IN THE

Court of Appeals of Maryland

SEPTEMBER TERM 2007

Docket No. 121

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

Petitioners

v.

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

Respondents

On Writ of Certiorari from
the Court of Special Appeals

BRIEF OF PETITIONERS

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APPENDIX OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES[*]

[*] Because this case presents a challenge to many of these legislative acts, they are set forth in full within Record Extract II.

> "[A]ll persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct: Wherefore, whenever the ends of Government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the People may, and of right ought, to reform the old ... ."
>
> — *The Maryland Declaration of Rights*, MD. CONST., DECL. OF RIGHTS, ART. VI

These public trustees betrayed the public's trust during the Extraordinary Session of 2007. Rather than account for their conduct, legislative leaders hid their constitutional infractions behind closed doors and a pile of falsified records.

Though elected to represent their constituents, lawmakers abstained from voting on their behalf, shifted risky decisions back to these voters, curtailed debate on other measures, and derailed the bicameral process in a rush to return to private life.

Duped by the perverse conduct of their own "trustees," "the citizens of Maryland deserve far better" than an ineffectual reprimand from a trial court disturbed about "*business as usual*" in Annapolis. *See* E. 27 (emphasis in original). As the State House prepares for historic restoration efforts, Petitioners respectfully submit this Brief in the hope that this Court will restore its occupants' respect for time-honored rules embodied in a constitution which powerful politicians may not reconstruct.

STATEMENT OF THE CASE

The General Assembly's Extraordinary Session of 2007 gave rise to extraordinary misconduct and an action designed to redress it.

On December 13, 2007, Petitioners filed suit in the Circuit Court for Carroll County, seeking declaratory and injunctive relief. *See* E. 35. These Maryland taxpayers sought to enforce the Constitution by invalidating the fruits of an unconstitutional process. Specifically, Petitioners alleged that lawmakers violated constitutional mandates: (1) by attempting to delegate their legislative work to the same voters who

elected them to decide tough issues; and (2) by disregarding provisions designed to maintain a deliberative, bicameral process in which both Houses take the time needed to debate and to resolve these controversies.

In response to Petitioners' Verified Complaint and accompanying motions, *see* E. 61-72, the defense disputed these violations and moved to dismiss this action. E. 73-75. Denying any undue delegation of legislative duties, the Attorney General claimed that legislators have limitless power to pass laws which are contingent on voter approval so long as they tie them to proposed "constitutional amendments."

The defense similarly denied any violation of constitutional restrictions designed to preserve the deliberative process of a bicameral legislature. Even if legislators violated provisions contained in Article III of the Maryland Constitution, *see*, *e.g.*, MD. CONST. ART. III, § 25, the defense contested the Circuit Court's power to grant the relief requested. Claiming that legislators themselves must enforce constitutional restrictions on the bicameral process, the Attorney General doubted the existence of judicial remedies for such violations and vehemently argued that any judicial intervention in this instance would unconstitutionally intrude upon legislative affairs.

The Attorney General argued likewise when Petitioners tried to investigate this alleged constitutional infraction. As counsel for the Chief Clerk of the House of Delegates, the Attorney General challenged Petitioners' right to depose this state official by claiming that she was immune from discovery on matters pertaining to legislative business. After the trial judge rejected the Attorney General's assertion of a "legislative privilege," *see* E. 77, neither the Court of Special Appeals nor this Court would preclude this official from testifying to alleged departures in the constitutional process. *See* E. 78-79.

Though he failed to prevent this deposition, the Attorney General sought to benefit from his dilatory tactics, asserting the delay of proceedings as grounds for denying Petitioners' request for emergency injunctive relief. *See* Letter from Austin Schlick to

The Honorable Thomas F. Stansfield at 2. At a hearing held two days after this deposition, trial judge followed this recommendation and refused to hear Petitioners' preliminary injunction request.

After limiting these January 4, 2008 arguments to motions to dismiss and for summary judgment, E. 11, the lower court rendered a brief Opinion which rejected all of Petitioners' claims on January 10, 2008. E. 14. Though dismissing these claims, the ruling itself came in the form of a "Declaratory Judgment" in favor of Respondents who never requested any type of affirmative relief. *See* E. 33-34.

Petitioners promptly filed the Notice of Appeal on January 14, 2008. E. 12. Due to the significant constitutional questions presented in this case, these taxpayers petitioned this Court for review in lieu of proceedings before the Court of Special Appeals. This Court granted the Writ of Certiorari on January 29, 2008.

QUESTIONS PRESENTED

I. MAY LAWMAKERS DELEGATE DECISIONS, WHICH THEY ARE FULLY EMPOWERED TO MAKE THEMSELVES, TO VOTERS BY PASSING STATUTES WHICH ARE CONTINGENT UPON THE POPULAR APPROVAL OF DUPLICITOUS CONSTITUTIONAL AMENDMENTS?

II. DOES THE JUDICIARY HAVE THE POWER TO CHECK THE UNRESTRAINED ACTIONS OF THE LEGISLATURE WHEN LEADERS IN BOTH HOUSES CONSPIRE TO VIOLATE THE CONSTITUTION AND MAKE THE LAW THROUGH A PROCESS THAT BREAKS THE LAW?

STATEMENT OF FACTS

A. The "Extraordinary Session" of 2007

Calling upon legislators to implement "a more progressive revenue structure" and avoid what he predicted to be a "$1.7 billion structural deficit in [Fiscal Year 2009's] Budget," E. 129, Governor Martin O'Malley ordered Maryland's Senate and House of Delegates to convene in Annapolis on October 29, 2007. *Id*. In this "extraordinary session," the Governor unveiled a series of intricate bills designed to correct what he described as a "structural deficit." *Id*.

The Governor's call for a special session prompted the State's top fiscal officer "to caution against acting in haste." E. 131. Comptroller Franchot advised House and Senate leaders that critical revenue estimates and other data needed to evaluate the Governor's plan would not be available until *after* the session. E. 132. According to the Comptroller, his "December presentation of revenue estimates would offer a much clearer sense of Maryland's long-term economic outlook, as well as the dependability of the funding streams that the Governor is counting on in his package." *Id*. Lacking "this crucial data," *id*., or the details of the Governor's proposals, the Comptroller observed that "[t]his makes review and evaluation of the plan next to impossible, and further risks actions being taken that may have unintended consequences." E. 133.

Though the Comptroller believed "it would be more appropriate to take up the Governor's package during the regular legislative session" when legislators will be presented with the Governor's Fiscal Year 2009 budget, *id*., the Governor could not wait to call legislators to Annapolis on October 29, 2007 in a special session that would give them only thirty days to review his multi-billion dollar proposals.[1]

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[1] When the Governor orders a special session, it "shall not continue longer than thirty days" and may not be extended. MD. CONST. ART. III, § 15(1); *see* MD. CONST. ART. III, § 15(1) (legislative sessions "shall be consecutive unless otherwise provided by law"). Neither the Constitution nor any other law permits the Governor, the House of

At the start of the Extraordinary Session, legislators were presented with an extraordinary volume of tax, revenue and appropriations bills, but little data on which to evaluate them. *See* E. 133-B. In total, legislators were asked to consider the merits of 94 bills, 34 of which were introduced in the Senate and 60 in the House. In what the Governor characterized as a "plan for structural reform," E. 129, the Administration itself proposed a comprehensive package of budgetary measures which would drastically change the State's tax and revenue structure. Taken together, The Tax Reform Act of 2007, The Budget Reconciliation Act and The Transportation Investment Act introduced a series of new taxes on a variety of sales and services, dramatically increased existing income and sales taxes, repealed a number of longstanding tax exemptions, and proposed a controversial plan to raise additional revenue through slot machine gambling. *See generally* Record Extract Volume II (containing authenticated copies of all special session acts).

B. Constitutional Improprieties

"Rather than act in haste," the State's top fiscal officer advised legislators "to move cautiously and deliberately throughout this process." E. 133-B. Against this advice, legislators moved swiftly, spent little time deliberating over these and 82 other bills, failed to consider the views of affected taxpayers, and voted on these proposals without the "crucial data" needed to evaluate them. E. 132. In their rush to judgment, legislators also failed to heed the dictates of the Maryland Constitution.

1. Unconstitutional Delegation of Duties

Rather than vote on a controversial plan to raise revenue through slot machines, legislators avoided this controversial issue and streamlined these proceedings by delegating their votes to the public at large. Though legislators have the statutory authority to approve such measures themselves, they refrained from exercising this power

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Delegates, or the Senate to disrupt the flow of special sessions. *See id*.

and avoided this politically-sensitive decision by shifting it to voters in the next general election.

Unable to place such statewide laws on the ballot directly, *see*, *e.g.*, *Brawner v. Supervisors*, 141 Md. 586, 587, 119 A. 250 (1922); *Benson v. State*, 389 Md. 615, 641, 887 A.2d 525 (2005), legislators adopted a two-bill plan to achieve this same result *indirectly*. Giving new meaning to the phrase "double-billing," legislators passed 74 pages of intricate appropriations statutes, but made them expressly contingent on voter approval of a companion bill to authorize slot machines under the guise of a proposed "constitutional amendment." E. 332-405; E. 408-411.

