

IN THE COURT OF APPEALS OF MARYLAND

NIKOS STANFORD LIDDY

*

Petitioner/Cross-Respondent,

*

September Term, 2006

v.

*

Petition Docket No. 432

LINDA H. LAMONE, *et al.*,

*

Case No. 71

Respondents/Cross-Petitioners.

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JOINT CROSS-PETITION FOR WRIT OF CERTIORARI

Respondents Linda H. Lamone, the State Administrator of Elections, and the State Board of Elections, through their attorneys, J. Joseph Curran, Jr., Attorney General, and William F. Brockman, Assistant Attorney General, join Respondent Douglas F. Gansler, through his attorney, Carmen M. Shepard, in respectfully submitting this cross-petition for a writ of certiorari to the Court of Special Appeals to ensure that the Court is presented with all relevant grounds for reviewing the decision below in this matter of great public importance.

QUESTION PRESENTED

Was the plaintiff’s challenge to the placement on the ballot of a candidate for state-wide office, which was commenced less than three weeks before the general election and more than three weeks after the certification of the results of the primary election, barred by the applicable statute of limitations or, alternatively, by the equitable doctrine of laches?

STATEMENT OF THE CASE

The action was brought on October 20, 2006 in the Circuit Court for Anne Arundel County. *Nikos Stanford Liddy v. Linda H. Lamone, et al.*, No. C-06-117729. The circuit court held a hearing on October 25, 2006 and issued an opinion and order on October 27, 2006, which disposed of all claims against all parties. (The circuit court’s opinion and order

are attached as Exhibit A.) The plaintiff, Mr. Liddy, noted an appeal directly to this Court and a separate appeal to the Court of Special Appeals on October 30, 2006. Also on October 30, Mr. Liddy petitioned this Court for a writ of certiorari to the Court of Special Appeals. On October 31, this Court granted the petition and issued the writ before any consideration or decision of the matter in the Court of Special Appeals. The appeal has been docketed as *Nikos Stanford Liddy v. Linda H. Lamone, et al.*, September Term 2006, No. 71. The parties filed briefs on October 31, 2006, and oral argument in the case is scheduled to be heard November 2, 2006.

This cross-petition seeks review of the October 27, 2006 ruling by the circuit court rejecting the defendants' defenses to the suit on the grounds that it was barred by the applicable statute of limitations and by laches. The cross-petition also seeks review of the prior included rulings by the circuit court made in open court on October 25, 2006, which also rejected those defenses.¹

PERTINENT STATUTORY PROVISIONS AND RULES

Md. Code Ann., Cts. & Jud. Proc. § 12-301

Md. Code Ann., Election Law § 12-202(b)

Md. Code Ann., Election Law § 12-203(a)(3)

REASONS FOR GRANTING REVIEW

The extreme untimeliness of this suit and the decision of the circuit court to permit the suit to go forward raise issues of great public importance that go beyond the

¹ As indicated in the brief submitted on behalf of Respondents Ms. Lamone and the State Board of Elections, the Clerk of the Court and opposing counsel were informed by undersigned counsel that the respondents intended to note a precautionary cross-appeal and to file this cross-petition. *See* Brief at 4 n.5. The issues raised by this cross-petition were addressed by all parties in their October 31 briefs to this Court.

circumstances of this particular lawsuit, which itself presents extraordinary difficulties. The suit was allowed to proceed despite a statute of limitations designed to ensure that ballot-access challenges are timely brought and to minimize the potential for interference with the right to vote and for disruption to the orderly conduct of elections. These issues are addressed in the parties' briefs and do not require further elaboration here.

This cross-appeal, timely noted today in the Circuit Court for Anne Arundel County, *see* Md. Code Ann., Election Law §§ 12-203(a)(3) (five-day time limit for noting appeal), 1-301 (intervening Saturdays and Sundays included in computation of time), and this cross-petition are filed as a precautionary measure in light of ambiguities about whether the question presented in this petition would otherwise be preserved for appellate review.

This Court's precedents hold that a party "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). However, 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 respondents believe that the judgment entered against Mr. Liddy by the circuit court, by denying all the relief he sought, was not adverse to their positions.² The respondents further believe that the defenses of limitations and laches furnish alternative

² In both their motion filed in the trial court and their brief to this Court, Ms. Lamone and the State Board sought a disposition by the circuit court denying relief and affirmance by this Court, "on the grounds [of limitations or laches] or on the merits" because of the extreme urgency in resolving the case and the appeal, regardless of the grounds.

grounds (which were raised below) for affirmance of the trial court's denial of relief. Nevertheless, Mr. Liddy's complaint may be read as seeking a declaratory judgment and the circuit court's order may be seen as granting one. Had the circuit court accepted the limitations or laches defenses advanced by the defendants, such a ruling would arguably have precluded entry of a declaratory judgment. Under that reasoning, the limitations and laches arguments would not serve as an alternative ground for affirmance of that portion of the circuit court's ruling. *See Paolino*, 314 Md. at 580-81 (discussing analysis in *Joseph H. Munson Co. v. Secretary of State*, 294 Md. 160, 167-68 (1982)). Therefore, as a precautionary measure, the respondents submit this cross-petition to ensure that these important issues are preserved for this Court's appellate consideration.

CONCLUSION

For the foregoing reasons, the cross- petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 1, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 1st day of November 2006, a copy of the foregoing Joint Cross-Petition for Writ of Certiorari was sent by email and served by first-class mail on:

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EXHIBIT A

NIKOS STANFORD LIDDY

Plaintiff,

v.

