IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2005

No. 142

STEPHEN N. ABRAMS,

Petitioner,

v.

LINDA H. LAMONE, *et al.*,

Respondents.

On Appeal from the Circuit Court for Anne Arundel County
(Paul A. Hackner, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF RESPONDENTS LINDA H. LAMONE AND STATE BOARD OF ELECTIONS*

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STATEMENT OF THE CASE

This case presents a challenge to the qualifications of Respondent Thomas E. Perez as a candidate for the office of Attorney General of Maryland in the 2006 election. Petitioner Stephen N. Abrams, a registered voter and a candidate for the office of the Comptroller of Maryland, (E. __[Complaint ¶¶ 1, 23, 27]), brought this action seeking declaratory and injunctive relief not only against Mr. Perez, but also against the State Administrator of Elections, Linda Lamone, and the State Board of Elections (collectively, the "State Board"). As to Mr. Perez, the complaint sought an order declaring that he is not eligible for the office of Attorney General and an injunction requiring Mr. Perez to withdraw his certificate of

candidacy for that office. (E. ___ *id.* at page 8 (Count II).)[1] As to the State Board, the complaint sought the same declaration and an injunction preventing the State Board from "placing Defendant Perez's name on the ballot. . . ." (E. __ *See id.* at page 7 (Count I).)

Mr. Abrams filed his complaint on Thursday, July 13, 2006, and also filed an *ex parte* motion for a temporary restraining order, which was denied.[2] (E. __.) Service was made on the defendants five days later, on July 18, 2006.[3] (E. __ (docket), __ (SA affidavit).)

The State Board filed a Motion to Dismiss and to Expedite Scheduling, pursuant to Rules 2-322(c) and 2-504(b)(2)(G), on July 25. (E. __.) Mr. Perez also filed a dispositive motion on July 25. (E. ___.) The State Board urged dismissal of the action on the grounds that it was barred by the applicable statute of limitations and by laches. Mr. Perez sought dismissal or, alternatively, summary judgment, principally on the grounds that his legal experience met the constitutional requirement that a candidate for Attorney General have "practiced Law in this State for at least ten years." Md. Const., Art. V, § 4.

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[1] Counsel for the respondents have collaborated in producing the record extract being filed contemporaneously with this brief because none was submitted by Mr. Abrams with the petitioner's brief, as directed by the Court's August 4, 2006 order. The citations in this page-proof brief to the record extract, which has been only recently prepared, have been left blank, and will be supplied shortly in a revised brief. *Cf.* Rule 8-501(*l*) (deferred record extract).

[2] The motion did not contain a certification, in accordance with Rules 1-361(b) and 15-504(b), that notice had been given to the defendants or that "specified efforts commensurate with the circumstances [had] been made to give notice." The defendants learned of the motion only after it had been denied. Mr. Abrams' claim that he gave notice and "provided copies of all filings to counsel for Respondents," (Brief of Petitioner at 2), is incorrect.

[3] In fact, service of process on Ms. Lamone and the State Board of Elections, which was made at the offices of the State Board in Annapolis, was defective. Rule 2-124(k) requires service on an officer of agency of the State to be made on the Attorney General. In view of the need for expedited adjudication of this matter, the State Board waived service of process in its dispositive motion. *Cf.* Rule 2-322(a).

On July 28, Mr. Abrams filed a memorandum in opposition to the dispositive motions filed by the State Board and Mr. Perez and in support of a cross-motion for summary judgment. (E. __.) The circuit court held a hearing on the parties' motions on July 31, at the conclusion of which the court issued an opinion from the bench and entered final judgment against Mr. Abrams. (E. ___.) The circuit court rejected the State Board's limitations and laches defenses, granted Mr. Perez's motion for summary judgment, denied Mr. Abrams' cross-motion for summary judgment, and declared that Mr. Perez was "eligible to be a candidate for the Office of the Attorney General pursuant to Article V Section 4 of the Maryland Constitution." (E. __.)

Mr. Abrams filed a notice of direct appeal to this Court on August 2; he filed a notice of appeal to the Court of Special Appeals and a petition for a writ of certiorari on August 4. This Court granted the petition for a writ of certiorari on August 4, 2006.

