IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2007

No. 121

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

Petitioners,

v.

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

Respondents.

On Appeal from the Circuit Court for Carroll County
(Thomas F. Stansfield, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

---

BRIEF OF THE STATE RESPONDENTS

DOUGLAS F. GANSLER
Attorney General of Maryland

AUSTIN C. SCHLICK
SANDRA B. BRANTLEY
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for the State Respondents

February 28, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions, Statutes and Rules

Miscellaneous

IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2007

No. 121

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

Petitioners,

v.

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

Respondents.

On Appeal from the Circuit Court for Carroll County
(Thomas F. Stansfield, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

---

BRIEF OF THE STATE RESPONDENTS

STATEMENT OF THE CASE

Petitioners disagree with the substance of legislation that the Governor and General Assembly jointly crafted in 2007 to address a fiscal crisis. They ask this Court to do through a judicial order what they could not do through the political process: Obstruct legislative action to balance the State's budget and address public needs.

Petitioners are three members of the House of Delegates, two State Senators, and one provider of computer services. (E. 39-41.) On December 13, 2007, petitioners filed a Verified Complaint for Emergency Declaratory and Injunctive Relief in the Circuit Court for

Carroll County. (E. 7, 35-65.) The Complaint contained five counts. In Counts I, III, and IV, petitioners requested declaratory and injunctive relief on the theory that all legislation enacted by the 2007 Extraordinary Session of the General Assembly was unconstitutional under Article III, § 25 of the Maryland Constitution because, petitioners contended, the Senate adjourned during the special session for more than three days without the consent of the House of Delegates. (E. 47-49, 50-56.) In Counts II and V, petitioners alleged that two enactments of the 2007 Extraordinary Session – one proposing a constitutional amendment concerning video lottery terminals and the other implementing the video lottery program if voters approve the constitutional amendment – violate the prohibition in Article XVI, § 2 of the Maryland Constitution on petitioning appropriations legislation to a popular referendum, and therefore should be declared invalid and enjoined. (E. 47, 49-50, 56-59.)

Petitioners simultaneously filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction based on the same purported constitutional violations. (E. 8, 61-64.) In addition, petitioners moved for summary judgment on the basis that their Complaint presented "purely legal questions" under Article III, § 25 and Article XVI of the Constitution and did not require the circuit court "to make any factual determination whatsoever." (E. 69; *see* E. 7, 69-71.)

The State respondents are some of the State officials and agencies who are responsible for implementing the enactments of the 2007 Extraordinary Session.[1] On December 19, 2007, the State respondents filed an opposition to petitioners' requests for preliminary injunctive relief and moved to dismiss the Complaint. (E. 8, 9, 73-74.) The State respondents contended that petitioners' claims were not justiciable and none of the counts of the Complaint stated a claim on which relief could be granted. (E. 73.) In the alternative, the State respondents agreed with petitioners that the case presented no disputed issues of fact and was ripe for disposition on summary judgment, and urged that summary judgment be entered in favor of the State. (E. 73-74.)

On January 4, 2008, the circuit court (Stansfield, J.) held a hearing at which the parties presented argument on the State respondents' motion to dismiss and cross-motions for summary judgment. (E. 11.) On January 10, 2008, the circuit court issued an Opinion and Declaratory Judgment in which it granted the State respondents' motion to dismiss all claims and declared that the challenged enactments of the 2007 Extraordinary Session were enacted in accordance with constitutional requirements. (E. 34.)

On January 14, 2008, petitioners filed a notice of appeal. (E. 12.) On January 25, petitioners filed a petition for a writ of certiorari. This Court granted the petition on January

---

[1] The "State respondents" are Comptroller Peter Franchot, Interim Secretary of State Dennis C. Schnepfe, the State Board of Elections, and the Maryland Department of Health & Mental Hygiene and its component units, the Health Services Cost Review Commission and the Maryland Health Care Commission. The Attorney General does not represent respondent Carroll County Board of Elections in this action and this brief is filed solely on behalf of the State respondents.

29, 2008, without awaiting responses and before any briefs were filed in the Court of Special Appeals.

STATEMENT OF FACTS

A. The 2007 Extraordinary Session.

On October 15, 2007, the Governor issued Executive Order 01.01.2007.23 proclaiming the convening of the General Assembly in special session. (E. 129.) The Governor explained in his Executive Order that Maryland faced a projected $1.7 billion structural deficit for Fiscal Year 2009 (*i.e.*, July 1, 2008 through June 30, 2009), and similar budget shortfalls in future years. (*Id.*) He outlined a plan to cut spending and raise revenue and advised the General Assembly that "[s]tructural reform [of the budget] is the only long-term solution to this problem." (*Id.*) If the General Assembly waited until its January 2008 regular session to take up the budget issue, the Governor stated, the budget imbalance confronting the Legislature would be $500 million greater than if revenue needs were addressed immediately in a special session. (E. 129-30.)