**LINDA LAMONE, in her capacity as
STATE ADMINISTRATOR OF
ELECTIONS, et al.,**

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
*
* Case No. C2006 – 11729

* * * * *

MEMORANDUM OPINION

This matter came before the Court on October 24, 2006, for a merits hearing on Plaintiff’s “Verified Complaint for Judicial Relief Pursuant to Maryland Election Law Statute and Motion for Temporary Restraining Order.” The Court held the matter *sub curia*. Upon consideration of the arguments of the parties and the evidence admitted, the Court presents its conclusions below.

BACKGROUND

I. Procedural History

This action was filed by Plaintiff, Nikos Stanford Liddy, (hereinafter referred to as “Mr. Liddy”) as a self represented litigant, on Friday, October 20, 2006. Mr. Liddy, is an adult citizen and registered voter in the State of Maryland, residing in Prince Georges County. On Monday, October 23, 2006, Attorney Joseph Shoemaker entered his appearance on behalf of Mr. Liddy and appeared at the Courthouse seeking an order to grant the immediate relief prayed in the Temporary Restraining Order (“TRO”).

This case was specially assigned to the undersigned. A scheduling conference was held with Plaintiff’s counsel, Jason W. Shoemaker; counsel for the State Defendants, William F.

Brockman, and Michael D. Berman of the Attorney General's Office; and Carmen M. Shepard for Defendant, the Democratic nominee for Maryland Attorney General, Douglas Gansler, (hereinafter referred to as "Mr. Gansler").

Following a discussion with the Court regarding the need to expedite this litigation, all counsel reached an agreement that was placed on the record. Plaintiff withdrew his request for a TRO and agreed to waive his request to have this case assigned to a three-judge panel of circuit court judges as provided in MD. CODE ANN., ELEC. LAW §12-203(a)(2). The Defendants agreed to accept service on behalf of their respective clients and to submit a memorandum response prior to the merits hearing. Plaintiff's prayer for a preliminary injunction was then consolidated with a trial on the merits, pursuant to MD. RULE 15-502(b), and a merits hearing was set for October 25, 2006 at 9:00 a.m. before the undersigned.

Testimony was taken at the hearing on October 25, 2006 and arguments of counsel were heard and considered. All parties submitted their respective legal memoranda. This Court held the matter *sub curia*. The Court will now briefly summarize each party's position and the relevant evidence, which consists only of agreed stipulations and the testimony of two witnesses: Plaintiff, Mr. Liddy, and Defendant, Mr. Gansler.¹

II. Plaintiff's Position

Plaintiff maintains that "[a]lthough Defendant Gansler has been a Member of the Maryland State Bar Association for approximately seventeen (17) years, he has actually practiced law in Maryland for, at a maximum, eight (8) years." (Pl.'s Compl. ¶ 11.) Therefore, he argues that Mr. Gansler has failed to meet the minimum requirements set forth in the Constitution for the office of Attorney General. MD. CODE ANN., CONST. ART. V, § 4 states:

¹ No exhibits were moved for admission into evidence.

Section 4. Qualifications of Attorney General.

No person shall be eligible to the office of Attorney General, who is not a citizen of this State, and a qualified voter therein, and has not resided and practiced Law in this State for at least ten years.

Plaintiff based his complaint on his research from the internet, wherein he claims that, “Defendant Gansler has publicly admitted that, apart from his service for the past eight (8) years as State’s Attorney for Montgomery County, he practiced law solely in the District of Columbia.” (Pl.’s Compl. ¶ 17.)

Plaintiff seeks a judicial determination that Mr. Gansler does not meet the eligibility requirements set forth in MD. CODE ANN., CONST. ART. V, § 4. He further requests that this Court order the Defendants, Linda Lamone (hereinafter referred to as “Ms. Lamone”) and the State Board of Elections (hereinafter referred to as “SBE”), to remove Mr. Gansler’s name from the ballot, or in the alternative, to take appropriate measures to notify Maryland voters of the same. In addition, the Plaintiff included a second count for injunctive relief, requesting that the Court issue a TRO enjoining Mr. Gansler from continuing his candidacy, and “for such other and further relief as deemed equitable.” (Pl.’s Compl.)

Mr. Liddy is a student at the Anne Arundel County Community College and is enrolled in a Business Law Class. He is a resident of Prince Georges County and a registered voter. He intends to vote in the upcoming general election. He testified that he concluded based on information he viewed on Mr. Gansler’s website that Mr. Gansler had not practiced law in Maryland for the required ten (10) years. He learned this for the first time on “Monday of last week,” which was Monday, October 16, 2006. This was approximately four (4) days before his complaint was filed. Mr. Liddy testified that he learned about Mr. Gansler’s alleged lack of qualifications from multiple websites. These sites referred only to his practice in the District of

Columbia, and not in Maryland. From this, he inferred that Mr. Gansler did not meet the ten year eligibility requirement. He acknowledged on cross-examination that he read newspapers and watches T.V. news “objectively.” He said that he didn’t learn any information from these news sources. He based his conclusion on his own character and judgment. He stated that he believes “half of what I see and what I hear.” Mr. Liddy finds what he sees in T.V. to be “horrible,” and stated, “I don’t really like how politicians are.... I think they need to work together.” (Audio R.) He said that he is “pretty confident in his own opinion, who I want to vote for, who I trust.” (Audio R.) He further testified that he has been following the “campaigns for the Democratic and Republican candidates pretty closely.” (Audio R.)

III. State Board’s (SBE) Position

The SBE filed a “Motion To Dismiss and To Expedite Scheduling” and a supporting memorandum on the morning of the merits hearing. As set forth in their memorandum, “[t]he sole interest of the SBE and the State Administrator in this matter is ensuring an expeditious and orderly administration of the election process.” In support of their position, the SBE argued that the Plaintiff’s complaint was barred by both the statute of limitations set forth in MD. CODE ANN., ELEC. LAW § 12-202 and by the equitable defense of laches.