QUESTION PRESENTED

1. Should this Court deny equitable relief to a petitioner who brought an untimely challenge to a state-wide candidate's qualifications for office, seeking to require the candidate to withdraw his candidacy and to require the State Board to remove him from the ballot, where the statutory deadline for withdrawing a candidacy passed six weeks earlier and after an alteration to every ballot in the State became impossible?

2. May the State Board of Elections accept certificates of candidacy from the hundreds of individuals seeking public office without subjecting each proposed candidate to a searching examination of his or her qualifications where such an inquiry would require consideration of evidence the State Board is not equipped either to gather or to evaluate?

STATEMENT OF FACTS

The Perez Candidacy

Mr. Perez announced his candidacy for the office of Attorney General on May 23, 2006, and the event was covered extensively in the press. *See, e.g.,* Thomas Dennison, *Perez Announces Candidacy for AG,* THE GAZETTE, May 23, 2006; Andrew A. Green, *Perez Enters Race for Attorney General,* BALTIMORE SUN, May 24, 2006, at 1B; Steve Vogel, *Perez Enters Race for Attorney General,* WASHINGTON POST, May 24, 2006, at B5. Speculation about Mr. Perez's candidacy had been reported prior to the announcement, as had the question of his eligibility for the office that is the basis for this lawsuit. *See, e.g.,* Matthew Mosk & John Wagner, *Could Technicality Boot Montgomery Official from Attorney General Race?* WASHINGTON POST, May 7, 2006, at C4; David Nitkin & Jennifer Skalka, *Curran's Would-Be Successors Can Get Going,* BALTIMORE SUN, May 8, 2006, at 4A.

Mr. Perez requested an advisory opinion from the Office of the Attorney General regarding his eligibility for the office of Attorney General. (E. ___ (Complaint ¶ 19).) Based on the information Mr. Perez provided, the Attorney General opined that Mr. Perez's past practice experience would satisfy the eligibility requirement set forth in Article V, § 4 of the Maryland Constitution of having "practiced Law in this State for at least ten years." *See* 91 Op. Md. Att'y Gen. 99, 114, 116 (May 19, 2006).[4] The Attorney General's opinion also was widely reported in the press. *See, e.g.,* Jennifer Skalka, *Perez OK'd in Race for Attorney General,* BALTIMORE SUN, May 20, 2006, at 5B; Douglas Tallman, *AG Opinion Finds Perez*

[4] For the Court's convenience, a copy of the Attorney General's opinion is included in the appendix to this brief. It is also available on-line on the website of the Attorney General's Office, at www.oag.state.md.us/Opinions/2006/06index.htm.

Candidacy Constitutional, THE GAZETTE, May 19, 2006; Steve Vogel, *Perez is Eligible to Run for Attorney General,* WASHINGTON POST, May 20, 2006, at B10.

On June 19, 2006, Mr. Perez formally registered his candidacy by filing with the State Board a certificate of candidacy, accompanied by associated forms and a filing fee of $290.00. In accordance with Md. Code Ann., Election Law ("EL")§§ 5-302 and 5-304, Mr. Perez completed a standard form requiring him to supply certain information, *see* EL § 5-304(c)(1)-(4), and to provide a statement that he "satisfies the requirements of law for candidacy for the office" of Attorney General. This form, and the statement attesting to his eligibility for the office, were required to be "filed under oath." EL § 5-302(a)(1). The form itself, (E. __ (Exhibit 1)), required Mr. Perez to "certify under penalties of perjury" that he is "a registered voter and a citizen of Maryland and meet[s] all other requirements for the above listed office."

Mr. Perez's name, party affiliation, mailing address, phone number and date of filing were then added to the list of State candidates for the 2006 Gubernatorial Primary Election maintained by the SBE. That list, which is updated at least once daily, is accessible through a link on the homepage of the SBE website entitled "Listing of State Filed Candidates." *See* www.elections.state.md.us.

The Timing of This Lawsuit

On Thursday, July 13, 2006, the day Mr. Abrams filed his complaint, the circuit court entered an order providing that "the time for Defendants to respond to the Complaint is shortened until five (5) days from service of this Order on the Defendant." (E. __.) The court also issued writs of summons for each of the defendants on July 13. Although Mr. Abrams' July 13 motion was necessarily based on an assertion that he would suffer "immediate, substantial and irreparable harm," Rule 15-504(a), in the absence of court intervention, he did

not effect service of the summons until five days later, on July 18, 2006. In accordance with the Court's order, requiring a response within five days, both Mr. Perez and the State Board submitted dispositive motions on July 25.