Ironically, the same legislators promoting the need for "a new article to the Maryland Constitution to authorize [slot machine] gaming in the State," E. 408, found no need to clutter the Constitution when they passed a statute to expand the charitable use of slot machines only months before. *See*, *e.g.*, MD. CRIM. LAW CODE ANN. § 12-304 (2007) (App. 7). Because the Constitution does not prohibit or restrict such gaming, the General Assembly may authorize the commercial use of slot machines without amending the Constitution. *See id*.

Rather than risk the wrath of gambling opponents by exercising this power themselves, legislators would prefer that their constituents do it for them. In a promotional preamble that begs the upcoming ballot question, the Legislature kicked off the slots campaign by proposing this amendment "for the primary purpose of providing funds for public education." E. 408. Lobbying for their own proposal, legislators even used the text of this amendment to reassure voters that their approval would serve "the primary purpose of raising revenue for ... (i) education for the children of the state in public schools, pre-kindergarten through grade 12; (ii) public school construction and public school capital improvements; and (iii) construction of capital projects at community colleges and public senior higher education institutions." E. 409.

Conveniently omitting any reference to companion appropriations bills, this

proposal makes no mention of the multitude of extracurricular activities which will take priority in reaping these proceeds. *See* E. 408-411. Nor does it disclose that legislators have *already* voted to channel these funds away from the classroom in several of these appropriations bills. *Cf.* E. 332-405. Instead, legislators would place their "educational" proposal on the ballot without educating the public that ratification would trigger hundreds of millions of dollars in appropriations which will *not* meet the objectives expressed by their vote.

Although local newspapers will publish this amendment before the election, *see* App. 4, even voters who are conscientious enough to read it may mark their ballots without a clue that 74 pages of appropriations bills are also "contingent on the passage of [this] constitutional amendment, and its ratification by the voters of the State." E. 404-405. Without disclosing that these statutes will only "take effect [when] the constitutional amendment ... has been adopted by the people of Maryland," *id.*, the Legislature would leave this entire revenue package to voters who may never know that they are deciding much more than meets their eyes at the ballot box.

2. Abandoning the Bicameral Process

Though legislators purported to pass the remaining revenue measures on their own, they failed to conduct this session in accordance with the deliberative process mandated by the Constitution. Rushing to vote on complex, multi-billion dollar appropriations bills that they took little time to review, legislators approved the Governor's initiatives much faster "than anyone thought possible," and achieved what the Governor believed was "more than many governments achieve in four years." E. 150.

Placing speed over substance, legislators did not stop to consider the views of many affected taxpayers who had no warning of the legislation coming from behind

closed doors.[2] Without slowing down to deliberate in a constitutional manner, legislators rushed these bills to passage. Indeed, less than two weeks into the session itself, Senators largely rubber-stamped the Governor's proposals, claimed to have finished all of their "work," and abandoned the bicameral process to embark on what became a six-day holiday.

The Constitution required the Senate to obtain House consent for adjournments exceeding three days, *see* MD. CONST. ART. III, § 25 (App. 1), but Senators showed little regard for constitutional provisions designed to keep them focused on the interests of their constituents. Having initially agreed to take a three-day weekend from Friday, November 9, 2007 through Monday, November 12, 2007, E. 199, Senators failed to resume their duties as promised. Instead, the Senate deserted the House of Delegates for close to a week. E. 200.

While Senators took off, House members worked through the weekend. But by Monday, November 12th, Senate President Thomas V. Mike Miller, Jr. observed that the House was "continuing to work through the various parts of the comprehensive package introduced by Governor O'Malley." E. 155. Claiming that there was "not substantive work for the Senate to address [on Tuesday, November 13th]," *id*., Senator Miller refused to call his body back into session. *Id*. Instead, he issued a Memorandum which singlehandedly extended the Senate's adjournment to Thursday, November 15th – six days after Senators abandoned their chamber. *Id*.

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[2] In the few instances where lawmakers modified the Governor's proposals, they acted so hastily that many affected taxpayers had no opportunity to educate legislators on the implications of the change. For example, after being notified of plans to tax health clubs, tanning salons, property management and landscaping services, lobbyists for these industries helped to kill these proposals. When legislators subsequently scrambled for other revenue, they made what some critics have described as an abrupt "backroom deal" to target computer service providers. As no hearing was conducted in this "back room," this unrepresented industry could only read about the passage of a new 6% tax on their services. *See* E. 285-289.

Although legislative leaders quickly produced documents suggesting otherwise, the Senate did *not* obtain House consent to a prolonged adjournment when it left Annapolis on Friday, November 9, 2007. Instead, on the motion of the Senate Majority Leader at 1:59 p.m., "the Senate adjourned until 10:00 A.M. on ... Tuesday, November 13, 2007." E. 199.

This did not stop legislative leaders from attempting to re-write history. In a "Message to the House of Delegates" that was purportedly written on "November 9, 2007," the Senate Majority Leader professed his chamber's "intention ... to adjourn until Thursday, November 15, 2007. If the House consents the Senate will adjourn until Thursday, November 15, 2007." E. 156..

This November 9th communique sharply contradicts the Senate Majority Leader's motion to adjourn for only three days, the Senate President's November 12th Memorandum prolonging this adjournment, and the Senate's own records. *See* E. 199.

It is easy to understand why: It was a total fabrication.

Forged by the Office of the Chief Clerk of the House of Delegates, this fictitious "Message" was never written, sent or adopted by the Senate. *See* E. 191; *see also* Deposition of Mary Monahan ("Monahan") (T. 84).[3] After being shown this "November 9, 2007 Message to the House of Delegates," Chief Clerk Mary Monahan confirmed that, in truth, this document "was created on the 12th." *Id.* With letterhead that Monahan personally retrieved from a closed Senate office, this fictitious "message" was backdated to make it appear as if the Senate sought and obtained House consent for its entire adjournment. T. 99.

Having been "instructed by the Secretary of the Senate to create the letter," T. 84,

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[3] Although Volume I of the Record Extract contains the entire transcript of Monahan's January 2, 2008 Videotaped Deposition, *see* E. 80, to distinguish this testimony from other documentary evidence, Petitioners shall designate the specific pages of this transcript with a "T".

Monahan "just told him I would check with the Speaker and get back to him." T. 89. Concerned about the constitutionality of this request, she called the Speaker's attention to Article III, § 25 of the Maryland Constitution, supplied his office with a copy of this adjournment clause, and admonished them to "'*Please read this carefully*.'" T. 90 (emphasis added). "I wanted them to have it in their hands, discuss it, and get back to me on what I was to do." T. 91.

Monahan testified that she really "didn't want to get involved" in fabricating this letter, T. 99, but confessed that her "judgment was impaired" by illness. T. 101. Had it not been for "a 24-hour flu bug," *id,* Monahan claimed that she would have rejected the Speaker's instructions:

> Q Otherwise, you would have gotten involved?
> A Yeah. I would have.
> Q Why?
> A ***I wouldn't have backdated it.***
> Q ***Because as Chief Clerk, it is your responsibility to make sure that the record is kept accurately?***
> A ***Correct.***
> Q ***Why then would you have your assistant chief clerk ask the Speaker's Office for direction as to whether this should be backdated?***
> MR. MOORE: Objection.
> A I've answered that already.
> Q What is the answer?
> A ***The answer was I was sick. I wasn't feeling well. My judgment was impaired.***

T. 99-100 (emphasis added).[4]

As the official charged with the "awesome responsibility" of ensuring the

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[4] Like the bills introduced in the special session, Monahan's "24-hour flu bug" passed in record time. After leaving work some time prior to the 7:00 p.m. start of the House's November 12th session, T. 86-87, Monahan returned to work the very next morning. T. 169-70. Asked how she coped with an illness that supposedly produced a "high fever" and left her "dizzy to the point that [she] almost called 911," T. 101, Monahan merely replied, "I'm dedicated." T. 86.

constitutionality and integrity of this process, *id.* at 20, 188, Monahan was visibly distraught when admitting that she "*would have objected*" to the Speaker's instructions had she not been ill. T. 132 (emphasis added). Citing the adjournment clause of the Maryland Constitution, Article III, § 25, the Chief Clerk "would have insisted something else be done." T. 133. Asked whether she believed in adhering to the Constitution, Monahan tearfully admitted that she "like[s] to go with the rules of the House [and] the Constitution of Maryland," before taking a break to regain her composure. T. 134.

Rather than communicating the Senate's fictitious request to House members, Monahan concealed it from them. Unable to explain why she "instructed [her] staff not to" read this document to delegates, Monahan said that "[i]t just seemed like the thing to do at that time" and claimed that she "wasn't thinking correctly." T. 109, 111.