In support of this position, the following stipulations were placed upon the record:

1. Plaintiff’s complaint was filed on October 20, 2006.
2. Mr. Gansler filed his certification for candidacy on June 28, 2006.
3. The Maryland Primary was held on September 12, 2006, and the election results were certified on September 26, 2006.
4. As of the morning of October 25, 2006, 138,043 applications for absentee ballots had been received by the State Board of Elections. Of those applications, 7,035 arrived in the past twenty-four hours alone.²

² The number of applications as of October 23, 2006, was 131,008.

5. The deadline to file an application for absentee voting is October 31, 2006.
6. 7,074 of the absentee ballots belong to servicemembers overseas.
7. 14,277 absentee ballots have already been cast and received by the State Board.
8. 19,000 electronic voting machines have been deployed throughout the State.
9. Each electronic voting machine must be tested, pursuant to COMAR 33.10.02.15 and 33.10.02.16, and notice of the test demonstration must be given at least 10 days before the election.
10. 13 of the 24 election jurisdictions have already completed the DRE logic and accuracy testing which must take place after the data chips are inserted into the electronic voting machines.
11. More than 1.8 million paper ballots were ordered and are currently in the process of delivery.
12. There are more than 200 different styles of the paper ballot in place.
13. There are more than 3 million registered voters in Maryland.
14. Unofficially, 41,391 Democratic voters cast their vote at the primary election for Attorney General for Mr. Perez.³

The SBE contends that MD. CODE ANN., ELEC. LAW § 12-202, in the subtitle “Contested Elections” sets forth the proper statute of limitations. This section, in its entirety, states:

§ 12-202. Judicial challenges.

(a) *In general.* – If no other timely and adequate remedy is provided by this article, a registered voter may seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission:

³ This was despite the August 25, 2006, directive by the Court of Appeals that Mr. Perez was unqualified to run for the office of Attorney General and that his name was to be removed from the primary election ballot.

The Court of Appeals later modified their directive to require that this Court enter an order stating that the State Board must “(1) post notices conspicuously in each polling location informing voters that Thomas Perez is not a candidate for the Office of Attorney General and that any votes cast for Mr. Perez will not be counted; and (2) provide the same standard of notice to voters who will be using paper ballots for absentee and provisional voting.” *Abrams v. Lamone, et al.*, No. 142, September Term, 2005; modification of *per curiam* order filed August 29, 2006.

(1) is inconsistent with this article or other law applicable to the elections process; and

(2) may change or has changed the outcome of the election.

(b) *Place and time of filing.* – A registered voter may seek judicial relief under this section in the appropriate circuit court within the earlier of:

(1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or

(2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.

MD. CODE ANN., ELEC. LAW § 12-202.

The SBE maintains that this suit is barred by limitations because it was not brought within three days of September 26, 2006, the date election results for the gubernatorial primary were certified, as required by 12-202(b)(2). As the SBE asserted in their Memorandum, “[t]he three-day limitations period provided ample time for Mr. Liddy to challenge Mr. Gansler’s candidacy, which was announced in May and formally registered in late June.” (Def.’s Mem. in Support of Mot. to Dismiss, p. 12.) The SBE further argued that the date Plaintiff became aware of Mr. Gansler’s alleged ineligibility, October 16, 2006, cannot constitute an “act or omission related to an election,” pursuant to § 12-202(a) because Plaintiff’s own actions taken to “investigate the history of Mr. Gansler’s legal career,” were not relevant acts or omissions. Instead, the SBE claims that the language of § 12-202(a) refers to dates such as Mr. Gansler’s “June 28 filing of a certificate of candidacy, the SBE’s acceptance of his certificate of candidacy prior to the July 3 deadline for filing, his September 12 primary election victory, [or] the SBE’s September 26 certification of the results of the primary election.” *Id.* at 14.

With regard to laches, the SBE argued that “[t]his principle applies with great force in the elections process, where practical imperatives related to the implementation of the election

process and the statutory scheme governing that process combine to emphasize the need for expedited resolution of disputes....” *Id.* at 15. For further support, the SBE cited the United States Supreme Court in *Purcell v. Gonzalez*, Nos. 06-532, 06-533, 2006 WL 2988365 (S. Ct., Oct. 20, 2006). The SBE asserted that “[c]oncerns about the prejudice to the electorate are paramount in this case.... To grant the relief requested by Mr. Liddy at this stage in the elections process would lead to an unmanageable disruption of the general election and disenfranchise thousands of voters.” (Def.’s Mem. in Support of Mot. to Dismiss, p.16.)

IV. Defendant Gansler’s Position

Mr. Gansler responded to the Plaintiff’s complaint by filing an opposition to the Plaintiff’s request for a TRO and preliminary injunction, and a memorandum in support of his “Motion to Dismiss or, in the Alternative, for Summary Judgment.” In addition to adopting all of the SBE’s arguments based on the statute of limitations and the equitable bar of laches, Mr. Gansler also claims that he has met the constitutional eligibility requirements to serve as Attorney General, having practiced law in Maryland for more than ten (10) years. He attached to his pleading an affidavit describing the activities he alleges meet the eligibility requirements set forth in MD. CODE ANN., CONST. ART. V, § 4. This affidavit was not moved into evidence, however, Mr. Gansler was called as a witness by the Plaintiff.

Mr. Gansler testified that he was familiar with the eligibility requirements for the Office of Attorney General, having read them before he decided to sign the affidavit. He said that he has practiced law in the State of Maryland for seventeen (17) years. He based that on his bar admission since approximately December 18, 1989, having “practiced law every minute since that time.” (Audio R.) In concluding that he has met the eligibility requirements he referred to the definition of practice of law as it is defined in the unauthorized practice of law statute, which

he believed the Court of Appeals would hold to be a “threshold requirement” for one who runs for the Office of Attorney General. He further opined that the requirements for the “practice of law” would include being a member of the bar and following the rules of the Court of Appeals. He expressed his belief in a “very expansive view” of the definition of the practice of law relying upon an opinion of the Attorney General. See Kelly Opinion, *infra*.