On July 28, Mr Abrams submitted a memorandum of law in opposition to the motions and in support of a cross-motion for summary judgment. (E. __.) Mr. Abrams attached an affidavit attesting that he had been traveling in Egypt for the first two weeks in June, and in London from June 26 until July 3. (E. __.) He further testified that in the two-week period between June 13 and June 26, he did not read any news accounts reporting that "Mr. Perez had formally filed" his certificate of candidacy[5] and did not check the list of candidates maintained by the State Board. (E. __.) Mr. Abrams stated that he "first became aware that Mr. Perez had formally filed the papers required for his Attorney General candidacy" when he checked the Board website on July 5. A week later, after taking a three-day vacation in Atlantic City, Mr. Abrams completed preparation of his eight-page complaint and two-page motion for a temporary restraining order. (E. __.) The next day, on Thursday, July 13, he filed the papers, received writs of summons and was denied the *ex parte* relief he sought by his motion for a temporary restraining order. Mr. Abrams delivered the service papers to a

[5] This is not to say that the news media were not covering the Perez campaign. A sampling of the news articles that appeared during that period referring to Mr. Perez's candidacy includes: Janel Davis, *Report: Immigrants Pay Their Fair Share,* THE GAZETTE, June 14, 2006; Thomas Dennison, *Campaign to Stop Early Voting Prompts Opposition,* THE GAZETTE, June 21, 2006; Michael Dresser, *Montgomery's Frosh Eschews Statewide Run; State Senator Decides to Seek Re-election in District 16, not Attorney General's Post,* BALTIMORE SUN, June 21, 2006, at 5B; Thomas Dennison, *Between Applause and Smiles, A Politician Bows; Focus Now Turns to Running Mate Stuart Simms for Statewide Office,* THE GAZETTE, June 23, 2006; Sumathi Reddy, *Simms Weighs Another Run,* BALTIMORE SUN, June 23, 2006, at 14A; Barry Rascovar, *Duncan Makes the Right Move,* THE GAZETTE, June 26, 2006; and Blair Lee, *Maryland Politics after Duncan,* THE GAZETTE, June 26, 2006.

process serving company on July 17, which effected service the following day.

The SBE's Procedures for Candidate Filings and Preparation of Ballots

The SBE accepts certificates of candidacy from those seeking election to State-wide or federal office, the General Assembly and the circuit courts. The list of candidates posted on the SBE website for the 2006 election runs to 103 pages. The eligibility requirements for the various State-wide offices vary widely. For instance, a candidate for Attorney General must have resided in the State for 10 years and practiced law in the State for 10 years. A candidate for United States Senate must have been a United States citizen for nine years, while a candidate for the House of Representatives must have been a citizen for seven years. Circuit judges must be members of the Maryland Bar, have resided in the State for five years and in the pertinent district for six months. The SBE publishes a chart setting forth such qualifications for each office as well as filing fee amounts and other filing requirements; the chart may be accessed through a link on the SBE website entitled, "Requirements and Qualifications for Filing Candidacy."

The State Board's procedures for accepting candidacy filings are consistent with an overarching goal of ensuring a swift and orderly preparation of ballots in accordance with the short timelines imposed by statute. To that end, the State Board avoids engaging in fact-intensive inquiries into such subjects as the residency and duration of residency of a candidate, relying instead on the candidate's sworn certification that such eligibility requirements have been satisfied. By contrast, compliance with other filing requirements can be easily verified because the information is readily available to the State Board in its own records or on the form completed by the candidate. Thus, the State Board can confirm a candidate's registered voter status, party affiliation, payment of the filing fee and compliance with campaign finance

reporting requirements without engaging in administratively burdensome tasks that could lead to uncertainty and delays, disrupting the process of ballot preparation and other key functions required to implement voting in a narrow timeframe.

EL § 5-303(a)(1) imposes a candidate filing deadline of 9:00 p.m. "on the Monday that is 10 weeks or 70 days before the day on which the primary election will be held." In this election cycle, the primary election will be held September 12, 2006, producing a filing deadline of July 3, 2006. (As noted above, Mr. Perez filed his certificate of candidacy on June 19, two weeks prior to the deadline.) The Court of Appeals has emphasized the importance of this deadline "in view of the necessity for making timely preparations for elections." *Andrews v. Secretary of State,* 235 Md. 106, 108 (1964).