Though delegates were unaware of this fabrication or of any request for their consent, *see id*., Monahan nonetheless instructed her staff to prepare a November 12, 2007 "Message to the Senate" which purported to provide this consent. Exhibit FF. Like the bogus November 9th Message, Monahan "didn't want [the November 12th 'Message'] read across the desk. I just wanted it put in the [House] journal." T. 118.

Admitting that she also "instructed [her] staff not to" read this document to House members, Monahan could not explain why she concealed this fictitious "message":

Q. Let me hand you [the November 12th Message marked as] Exhibit FF. Could you read Exhibit FF for us?
A. "The House consents to the Senate adjourning until Thursday November 15th, 2007."
Q. It took you about five seconds; would you agree?
A. Yeah.
Q. So, what would be the problem with doing that on the floor of the House of Delegates?
A. ***I don't know***.
Q. Well, why is it you didn't want it to be done?
A. ***I don't recall***.
Q. Well, so, if I'm -- let me see if I understand this right. If I am a member of the House of Delegates, how would I know about the Senate's request to

adjourn to November 15th or the reply back providing that consent? How would I know that as a regular member of the House of Delegates?

MR. MOORE: Objection.

A. ***I don't know.***

Q. Was there anything done, to your knowledge, that communicated these messages in some other way to members of the House?

A. ***I don't know***.

Id. at 118-19 (emphasis added).

Although Monahan quietly placed both of these fictitious "messages" into the House Journal, *see* E. 191 (bogus Senate message "journalized," but not read to House members); E. 191-192 (bogus House message "journalized," but not adopted by House members),[5] the Senate's Journal of Proceedings is devoid of any reference to either document. *See* E. 196-199 (November 9, 2007 proceedings); E. 200-214 (November 15, 2007 proceedings).

Departing from the customary manner in which the House does business, Monahan "didn't want to adopt them" and confirmed that the House never adopted any message consenting to the Senate's adjournment. T. 126. Had she exercised proper judgment, Monahan admitted that she "wouldn't have done either letter," and repeatedly protested that she "just wouldn't have done it." T. 130, 133.

Concerned about these constitutional improprieties, Monahan never sent these fictitious "messages" to the Senate. But she did send them to the Office of the Attorney

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[5] "The usual form of communication [between houses] is by written message." Mason's Manual of Legislative Procedure § 761 at 547, *adopted in* House Rule 117 and Senate Rule 117. After being "presented to the House for decision," the question or request contained in the message "shall be entered upon the Journal at the time that business is considered." House Rule 99(a)(1); Senate Rule 99(a)(1). Outgoing messages are placed within the Journal as being "Read and adopted," while incoming messages are marked as "Read and ordered journalized." *See*, *e.g.*, E. 165-167 (showing the exchange of adjournment messages between House and Senate). As Monahan confirmed, she omitted this language when journalizing the "messages" at issue because neither document was read to or adopted by the House. *See* T. 123-24, 126.

General when legislative leaders sought a legal opinion on the validity of this process. At the request of an assistant attorney general, Monahan "made copies of the original letters and then wrote 'journalized' on both of them and then faxed them to [him]." T. 170.

Without questioning the authenticity of these documents, the Attorney General expressly relied upon both "Messages" in validating the constitutionality of the Legislature's actions. Responding to requests for a legal opinion from the Senate President and from the Speaker, Assistant Attorney General Kathryn M. Rowe issued identical letters claiming that consent was both sought and obtained in compliance with the Constitution:

> As you know, on November 9, the Senate sent a Message to the House of Delegates stating its intention to adjourn until November 15, 2007, and seeking consent of the House to this action. The Chief Clerk responded with a Message to the Senate, "by the Majority Leader" expressing the consent of the House "to the Senate adjourning until Thursday, November 15, 2007." Both of these messages were journalized.

E. 160, 162, 158.

After receiving their respective opinion letters on November 14th and 15th, E. 160, E. 162, neither the Senate President nor the Speaker made any effort to correct the Attorney General's misapprehensions as to the authenticity of documents which were fabricated only a couple of days before. Had they advised Ms. Rowe that the House Clerk forged and backdated this letter to convey the appearance of consent, that these documents were never transmitted to or from the Senate, and that they were never read to or adopted by either body, it is hard to understand why the Attorney General and his assistants would continue to claim otherwise during the course of this litigation.[6]

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[6] *See* State Defendants' Opposition to Preliminary Injunctive Relief at 17 ("the Senate requested consent for the adjournment that started on November 9 and the House granted the requested consent.").

C. Circuit Court Proceedings

Even after questions surfaced as to the authenticity of these records, the Attorney General refused to launch any investigation into the falsification of the very documents that his office used to support his legal opinion. Rather than support efforts to discover the truth, *see* E. 76, the State's top prosecutor vigorously contested them. Desperate to preclude Petitioners from questioning the Chief Clerk, the Attorney General claimed that this state official was immune from such discovery, moved for a protective order on her behalf, and sought the assistance of the Circuit Court, the Court of Special Appeals, and this Court to keep this witness silent. All three courts summarily rejected defense efforts to obstruct this discovery. *See* E. 77-79.

Having exhausted all efforts to block this deposition, the Attorney General reluctantly produced Monahan for testimony on Wednesday, January 2, 2008. E. 80. Unable to dispute his client's remarkable testimony, the Attorney General ignored it and stubbornly clung to bare assertions of constitutional compliance.

Scoffing at the mere suggestion of the fraudulent misconduct which Monahan confirmed, the Attorney General danced around her fabricated documents at a January 4, 2008 hearing. Claiming that the Constitution does not require any particular form of documentation, the defense argued that any falsification of records was immaterial in assessing the constitutionality of legislative conduct. Characterizing these discrepancies as meaningless technicalities, the Attorney General challenged the lower court's authority to enforce constitutional restrictions on the legislative process.

In his January 10, 2008 Opinion, Circuit Court Judge Thomas F. Stansfield was "inclined to agree with the [Petitioners] regarding the reprehensible nature in which the Legislature conducted itself." E. 26. Voicing serious "concern with the conduct presumably allowed for by Senator Miller and Speaker Busch regarding the Special Session," E. 27, the lower court opined "that there has clearly been an egregious lack of judgment on the part of the Offices of the President of the Senate and the Speaker of the

House of Delegates regarding their conduct in failing to abide by constitutionally mandated procedures." E. 25.

Despite their loathsome misconduct, the judge was "loathe to allow for the relief sought by [Petitioners] inasmuch as it would give rise to a most terrible precedent." E. 27. Though he claimed that "[e]ven elected lawmakers must be held to respect the Constitution and follow the letter of the law in conducting their affairs," E. 24 n.9, this judge declined to enforce it and granted a defense motion to dismiss a case which would require lawmakers to abide by the law.

Rather than hold lawmakers to the letter of the law, the lower court read Article III, § 25 rather loosely. While the letter of this law provides that "[n]either House shall, without the consent of the other, adjourn for more than three days, at any one time," App. 1, the judge was willing to forgive this violation so long as the adjourning House eventually returned. E. 26.

Excusing the reprehensible misconduct to which Monahan testified, the lower court felt powerless to enforce this provision with what it viewed as "too drastic" a remedy. *Id*. Afraid that invalidating the fruits of an unconstitutional process "would give rise to a most terrible precedent," E. 27, the judge relinquished an opportunity to ensure lawmakers' respect for constitutionally mandated procedure. Instead, he released an opinion which empowers legislative leaders to dismiss constitutional provisions as trivial whenever it is politically expedient to do so.

Not only does this opinion allow powerful politicians to circumvent constitutional requirements, it also permits the General Assembly to avoid its legislative duties by shifting these burdens to the public at large. Contrary to the cursory analysis contained within the lower court's opinion, this Court has repeatedly confirmed that legislators may not "re-delegate" their legislative power to enact public general laws, like the slot machine revenue package at issue in this case. *See Brawner*, 141 Md. at 587; *Benson v.*

State, 389 Md. 615, 641, 887 A.2d 525 (2005).[7]

Ignoring the opinions of this Court, the lower court deferred to those of defense counsel instead. Citing the Attorney General's opinion on how to circumvent restrictions on the referendum process, the judge provided legislators with "limitless" power to delegate their legislative duties under the guise of a constitutional amendment. *See* E. 31. Without citing any of this Court's opinions to the contrary, the lower court then extended this unrestrained power so that legislators may do indirectly what they cannot do directly: Passing the buck by passing revenue and appropriations statutes which are entirely contingent on voter approval.

ARGUMENT

In dismissing this case, the lower court felt "compelled to observe that if the actions presented by way of deposition are *business as usual* for the General Assembly, the citizens of Maryland deserve far better." E. 27 (emphasis in original). Indeed, the citizens of Maryland deserve lawmakers who respect the law. They also deserve judges with the courage to enforce the Constitution when legislators do not.