He acknowledged that he has never been docketed as the attorney of record in any case filed in a Maryland Court prior to becoming a Montgomery County State’s Attorney in 1998. Aside from his view of the “threshold requirement” of being a member of the State bar, he testified concerning various activities that he considers “practicing law” in this State.

A. Judicial Clerkship

From August or September, 1989, until August, 1990, he worked as an appellate clerk serving the Hon. John McAuliffe, a Maryland Court of Appeals Judge. There were two clerks with their own office and the Judge assigned one clerk to each opinion. He testified that he would write drafts of the opinions, discuss them with the Judge, and perform other typical duties of an appellate clerk. He distinguished the duties of an appellate law clerk from those of trial judges’ clerks who “watch trials and that type of thing and not doing opinions...”.⁴ He was only a member of the State bar during a portion of this clerkship.

B. Howrey & Simon

He became a litigation associate of Howrey & Simon (“Howrey”), located in the District of Columbia, subsequent to his clerkship. The firm’s clients included Anheuser-Busch, Calvin Klein, Gatorade, Carolina Power & Light and Duke Power. As a first and second year associate, he never appeared in any Maryland courtroom on behalf of any client during his tenure at

⁴ Although the Court finds Mr. Gansler credible, he is entirely inaccurate with regard to his knowledge of the duties of a trial court clerk. The Court notes that both District and Circuit Court clerks engage in activities other than just “watching trials and that type of thing,” as he testified.

Howrey, but he testified that “most of these clients had either retail facilities or some direct interaction with the State of Maryland.” As an example of how his work constituted practicing law in Maryland, he testified that Gatorade hired Howrey to defend a copyright infringement action regarding their slogan. Had Gatorade lost this litigation, every Gatorade bottle in Maryland would need to be changed to erase that slogan.

He also used the fact that he was subject to the Maryland Bar’s disciplinary authority because of his Maryland law license as an example of why his actions as a lawyer constituted practicing law in Maryland. For example, if he stole money from a client whose principal place of business was North Carolina, while engaged in litigation in that State, he would be subject to the Maryland disciplinary rules.

He testified that he continually held himself out as an attorney in Maryland and that he was available to handle legal matters. Even though his office was in the District of Columbia, he chose to sit for the Maryland Bar and use that license as an aid in his representation of national clients and in his desire to develop his practice. He tried to bring business to the firm based upon that fact. However, he never actually brought any major clients to the firm. He testified that he was also a member of the District of Columbia bar.

C. *Pro Bono* Activities

Due to his position as an Assistant U.S. Attorney, Mr. Gansler testified “[d]uring those 17 years, I could only hold myself out as a lawyer for three of those years.” (Audio R.) It would be the three years while in private practice when he most clearly held himself out as an attorney to individuals other than family or friends. However, Mr. Gansler was permitted to engage in *pro bono* legal work. Specifically, he named three organizations in which he participated.

At some point (he did not specify when or for how long), Mr. Gansler joined The Community Partnership, a Montgomery County organization dedicated to creating a drug free Montgomery County. He testified that, as far as he was aware, he was the only lawyer participating. He described his work as “making sure we had the proper treatment centers in the County, that there was accessibility for people to get into treatment and that kind of thing.” (Audio R.) He clarified that he was not the general counsel for The Community Partnership.

He was also appointed to the Montgomery County Commission on Aging, but again, not as general counsel. He “dealt with a myriad of issues involving seniors in the County but some of them involved legal issues. For example, and I don’t remember what the piece of legislation was, but there’s always a need or desire to promote pro-seniors legislation and I worked on that.”

He testified that he “didn’t know if it’s a legal service or not, but in 1994, in compliance with the Hatch Act, which became less strict while I was there, I served for... then County Executive Paris Glendening, who was running for Governor, I did a lot of his criminal policy. I wrote, in fact, I wrote his criminal policy papers that ended up being part of his distribution here in Maryland.” (Audio R.)

Lastly, in the beginning of 1994 until 1998, when he became a State’s Attorney, Mr. Gansler was a member and co-chair of the Montgomery County NAACP Criminal Justice Committee. He testified that his four years there consisted of mostly legal work, “people who thought that their Constitutional Rights or legal rights were violated would write letters or call the NAACP. We would meet... on a monthly basis... and review those claims for merit or not. They had a list of lawyers that they would recommend.” (Audio R.) There were other members or co-chairs who would participate in identifying and analyzing the legal issues and referring the people to attorneys, and Mr. Gansler testified that not all the members were attorneys.

During cross-examination, Mr. Gansler testified that his work with the NAACP, The Community Partnership and the Commission on Aging involved the analysis of substantive Maryland law, as well as legal knowledge and skill. He raised the question to himself who his client would be; for example, at the NAACP would it be a person writing a complaint or the NAACP chapter? But, he maintained that he would still be “dealing with” substantive Maryland law and addressed these issues using his legal education, training and experience.

D. Teaching a Class at American University Law School Washington School of Law

In addition to the other experiences, Mr. Gansler testified: “I taught along with the Hon. DeLawrence Beard, a class at American University Law School, located in the District of Columbia.” (Audio R.) He averred that he used the differences in law between Maryland and D.C. as a teaching tool, and that the preparation he did for the classes most often took place in the evening at his home in Maryland.