A series of milestone deadlines and timeframes follow the certificate of candidacy filing and further facilitate "timely preparations for elections." *Id.* EL § 5-502 creates a short deadline for withdrawing a candidacy, requiring that a certificate of withdrawal be filed within ten days after the § 5-303 filing deadline – here, July 13, 2006. This deadline, too, has been construed as mandatory and unalterable because of the importance of implementing the election process in a timely manner. *See McGinnis v. Board of Supervisors of Elections,* 244 Md. 65, 68 (1966). A short period follows during which political parties may designate candidates to fill a vacancy in a candidacy for a primary election. In that event, both the party's certificate of designation and the designated candidate's certificate of candidacy must be filed by the fifth day following the candidate withdrawal deadline – here, July 18, 2006.

At this point, after all of the possible candidacies have become known, the SBE must begin the ballot preparation process. This process, too, is governed by strict deadlines. EL § 9-202(a) requires the SBE to "certify the content and arrangement" of the ballots. This

certification must be completed at least 50 days before a primary election, *i.e.* by July 24, 2006. *See* EL § 9-207(a)(1). Within 48 hours of the certification, *i.e.* no later than July 26, the SBE is required to deliver to each local board of elections a copy of the certified ballot content and arrangement for that county. *See* EL § 9-207(c).

The requirements of prompt ballot certification and delivery by the SBE allows the local boards to comply with their statutory responsibilities in a timely fashion, as required by statute. Specifically, the local boards must prepare the arrangement of all ballots to be used in the county and to display them within 5 days after the certification – here, July 31.[6] *See* EL § 9-207(d)(1). After the third day of display, – here, at the latest, August 3, the ballots may not be modified (except pursuant to a court order or corrective action authorized by the SBE). *See* EL § 9-207(d)(2).[7]

Under the statutory timeframes set forth above, the printing of ballots may begin on August 3 (or sooner, if other stages of the process are completed before the prescribed deadlines), slightly more than a week from the date of the filing of this motion. *See* EL § 9-207(e). At that point, extraordinary action is required to halt the process, and the attendant consequences impose severe burdens on the rights of voters. In particular, modification of the ballots after August 3 can be accomplished only if ordered by a court to correct an error in the content or arrangement of the ballot or if the SBE approves corrective action. *See*

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[6] EL § 1-301 provides that, in computing periods of time under the Election Law Article, Saturdays, Sundays, and legal holidays are included. *See* EL § 1-301(a)(1). Because the fifth day after July 24 is a Saturday, however, the local boards' preparation and display of ballots would have to be completed on Monday, July 31, 2006, assuming that all previous stages of the process were completed no earlier than the statutorily prescribed deadlines.

[7] Any court challenge to the content or arrangement of the ballot must be initiated within the same three-day period. *See* EL § 9-209(a).

EL § 9-207(d)(2). Reprinting of the ballot may be approved by the SBE "if there is sufficient time," EL § 9-208 (b)(1); if there is not sufficient time, SBE may approve the use of stickers to be affixed to the printed ballots, or, if that is not feasible (as with the current electronic voting system), some other form of notification of the changes must be provided to the voters, *see* EL § 9-208(b)(2),(3).

Reprinting ballots to correct an "error" with respect to a state-wide candidacy obviously imposes a large administrative burden on the local boards of elections in all 24 jurisdictions. The consequences are of still greater concern when the matter of absentee ballots is considered. EL § 9-213 requires the content of an absentee ballot to be identical to the ballot used in the absentee voter's polling place. Thousands of Maryland troops are stationed overseas, many deployed in combat areas. The Federal Voting Assistance Program of the United States Department of Defense has advised that a reasonable benchmark world-wide for round-trip mailing time for international mail is 20 to 34 days and for Military Postal Service delivery, 30 days. Implementing the Uniformed and Overseas Citizens Absentee Voting Act and avoiding the disenfranchisement of Marylanders stationed overseas thus requires close adherence to the timeframes prescribed by statute.

