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IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2017

No. 85

LINDA H. LAMONE,

Appellant,

v.

NANCY LEWIN, *et al.*,

Appellees.

On Appeal from the Circuit Court for Anne Arundel County
(Glenn L. Klavans, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

REPLY BRIEF OF APPELLANT

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May 1, 2018

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REPLY BRIEF OF APPELLANT

REPLY ARGUMENT

"The ultimate issue before the Court is the proper interpretation of [Election Law] § 5-504(b) and § 5-601 under the circumstances presented." Appellees' Br. 13. So it is. But where plaintiffs suggest that the Court's interpretation of these provisions may vary depending on the "circumstances," the statutes themselves say otherwise. Contemplating the very situation that is presented by this case, they prescribe a clear resolution: the name

of a candidate who becomes disqualified after the pertinent deadline "shall remain on the ballot and be presented to the voters." Md. Code Ann., Elec. Law § 5-601(1). For this reason, the doctrine of constitutional avoidance does not apply, and nothing in the structure of the Election Law Article or the legislative history of these provisions compels, or even suggests, a contrary result. And even if plaintiffs could somehow show that the statutes should be interpreted to be "directory" as opposed to "mandatory," they cannot show—as they must—that the State Board acted arbitrarily or capriciously in exercising discretion to decline to remove former Senator Nathaniel T. Oaks's name from the ballot.

Nor are the deadlines in these statutes, as applied to Mr. Oaks's purported self-disqualification, unconstitutional. The plaintiffs are free to associate and vote for the candidate of their choosing, and thus cannot assert claims that Mr. Oaks's presence on the ballot impairs their voting rights in any way. In any event, the statutory withdrawal and disqualification deadlines, as applied to Mr. Oaks's very late efforts to self-disqualify, satisfy even the highest level of constitutional scrutiny. These deadlines further the State Board's compelling interests in the timely and orderly preparation of ballots, and are reasonably necessary for the furtherance of those interests. Ballot preparation would be subject to constant interruptions if the circuit court's interpretation of the State Board's constitutional duties were allowed to stand. Any time a candidate self-disqualified after the deadline, by cancelling his or her voter registration, the State Board would have to halt its processes to accomplish the candidate's untimely request.

Because (in addition to being barred by laches) the plaintiffs' claims have no legal basis, plaintiffs are not likely to succeed on the merits of their claims and the circuit court

should not have entered a preliminary injunction. And in refusing to balance the equities as they actually existed, the circuit court abused its discretion and erred a matter of law. The court should not have ignored the additional prejudice to the State Board occasioned by its continued performance of long-scheduled ballot-preparation work, after having denied the plaintiffs both a preliminary injunction and an injunction pending appeal.

I. PLAINTIFFS DID NOT SHOW THAT THEY WERE LIKELY TO SUCCEED ON THE MERITS OF THEIR BELATEDLY ASSERTED REQUEST FOR A PRELIMINARY INJUNCTION BECAUSE THE STATE BOARD DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHEN IT APPLIED THE PLAIN LANGUAGE OF §§ 5-504(B) AND 5-601(1) IN DECLINING TO REMOVE MR. OAKS'S NAME FROM THE PRIMARY ELECTION BALLOT.[1]

A. The Statutes Are Clear, Unambiguous, and Mandatory.

The plaintiffs' principal statutory argument is that the "canon of constitutional avoidance" compels the interpretation that §§ 5-504(b) and 5-601(1) are "directory." Appellees' Br. 14, 22. But this has the doctrine backwards. The doctrine of "constitutional avoidance" is a "'tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.'" *Koshko v. Haining*, 398 Md. 404, 425 n.10 (2007) (quoting *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005)). Where the competing interpretation is not "plausible," however, the doctrine has no application. *See Maryland State Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 519 n.12 (2012) (declining to apply the doctrine because "[t]he statutory provisions before us in the instant

[1] Plaintiffs are also not likely to succeed on the merits of their claims because they are barred by laches. *See* Appellant's Br. 20-23.

case are not susceptible to more than one reasonable interpretation; rather, the relevant provisions are governed by their plain and unambiguous meanings").