After reading this opinion, legislative leaders may very well change *business as usual* in the General Assembly. Given the unchecked power to make the law through a process that breaks the law, lawmakers no longer need to conceal their egregious

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[7] Despite this Court's consistent rejection of laws which are contingent on voter approval, the trial judge blithely stated that "there are many instances of legislation which [*sic*] been made contingent upon the passage of constitutional amendments, including amendments that involved fiscal legislation." E. 31, 32. Unable to cite "many instances," the only Maryland case which the lower court could find is as inapposite as it is old. Though *State v. Kirkley*, 29 Md. 85 (1869), upheld a city ordinance designed to take effect upon a contingency 139 years ago, this ancient case has nothing to do with legislation that was made contingent on voter approval. In fact, this Court would later distinguish the city ordinance in *Kirkley* from statutes like those contained in the slots package, which are contingent on the exercise of non-delegated powers. *See Levering v. Supervisors,* 129 Md. 335, 338-39 (1916).

violations by falsifying legislative records, or by obstructing access to evidence of their misconduct. Thanks to the lower court, they may even be inclined to flaunt their disregard for the Constitution without fear of adverse consequences.

Unless and until this Court steps in to enforce the Constitution, the lower court has empowered legislators to ignore these provisions whenever they deem it feasible. Rather than ensure respect for the Constitution, the lower court's opinion tells legislators that their "fail[ure] to abide by constitutionally mandated procedures" is a trivial "technicality" which they may observe at their discretion. See E. 24 n.9, 13.

Legislators now have the "limitless" power to subvert these mandates, even to the point of manipulating the constitutional amendment process to avoid their duties, to delegate their legislative work back to their own constituents, and to circumvent the Constitution itself. By acquiescing in the Legislature's "egregious" and "reprehensible" disregard for these provisions, the trial judge has produced precisely what he hoped to avoid – rulings which "give rise to a most terrible precedent." E. 27.

I. LAWMAKERS MAY NOT AVOID THEIR ELECTED DUTIES BY LEAVING CONTROVERSIAL DECISIONS TO THE PUBLIC AT LARGE

Presented with the Governor's proposal to raise funds through slot machine gaming, legislators decided *not to decide* the fate of this controversial plan. Unwilling to gamble their political futures by voting in favor of these "one-armed bandits," lawmakers purported to "pass" a plethora of related appropriations, but failed to activate any of them. Rather than use their statutory power to authorize slot machine gambling, legislators wish to avoid responsibility for this risky decision by dispersing it to the public at large.

Reversing roles with their own constituents, these elected representatives have abstained from voting on their behalf and hope to burden the public with a decision they would rather avoid. Though the Constitution does not permit legislators to pass their elected duties back to the electorate, or to pass laws which are contingent on voter approval, these lawmakers would place their political interests above provisions designed

to serve the public interest.

Anxious to increase revenue without losing political capital, legislators seek to circumvent the Constitution with deceptive efforts to manipulate the public at large and secure passage of the slots plan without arousing the ire of gambling opponents. Giving new meaning to the term "double-billing," the Legislature attempted to sell the slots package to voters by dividing it into two bills – a well-publicized House bill designed to inspire popular support and an unpublicized Senate bill which quietly appropriates this revenue to less popular causes.

After passing the Senate bill, E. 332-405, the Legislature conditioned this intricate scheme of appropriations on voter approval of a misleading constitutional amendment contained in a related House bill. *See* E. 404-405. Enticing voters to authorize slot machine gaming to fund seemingly worthy educational causes, E. 408-411, the proposed amendment makes no mention of companion legislation which would allocate these funds to other pursuits. Not only does this proposal fail to apprize voters on how slots revenues will actually be used, it fails to notify them on how their *votes* will be used. Without any mention of the contingency contained in the Senate bill, the House bill gives voters no clue that approving this amendment would activate a host of statutes they have never seen.

Unaware that their votes will determine far more than meets their eyes at the ballot box, voters will get caught in this political shell game. Indeed, by "double-billing" the slots package, legislators have been able to hide most of this plan from public scrutiny, wrap it attractively in school colors, and deliver it to citizens whose only knowledge of its contents stems from the false pretenses of their elected representatives. Encouraged to support "public education," voters who accept this package will unwrap a Pandora's box of incongruous appropriations which were concealed in this unconstitutional "bait and switch."

A. *Legislators May Not Constitutionally Abstain from Voting on Behalf of Their Constituents*

In a representative democracy, the people delegate power *to* legislators – *not* the other way around. "The general powers of legislation being conferred exclusively upon the Legislature, that body may not escape its duties and responsibilities by delegating such legislative power to the people at large." *Brawner v. Supervisors*, 141 Md. 586, 587, 119 A. 250 (1922); *Benson v. State*, 389 Md. 615, 641, 887 A.2d 525 (2005).

This Court has long held the view that "the people of Maryland, having delegated to the Legislature of Maryland the power of making its laws, that body could not legally or validly redelegate the power and the authority thus conferred upon it to the people themselves." *Brawner*, 141 Md. at 595. By delegating this power to the Legislature, the people of Maryland "reserv[ed] no part of such power to themselves." *Board v. Attorney General*, 246 Md. 417, 431 (1967). "[I]f the Legislature cannot delegate to the people the law making power which the people delegated to them, then it cannot pass a valid act which can only become a law in the event that the people of the State approve it." *Brawner*, 141 Md. at 599.[8]

This is especially true in connection with revenue measures, where legislative power is precisely defined and sharply curtailed. As "a pioneer in inaugurating [a constitutional amendment] for controlling appropriations," *McKeldin v. Steedman*, 203

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[8] The people did reserve the power to place some issues on the ballot in "facultative" referenda, *see* MD. CONST. ART. XVI; *Board v. Attorney General*, 246 Md. at 431; *Ritchmount Partnership v. Board*, 283 Md. 48, 60 n.9 (1978), but did not reserve any power to vote on revenue measures like those contained in the slots package. In ratifying the 1915 Referendum Amendment, citizens made it clear that "[n]o law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution ... shall be subject to rejection or repeal" by voters. APP. 3. Having delegated this power to the Legislature, neither the Legislature nor the people of Maryland may call for a popular vote on bills like those at issue here. *See Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 530 A.2d 245 (1987) (rejecting voters' efforts to place remarkably similar bills on ballot).

Md. 89, 99 (1953), Maryland's balanced budget provision eliminated the economic instability arising from unrestrained political pressures, shifted most of the State's fiscal power from the Legislative Branch to the Executive Branch, and established a strict protocol for the consideration of budget and appropriations bills. *Id.*; *see* MD. CONST. ART. III, § 52 (A-1).

Cutting legislative authority, the Constitution limits much of the Legislature's fiscal power to *cutting* the Governor's spending initiatives. *Id.* "[T]o discourage proposals for new appropriations," it expressly forbids legislators from exercising additional revenue authority unless they are willing to "assume the burden and responsibility" of approving a "supplementary appropriations bill." MD. CONST. ART. III, § 52(8) (A-2-3) (bill must be passed by a majority of both Houses and presented to the Governor); *McKeldin*, 203 Md. at 98. Since the "General Assembly is forbidden to appropriate any money except in accordance with [these] provisions," *id.*, legislators have no right to shift this burden and responsibility to the public at large.

Nor should legislators be permitted to avoid these duties by cluttering the Constitution with needless amendments. Contrary to the claims of its sponsors, voters do ***not need*** to add "a new article to the Maryland Constitution to authorize [slot machine] gaming in the State." E. 408. Well aware that the Constitution does not restrict such gaming, these same lawmakers had no need to amend it before authorizing the limited use of slot machines during the regular session of 2007. *See* App. 7. Having exercised its statutory power to expand the use of these machines only months before, App. 7, the Legislature cannot abdicate this power and use the amendment process as a disingenuous pretext for shifting its vote to voters at large. As they are fully empowered to approve the entire slots package, legislators may not avoid the burden and responsibility of this decision by recruiting unsuspecting voters to make it for them.

B. *Lawmakers May Not Avoid the Political Risk of Approving Slot Machines by Tricking Their Constituents into Casting this Vote for Them*

Showing no respect for the Constitution or for their own constituents, lawmakers manipulated both with tactics that pervert the constitutional process and mislead the electorate. in. Proposing a constitutional amendment as a pretext for skirting the Constitution itself, the Legislature embarked on a disingenuous campaign to circumvent its restrictions, avoid their legislative duties, and pass the buck back to taxpayers.

Enticing voters to approve the slots plan for them, legislators begged the upcoming ballot in the text of the amendment itself. Proposing this amendment "for the primary purpose of providing funds for public education," E. 408, the Legislature commenced this clandestine campaign with a 162-word preamble that does not utter a single word about less popular uses for this revenue.

Enumerating three broad areas of education funding, their proposal does not specify, or even mention, the multitude of extracurricular activities which would take priority in reaping these proceeds. Nor does their proposal make any mention of a host of appropriations bills which these lawmakers *already* passed to take these funds far away from the classroom. E. 408-411; *cf.* E. 332-405. Instead, legislators would place their "educational" proposal on the ballot without educating voters that their approval would activate hundreds of millions of dollars in appropriations which contravene the amendment's expressed purpose.