At the time of the July 31 hearing before the circuit court, many of these milestone dates were swiftly approaching or had already passed; many had been reached in advance of the statutorily prescribed deadlines.[8] The local boards of elections completed their proofing of ballots – more than 600 different ballot formats are being used throughout the State so that

[8] The facts presented in this paragraph were proffered by counsel during the July 31 hearing; because of the swiftly moving elections preparations process, it was not possible to prepare an up-to-date affidavit, although Donna Duncan, the Director of the Division of Election Management, and Ms. Lamone were present to provide testimony if needed.

each ballot presents the correct array of candidates. The public display of ballots had been completed in each county, and approximately 400,000 ballots had been sent to be printed (at a cost of $160,000). The audio recordings used to assist visually impaired voters using the touch-screen voting system were being produced, and screen shots from the touch-screen system were being prepared, which would be reproduced in specimen ballots. *See* EL § 9-214. The computer specialist under contract to program the ballots for the electronic voting was completing her work and preparing to depart two days after the hearing. Most local boards had turned to tasks associated with other vital and time-consuming aspects of the elections process, including processing voter registration applications, which could be submitted up to August 22.

The election preparation process has, of course, continued to progress in the period between the July 31 circuit court hearing and this Court's review. The process has moved forward expeditiously, and continues. As of the date of this filing, more than 10,000 absentee ballots have been mailed.[9] Each of the 19,000 voting units that will be used in the primary election throughout the State has been loaded with a data card particular to the ballot format it will display. To ensure the security of the voting process, each unit must, by regulation, undergo "preelection logic and accuracy" testing. *See* COMAR 33.10.02.14 - .15. This testing must be completed at least 10 days before an election, *see* COMAR 33.10.02.14, and most counties have now completed testing and the requisite public demonstration of the tests,

[9] The facts discussed in this paragraph are not a part of the record because they occurred subsequent to the development of the record. Nevertheless, the State Board believes it is important to bring these more recent facts to the attention of the Court. The State Board proffers that, if this case were remanded to the circuit court (a disposition the State Board opposes), evidence in support of these facts could be readily adduced.

see COMAR 33.10.02.16, at this point. Following the test and demonstration, the votes recorded during the test are cleared from the system, and the unit is sealed.

For the ballot to be changed to remove or alter a statewide candidate's name would require this entire process to be repeated. The programming and installation of the data cards could not be completed before September 5, when early voting is to begin, and would be extremely difficult to complete before the primary election on September 12. Conducting the logic and accuracy tests on each voting unit for the reformatted ballot could likely not be accomplished, and the public demonstration of the results (before which 10 days' notice must be given, COMAR 33.10.02.16) would be impossible, undermining public confidence in the integrity of the voting process. In short, the elections process has passed this litigation by, and an order compelling the State Board "not to place Mr. Perez's name on the ballot," as Mr. Abrams requested, or indeed, an order compelling the State Board to remove Mr. Perez's name from the ballot, as he presumably now seeks, is an order with which the State Board and the local boards of elections in each jurisdiction could likely not comply.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT THE RELIEF SOUGHT BY MR. ABRAMS, WHERE THE ELECTION IS IMMINENT, THE PREJUDICE TO THE STATE BOARD AND VOTERS IS GREAT, AND THE CLAIMS WERE NOT TIMELY BROUGHT OR EXPEDITIOUSLY PURSUED.

Regardless of the reasons for Mr. Abrams' delay in challenging Mr. Perez's candidacy, the challenge must at this point be rejected. This Court has recognized the special considerations that apply in the elections context when a claimant comes before a court seeking injunctive relief. *See Ross v. State Bd. of Elections,* 387 Md. 649, 671-72 (2005). As the discussion of the elections timeline above demonstrates, the timing of lawsuits

challenging an aspect of the elections process is crucial. Thus, for instance, the Supreme Court has made clear on several occasions that injunctive relief may be inappropriate in an elections case even where a constitutional violation affecting the fundamental rights of voters has been shown,[10] if the election is too close for the State to realistically be able to implement the necessary changes before the election. In *Reynolds v. Sims,* 377 U.S. 533, 585 (1964), the Court said:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. *In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.*

(Emphasis added.) The Court elaborated on the equitable considerations that bear on the timeliness of an election challenge:

> With respect to the timing of relief a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Id.; see also Wells v. Rockefeller, 394 U.S. 542, 547 (1969); *Kilgarin v. Hill*, 386 U.S. 120, 121 (1967). Following this rationale, courts have denied or dismissed claims for injunctive relief on equitable principles based on the nearness of the elections and the harm to the State, candidates and citizens from the disruption of the electoral process. *See, e.g., White v. Daniel*,

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[10] By pointing to the extreme case where a court refuses to enjoin an invalid election procedure, the State Board does not in any way suggest that any legal violation is present in the present case or that the lower court erred in its legal conclusion finding no bar to Mr. Perez's candidacy.