The fact that the Court has interpreted "shall" to be directory in other circumstances, *see* Appellees' Br. 23, does not compel that conclusion here.[2] Contrary to plaintiffs' suggestion, in the elections context, this Court has spoken with clarity that candidacy filing and withdrawal-related deadlines are mandatory. *See McGinnis v. Board of Supervisors of Elections of Harford County*, 244 Md. 65, 68 (1966) (withdrawal deadlines are mandatory); *Andrews v. Secretary of State*, 235 Md. 106, 108 (1964) ("It has been held that the fixing of a deadline for the filing of certificates of candidacy is not an unreasonable or unconstitutional restriction, in view of the necessity for making timely preparations for elections." (citing *Chamberlain v. Board of Supervisors of Elections of Baltimore County*, 212 Md. 342, 345 (1957)); *id.* (noting election officials "may not exercise any discretion" regarding statutory deadlines for certificates of candidacy); *see also Pumphrey v. Stockett*, 187 Md. 318, 322 (1946) (strictly applying the 65-day withdrawal deadline then in effect, and holding that the candidate had met the deadline).

This Court's decision in *Black v. Board of Supervisors of Elections of Baltimore City*, 232 Md. 74 (1963), is not to the contrary. In *Black*, this Court held that a general

[2] This Court's decision in *Maryland State Bar Association v. Frank*, 272 Md. 528, 533 (1974), *see* Appellants' Br. 23, involved the interpretation of provisions governing the conduct of attorney disciplinary proceedings that required charges to be prosecuted within a period of 60 days. *Id.* at 532. This Court concluded that the provision in question was "directory" because the "context" of the statute made it clear that "shall" was not intended to be a "mandatory" provision. *Id.* at 533. Here, the statutes are clear and unambiguous, and the provisions would be meaningless if they were merely "directory." *See* Appellants' Br. 24-33.

withdrawal deadline of 65 days before the election did not "apply to municipal elections in Baltimore," 232 Md. at 80, and that it did not, in any event, bar the withdrawal of a candidate nominated by a municipal primary that would not take place until 63 days before the municipal general election, i*d.* (holding that "the time limitation is inapplicable in a case where it clearly cannot apply"). As plaintiffs concede, the Court decided the case "on other grounds," and its dicta were superseded by this Court's decision in *McGinnis*, 244 Md. at 68. Appellees' Br. 24.

Nor is the plaintiffs' invocation of the practices in New Jersey and Pennsylvania—or of a law review article purporting to describe a "democracy canon" of statutory construction—persuasive with regard to Maryland law. *See* Appellees' Br. 26. Although some state courts have interpreted certain of their respective election deadlines to be directory, this is by no means a universal practice outside of Maryland. *See, e.g.*, *Templeton v. McEntyre*, No. 09-02-423CV, 2002 WL 31268496 (Tex. App. Oct. 9, 2002) (unreported) (describing Texas's ballot disqualification deadline and dissolving temporary injunction requiring removal of candidate who became disqualified after the deadline for ballot removal because "[t]he statutory scheme requires [the candidate's] name to remain on the ballot"). More importantly, other states' practice is of little relevance to the election laws of Maryland, which have *never* been held to be directory rather than mandatory.

The same is true of Professor Hasen's "democracy canon," *see* Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (2009), which Plaintiffs urge this Court to adopt. The "democracy canon" (or anything like it) has never been cited by the courts of this state. Moreover, Professor Hasen is circumspect about the canon's applicability

where—as here—the statute in question is "unambiguous." *See id.* at 88 (acknowledging that "it remains unclear whether the Canon may apply to construe an unambiguous statute").