On Monday, October 29, 2007, the General Assembly convened. In each chamber, the Administration introduced a package of six bills that would generate budget savings and raise new revenue beginning in the current fiscal year, Fiscal Year 2008. The Administration's proposals became House Bills 1 through 6 and Senate Bills 1 through 6 of the 2007 Extraordinary Session. (*See* E. 137-49 (summarizing Administration bills).)

The Governor's plan for resolving the structural deficit included, among other actions, revising the personal and corporate income taxes to generate additional revenue, closing corporate tax loopholes, and increasing the tobacco tax, while also making targeted new investments in transportation, education, and health care. (*Id.*) The Administration also outlined $1.7 billion in spending cuts that the Governor would make in order to balance the budget as required by Article III, § 52(5a) of the Maryland Constitution, in the event the General Assembly failed to act to eliminate the structural deficit. These anticipated cuts included reductions in local aid for police, libraries, education and other services, cuts to entitlement programs including Medicaid and foster care, closing eight state parks, reducing funding for state colleges and universities by ten percent, and laying off state employees, among other savings. (Cir. Ct. Doc. No. 29, Exh. 2.)

After the Governor's proposed bills were introduced on Monday, October 29, the standing committees with jurisdiction over the legislation held public hearings for the remainder of that week, through Saturday, November 3.[2]

During the week of November 5, the full Senate considered five bills that were reported favorably by the relevant committees, along with many proposed amendments. By Friday, November 9, the Senate had passed its versions of five bills from the

[2] The circuit court wrongly stated in its Opinion that the legislative hearings were "closed." (E. 17.) It appears that the circuit court was misled by a letter the Senate Republican Caucus sent during the special session, which argued for "Public Access by Internet" to the hearings. (E. 134.) As the Republican Caucus itself made clear, all they were suggesting was that the General Assembly's hearing room be equipped for "webcasting" of the public hearings over the Internet. (*Id.*)

Administration's package and sent those bills to the House. Because the Senate's desk was clear and no bills had yet reached the House floor, the Senate adjourned until Tuesday, November 13, in order to give the House time to complete its deliberations and send its versions of the Administration bills to the Senate. (E. 17-18.)

On Monday, November 12, the Veterans' Day holiday, it appeared that the House would not have bills ready for the Senate to consider by Tuesday. (E. 155.) Accordingly, the Secretary of the Senate called the Chief Clerk of the House of Delegates to obtain the views of the House on extending the Senate's adjournment. The House Clerk, Ms. Mary Monahan, contacted the staff of the Speaker of the House and was advised that the Speaker agreed to the Senate's proposed extension of adjournment. (E. 121.) Such consent by the House Speaker, without a vote of the full House, was consistent with the General Assembly's past practice. (E. 114.)

The Senate President, Thomas V. Mike Miller, Jr., then sent a memorandum to all members of the Senate informing them that "[t]he House is continuing to work though the various parts of the comprehensive package introduced by Governor O'Malley to resolve the structural deficit and there is no substantive work for the Senate to address tomorrow." (E. 155.) President Miller's memorandum advised the Senators in bolded and underscored text that "the **floor session of the Senate of Maryland has been rescheduled from 10:00am Tuesday, November 13th until 10:00am Thursday, November 15th**." (*Id.*)

The legislative leadership left implementation of the Senate's extension to the legislative staff. (E. 103.) Because the Secretary of the Senate was not at his office, he asked his counterpart in the House, Ms. Monahan, "to create the documentation necessary" to memorialize the extension of the Senate's adjournment. (E. 108.) At the specific request of the Secretary of the Senate, Ms. Monahan obtained a sheet of the Secretary's stationary from his empty office. (E. 103.) As directed by Ms. Monahan pursuant to the Senate Secretary's request, one of her assistants used the letterhead to create a "Message from the Senate," "By Order" of the Senate Secretary, stating the intention of the Senate to adjourn until November 15 "[i]f the House consents." (E. 156; *see* E. 100-01, 107.) After discussion among House staff members, the assistant House Clerk decided that the message from the Senate should be dated November 9, 2007, which was the last day the Senate had been in session. (E. 104-05.)