E. Holding Himself Out As An Attorney

Mr. Gansler testified that he would be practicing law in the State of Maryland when he was playing basketball at the gym and a friend would ask him a legal question to which he’d offer his legal advice. He also drafted his grandfather and mother’s will. His last example was an occasion when a friend rented a van from Budget and the van was stolen, “I did all the legal work for him... and helped him with that case and wind his way through the system.... I was allowed to do that because I was a member of the State bar.... And then you get questions all the time, ‘I’m getting divorced, can I do this?’ We all get those questions....”

F. Coburn & Schertler

While at Coburn & Schertler, Defendant Gansler testified that he “took depositions in Bethesda [while] represent[ing] a man named Flax.” (Audio R.) The reason he said he was able to do these depositions is because he was a member of the Maryland Bar.

DISCUSSION

I. Motion to Dismiss

The Defendants’ Motion to Dismiss is based upon MD. CODE ANN., ELEC. LAW § 12-202 (“§ 12-202”) and the equitable bar of laches. For the reasons stated below, the Court finds that neither defense is justified on the facts of this case.

A. Statute of Limitations

Section 12-202 contains a general statement as to when a registered voter may seek judicial relief in subsection (a), and procedures for the place and time of filing in subsection (b). Plaintiff’s case is not barred pursuant to the passing of a deadline set forth in § 12-202(b).

The Plaintiff’s complaint is not specifically alleging that certifying Defendant Gansler as a candidate or certifying his victorious result in the primary were acts inconsistent with the Election Law article. Instead, Plaintiff “challenges whether Defendant Gansler’s qualifications meet the requirements set forth by the Maryland Constitution regarding candidacy for Attorney General of Maryland.” (Pl.’s Compl. ¶¶ 15, 16.) Therefore, § 12-202(b)(2) does not yet apply because the general election has not yet taken place, and consequently, the election results have not yet been certified.⁵ It is Defendant Gansler’s eventual participation in the final contest⁶ for

⁵ If the State Board’s argument were applied to an action that could be filed, within seven days after the general election, to challenge Defendant Gansler if he was victorious in the general election, then the statute of limitations bar may not apply, *so long as* the Plaintiff could show that he did not become aware of Defendant Gansler’s questionable eligibility at a time prior to the election. (If he were aware of the basis of the complaint prior to the election results being certified, his limitations window would be governed by the ten day window set forth in 12-202(b)(1).)

⁶ See MD. CODE ANN., ELEC. LAW § 1-101(m).

Attorney General; a contest that has not yet taken place, that would be inconsistent with “other law applicable to the elections process,”⁷ namely, the Constitution, if Mr. Gansler has not practiced law in this State for at least ten (10) years. Section 12-202(a) gives a registered voter the power to challenge the election, although it has not yet been held. Because the general election has not yet been held, the “earlier of” the two deadlines set forth in § 12-202(b) is § 12-202(b)(1), ten days of it being known to the Plaintiff that an allegedly ineligible candidate will be running in the general election.

This Court’s interpretation of § 12-202(b) is also consistent with *Ross v. State Board of Elections*, 387 Md. 649 (2005). In *Ross*, the Court of Appeals held that the governing statute of limitations was § 12-202, but ultimately barred Ross’ complaint based upon laches. Ross challenged the winner of the Baltimore City Council election for the 13th District, a politician named Branch, because Branch allegedly failed to file certain campaign finance reports. Ross claimed that Branch’s failure made her ineligible to take office. The Court of Appeals stated in its opinion that:

Ross appears to have conceded, by attaching the Baltimore Sun article to his initial petition filed in the Circuit Court, that he knew of Branch’s campaign finance entity’s failure to file campaign finance reports on October 13th. Thus, under the operation of the ten-day time period in Section 12-202, Ross should have filed his petition at least a week before the election, that is by October 23rd. [Instead, Ross did not file his petition until November 5, 2004.]
Id. at 686.

This statement is significant because the Court of Appeals did not note the date the primary results were certified as the point when the act or omission occurred for purposes of limitations. The Court of Appeals also did not note the date of the candidate’s failure to file the report as the relevant act or omission. Instead, the Court of Appeals relied on laches as the

⁷ § 12-202(a)(1).

justification for affirming judgment against Ross. In this case, the SBE argues that the date the primary results were certified is the date the limitations clock began to run.

In conclusion, the Court finds Mr. Liddy's testimony credible. He appeared to be an independent young thinker who makes decisions based on his own objective research. The Court has no reason to disbelieve his testimony that he recently came to the conclusion on October 16, 2006, while accessing the internet, that Mr. Gansler had only been practicing law in this State for eight years. Therefore, the Plaintiff's claim is not barred by any applicable statute of limitation.

B. Laches

The Court of Appeals has defined laches as "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." *Ross*, 387 Md. at 668, citing *Parker v. Board of Election Supervisors*, 230 Md. 126, 130 (1962). "[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 669. Laches is "an *inexcusable* delay, without necessary reference to duration in asserting an equitable claim." *Schaeffer v. Anne Arundel County, et al.*, 338 Md. 75 (1995) (emphasis in original). To assert the defense of laches, the delay must have also prejudiced the Defendant; if the delay has not prejudiced the party asserting the defense, it will not bar the equitable action." *Ross*, 387 Md. at 670, quoting *Schaeffer*, 338 Md. at 83

Turning first to the issue of prejudice, Mr. Gansler cannot be prejudiced because if, in fact, he does not meet the eligibility requirements, he ought not to be on the ballot. The SBE is not prejudiced because it is undisputed that at this late date, there is nothing that can be done to alter the makeup of the ballot for this election. In fact, if this Court were to determine that Mr. Gansler is not eligible to run for the office of Attorney General, other remedies are available to

preserve the integrity of the election process and to give the voters the choice of qualified candidates that they deserve. Plaintiff and similarly situated voters would be prejudiced if an ineligible candidate were to remain on the ballot merely because of a delay in finding out about the lack of eligibility.