909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991); *Knox v. Milwaukee County Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984).

In its papers below, the State Board advanced a defense based on the limitations period imposed by EL § 12-202(b)(1). That provision requires that an action such as the present one must be brought within "10 days after the act or omission or the date the act or omission became known to the petitioner." The pertinent act or omission in this case occurred on June 19, 2006, when Mr. Perez acted by filing his certificate of candidacy (or, conceivably, when the State Board failed to reject it on that date). The State Board has not challenged Mr. Abrams' affidavit claiming that he did not become aware of this act until July 5, which was within 10 days of his filing of the complaint. Accordingly, the State Board did not pursue the limitations defense any further in the circuit court, and does not do so here.

That does not mean, however, that the timeliness of Mr. Abrams' claims, the pace at which they were pursued, or the lapse of time since the circuit court ruled are not relevant to the resolution of this appeal. Moreover, Mr. Abrams is mistaken in asserting that the issues of limitations, laches and availability of injunctive relief when an election is imminent are not before the Court in this appeal because the issues were not raised in a cross-appeal. (Brief of Petitioner at 2-3.) A cross-appeal in these circumstances was "neither necessary nor proper." *Insurance Comm'r v. Equitable Life Assurance Soc'y,* 339 Md. 596, 612 n.8 (1995). "It is established as a general principle that only a party aggrieved by a court's judgment may take an appeal and that one may not appeal or cross-appeal from a judgment wholly in his favor." *Offutt v. Montgomery County Bd. of Educ.,* 285 Md. 557, 564 n.4 (1979). The final judgment entered by the circuit court denied Mr. Abrams all of the relief he sought, and its declaration

of Mr. Perez's eligibility was not adverse to the State Board's position.[11] "Where a party has an issue resolved adversely in the trial court, but . . . receives a wholly favorable judgment on another ground, that party may, as an appellee and without taking a cross-appeal, argue as a ground for affirmance the matter that was resolved against it at trial." *Id.*; *see also Wolfe v. Anne Arundel County,* 374 Md. 20, 26 n.2 (2003); *Paolino v. McCormick & Co.,* 314 Md. 575, 579 (1989).

The issues raised by the State Board in its motion to dismiss regarding the timing of the lawsuit, the potential for disruption to the elections process, and the availability of injunctive relief not only remain at issue in this appeal – they have become all the more pressing in view of the continued progression of the elections process over the three-week period since the circuit court ruled. To grant the relief denied by the circuit court at this juncture would lead to an unmanageable disruption of the primary election and disenfranchise thousands of voters, many of them serving in the armed forces overseas.

By contrast, the harm suffered by Mr. Abrams is abstract and speculative. Mr. Abrams is a candidate for Comptroller, not Attorney General. Moreover, as a registered Republican, he is not even eligible to vote for Mr. Perez or any of his opponents in the Democratic primary. Mr. Abrams simply has not pointed to any reasons justifying the extraordinary injunctive relief he has requested.

While the limitations period imposed by EL § 12-202 is not, by its terms, applicable to the facts of this case, it is nevertheless instructive. Like other judicial review provisions

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[11] As stated in the State Board's memorandum in support of its motion to dismiss and for expedited scheduling, "The State Defendants further request that scheduling of the action be expedited to ensure a swift disposition of the case, whether on the grounds advanced above or on the merits." (R. 62.)

in the Election Law Article, it envisions that claims will be brought promptly and adjudicated expeditiously. Indeed, a challenge to a candidate's qualifications on residency grounds, which previously would have been governed by EL § 12-202, is now controlled by EL § 5-305. *See* 2004 Laws of Maryland, ch. 338. That provision requires that such a challenge be brought no later than nine weeks before the election, *i.e., by July 11, 2006* for the primary election this year. *See* EL § 5-305(c)(1)(i). EL § 5-305(c)(2) further directs that the circuit court's review be conducted expeditiously, "and in no case, longer than 7 days from the date the petition is filed." The same considerations counseling urgency in a case challenging qualifications based on residency apply to this case challenging qualifications based on the "practiced Law" requirement.

