, 426, 875 A.2d 177 (2005); *see Crown Oil & Wax Co. of Delaware, Inc. v. Glen Constr. Co. of Virginia, Inc.*, 320 Md. 546, 561, 578 A.2d 1184, 1190-92 (1990) (where petitioner "did not argue the successor theory until the case was briefed for the Court of Special Appeals, the theory does not present a new issue, but it is an additional argument for" the relief requested); *Mandel v. O'Hara*, 320 Md. 103, 576 A.2d 766 (1990) (reversing trial court on basis of legislative immunity first raised on appeal); *Bachmann v. Glazer & Glazer, Inc*., 316 Md. 405, 559 A.2d 365 (1989) (issue of discharge of guarantor decided on subrogation doctrine that was not raised below).[1]

Despite the Attorney General's mislabeling of what he calls the "Article XVI/*Kelly* argument," Petitioners have never wavered in objecting to the slots package as an impermissible delegation of legislative duties and as an unconstitutional attempt to leave fiscal decisions to voters at large. Well aware that Article XVI does not permit legislators to delegate such decisions to the electorate, Petitioners have repeatedly cited this 1915 Referendum Amendment for this very proposition. Indeed, as Petitioners have long emphasized, this provision only serves to confirm the fact that Maryland citizens did not reserve any power to approve or to reject revenue measures. *See*, *e.g.*, Brief of Petitioner at 19 n.8. "Having delegated this power to the Legislature," Petitioners continue to emphasize that "neither the Legislature nor the people of Maryland may call for a popular vote on bills like those at issue here." *Id*., *citing Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 530 A.2d 245 (1987) (rejecting voters' efforts to place remarkably similar bills on ballot).[2]

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[1] "In any event, even if the State has raised a new issue, Rule 8-131(a), by use of the adverb, 'ordinarily,' vests discretion in this Court to consider a new issue." *Greenstreet*, 162 Md. App. at 426.

[2] The Attorney General suggests that Petitioners abandoned this argument by placing it in a footnote. But nothing more is needed to make this point. Since the trial judge and the Attorney General acknowledged the fiscal nature of the slots package in proceedings below, *see* E. 32, there is simply no need for a more lengthy analogy to the

Although the Legislature proposed to add a "new article" to the Maryland Constitution for the purported purpose of authorizing, licensing, locating and restricting the number of slot machines in the State, E. 408, legislators may achieve each of these purposes without any need for a constitutional amendment or any form of popular vote. Unable to deny the statutory power of these lawmakers, the Attorney General acknowledges that only one small subsection of this "new article" legitimately requires voter approval:

> THE GENERAL ASSEMBLY MAY ONLY AUTHORIZE ADDITIONAL FORMS OR EXPANSION OF COMMERCIAL GAMING IF APPROVAL IS GRANTED THROUGH A REFERENDUM, AUTHORIZED BY AN ACT OF THE GENERAL ASSEMBLY, IN A GENERAL ELECTION BY A MAJORITY OF THE QUALIFIED VOTERS IN THE STATE.

E. 141 (Lines 6-10). If this was the only provision placed on the ballot, it would be difficult to articulate a legitimate objection to it. When legislators propose that the people exercise a power which they have not delegated to their elected representatives, they may not be accused of abdicating their legislative role. Unfortunately, while these five lines do not shift legislative duties to the electorate, the rest of this 112 line article lets legislators avoid a decision which they were elected to make on behalf of these constituents.

Beyond the illusory "need" for this new article, the Legislature also misrepresents the true purpose for the resulting revenue. Baiting voters to ratify an amendment "for the primary purpose of providing funds for public education," E. 408, and specifying three distinct categories of educational funding, E. 409, the proposed amendment fails to inform voters that they would unconsciously flip the switch on a plethora of

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stadium appropriations measures in *Kelly*. Had the lower court or Respondents disputed the status of each slots bill as an "appropriation for maintaining the State Government, or for maintaining or aiding any public institution," Petitioners would have used this opportunity to rebut this belated contention.

appropriations measures which channel these funds far from the classroom. *See* E. 332-405. Making no mention of these appropriations, the Legislature's proposal can only be characterized as a disingenuous plot to trick its own constituents.

Unable to dispute the incongruous appropriations passed by his legislative clients, or the substance of the legislative reports which confirm that slots revenue will not increase educational funding, E. 139-144, the Attorney General urges this Court to postpone a decision on the constitutionality of this disturbing proposal. Pretending that these taxpayers are challenging the language of an upcoming ballot question, Respondents claim that this issue will only be ripe for review once state officials draft it in August. At that time, the Attorney General suggests that the Executive Branch may correct public misapprehensions with a ballot summary that will "'mention' that adoption of the constitutional amendment will render SB 3 ... effective." *See* Respondents' Brief at 16.

Even if election laws permitted the Secretary of State or other officials to supply information which lies outside the scope of House Bill 4, members of the Executive Branch could hardly erase the deceptive language of the bill itself. Because the language of the proposal is itself misleading, this Court need not wait for the Administration's attempts to restate this language in more honest terms.