MD. CODE ANN., ELEC. LAW § 5-304(e) states that “[t]he appropriate board shall accept the certificate of candidacy if it determines that all requirements are satisfied.” This Court has no evidence before it to determine what, if any, procedures or steps are or were in place before the SBE to make such a determination. Obviously, such procedures could serve to minimize the potential of last minute eligibility disputes. The responsibility for this, of course, does not rest with the Plaintiff. Nor has the Plaintiff challenged the certification process or lack of it in his complaint. Furthermore, even in a more perfect world where such measures are taken, the possibility of such last minute revelations still exists.

Constitutional ineligibility to run for office cannot be corrected merely because of laches, when the election has not even yet taken place. The Court is concerned with more than whether one’s name appears correctly on the ballot, in accordance with a statute, or whether a ministerial task, such as filing a statutorily required campaign finance report, was complied with by a candidate. At issue is the candidate’s eligibility itself. The Court of Appeals has cited cases in other jurisdictions that are in harmony with this Court’s view. In discussing the laches issue that arose in *Ross*, the Court of Appeals declined to “decide whether a *per se* rule should apply. There may be situations in which such a rule would be inappropriate.” *Ross*, 387 Md. at 671. In a footnote, the Court of Appeals suggests that, perhaps, one of those inappropriate situations would be a dispute concerning the requirements to run for office. The Court of Appeals cited *Melendez v. O’Connor*, 654 N.W.2d 114, 117 (Minn. 2002), which held “that laches did not

apply where candidate did not satisfy residency requirement to hold office and therefore suffered no prejudice due to the delay.” *Ross*, 387 Md. at 671.

This Court concludes that Plaintiff is not responsible for any inexcusable delay in the processing of his complaint. The Court further finds it inappropriate to allow the general election to go forward without examining whether a candidate who may become this State’s next Attorney General is constitutionally eligible to hold that office.

II. Merits

Turning to the merits of this, as the SBE referenced in their Memorandum, the Court of Appeals recently considered the phrase “practice of law,” as used in Article V, § 4, in the challenge to Mr. Perez’ candidacy for Attorney General. The factors to be used in determining whether one meets the definition of “practice of law” as used in this context have not yet been delineated by the Court of Appeals. Therefore, this Court shall use the case law available to it to make the best determination possible as to whether Mr. Gansler is “eligible” to run for the office of Attorney General.

At the outset, the Court distinguishes the concepts of eligibility and qualification. Such distinction serves to remedy the possible dissonance between the power given to the Judiciary to determine issues “arising in an election conducted under the [Election Law] article,” MD. CODE ANN., ELEC. LAW § 12-201, and the obligation delegated to the Governor, “whose duty it shall be to decide on the election and qualification of the person returned [as the winning candidate].” MD. CODE ANN., CONST. Art. V, § 2. This Court finds that its sole function here is to weigh the evidence it has been given to determine whether Mr. Gansler’s actions have constituted the “practice of law in this State” for “at least ten years.” Art. V, § 4. Whether those actions make

him qualified to be the next Attorney General is a question left to the registered voters. See also, *Groome v. Gwinn*, 43 Md. 572 (1876).

To reach its conclusion, the Court has relied on an opinion issued by the Attorney General in 1983. Dean Michael Kelly of the University of Maryland School of Law wrote to the Attorney General's Office ("AG's Office") to request their opinion on whether his work met the constitutional requirement that he must have practiced law in the this State for at least ten years to be this State's Attorney General. The AG's Office asserted in its opinion that it was "aware of no case or prior Opinion of the Attorney General that has construed the 'practice Law' eligibility requirement." 68 Md. Op. Atty. Gen. 48, 1983 WL 179171 (Md. A.G. 1983) (hereinafter referred to as the "Kelly Opinion"). However, the Kelly Opinion does review the constitutional history of the requirements set forth for the Office of Attorney General.

The position of Attorney General was reestablished⁸ in the 1864 Constitution, "and, for the first time in Maryland history, [the office was] made elective...." Kelly Opinion at 2. At the time, the requisite residential period and period of practicing law in this State was seven years. Comments made during the debate noted that "a highly skilled lawyer must be attracted to the position, given the importance of the Attorney General's duties.... One delegate observed: 'Now you must have for attorney general a man who is accustomed to trying cases, or he will not be fit for the office.'" *Id.* at 3. When the debate turned to the length of time that a person must have practiced law to be eligible for the office, a delegate suggested ten years:

It is one of the most important and responsible positions in the State.... we require in this position the services of one who has occupied a leading

⁸ According to the Kelly Opinion, no eligibility requirements for the office of Attorney General were set in the Maryland Constitution of 1776, but the Constitution was amended in 1817 to repeal all references to the Attorney General. In 1851, the Governor was given the power to employ counsel "when the public interest requires it." But that, "no law shall be passed creating the office of Attorney General."

In 1864, the position of Attorney General was reestablished. The Court refers the reader to the full text of the Kelly Opinion for further detail.

position in the profession for ten years at least.... A gentleman may be learned in the law, and yet not knowing about the duties of attorney general. I think ten years is short enough time to require of one who will be called upon to apply himself to the practice of law in all its branches.
Id. at 3.

The ten year proposal failed in lieu of seven years. The current wording of Art. V, § 4, has not changed since the Constitution of 1867. The phrase “practice of law” was carried forward from 1864 and the time period was increased to ten years. The AG’s Office asserted that it found nothing in the 1867 debate when the time period was increased “which sheds light on the meaning of ‘practice Law’.” *Id.* at ftnt. 5.

The Kelly Opinion summarizes its findings as follows:

The 'practiced Law' requirement can best be understood as generally expressing the framers' intention that the Attorney General be a person steeped in the law, of sufficient legal maturity to undertake the duties of the office. Their articulation, in debate, of the necessary qualifications was quite naturally phrased in terms of the general-practice lawyering with which they were familiar. Indeed, in an era before legal specialization, large law firms, corporate law departments, and institutionalized law schools, they could hardly have done otherwise.
Id. at 4.