The legislative history of the withdrawal and disqualification provisions also does the plaintiffs no favors. As explained in the appellant's opening brief, the removal of specific statutory language stating that the provisions were "mandatory" in 1998 in connection with the implementation of the Garber Commission's recommendations does not suggest an abandonment of that principle. *See* Appellants' Br. 26-28. In detailing its "substantive" and/or potentially "controversial" aspects of its proposal, the Garber Commission did not discuss this removal at all, which underscores that the proposal to remove the provision was not substantive at all. *Id.* And even if the legislature *did* intend to return the state of the law to the period prior to when the directory nature of these provisions was enshrined in the law, that period was governed by this Court's ruling in *McGinnis*, 244 Md. at 68 (withdrawal deadlines are mandatory). Thus, the plaintiffs' statutory argument lacks any support in the history or case law.

Finally, the plaintiffs continue to ignore the administrative unworkability of their favored interpretations of §§ 5-504(b) and 5-601(1). *See* Appellant's Br. 6-9, 31-35, 39-41. The plaintiffs argue that "under the circumstances presented" in *this* case, the Court should construe these provisions to be "directory," affording some unspecified degree of discretion to the State Board in implementing them. But under what circumstances would the provisions ever be deemed "mandatory", if not here? When may the State Board, in its discretion, decline to remove a self-disqualified candidate from the ballot? At what point,

if any, would the volume of post-deadline requests justify the denial by the State Board of every one? Understandably, the plaintiffs focus solely on the circumstances of this case, but the Court must take a broader view. The State Board cannot practically implement floating and discretionary withdrawal and disqualification deadlines while at the same time preparing ballots and performing the other tasks needed to run an election. (E. 22.) The plaintiffs' interpretation should be rejected.

B. Even If the Statutes Are Not Mandatory, the State Board Acted Reasonably and with a Rational Basis in Declining to Remove Mr. Oaks's Name from the Primary Ballot.

The plaintiffs' statutory argument only goes so far. Even accepting for the sake of argument that §§ 5-504(b) and 5-601(1) are "directory" and not "mandatory," it means that the determination to remove Mr. Oaks's name was (at least to some degree) committed to the State Board's discretion. Under such circumstances, state action is reviewed under an arbitrary or capricious standard, and will be upheld if taken reasonably and with a rational basis. *Harvey v. Marshall*, 389 Md. 243, 297 (2005).

As set forth in defendant's opening brief, that standard is met here. *See* Appellant's Br. 33-35. Mr. Oaks was not even disqualified until April 23, 2018, so the State Board was acting well within its discretion to decline to remove his name from the ballot before that date. And even when he cancelled his voter registration and became disqualified on April 23, his primary-date disqualification remained legally speculative (in that he could always just re-register to vote), and in any event the printing process had begun. It was reasonable for the State Board to decline to remove Mr. Oaks's name at that time as well. Finally, it was reasonable for the State Board to consider the ripple effect of Mr. Oaks's self-

disqualification on other candidates who might wish to withdraw in a similar manner (both in this election and in elections to come) in declining to remove Mr. Oaks's name. The plaintiffs have failed to establish that the State Board acted arbitrarily or capriciously in exercising its discretion—assuming it had any—under §§ 5-504(b) and 5-601(1).

II. THE STATE BOARD'S APPLICATION OF §§ 5-504(B) AND 5-601(1) TO DECLINE TO REMOVE MR. OAKS'S NAME FROM THE BALLOT WAS CONSTITUTIONAL.

A. Plaintiffs' Voting Rights Will Not Be Impaired by Mr. Oaks's Presence on the Ballot.

The plaintiffs' constitutional argument fares no better. As set forth in the appellant's opening brief, the plaintiffs have not asserted a cognizable constitutional injury because they remain free to associate with and vote for the candidate of their choice, notwithstanding the presence of Mr. Oaks on the ballot. *See* Appellant' Br. 35-38.