Because the limitations period in EL § 12-202 is tied to the "date the act or omission became known to the petitioner," rather than the date the petitioner knew or should have known of the act or omission," it will not always serve its intended purpose of ensuring prompt resolution of election disputes – as this case illustrates. *Cf. Oglesby v. Williams,* 372 Md. 360, 370-71 (2002) (noting that a second plaintiff had been added where the original plaintiff may have been aware of the eligibility question at issue for four months before filing suit). The equitable doctrine of laches provides another framework for addressing the problem of untimely lawsuits interfering with the intricate elections machinery. In *Ross,* 387 Md. 649, this Court held that laches may apply to bar a claim even before a statutorily imposed limitations period has run. The circuit court rejected the State Board's defense on laches grounds, however, because it found no "dilatory conduct on [Mr. Abrams'] part." (E. __ (Tr. 58).) The State Board takes issue with that finding, but it again illustrates the problem posed by untimely election challenges.

Whether a plaintiff's suit is untimely because of deliberate delay, inexcusable dilatoriness, excusable mistake, or simple ignorance, the impact of a belated election challenge is the same. The causes of the delay are immaterial to its consequences, which involve, as the Supreme Court said in *Reynolds,* "consider[ations] of the proximity of a forthcoming election and the mechanics and complexities of state election laws," as well as "general equitable principles." 377 U.S. at 585. Similarly, the necessary and inexorable progress of the preparations for the September primary election during the period since this appeal was noted must be considered in the decision whether to grant or withhold equitable relief.

II. MR. ABRAMS MISAPPREHENDS THE NATURE OF THE STATE BOARD'S ROLE IN ACCEPTING CERTIFICATES OF CANDIDACY.

In his brief, Mr. Abrams indicates that one of the "Questions Presented" in this appeal is whether the State Board has "any duty to inquire into the representations made by a candidate for any office in Maryland" when the candidate files a certificate of candidacy. (Brief of Petitioner at 4.) The remainder of the brief does not address the issue, *cf. Sweeney v. Savings First Mortg., LLC,* 338 Md. 319, 325 n.8 (2005) (argument waived if not raised in brief); Rule 8-504(a)(5); nevertheless, Mr. Abrams has suggested that the issue presented by this appeal might have been raised and resolved earlier if Mr. Perez or the Board had acted differently on or before June 19, and it is important that the misconceptions about the Board's role be dispelled.

Mr. Abrams has pointed to the requirement imposed by EL § 5-301(b) for the State Board to:

> determine whether an individual filing a certificate of candidacy meets the requirements of this article, including:
>
> (1) the voter registration and party affiliation requirements under Subtitle 2 of this title; and
>
> (2) the campaign finance reporting requirements under Subtitle 13 of this article.

(E. ___(Complaint ¶ 15).) Mr. Abrams interprets this provision to mean that the State Board's determination must include an evaluation of "the requirement in EL § 5-201 that the individual is qualified for the office," and suggests that this should have included, in the case of Mr. Perez, an inquiry into the question of whether the candidate had "practiced Law in this State for at least ten years." Mr. Abrams misapprehends the nature of the determination that the State Board is required to make. It is simply not feasible for the State Board to conduct fact-intensive inquiries into a candidate's qualifications. For instance, residency and duration of residency are qualifications of office akin to the requirement of ten years' practice of law. Neither qualification is readily verified by the State Board or a local board of elections.

In the last gubernatorial election cycle, this Court considered a challenge to the qualifications of a candidate for State's Attorney imposed by Article V, § 10 of the Constitution. In *Oglesby v. Williams,* 372 Md. 360 (2002), the Court determined that the candidate was ineligible because he had not established domicile in Worcester County within two years of the election. The candidate had purchased property there, and begun construction of his home more than two years before the election, but he did not actually occupy the home until December of 2000, less than two years before the election. Even without such complex factual questions regarding the timing of a candidate's move into a new

home, the question of residency remains intensively fact-bound. This Court has stressed that questions of "residency" are in fact questions of domicile, *see Blount v. Boston,* 351 Md. 360, 364-66 (1998), and "the controlling factor in determining a person's domicile is his intent," *Roberts v. Lakin,* 340 Md. 147, 153 (1995).[12]