Also on November 12, the assistant House Clerk prepared a response to the message from the Senate. (E. 108.) Because the House was in session on November 12, its response was dated that day. (E. 106.) Consistent with House custom, the message was "By The Majority Leader" and "By Order" of Ms. Monahan, and stated that "The House consents to the Senate adjourning until Thursday, November 15, 2007." (E. 108, 157.)

As noted, all members of the Senate were advised of the extended adjournment by the Senate President's memorandum of November 12. (E. 155.) The members of the House

likewise were aware of the Senate's extension of its adjournment. (E. 109.) The messages to and from the House were entered into the House Journal on November 12. (E. 191.)

On November 14, 2007, while the Senate was still adjourned, Delegate Michael Smigiel (who is the lead petitioner in this case) made a parliamentary inquiry on the House floor about the constitutional sufficiency of the House's consent to the Senate's extension of its adjournment. The House Parliamentarian engaged in a colloquy with Delegate Smigiel and ruled that "[t]he message [from the Senate] was sent to the House. The House accepted it and journalized it. We are therefore constitutionally proceeding appropriately." (E. 124-25.)

After the Senate reconvened on November 15, the House and Senate continued their work in routine fashion. Both chambers went in and out of session; committees of each chamber deliberated; each chamber considered concurrences with amendments from the opposite chamber; and conference committees were appointed to reconcile differences in the House and Senate bills. Early on the morning of Monday, November 19, 2007, the House and Senate adjourned their special sessions "sine die" after passing the Governor's package of bills with the legislators' amendments. Later that day, the bills were presented to the Governor, who signed them into law. (*See* E. 150-54.)

B. The Circuit Court's Proceedings.

On December 13, 2007 – nearly a month after the end of the special session – petitioners filed their complaint for declaratory and injunctive relief in the Circuit Court for

Carroll County. None of the five legislators bringing the suit resided in Carroll County. Nor did petitioners allege any connection between Carroll County and the State respondents. (E. 39-43.) Instead, apparently in an effort to support venue in Carroll County, the legislators who were the lead plaintiffs added a sixth plaintiff who operated a computer business in Carroll County. (E. 39-40.) Petitioners also named an additional defendant, the Carroll County Board of Elections. (E. 42-43.) The Carroll County Board was the only one of the 24 local boards of elections that petitioners sued, and it did not take active part in the circuit court's proceedings.

Although they had demonstrated no particular urgency in bringing their lawsuit, petitioners asked the circuit court to render a decision almost immediately. In a motion filed with the Complaint, petitioners asked for briefing and a hearing on their motions for a temporary restraining order, preliminary injunction, or summary judgment in just two business days (on Monday, December 17, 2007). (Cir. Ct. Doc. Nos. 10, 12.) The circuit court expedited the case on a reasonable schedule and set a hearing on petitioners' motion for a temporary restraining order for December 21, 2007. (E. 9.)

On the day of the scheduled hearing, petitioners moved for a continuance. Although they had sought the expedited hearing, petitioners argued that they should be given more time to locate Ms. Monahan, whom they wished to depose in the case. (Cir. Ct. Doc. No. 30.) The circuit court granted their motion and continued the hearing to January 4, 2008. (E. 9.) After the Court of Special Appeals and this Court declined to consider the State's challenge

to Ms. Monahan's deposition on grounds of legislative privilege, petitioners took the deposition on January 2, 2008. (E. 78-80.)[3]

On January 4, 2008, the court heard argument by counsel on the State respondents' motion to dismiss and the cross-motions for summary judgment. (E. 11.)[4]

On January 10, 2008, the circuit court entered an Opinion and Declaratory Judgment dismissing the case and affirming the validity of the Acts of the 2007 Extraordinary Session. (E. 14-34.) The court first addressed petitioners' lead argument: that all legislation enacted during the 2007 Extraordinary Session should be "void[ed]" because the Senate supposedly "failed to return to chambers after the constitutionally permissible three days without proper consent of the House," allegedly in violation of Article III, § 25 of the Maryland Constitution. (E. 23-24.) Article III, § 25 provides: "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."

---

[3] Petitioners' sensational accusation that the Office of the Attorney General sought to "keep [Ms. Monahan] silent" (Petitioners' Br. at 14) is based on nothing more than the State's invocation of legislative privilege on the Chief Clerk's behalf. Neither the Court of Special Appeals nor this Court ruled on the merits of the claim of privilege. (E. 78-79.)