The plaintiffs cite several cases—both state and federal—that involved "barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose." Appellees' Br. 17 (quoting *Board of Supervisors of Elections of Prince George's County v. Goodsell*, 284 Md. 279, 287 (1979)).) *See also Maryland Green Party v. Maryland Bd. of Elections*, 377 Md. 127 (2003) (addressing petition signature requirements for minor party access to ballot); *Nader for President 2004 v. Maryland State Bd. of Elections*, 399 Md. 681 (2007) (same); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (addressing early primary filing deadline applicable to independent candidate not participating in primary-nomination process); *Burdick v. Takushi*, 504 U.S. 428 (1992) (addressing right of voters to cast write-in votes). This is not surprising,

because "[t]he First Amendment . . . protects the right to cast an effective vote by prohibiting restrictions on ballot access that impair the ability of citizens to express their political preferences, or that limit the opportunity for citizens to unite in support of the candidate of their choice." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959-60 (4th Cir. 1992). This case, however, does not present a ballot-access issue, nor does it "limit the opportunity" for voters in Legislative District 41 "to unite in support of the candidate of their choice." *Id.* Instead, the ostensible voting-rights question is whether the State Board must be compelled to *remove* a self-disqualifying candidate who, by statute, is required to "remain" on the ballot. The ballot access cases are inapposite.

The plaintiffs cannot point to a single case that supports their theory of constitutional harm. In fact, the case they cite that is arguably closest to these facts supports the State Board. In *McNulty v. Board of Supervisors of Elections for Anne Arundel County*, 245 Md. 1 (1966), this Court was called on to determine whether a human error in how 39 of the 49 voting machines deployed in a particular district—which caused a voting lever to appear to be available to voters, when in fact it was not associated with any candidate—required the Court to award 136 under-votes to the losing candidate (whose name was placed on the ballot closest to the empty lever). *Id.* at 7. The Court concluded that it could not do so, because "[t]o say that they were all, or even a substantial portion, [the plaintiff's] votes would be speculation." *Id.* at 10. The Court could not even say that *any* voters were disenfranchised by this error, *id.* at 9 ("The evidence further establishes the fact that no substantial number of voters were disenfranchised, indeed, if any were."), because some voters may have voted the empty lever "as a protest vote," *id.* at 10. The same issues of

speculation and uncertainty bedevil the analysis here. "'There is no limit to guessing and speculating as to what may have been intended by those who voted.'" *Id.* (quoting the lower court).

B. The Withdrawal and Disqualification Deadlines—as Applied to Mr. Oaks—Are Reasonably Necessary to Accomplish Legitimate Government Objectives.

Even if the Court were to accept that Mr. Oaks's presence on the ballot could impair plaintiffs' voting rights, the withdrawal and disqualification deadlines—as applied to Mr. Oaks—satisfy heightened scrutiny under both the United States and Maryland constitutions. In order to overcome heightened scrutiny, the State Board must show that the application of these deadlines to Mr. Oaks was "reasonably necessary to the accomplishment of legitimate governmental objectives, . . . or necessary to promote a compelling governmental interest." *Nader for President 2004*, 399 Md. at 699 (internal quotation marks and citations omitted). The standard is more than met in this case.

There can be no dispute that the State Board's ballot preparation needs are "legitimate governmental objectives." Nor does the record allow for any other conclusion than that declining to remove Mr. Oaks from the ballot was "reasonably necessary" to the accomplishment of those objectives. The plaintiffs' reliance on the circuit court's findings at the April 20 hearing that "the State Board has adequate time to reform the ballot in this case," Appellees' Br. 20 (citing E. 42), is misplaced, because the circuit court erred as a matter of law in failing to take into account the ballot-preparation work done by the State Board between April 20 and the entry of the preliminary injunction on April 26. *See* Appellant's Br. 43-44.