Like an illegitimate charity, the Legislature has no plans to use these funds to support the worthy cause advertised in its public solicitation. Well aware that few, if any, of these funds will support public education, the Legislature's own fiscal analysis belies the notion that schools will benefit from $546 million in revenues forecast over the next five years. Hardly the sole or primary beneficiary of this revenue, educational institutions will actually *lose* $1.239 billion in funding during that same period. E. 141, 144.

Despite soliciting funds for "public school construction," "public school capital

improvements," and "construction of capital projects at community colleges and Public senior higher education institutions," E. 409, legislators will not spend any of this revenue to increase aid for "School Construction." E. 141. In fact, by FY 2012, when slot revenues are expected to reach $445 million, the Legislature has only allocated an extra $15 million for "Higher Education" – little more than three percent from a program which legislators have touted to voters as supporting "the primary purpose of providing funds for public education." *See id*.[9]

Baiting voters to support a proposal that will save our schools, the Legislature fails to disclose that their votes will flip the switch on voluminous appropriations bills, many of which are designed to save the horse racing industry instead. Unbeknownst to voters who would amend the Constitution on the false pretense of enriching public education, their legislators have already voted to enrich racehorse owners with increased prize money, to renovate racetracks, and to subsidize the business of horse breeders with up to $100 Million per year. *See* E. 380-383. Unless they plan to expand the Equestrian Studies program, legislators cannot legitimately claim that their elaborate scheme of appropriations will, in any respect, improve public education.

Without any notice that these appropriations will only "take effect [when] the constitutional amendment ... has been adopted by the people of Maryland," *id*., citizens will go to the polls unaware that their votes will determine much more than the fate of the

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[9] Figures don't lie, but legislators can figure. Though the Legislature claims that these funds will improve public education, its appropriations acts speak louder than the misleading words of the proposed amendment. To the extent that schools receive this revenue, the Department of Legislative Services confirms that these funds will only be used "to *offset* general fund education spending" rather than to increase the existing budget. E. 139 (emphasis added). Even then, this revenue will only be applied to education *after* all other "general fund expenditures required in the [appropriations] legislation" are satisfied. *Id*. Thus, despite the illusory claim that educational funding was the "primary purpose" of this revenue plan, legislators put it last on their list of fiscal priorities.

amendment itself. Though local newspapers will publish this amendment before the election, even voters who are conscientious enough to read it may mark their ballots without a clue that 74 pages of appropriations bills are also "contingent on the passage of [this four-page] constitutional amendment, and its ratification by the voters of the State." E. 408-411. Rather than jeopardize the election with notice of unpopular appropriations or the unpublicized contingency found in this companion legislation, the Legislature would place the *entire* slots package into the hands of a misguided electorate.[10]

To be constitutional, such proposals must "fairly apprise the voters of the purpose of the act, not be misleading and not calculated to lead the public to believe that the proposed legislation is substantially different from that which would actually become law ... ." *Anne Arundel Co. v. McDonough*, 277 Md. 271, 296, 354 A.2d 788 (1976).

To paraphrase this Court in *Surratt v. Prince George's County*, 320 Md. 439, 449, 578 A.2d 745 (1990), the slots proposal "here fails the test in every respect." Instead of fairly apprising voters of the purpose of the slots plan, the Legislature deliberately misstated this purpose to increase the chance of ratification. Leading voters to believe that approving slots will improve our schools, the language of this proposal is substantially different from that which would actually become law in statutes which appropriate these funds elsewhere. Not only does this proposal conceal the true purpose of the slots plan, it even conceals the true purpose of the public's vote – to activate a host of appropriations which have nothing to do with public education. Hardly an inadvertent omission, the Legislature carefully crafted the proposed amendment to make the most of an opportunity to mislead the public into approving it.

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[10] None of these appropriations will be publicized prior to an election in which voters will unconsciously determine their fate. Under the Maryland Constitution, only "[t]he bill or bills proposing amendment or amendments shall be publicized" once a week in various newspapers during the month "immediately preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted ... to the qualified voters of the State for adoption or rejection." MD. CONST. ART. XIV, § 1.

"[W]here there is an *apparent opportunity for misleading* ... the public, the Court has not hesitated to strike down many acts" under less egregious circumstances than those surrounding the slots amendment. *Bell v. Prince George's County*, 195 Md. 21, 28-29, 72 A.2d 746 (1950) (emphasis added). Even without the level of deception exemplified in the case at bar, this Court showed little tolerance for legislative proposals which are presented to the public in a false light. Although the amendment proposed in *Surratt v. Prince George's County*, 320 Md. 439, would repeal the County's waiver of tort immunity under certain contingencies, a summary appearing on the ballot "contained not the slightest hint of that possible outcome." *Id*. at 448. Rather than emphasize such an unpopular change, the ballot led voters to believe that their approval would simply reaffirm that "the County will only waive its immunity in those instances where its officers and employees are liable." *Id*. Concealing the purpose of a proposal designed to change this law under certain conditions, the ballot "told the voter nothing about what really was involved."

Though voters could readily discern its purpose by reading the amendment itself, this disclosure was not enough to "convey to a voter an understanding of 'the full and complete nature' of what the ... amendment involved." Because the ballot failed to present a full understanding of this proposal, it may have "prevented a free and full expression of the popular will." *Id.* at 409, *quoting McDonough*, 277 Md. at 307. Accordingly, this Court invalidated an amendment which County residents overwhelmingly voted to approve.

Placing a high value on fair and honest elections that truly reflect the will of the people, this Court has little tolerance for confusing, incomplete or misleading titles. It may be unwise to judge a book by its cover, but voters – and even legislators – frequently judge proposed amendments and other legislation by their titles alone. Since they are often placed on the ballot in lieu of the full text, this Court insists that all aspects of a ballot measure "present a clear, unambiguous and understandable statement of the full

and complete nature of the issues." *McDonough*, 277 Md. at 300.

To advise "voters of the *true nature* of the legislation upon which they are voting," *Anne Arundel Co. v. McDonough*, 277 Md. 271, 300, 354 A.2d 788 (1976) (emphasis added), and "to guard against fraud in legislation," *Culp v. Comrs. of Chestertown*, 154 Md. 620, 141 A. 410 (1928) this Court has repeatedly stricken otherwise valid acts which were presented in a confusing or misleading manner. *See*, *e.g.*, *Anne Arundel Co. v. McDonough*, 277 Md. 271 ("the amendments would have accomplished numerous changes, none of which were even alluded to" in the title); *Shipley v. State*, 201 Md. 96, 100-104, 93 A.2d 67, 69-71 (1952) (invalidating proposal to amend two articles, only one of which was mentioned in title); *Culp v. Comrs. of Chestertown*, 154 Md. 620, 141 A. 410 (1928) ("the title express[ed] an entirely different purpose ... [which was] not only deceptive and misleading, but is at variance with the body of the act").

Unlike cases in which a title or summary may be a bit confusing, the slots amendment is rotten to the core. As legislators proposed this amendment for the very purpose of deceiving their constituents, these "public trustees" must not be permitted to betray the public's trust, solicit their votes on the basis of false pretenses, and even send them to the polls without disclosing all that hinges on their votes. This is particularly true where, as here, legislators have abused the constitutional process to avoid their elected duties and to recruit uninformed constituents to do this work for them.

Worse than the "logrolling" tactics that this Court rejected in a host of other cases, this "double-billing" scheme makes it virtually impossible for the most conscientious of voters to uncover their legislators' hidden agendas. Though voters could conceivably conduct their own legislative research to discover the true nature of the legislation upon which they are voting, this Court has never gambled with the public's right to a full and fair disclosure of all information needed to make sound decisions.

Using these tactics to dodge a politically-sensitive issue, these public servants averted a protracted debate on this controversy, lightened their workload, left Annapolis

early, and left their unfinished business to those they were elected to serve. Without the slots vote on their agenda, Senators claimed to have finished all of their "substantive work" in less than two weeks and even squeezed in a six-day vacation before both Houses closed the session ten days early. *See* E. 155.[11]

Avoiding this work may have been efficient, but this Court has never let the personal interests of legislators override the public interests of their constituents. Nor has this Court empowered legislators to avoid their elected duties, mislead the public, and ignore their constitutional mandate whenever it may be politically expedient to abstain. Reversing these priorities, the lower court gave legislators a "limitless" right to propose duplicitous constitutional amendments as a pretext for shifting their votes to voters at large, for persuading voters to pass unnecessary measures which will not perform as advertised, and for passing statutes which are contingent on the approval of an electorate that does not even know they exist. *See* E. 31.

Without any restraint on these deceptive tactics, this Court would permit legislators to trample on the rights of their own constituents and reduce the amendment process to a legislative loophole for circumventing the Constitution itself.