* * *

In our view, the 'practiced Law' eligibility requirement should be construed in consonance with the changed responsibilities of the Attorney General and the changes in the nature of legal practice. Certainly, the expertise and acumen derived from a personally conducted private practice, which the framers of the provision seemingly had specifically in mind, remain highly pertinent. But other legal skills that reflect experience with types of legal practice unknown in 1864--for example, managing the work of subordinate attorneys or shaping legal policy for a public or private institutional client--are now just as pertinent to the constitutional test. To read the provision as if its scope were forever frozen in the mid-Nineteenth Century legal era would frustrate its overall purpose: that the Attorney General's legal experience be 'fit . . . for this office', as both the nature of legal practice and the duties of the Attorney General may evolve.⁹
Id. at 5.

⁹ With regard to Dean Kelly’s experience, specifically, the AG’s Office opined:

Although it would be nice if we could do a more detailed, historical analysis, time is of the essence. Given other opinions handed down by the Court of Appeals that address the phrase “practice of law,” the Court finds that the AG’s view is correct. In the context of Art. V, § 4, it is whether one’s background, “taken as a whole,” would “reflect[] involvement with the kinds of legal responsibilities” that an Attorney General must handle. *Id.* at 9. The Court of Appeals cited the Kelly Opinion with approval for this notion that the phrase “‘practice of law’ may mean different things in different contexts.” *Application of R.G.S.*, 312 Md. 626, 637 (1988).

In *R.G.S.*, the Court of Appeals was concerned with whether a Dean of the University of Baltimore School of Law could be eligible to take the Attorney’s Exam, pursuant to Md. Rule 14, rather than the full length Bar Exam for admission to the Maryland Bar. Part of the Dean’s argument that his activities constituted the practice of law, which is a necessary requirement for eligibility to take the Attorney’s Exam, included activities which the Board of Bar Examiners found would place the Dean in the position of engaging in the unauthorized practice of law in this State. The Dean appealed the decision of the Board of Law Examiners. In their opinion, the Court of Appeals distinguished unauthorized practice of law, as used in the statutes and professional rules which forbid such conduct, from the practice of law that is necessary for eligibility to take the Attorney’s Bar Exam. “[T]he unauthorized practice statutes need not be read as synonymous with ‘practice of law’ as used in Rule 14. *The question is the goal or objective of each enactment and the context within the words are used.*” *R.G.S.* 312 Md. at 638, citing *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513-514 (1987) (emphasis added).

[Y]ou have engaged in activities that involve both the application of your individual judgment to legal issues and participation in the framing of institutional response to legal problems. Moreover, you have simultaneously held yourself out as a practicing attorney and have engaged in various professional activities, albeit on a necessarily limited scale.
Kelly Opinion at 9.

This Court believes that, given this pronouncement, the Court of Appeals would likewise find that the practice of law necessary to run for the Office of Attorney General also depends on the framers' goals and objectives. This must be considered on a case by case basis. In doing so, the Court notes the argument set forth in the Kelly Opinion that the relevant terms "should be construed in consonance with the changed responsibilities," see Kelly Opinion at 5 – 6, stating:

The Court of Appeals has adopted just such an approach to other interpretive issues under the Constitution. For example, in *Norris v. Mayor & City Council of Baltimore*, 172 Md. 667 (1937), the issue was whether voting machines might lawfully be used in elections in this State. Article I, § 1 of the Constitution provides that '[a]ll elections shall be by ballot', and the opponents of voting machines argued that the term 'ballot' could not possibly have been intended to permit the use of voting machines--which, of course, did not exist in 1867.

The Court forcefully rejected this constricted view of the Constitution: '[T]he argument ignores the rule which above all others gives life to the written law and makes its use possible for the government and control of men in carrying on the actual business of life, and that is that, while the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee. . . . [W]here the meaning of the words employed is susceptible of expansion so as to include a significance in complete harmony with the spirit and purpose of the instrument, which will gratify a legislative intent or serve a present need, they may be so interpreted, for it is an accepted canon of constitutional construction that such instruments are to be liberally construed to accomplish the purpose for which they were adopted.' 172 Md. at 675-76.

Furthermore, as the Court of Appeals has stated in the context of Attorney Grievance Commission cases, it "has always found it difficult to craft an all encompassing definition of the 'practice of law'." *Att'ny Griev. Comm. v. Hallmon*, 343 Md. 390, 397 (1996). Similarly, it may be just as difficult to do so when examining the terms "practice law in this State" for "at least ten years." Art. V, § 4. In those Attorney Grievance Commission cases, the Court of Appeals looks at "the *facts of each case* and [] whether they fall within the fair intendment of the term

[practice of law].” *Id.* quoting *In re Application of Mark W.*, 303 Md. 1, 8 (1985) (internal quotations omitted).

This Court will now do the same, looking at the facts before it, to determine whether Mr. Gansler meets the minimum constitutional eligibility requirements to run for the Office of Attorney General.

B. Mr. Gansler’s Practice of Law

As used in the confines of Art. V, § 4, Mr. Gansler has practiced law in this State for at least ten years, as required by the Maryland Constitution. Given Plaintiff’s acknowledgment that Mr. Gansler served as the State’s Attorney for Montgomery County for eight years, the Court is merely concerned with determining whether two year’s “worth” of the remaining nine years during the seventeen years Mr. Gansler has claimed to practice law would suffice. Based on the testimony admitted, this Court finds that Mr. Gansler does possess the requisite ten (10) years of practice in Maryland making him eligible to run for the Office of the Attorney General.