The week beginning April 23 was a critical week for ballot preparation, as the circuit court knew the preceding Friday when it denied both the preliminary injunction and stay pending the appeal. Specifically, the State Board began to print ballots on April 23 (E. 90), as it said it would do in advance of the April 20 hearing. (E. 86.) Any ballot change will require reprinting of affected ballots, and potentially the ordering of new ballot paper due to the size of the Baltimore City jurisdiction. (E. 91.) In addition, test decks are being printed now (a two-week job), after which they will be sent to local boards for the testing of all vote-tabulation machines. (E. 24.) A delay at this late day will impact the State Board's ability to meet the June 12 deadline for completing machine testing. (E. 26.)

The State Board also assigned absentee voters to this election on April 25, and was set to begin the two-week process of testing its web-delivery system on April 26 (for which it needed ballots finalized and absentee voters assigned to do so). (E. 90.) Testing must be complete by May 12, the deadline for delivering absentee ballots to military voters under federal law. *See* 52 U.S.C. § 20302(a)(8)(A). Re-assigning absentee voters due to a ballot change will take five days, which will require restarting the testing of the web-delivery system. (E. 86-87.) The circumstances confronting the State Board when the circuit court entered the injunction differed fundamentally from those at the time of the April 20 hearing. And they were different not due to some desire of the State Board to "forge[] ahead and begin the process for printing ballots" for its own sake, Appellees' Br. 31, but because *there is a lot of work to do in preparing for an election.* From early in the case, the State Board was clear about the practical necessities of the relevant deadlines and the production schedule established for the orderly process of the election. (*See* E. 114.)

The plaintiffs misplace reliance on the State Board's publicly available "election calendar" to suggest that certain deadlines pertinent to ballot preparation have not even arrived (and that, therefore, a change would still be possible). *See* Appellees' Br. 11, 32. Although the online calendar includes a calendar date for the statutory ballot certification deadline (May 2, 2018), the statute itself requires that ballots be certified "at least 55 days before the election." Elec. Law § 9-207(a)(1).[3] This means that May 2 was the *last day* for certification to take place under the law. In fact, it occurred this year on April 3, 2018. (E. 84.) The schedule requires the State Board to certify ballots as early as possible due to the numerous steps that must be taken prior to the May 12 absentee deadline codified at 52 U.S.C. § 20302(a)(8)(A).[4] (E. 84-85.)

The plaintiffs' purported exasperation at the difficulty of removing "exactly two lines on two ballots" inaccurately characterizes the nature of the tasks facing the State Board in ballot preparation, which involves many sequenced steps. (E. 32.) As Natasha Walker, the State Board's Project Manager of Election Management, explained,

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[3] Deadlines for public display, judicial review of content and arrangement, and when printing may begin are all keyed to when certification takes place. *See* Elec. Law §§ 9-207(c)-(e), 9-209(a). Although the online calendar gives "calendar" dates for these deadlines as May 3, May 4, and May 7, respectively (E. 117), in fact they occurred on April 4, April 5, and April 8.

[4] The plaintiffs appear to question the inflexibility of this deadline by pointing to a separate subparagraph of this statute requiring states to accept and process absentee and voter registration applications received from military or overseas voters at least 30 days before the election. Appellees' Br. 30-31 (citing 52 U.S.C. § 20302(a)(2)). Both requirements apply. *Compare* 52 U.S.C. § 20302(a)(8)(A) (providing that a state must provide validly requested absentee ballots for requests received at least 45 days prior to the election not later than 45 days before the election).

> [I]t is not about just removing the name from the ballots. The ballots are the first piece to the election puzzle and the removal of him from just those two ballots impacts the other ballot styles in that county because again everything is being produced from the same application. You are having to regenerate everything. You have to redo the audio ballot that we also have to produce and the counties have to proof everything and you know, once ballots are done and final then it feeds to all of the other systems. So yes that is the most common misconception is that changing a ballot is easy. They don't see what goes into everything else.

(E. 20, 28.) This testimony is unrebutted and confirms the necessity of the withdrawal and disqualification deadlines for the furtherance of the State Board's compelling interests in this case.