To the extent that the Administration's "mention" of the incongruous appropriations contained in Senate Bill 3 would somehow help to cure this defect, a reference to the title of this companion legislation would only exacerbate the public confusion surrounding the slots package. Like so many statutes which this Court has readily rejected, Senate Bill 3, which would direct slots revenue to fund a plethora of non-educational pursuits, is known only by the misleading title, "Maryland Education Trust Fund - Video Lottery Terminals." By failing to apprize "voters of the *true nature* of the legislation upon which they are voting," *Anne Arundel Co. v. McDonough*, 277 Md. 271, 300, 354 A.2d 788 (1976) (emphasis added), and misleading them on the consequences of

their votes, the Legislature's double-billing strategy has produced an incurable constitutional defect which may only be rectified by this Court.[3]

II. CONTRARY TO THE ATTORNEY GENERAL'S CLAIMS, THIS COURT HAS THE POWER TO REDRESS LAWMAKERS' EGREGIOUS AND REPREHENSIBLE DISREGARD FOR THE RULE OF LAW

Rather than acknowledge the misconduct of his legislative clients, the State's highest ranking law enforcement officer echoes their feelings of moral indignation, denies the undisputed testimony of the Clerk of the House of Delegates, and continues to rely on documents which this witness thoroughly discredited.

Having relied upon these records to provide legislative leaders with formal legal opinions validating the constitutionality of the Special Session, the Attorney General is remarkably unshaken by the deliberate acts of deception transmitted to his assistants. Even now, when the entire State of Maryland recognizes the unprecedented breach of trust committed by these leaders and their staff, the Attorney General has submitted a brief to this Court which misstates the facts and denies the undeniable.

After desperate efforts to obstruct the discovery of these disturbing details, the Attorney General remains in a stubborn state of denial over these disclosures. Unwilling to criticize the constitutional infractions and fraudulent fabrications of legislative leaders and staff, this member of the bar is quick to dispute a summary judgment opinion as one which "is riddled with factual errors and imprudent dicta." Respondents' Brief at 14.

Lacking any evidence to confirm the propriety of legislators' collusive and premeditated plot to derail the bicameral process, or any basis for legislative leaders'

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[3] Like the lower court, Respondents strain to salvage Senate Bill 3 by citing cases which involved other "contingent legislation." Not only do these cases fail to address the constitutional prohibition on the delegation of legislative duties, they involved legislation which was designed to implement the terms of its corresponding constitutional amendment. As set forth here and in the Brief of Petitioners, Senate Bill 3 conflicts with, rather than implements, House Bill 4.

override of constitutional provisions designed to ensure a more deliberative process, the Attorney General equates the Constitution with the sort of House-keeping rules which these leaders may suspend at will.

Urging this Court to find these provisions "directory," Respondents challenge this Court's authority to redress these reprehensible violations. Yet, unlike directory provisions which would curtail the decision making process if strictly enforced, provisions like Article III, Section 25 are based upon a federal constitution in which the Framers sought to ensure the stability, integrity and deliberative nature of the process.

Violating these provisions is not an insignificant technicality. When the intrepid confidence of powerful politicians lead them to take unrestrained liberties with the Constitution, and rush the bicameral process without taking the time to deliberate on the implications of legislative proposals, the rights of taxpayers are disregarded, the rights of voters are subjugated to the political interests of their elected representatives, and the function of government is irreparably harmed.

Contrary to the claims of legislative leaders, the "drastic remedy" sought is the only alternative to the drastic misconduct displayed during the Extraordinary Session of 2007. While the State's top law enforcement officer would let these same leaders police themselves, constitutional enforcement should never be left to the political process. Despite suggestions that Petitioners are seeking to accomplish through litigation what they failed to achieve through legislation, Respondents must be reminded that no majority is powerful enough to repeal the Constitution. This fundamental body of law provides for the orderly conduct of government affairs by limiting the power of the majority to disregard the rule of law.

When lawmakers become law breakers, it is the duty of this Court to say what the law is and to impose remedies for its breach. Hardly an encroachment into the legislative process, this Court intervention is designed to ensure the integrity and fairness of this process. By failing to intervene in proceedings below, the circuit court abdicated its duty

to enforce the law, condoned the abdication of legislative duties, and emboldened legislative leaders to do it yet again.

CONCLUSION

Notwithstanding the Attorney General's protests, this case does not involve a dispute over politics or policy. If any policy is implicated at all, it is one deserving of bipartisan support – respect for the rule of law.

So long as they comply with constitutional provisions governing the legislative process, the majority rules. But no majority is large or strong enough to override the Constitution. Thus, while a majority which adheres to the constitutional process may implement whatever policies it chooses, the fundamental law of this State cannot be subjected to the whims of politics or the interests of powerful politicians.

As this case illustrates, when legislative leaders conduct these affairs outside of the constitutional process, the rights of all taxpayers are irreparably compromised. Though Respondents protest the "drastic remedy" sought by Petitioners, these taxpayers seek nothing more than an enforcement of the process ordained by the Framers. Rather than permit the gross disregard for this process which was exemplified by the Extraordinary Session of 2007, this Court must take decisive action to reestablish respect for the Constitution so that these same legislators may achieve their policy objectives in a lawful manner.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 7, 2008, by agreement of counsel in this case, a copy of the foregoing was sent via electronic transmission to:

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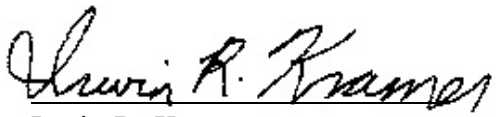

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