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[11] Ironically, by putting this statutory cart before the constitutional horse, legislators have hastily proposed an amendment which could invalidate their unpublicized efforts to expand the purpose of commercial gaming. Under the proposed amendment, "The General Assembly may *only* authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an Act of the General Assembly, in a general election by a majority of the qualified voters in the State." A-13 (emphasis in original). Absent such approval, deceived taxpayers may cite this amendment to challenge the Legislature's expansive plans for this revenue. Thus, in their effort to hide these plans from voters, legislators have likely outsmarted themselves.

II. UNLESS THE JUDICIAL BRANCH ENFORCES THE CONSTITUTION, THE LEGISLATURE WILL HAVE THE UNCHECKED POWER TO MAKE THE LAW THROUGH A PROCESS THAT BREAKS THE LAW

Though the lower court refused to intervene, legislators cannot make the law if they break the law. "If Congress or a state legislature violates a constitutional requirement, the courts will declare its enactment void." Mason's Manual of Legislative Procedure at 10 (2000); *see*, *e.g.*, *Getty v. Board of Elections*, 399 Md. 710 (2007). Legislators who disregard the constitutional process lack the power to legislate. *See Washington Airports v. Noise Abatement Citizens*, 501 U.S. 252, 275 (1991) ("cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified"). Indeed, if the Legislature's "deviations are constitutionally impermissible, we have but one choice: declare [its actions] unconstitutional and void." *In re Matter of Legislative Districting*, 370 Md. 312, 322 (2002).

Recognizing the tendency of ambitious legislators who feel empowered to act "out of the limit of authority" and to depart from an orderly process, *Schisler v. State*, 394 Md. 519, 570, 907 A.2d 175 (2006), those who drafted the provisions on which the Maryland Constitution is based took care to establish "precise rules" designed to foster "responsive and deliberative lawmaking" in a bicameral system. *Loving v. United States*, 517 U.S. 748, 757-58 (1996).

To keep these lawmakers in their seats and on task, these rules specifically limit the extent to which one legislative body may depart from this bicameral process. In Maryland, as in the federal system, the Constitution expressly prohibits one House of the Legislature from leaving the bicameral process for more than three days "without the consent of the other." *See* MD. CONST. ART. III, § 25 (A-1).

Contrary to the lower court's opinion, those who framed the federal provision on which Article III, Section 25 is based did not view this limitation as a mere "technicality

in procedure." *Cf.* E. 26. Vehemently opposing prolonged adjournments, James Madison expressed concern that legislators would unilaterally depart from the bicameral process and believed "[i]t would be very exceptionable to allow the senators, or even the representatives, to adjourn, without the consent of the other house, at any season whatsoever, *without any regard to the situation of public exigencies*." *Debate in Virginia Ratifying Convention*, THE FOUNDERS' CONSTITUTION, Vol. 2 at 292 (Kurland & Lerner 1987)(emphasis added).

Although special sessions are designed to handle state emergencies, the General Assembly has no greater license to depart from the constitutional process in these sessions than they do in regular legislative sessions. According to this Court, the short duration of special sessions and the critical public interests at stake "requires the Legislature to remain in session, within the thirty-day limit, as long as any necessary and proper legislation is under consideration and before it." *Richards Furniture Corp. v. Board of County Commissioners*, 233 Md. 249, 257, 196 A.2d 621, 626 (1964).

Rather than remain in session as long as necessary to deliberate on the complex multi-billion dollar legislation brought before it, the General Assembly raced through this session with all deliberate speed. To streamline this session, both Houses avoided issues which would require protracted and rancorous debates, and even attempted to shift key legislative duties to the public at large. By minimizing or eliminating their work, legislators claimed to have finished all legislative business with ten full days to spare.

This even left time for Senators to take an extended vacation less than two weeks into the session itself. Though they did not initially adjourn for more than three days, the President of the Senate unilaterally extended this adjournment beyond the constitutionally-prescribed time without obtaining the requisite consent of the House of Delegates. Rather than adhere to the Constitution and call Senators back into session as initially planned on Tuesday, November 13th, Senator Miller and the Senate Secretary conspired with the Speaker and the Chief Clerk of the House to fabricate and backdate

documents which would be used as evidence of compliance. *See* E. 156, 157.

To be sure, skipping constitutional steps does make the process easier for lawmakers. But the speed they gain comes at the expense of taxpayers who are deprived of the reasoned and deliberative process the Framers envisioned. Like Congress, Maryland's bicameral system helps to ensure the integrity of a process in which each House keeps the other in check as they simultaneously focus on the merits of each measure and deliberate to a reasoned conclusion. *See The Federalist No. 63; United States v. Munoz-flores*, 495 U.S. 385, 394 (1990); *see also INS v. Chadha*, 462 U.S. 919, 948-951 (1983) (bicameral legislature essential to protect liberty).

The Extraordinary Session was extraordinarily efficient. But the Constitution does not limit the power of the Legislature for the sake of speed. Indeed, the very bicameral process which Article III established is designed to slow things down.[12] As Justice Joseph Story observed long ago, constitutional procedures and limitations are essential components of a fair and deliberative legislative process:

> Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; *impatient, irritable, and impetuous*. ... If [a legislature] feels no check but its own will, it *rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society*.

Story, *Commentaries on the Constitution of the United States* 383-384 (3d ed. 1858) (emphasis added).

Less than two years ago, this Court admonished legislators for the type of impatient and impetuous decision making that crossed constitutional lines during the 2006 Special Session. *Schisler v. State*, 394 Md. 519, 907 A.2d 175 (2006). Concerned that,

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[12] Commenting on virtually identical federal provisions, the United States Supreme Court observed that "Article I's *precise rules* of representation, member qualifications, *bicameralism*, and voting procedure" are designed to foster "responsive and *deliberative lawmaking*." *Loving v. United States*, 517 U.S. 748, 757-58 (1996) (emphasis added).

all too often, the Legislature acts "out of the limit of authority," *Id*. at 570, *quoting Crane v. Meginnis*, 1 G. & J. 463, 472 (1829), this Court echoed what James Madison characterized as the Legislature's "intrepid confidence in its own strength." *Id*. at 601, *quoting* Madison, *The Federalist Papers: No. 48*. This legislative arrogance, or what Madison politely called "enterprising ambition," *id*. at 601, leaves this branch of government more prone to exceed these limitations. *Id*. (constitutional limitations "more liable to be exceeded in practice").

Little more than a year after being rebuked for abusing their power, intrepid, ambitious and impatient legislators have, once again, exceeded the constitutional speed limit and conducted their affairs with reckless abandon. Rather than fulfill their constitutional duties, House and Senate leaders turned this bicameral system into a legislative "House-race" where the fastest legislators are rewarded with a week off and the slower House labors through a long weekend to catch-up. That was hardly the intent of the Framers in approving a provision designed to keep both Houses on the job. *See* MD. CONST. ART. III, § 25. They did not view the legislative process as a race or as a set of technicalities which are left to the discretion of powerful politicians.

Unfortunately the lower court's opinion only bolstered the intrepid confidence of lawmakers who have, thus far, been able to disregard the law without consequence. Though the lower court found the constitutional misconduct of these legislative leaders to be both "egregious" and "reprehensible," E. 25, 26, the trial judge would nonetheless let these same individuals police themselves. Contrary to the lower court's view that invalidating the fruits of this unconstitutional process would be "too drastic a notion to accept," E. 26, the remedy sought in this case would not permit one House "to defeat the actions of the other by simply refusing to participate in the legislative process." E. 27.

Unlike the foreign cases to which the trial judge "gave a great amount of deference," *id*., the case at bar does not involve the unilateral infractions of one House. It involves a premeditated plan by the leaders of both Houses to violate the Constitution, to

conceal this violation with falsified documents, and to submit these fabrications in return for a legal opinion validating this legislative session. Rather than admit their misconduct, legislative leaders remained defiant as the State's top law enforcement officer urged three separate courts to silence an eyewitness to their fraudulent acts.

Unable to prevent or to dispute the compelling testimony of the Chief Clerk of the House of Delegates, the Attorney General and legislative leaders have chosen to ignore it. Denying any responsibility for these actions, these legislators and their counsel show no desire to avoid future abuses and continue to scoff at any hint of wrongdoing.

Rather than check this unrestrained conduct, the lower court merely reprimanded them for these egregious and reprehensible infractions. Unwilling to enforce the Constitution, the trial judge shifted his enforcement power to the same legislative leaders who conspired to violate it. Armed with a copy of the lower court's opinion, these leaders have "become judges of the validity of their own acts" who may "defeat and render nugatory, all the limitations and restrictions on the authority of the Legislature." *Schisler*, 394 Md. at 568-69. Unless this Court exercises its "power and authority to restrain" such unchecked conduct, *id*. at 590 n.51, the lower court's opinion has, indeed, "give[n] rise to a most terrible precedent." *See* Opinion at 14.

CONCLUSION

The people of Maryland deserve far better than legislators who only pay attention to the Constitution when they may use it as a loophole to avoid decisions that they were elected to make, or to shift this work to the constituents they were elected to serve. Marylanders deserve legislators who appreciate the importance of their duties, are committed to their legislative tasks, and respect the rule of law in discharging them.