Moreover, a constitutional rule requiring the State Board to remove from the ballot *every* candidate who, no longer wishing to run, disqualifies themselves by canceling their voter registration, so long as it is conceivably possible to do so, would thwart the State Board's ballot preparation efforts in a fundamental way. Just this year, ten candidates have requested to withdraw their candidacies after the withdrawal deadline. (E. 21.) If these candidates are permitted to effect their post-deadline withdrawals by cancelling their voter registrations, the logic of plaintiffs' constitutional argument would require these candidates' removal from ballots as well. As Ms. Walker testified, the State Board does not even begin ballot preparation until those deadlines (currently enforced strictly) pass. (E. 22.) Under the plaintiffs' proposed rule, when could the State Board safely begin? A firm, early, evenly enforced withdrawal and disqualification deadline is reasonably necessary for the furtherance of the State Board's ballot preparation needs.

III. THE OTHER PRELIMINARY-INJUNCTION FACTORS SUPPORT REVERSAL.

If the Court finds that the plaintiffs are not likely to succeed on the merits, it need not consider the other preliminary injunction factors. *See Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456-57 (1995) (all four factors of likelihood of success, balance of convenience, irreparable harm, and public interest must support injunction).

For the reasons discussed above, *see supra* § II.B, the balance of convenience supported denial of the preliminary injunction. The circuit court's weighing of the balance of convenience is not entitled to review for abuse of discretion, *see* Appellees' Br. 30, because the court erred as a matter of law in refusing to consider the additional "inconvenience" to the State Board arising from its ballot-preparation activities following the April 20 hearing. (*See* E. 6.) The plaintiffs' stated inconvenience of having to "campaign against someone" who, although his name will be on the ballot, is not actively campaigning, Appellees' Br. 32, is easily outweighed by the burdens that the State Board would face in complying with a removal order at this late stage of the process.

Nor have plaintiffs suffered irreparable harm, given that the harm to their voting rights is modest and, in any event, speculative. The plaintiffs suggest that, "[o]nce voters cast their ballots, it will be impossible to then determine for which candidate Mr. Oaks' voters would have voted had Mr. Oaks's name not been on the ballot." Appellees' Br. 32. That is by definition speculative, and not irreparable, harm.

Finally, the public interest weighs in favor of the clear, strict, and even-handed application of candidacy withdrawal and disqualification deadlines. As discussed in detail above and in the appellant's opening brief, a statutory regime that allows for floating

withdrawals and discretionary enforcement would wreak havoc on the ballot preparation process. It could also have a deleterious impact on the make-up of the candidate rosters, as powerful politicians would be able to exert influence to cause withdrawals in ways that they might not have been able to before.

These issues, and the issue of laches, merited a ruling based on the facts as they existed when the circuit court entered its preliminary injunction.

CONCLUSION

The judgment of the Circuit Court for Anne Arundel County should be reversed.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4,861 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Julia Doyle Bernhardt
____
Julia Doyle Bernhardt

TEXT OF PERTINENT PROVISIONS
(Rule 8-504(a)(8))

Annotated Code of Maryland, Election Law Article (LexisNexis 2017)

§ 9-209. Judicial review

(a) *Timing*. — Within 2 days after the content and arrangement of the ballot are certified under § 9-207 of this subtitle, a registered voter may seek judicial review of the content and arrangement, or to correct any other error, by filing a sworn petition with the circuit court for Anne Arundel County.

(b) *Relief that may be granted*. — The circuit court may require the State Board to:

(1) correct an error;

(2) show cause why an error should not be corrected; or

(3) take any other action required to provide appropriate relief.

(c) *Errors discovered after printing*. — If an error is discovered after the ballots have been printed, and the State Board fails to correct the error, a registered voter may seek judicial review not later than the second Monday preceding the election.

LINDA H. LAMONE,	*	IN THE
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CERTIFICATE OF SERVICE

I certify that on this 1st day of May 2018, two copies of the Reply Brief of Appellant in the captioned case were filed and served electronically by the MDEC system on all persons entitle to service, and that by the next business day two copies will be served by hand on:

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