Neither the State Board nor local boards of elections are administratively equipped to undertake investigations into a candidate's subjective intent about where to make his or her home, much less the construction schedule for the house, and the General Assembly did not intend for elections boards to conduct such inquiries as part of their determinations of a candidate's qualifications. Rather, the role of the State Board is limited to verifying information kept in connection with administration of the election process. This has been the longstanding interpretation of the Attorney General and the practice of the State Board. *See* July 2, 1987 Letter from Assistant Attorney General Jack Schwartz, Chief Counsel, Opinions and Advice, to Senator Robert H. Kittleman, (E. ___) (describing determination as "a ministerial function, accomplished by checking the registration records of the board" and stating that "election officials lack authority to determine other potential questions about qualifications . . . [such as whether] a candidate for Attorney General . . . has practiced law in Maryland for at least 10 years (Article V, § 4)"). This understanding of the State Board's

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[12] Mr. Abrams suggests that the Court's decision in *Oglesby* reflected an insistence on construing qualifications for candidacy strictly. (Brief of Petitioner at 14 n.8.) As the Court's precedents reflect, the equation of domicile with residency can, depending on the circumstances, result in either a "liberal" or "strict" application of the residency requirement. *See, e.g., Blount v. Boston,* 351 Md. 360 (1998) (candidate had not abandoned his original domicile even though he had changed his "primary place of abode").

role under the statute, because it is reflected in the longstanding practice of the State Board, is entitled to deference. *See Suessman v. Lamone,* 383 Md. 697, 725 (2004) (according "considerable weight" to the State Board's interpretation of election law).[13] The statutory framework for candidate filings and ballot preparation requires the candidate to attest under oath to his or her qualifications and permits the SBE to rely on the attestation in accepting a filing of a certificate of candidacy.

Mr. Abrams' misapprehension about the nature of the determination made by the State Board upon a candidacy filing is echoed in his contention that Mr. Perez should have utilized the administrative procedures for obtaining a declaratory ruling from the State Board, *see* COMAR 33.01.02.01, rather than seeking the advice of the Attorney General to confirm his view that he met the eligibility requirements for office. (E. ___ (Complaint ¶¶ 17-18).)

The State Board has discretion not to issue such a ruling when requested, and would likely have declined to do so had Mr. Perez posed the question addressed in the Attorney General's opinion, for two reasons: first, the administrative procedure makes a ruling

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[13] The State Board's interpretation is buttressed by the legislative history of the EL § 5-201. Its predecessor provision, Md. Ann. Code, Art. 33, § 4A-1 (1997 Repl. Vol.), stated simply: "Before finally placing the name of such a candidate on the ballot at the succeeding primary election, the board shall determine that the candidate meets the registration and affiliation requirements of this section." A separate section, § 26-13(b), stated that a candidacy could not be accepted from an individual who had not complied with the campaign finance disclosure requirements. The report that accompanied the proposals for recodification of the Election Code indicates that no substantive change was intended, suggesting that the State Board's inquiry was expected to be limited to matters easily ascertainable from its own records, including registration and party affiliation status and compliance with campaign finance disclosure requirements. *Cf.* Md. Ann. Code, art. I, § 30 ("unless the context requires otherwise," the term "including" in statutes means "by way of illustration and not by way of limitation").

available with respect to "the manner in which the Board would apply [a] statute that the Board enforces," and, as discussed above, the State Board does not "enforce" Article V, § 4 of the Constitution when it reviews candidacy filings; second, as discussed above, the State Board is not well equipped to delve into the factual details of Mr. Perez's legal experience or to evaluate it against a constitutional standard. Even if such a declaratory ruling had been requested and issued, the advice of the Office of the Attorney General, as counsel to the State Board, would have been the same as that set forth in the formal opinion of the Attorney General, 91 Op. Md. Att'y Gen. 99 (May 19, 2006) (attached in appendix to this brief). Thus, it is unlikely that any action by Mr. Perez or the State Board could have hastened the resolution of this dispute; only a more timely filed and diligently prosecuted lawsuit could have avoided the prejudice that would now result from granting the relief sought in the suit.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court for Anne Arundel County should be affirmed.

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Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman - 13 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of August 2006, a copy of the foregoing Brief of Respondents Linda H. Lamone and State Board of Elections was sent by email and served by first-class mail on:

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