Members of the General Assembly were elected to lead in accordance with the Constitution – not to *mislead* with duplicitous proposals, hidden agendas, and collusive acts which undermine the constitutional process. When lawmakers become law breakers, it is "the duty of this Court to say what the law is," and to enforce it with remedies

designed to restore respect for provisions which form the foundation of our democracy. Considering the deficit of integrity displayed in the Extraordinary Session of 2007, this Court must deter these assaults to the Constitution and correct a shortfall in values which Maryland taxpayers cannot afford.

To prevent such egregious misconduct from derailing the constitutional process in the future, it is imperative that this Court enforce the Constitution today and articulate a zero tolerance policy for deliberate and fraudulent efforts to take legislative action in derogation of its terms. Accordingly, Petitioners respectfully request that this Court reverse the lower court's judgment, and that this Court correct these infractions by:

A. Invalidating Chapter 5 of the Laws of Maryland (Special Session 2007) [PROPOSED MD. CONST. ART. XIX, § 1, House Bill 4] and precluding the Secretary of State and state elections officials from seeking voter ratification of the General Assembly's duplicitous pretext for avoiding legislative duties to vote on such statewide revenue measures;

B. Invalidating Chapter 4 of the Laws of Maryland (Special Session 2007) [Senate Bill 3] precluding the Legislature from making these appropriations bills contingent on the outcome of a popular vote on its companion bill and preventing the General Assembly from delegating their duty to vote on such fiscal measures themselves; and

C. Rejecting the fruits of a session which was conducted in derogation of constitutional provisions designed to prevent lengthy disruptions to the bicameral process. As leaders of both Houses conspired to violate the Constitution and to conceal the constitutional impropriety of their session, this Court must check this unrestrained and unprecedented legislative malfeasance by invalidating Chapters 2 through 6 of the Laws of Maryland (Special Session 2007).

By implementing these checks and balances, this Court would not only restore respect for the Constitution. It would go a long way in rebuilding public confidence in

our system of government by assuring the people of Maryland that their lawmakers are not above the law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2008, by agreement of counsel in this case, a copy of the foregoing was sent via electronic transmission to:

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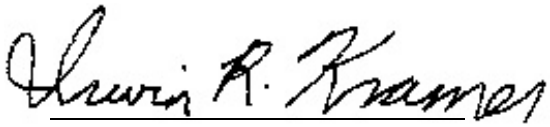

Irwin R. Kramer

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PETITIONERS' APPENDIX

Pertinent Constitutional Provisions and Statutes:

MD. CONST. ART. III, § 25: Consent required to adjournment.

Neither House shall, without the consent of the other, adjourn for more than three days, at any one time, nor adjourn to any other place, than that in which the House shall be sitting, without the concurrent vote of two-thirds of the members present.

MD. CONST. ART. III, § 52: How appropriations to be made; budget.

(1) The General Assembly shall not appropriate any money out of the Treasury except in accordance with the provisions of this section.

(2) Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter provided.

(3) On the third Wednesday in January in each year, (except in the case of a newly elected Governor, and then not later than ten days after the convening of the General Assembly), unless such time shall be extended by the General Assembly, the Governor shall submit to the General Assembly a Budget for the next ensuing fiscal year. Each Budget shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the estimated surplus or deficit of revenues at the end of the preceding fiscal year. Accompanying each Budget shall be a statement showing: (a) the revenues and expenditures for the preceding fiscal year; (b) the current assets, liabilities, reserves and surplus or deficit of the State; (c) the debts and funds of the State; (d) an estimate of the State's financial condition as of the beginning and end of the preceding fiscal year; (e) any explanation the Governor may desire to make as to the important features of the Budget and any suggestions as to methods for reduction or increase of the State's revenue.

(4) Each Budget shall embrace an estimate of all appropriations in such form and detail as the Governor shall determine or as may be prescribed by law, as follows: (a) for the General Assembly as certified to the Governor in the manner hereinafter provided; (b) for the Executive Department; (c) for the Judiciary Department, as provided by law, as certified to the Governor; (d) to pay and discharge the principal and interest of the debt of the State in conformity with Section 34 of Article III of the Constitution, and all laws enacted in pursuance thereof; (e) for the salaries payable by the State and under the Constitution and laws of the State; (f) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 of the Constitution and with the laws of the State; and (g) for such other purposes as are set forth in the Constitution or laws of the State.

(5) The Governor shall deliver to the presiding officer of each House the Budget and a bill for all the proposed appropriations of the Budget classified and in such form and detail as he shall determine or as may be prescribed by law; and the presiding officer of each House shall promptly cause said bill to be introduced therein, and such bill shall be known as the "Budget Bill." The Governor may, with the consent of the General Assembly, before final action thereon by the General Assembly, amend or supplement said Budget to correct an oversight, provide funds contingent on passage of pending legislation or, in case of an emergency, by delivering such an amendment or supplement to the presiding officers of both Houses; and such amendment or supplement shall thereby become a part of said Budget Bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may affect.

(5a) The Budget and the Budget Bill as submitted by the Governor to the General Assembly shall have a figure for the total of all proposed appropriations and a figure for the total of all estimated revenues available to pay the appropriations, and the figure for total proposed appropriations shall not exceed the figure for total estimated revenues. Neither the Governor in submitting an amendment or supplement to the Budget Bill nor the General Assembly in amending the Budget Bill shall thereby cause the figure for total proposed appropriations to exceed the figure for total estimated revenues, including any revisions, and in the Budget Bill as enacted the figure for total estimated revenues always shall be equal to or exceed the figure for total appropriations.

(6) The General Assembly shall not amend the Budget Bill so as to affect either the obligations of the State under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the General Assembly may amend the bill by increasing or diminishing the items therein relating to the General Assembly, and by increasing or diminishing the items therein relating to the judiciary, but except as hereinbefore specified, may not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill, when and as passed by both Houses, shall be a law immediately without further action by the Governor.

(7) The Governor and such representatives of the executive departments, boards, officers and commissions of the State expending or applying for State's moneys, as have been designated by the Governor for this purpose, shall have the right, and when requested by either House of the General Assembly, it shall be their duty to appear and be heard with respect to any Budget Bill during the consideration thereof, and to answer inquiries

relative thereto.

(8) Supplementary Appropriation Bill. Either House may consider other appropriations but both Houses shall not finally act upon such appropriations until after the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid except in accordance with the provisions following: (a) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (b) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be levied and collected as shall be directed in said bill; (c) No Supplementary Appropriation Bill shall become a law unless it be passed in each House by a vote of a majority of the whole number of the members elected, and the yeas and nays recorded on its final passage; (d) Each Supplementary Appropriation Bill shall be presented to the Governor of the State as provided in Section 17 of Article 2 of the Constitution and thereafter all the provisions of said section shall apply.

(9) Nothing in this section shall be construed as preventing the General Assembly from passing at any time, in accordance with the provisions of Section 28 of Article 3 of the Constitution and subject to the Governor's power of approval as provided in Section 17 of Article 2 of the Constitution, an appropriation bill to provide for the payment of any obligation of the State within the protection of Section 10 of Article 1 of the Constitution of the United States.

(10) If the Budget Bill shall not have been finally acted upon by the Legislature seven days before the expiration of the regular session, the Governor shall issue a proclamation extending the session for some further period as may, in his judgment, be necessary for the passage of such bill; but no matter other than such bill shall be considered during such extended session except a provision for the cost thereof.

(11) For the purpose of making up the Budget, the Governor shall require from the proper State officials (including all executive departments, all executive and administrative offices, bureaus, boards, commissions and agencies that expend or supervise the expenditure of, and all institutions applying, for State moneys and appropriations) such itemized estimates and other information, in such form and at such times as directed by the Governor. An estimate for a program required to be funded by a law which will be in effect during the fiscal year covered by the Budget and which was enacted before July 1 of the fiscal year prior to that date shall provide a level of funding not less than that prescribed in the law. The estimates for the Legislative Department, certified by the presiding officer of each House, of the Judiciary, as provided by law, certified by the Chief Judge of the Court of Appeals, and for the public schools, as provided by law, shall

be transmitted to the Governor, in such form and at such times as directed by the Governor, and shall be included in the Budget without revision.

(12) The Governor may provide for public hearings on all estimates and may require the attendance at such hearings of representatives of all agencies, and for all institutions applying for State moneys. After such public hearings he may, in his discretion, revise all estimates except those for the legislative and judiciary departments, and for the public schools, as provided by law, and except that he may not reduce an estimate for a program below a level of funding prescribed by a law which will be in effect during the fiscal year covered by the Budget, and which was enacted before July 1 of the fiscal year prior thereto.

(13) The General Assembly may, from time to time, enact such laws not inconsistent with this section, as may be necessary and proper to carry out its provisions.