The Court need not address Mr. Gansler’s assertion that bar membership in the Maryland State Bar is the *sine qua non* requirement to run for Attorney General. Mr. Gansler has had his license to practice law for seventeen years. Bar membership as a “threshold requirement” will perhaps be addressed by the Court of Appeals when reviewing Mr. Perez’ voided candidacy.

With regard to Mr. Gansler, however, his bar membership in this State has been considered by this Court as a crucial factor to the determination that Mr. Gansler is eligible to run for office. For example, without his license to practice law in this State, Mr. Gansler could not have held himself out, either formally or informally, to offer legal advice to family and friends concerning substantive Maryland law. The fact that he could legally engage in these activities in Maryland adds to his credibility when he stated that, during his three years in private

practice, he constantly held himself out as an attorney licensed to practice law in this State. Despite his legal education and training, without a license to practice law, it would have been illegal for Mr. Gansler to write his mother or grandfather's will, or offer advice in handling a legal matter regarding a stolen van, or answer questions about a divorce proceeding on the basketball court.¹⁰ The Maryland Constitution does not require a specific *quantity* or *quality* of activities.

The Court finds that Mr. Gansler's other activities, some of which he described as *pro bono* work, would also qualify as the practice of law in this State. In essence, Mr. Gansler testified that he was not just a participant in these activities, he used his legal knowledge and skills and experience as an attorney. The Court finds merit in the idea that, even if you are not officially acting as counsel, if the activity in which you are participating is benefiting from your legal knowledge, skills and abilities, as Mr. Gansler testified that those organizations were, then this "practice of law" has an independent value that qualifies as experience. Moreover, such "practice of law," in these selfless and varied ways, *i.e.* reviewing legislation, researching drug treatment alternatives, familiarizing one's self with elder law principles, and evaluating possible claims for referral to other counsel, all contribute to the purpose with which the framers were concerned in Art. V, § 4: that the Attorney General will be "called upon to apply himself to the practice of law in all its branches." Kelly Opinion at 3, *see supra*.

Also with regard to the notion that certain activities constitute practicing law when an attorney performs them, whereas, those same activities would not necessarily constitute practicing law when performed by a non-attorney, the Court again finds *R.G.S.* illustrative.

There the Court of Appeals explained:

¹⁰ The Court will refrain from analyzing whether these activities raise issues of competency (*e.g.* offering advice on a divorce) or conflict of interest (*e.g.* writing one's own mother's will). These were just specific examples Mr. Gansler offered.

[A]mong the activities among the activities included within “practice of law” by Article 10, § 1 is the preparation, for remuneration, of “any written instrument affecting the title to real estate...” A legal secretary, working for a weekly wage, would violate the literal language of this prohibition by typing a deed. Law clerks and others who undertake various tasks under the supervision of licensed lawyers might also be involved in unauthorized practice.
R.G.S., 312 Md. at 636.

This Court finds it unnecessary to critique exactly where Mr. Gansler prepared for his American University classes, or how many times per week he sat through meetings for the Montgomery County Commission on Aging, or whether Mr. Gansler was practicing law when he could not identify if his “client” was the individual citizen or the NAACP, or whether Mr. Gansler’s definition of clerking requires him to admit that he engaged in the unauthorized practice of law under Judge McAuliffe. With regard to Mr. Gansler, this Court agrees with the AG’s view that:

Article V, § 4 of the Constitution does not require a parsing of your legal career to determine whether any one or another if its separate components, taken in isolation, would be the ‘practice of Law.’ Rather, taken as a whole, your background reflects involvement with the kinds of legal responsibilities that meet the constitutional requirement.
Kelly Opinion at 9.

Therefore, this Court finds that Mr. Gansler’s candidacy is Constitutionally acceptable and hereby denies the relief requested in Plaintiff’s complaint.

III. Preliminary Injunction

The Court must consider four factors, as set forth in Mr. Gansler’s motion, in determining whether a preliminary injunction should issue:

(1) the likelihood that a plaintiff will succeed on the merits; (2) the balance of convenience determined by whether greater injury would be done to the defendant by granting the injunction than would result to the plaintiff from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

Def.'s Mem. in Support of Mot. to Dismiss, p. 9, *citing Lejeune v. Coin Acceptros, Inc.*, 381 Md. 288 (2004).

However, the Md. Rules also provide that a preliminary injunction may be consolidated with a trial on the merits. MD. RULE 12-205(b). Because this Court has had an opportunity to consider the merits of this action, and finds that the Plaintiff has not succeeded on the merits, a preliminary injunction is hereby denied.

CONCLUSION

For the reasons set forth in this memorandum opinion, the Court shall enter the order attached hereto.

Ronald A. Silkworth, Judge
Circuit Court for Anne Arundel County

NIKOS STANFORD LIDDY

Plaintiff,

v.

**LINDA LAMONE, in her capacity as
STATE ADMINISTRATOR OF
ELECTIONS, et al.,**

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
*
* Case No. C – 06 – 11729

* * * * *

ORDER

Upon consideration of the written motions, oppositions thereto and arguments of the parties, testimony taken and evidence admitted, and in accordance with the foregoing memorandum opinion, it is on this 27th day of October 2006, by the Circuit Court for Anne Arundel County, Maryland,

ORDERED that Plaintiff’s complaint for judicial relief and request for temporary restraining order is hereby DENIED; and it is further,

ORDERED that inasmuch as the Defendant, Douglas Gansler, has met the requirements set forth Art. V, Section 4, he is eligible to remain on the ballot as a candidate for Attorney General in the upcoming general election; and it is further,

ORDERED that all costs are assessed against Plaintiff; and it is further,

ORDERED that any and all other motions or requests for relief are DENIED.

Ronald A. Silkworth, Judge
Circuit Court for Anne Arundel County