(14) In the event of any inconsistency between any of the provisions of this Section and any of the other provisions of the Constitution, the provisions of this Section shall prevail. But nothing herein shall in any manner affect the provisions of Section 34 of Article 3 of the Constitution or of any laws heretofore or hereafter passed in pursuance thereof, or be construed as preventing the Governor from calling extraordinary sessions of the General Assembly, as provided by Section 16 of Article 2, or as preventing the General Assembly at such ertraordinary [extraordinary] sessions from considering any emergency appropriation or appropriations.

(15) If any item of any appropriation bill passed under the provisions of this Section shall be held invalid upon any ground, such invalidity shall not affect the legality of the bill or of any other item of such bill or bills.

(1916, ch. 159, ratified Nov. 7, 1916; 1947, ch. 497, ratified Nov. 2, 1948; 1952, ch. 20, ratified Nov. 4, 1952; 1955, ch. 725, ratified Nov. 6, 1956; 1964, ch. 161, ratified Nov. 3, 1964; 1966, ch. 416, ratified Nov. 8, 1966; 1970, ch. 576, ratified Nov. 3, 1970; 1972, ch. 373, ratified Nov. 7, 1972; 1973, ch. 745, ratified Nov. 5, 1974; 1978, ch. 971, ratified Nov. 7, 1978; 1990, ch. 62, ratified Nov. 6, 1990.)

MD. CONST. ART. XIV, § 1: Proposal in General Assembly; publication; submission to voters; Governor's proclamation.

The General Assembly may propose Amendments to this Constitution; provided that each Amendment shall be embraced in a separate bill, embodying the Article or Section, as the same will stand when amended and passed by three-fifths of all the members

elected to each of the two Houses, by yeas and nays, to be entered on the Journals with the proposed Amendment. The requirement in this section that an amendment proposed by the General Assembly shall be embraced in a separate bill shall not be construed or applied to prevent the General Assembly from (1) proposing in one bill a series of amendments to the Constitution of Maryland for the general purpose of removing or correcting constitutional provisions which are obsolete, inaccurate, invalid, unconstitutional, or duplicative; or (2) embodying in a single Constitutional amendment one or more Articles of the Constitution so long as that Constitutional amendment embraces only a single subject. The bill or bills proposing amendment or amendments shall be publicized, either by publishing, by order of the Governor, in at least two newspapers, in each County, where so many may be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for four weeks, or as otherwise ordered by the Governor in a manner provided by law, immediately preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted, in a form to be prescribed by the General Assembly, to the qualified voters of the State for adoption or rejection. The votes cast for and against said proposed amendment or amendments, severally, shall be returned to the Governor, in the manner prescribed in other cases, and if it shall appear to the Governor that a majority of the votes cast at said election on said amendment or amendments, severally, were cast in favor thereof, the Governor shall, by his proclamation, declare the said amendment or amendments having received said majority of votes, to have been adopted by the people of Maryland as part of the Constitution thereof, and thenceforth said amendment or amendments shall be part of the said Constitution. If the General Assembly determines that a proposed constitutional amendment affects only one county or the City of Baltimore, the proposed amendment shall be part of the Constitution if it receives a majority of the votes cast in the State and in the affected County or City of Baltimore, as the case may be. When two or more amendments shall be submitted to the voters of this State at the same election, they shall be so submitted as that each amendment shall be voted on separately.

(1941, ch. 337, rejected Nov. 3, 1942; 1943, ch. 476, ratified Nov. 7, 1944; 1972, ch. 367, ratified Nov. 7, 1972; 1977, ch. 679, ratified Nov. 7, 1978; 1978, ch. 975, ratified Nov. 7, 1978.)

MD. CONST. ART. XVI, § 2: Section 2. When laws to take effect; effect of filing of referendum petition.

No law enacted by the General Assembly shall take effect until the first day of June next after the session at which it may be passed, unless it contains a Section declaring such law an emergency law and necessary for the immediate preservation of the public health or

safety and is passed upon a yea and nay vote supported by three-fifths of all the members elected to each of the two Houses of the General Assembly. The effective date of a law other than an emergency law may be extended as provided in Section 3(b) hereof. If before said first day of June there shall have been filed with the Secretary of the State a petition to refer to a vote of the people any law or part of a law capable of referendum, as in this Article provided, the same shall be referred by the Secretary of State to such vote, and shall not become a law or take effect until thirty days after its approval by a majority of the electors voting thereon at the next ensuing election held throughout the State for Members of the House of Representatives of the United States. An emergency law shall remain in force notwithstanding such petition, but shall stand repealed thirty days after having been rejected by a majority of the qualified electors voting thereon. No measure changing the salary of any officer, or granting any franchise or special privilege, or creating any vested right or interest, shall be enacted as an emergency law. No law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this Section. The increase in any such appropriation for maintaining or aiding any public institution shall only take effect as in the case of other laws, and such increase or any part thereof specified in the petition, may be referred to a vote of the people upon petition.

(1914, ch. 673, ratified Nov. 2, 1915; 1977, ch. 681, ratified Nov. 7, 1978; 2002, ch. 588, ratified Nov. 5, 2002.)

MD. CRIM. LAW CODE ANN. § 12-304 (2007):

Chapter 645 of 2007: Second Printing House Bill 1310
By: Delegates Conway and Elmore

Introduced and read first time: February 26, 2007
Assigned to: Rules and Executive Nominations
Re-referred to: Ways and Means, March 12, 2007
Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 21, 2007
Returned to second reading: March 22, 2007
House action: Adopted with floor amendments
Read second time: March 22, 2007

AN ACT concerning Criminal Law — Slot Machines — Eligible Organizations

FOR the purpose of altering the definition of "eligible organization" to make it applicable to certain organizations with a certain affiliation and located in certain counties for a certain number of years before the organization applies for a license to own or operate slot machines; and generally relating to slot machine ownership and operation by eligible organizations.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the
Laws of Maryland read as follows:

Article — Criminal Law § 12-304.

(a) In this section, "eligible organization" means:

(1) a nonprofit organization that:

(I) has been located in a county listed in subsection (b) of this section for at least 5 years before the organization applies for a license under subsection (e) of this section; and

(II) is a bona fide:

1. fraternal organization;

2. religious organization; or
3. war veterans' organization; OR

(2) A NONPROFIT ORGANIZATION THAT HAS BEEN AFFILIATED WITH A NATIONAL FRATERNAL ORGANIZATION FOR LESS THAN 5 YEARS AND HAS BEEN LOCATED IN A COUNTY LISTED IN SUBSECTION (B) OF THIS SECTION FOR AT LEAST 50 YEARS BEFORE THE NONPROFIT ORGANIZATION APPLIES FOR A LICENSE UNDER SUBSECTION (E) OF THIS SECTION.

(b) This section applies in:

(1) Caroline County;
(2) Cecil County;
(3) Dorchester County;
(4) Kent County;
(5) Queen Anne's County;
(6) Somerset County;
(7) Talbot County; and
(8) Wicomico County.

(c) (1) In this subsection, a console or set of affixed slot machines is not an individual slot machine.

(2) Notwithstanding any other provision of this subtitle, an eligible organization may own and operate a slot machine if the eligible organization:

(i) obtains a license under subsection (e) of this section for each slot machine;
(ii) owns each slot machine that the eligible organization operates;
(iii) owns not more than five slot machines;
(iv) locates and operates its slot machines at its principal meeting hall in the county in which the eligible organization is located;
(v) does not locate or operate its slot machines in a private commercial facility;
(vi) uses:
1. at least one-half of the proceeds from its slot machines for the benefit of a charity; and
2. the remainder of the proceeds from its slot machines to further the purposes of the eligible organization;
(vii) does not use any of the proceeds of the slot machine for the financial benefit of an individual; and

(viii) reports annually under affidavit to the State Comptroller:
1. the income of each slot machine; and
2. the disposition of the income from each slot machine.

(d) An eligible organization may not use or operate a slot machine unless:
(1) the slot machine is equipped with a tamperproof meter or counter that accurately records gross receipts; and
(2) the eligible organization keeps an accurate record of the gross receipts and payoffs of the slot machine.

(e) (1) Before an eligible organization may operate a slot machine under this section, the eligible organization shall obtain a license for the slot machine from the sheriff of the county in which the eligible organization plans to locate the slot machine.

(2) (i) The county shall:

1. charge an annual fee of $50 for each license for a machine; and
2. issue a license sticker to the applicant.

(ii) The applicant shall place the sticker on the slot machine.

(iii) The proceeds of the annual fee shall be transferred to the general fund of the county.

(3) In the application to the sheriff for a license, one of the principal officers of the eligible organization shall certify under affidavit that the organization:

(i) is an eligible organization; and
(ii) will comply with this section.

(f) (1) A principal officer of the eligible organization may not intentionally misrepresent a statement of fact on the application.

(2) A person who violates this subsection is guilty of perjury and on conviction is subject to the penalty provided under Title 9, Subtitle 1 of this article.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2007.

(May 17, 2007 — Enacted)