[4] Petitioners criticize the circuit court after the fact for not focusing its attention on their motion for a preliminary injunction. (Petitioners' Br. at 3). Petitioners did not make any procedural objection in the circuit court and it was logical and sensible for the court to proceed directly to the State respondents' motion to dismiss and petitioners' ripe motion for summary judgment. All parties agreed that the case called for an expeditious final decision. Furthermore, a preliminary injunction may not be granted when a case must be dismissed. *See Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456 (1995) (preliminary injunction must be denied unless movant establishes "a real *probability* of prevailing on the merits").

The circuit court rejected petitioners' contention that voiding legislation is an appropriate remedy to enforce the three-day rule of Article III, § 25. The court termed this "too drastic a notion to accept" and noted that it "would give rise to a terrible precedent." (E. 26, 27.) Citing similar holdings of other state courts, the circuit court explained that voiding all legislation enacted after the end of an impermissible adjournment "would essentially negate the very purpose" of the three-day rule, "[t]hat is, to ensure both House (sic) of the Legislature are kept to their task and not allowed to thwart the efforts of their counterparts for mere failure to appear and perform their duty." (E. 27 n.13.)

Judge Stansfield did not stop there, however. Although the court identified no constitutional provision, statute, or rule of procedure that was violated during the special session, the Judge "fe[lt] compelled to observe" that he disapproved of the Legislature's internal procedures in connection with the extension of the Senate's adjournment. (E. 27.) Moreover, although the Monahan deposition transcript contained no suggestion of any personal involvement by the House Speaker or Senate President in preparing the legislative messages that were exchanged on November 12, the court opined that these leaders were "presumably" responsible for "actions presented by way of [the Monahan] deposition" that did not meet the court's approval. (*Id.; see also* E. 25.)[5]

[5] Petitioners are even looser with the facts. Contrary to the record evidence, they attribute the staff's decision on dating the Senate's adjournment message personally to the House Speaker. (Petitioners' Br. at 10-11.)

The circuit court then addressed the second legal argument petitioners had made in the case. That argument related solely to House Bill ("HB") 4 and Senate Bill ("SB") 3, which, respectively, proposed a constitutional amendment concerning video lottery terminals ("slots") and provided for implementation of a slots program if voters approve the constitutional amendment. (E. 331-414.) Petitioners' argument with respect to these bills was:

> that because House Bill 4 (which is a proposed Amendment to the State Constitution) and Senate Bill 3 (which is a companion authorization package to the proposed Amendment) are part of a comprehensive revenue and appropriations package expressly contingent upon voter approval, the two measures are invalid under Article XVI, §2 of the Maryland Constitution.
>
> . . .
>
> The Plaintiffs argue that since the ruling in *Kelly* [*v. Marylanders for Sports Sanity*, 310 Md. 437 (1987),] would not allow for a referendum vote for pieces of package legislation involving appropriations, that this Court must invalidate the Slots package as passed by the Special Legislature. They suggest that since Senate Bill 3 is attached to House Bill 4 (a Constitutional Amendment which in essence funds Senate Bill 3), that the ruling in *Kelly* would mandate that the Court invalidate the legislation as an impermissible referendum measure under article XVI, §2.

(E. 30-31.)[6]

---

[6] Article XVI, § 2 of the Maryland Constitution provides in pertinent part:

> 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 . . . . No law making any appropriation for

(continued...)

The circuit court rejected that argument and dismissed petitioners' claims concerning the slots bills. Article XVI, § 2 and *Kelly*, the court concluded, were "inapplicable to the facts presented here" because they involve voter petitions for a referendum to reject enacted legislation – not approval of a constitutional amendment proposed by the General Assembly through a referendum conducted under Article XIV. (E. 31.) The circuit court explained:

> House Bill 4 was introduced and validly passed by both houses of the legislature, and because it is a proposed Amendment to the State Constitution, the measure falls under the guidelines of Article XIV, §I. Therefore because House Bill 4 falls under the authority of Article XIV, §I and not Article XVI, §2, this Court finds that Senate Bill 3 is a valid piece of contingent legislation, and as such is not subject to invalidation under the ruling in *Kelly*.

(E. 32.)

Finally, the circuit court entered a Declaratory Judgment finding all the challenged laws of the 2007 Extraordinary Session to be "enacted in compliance with the Constitution of the State of Maryland" and dismissing the Complaint. (E. 33-34.) In fact, the circuit court declared constitutional both the House and Senate versions of all six bills that comprised the Administration's legislative package. (E. 33-34.) It thus declared constitutional six bills that were put aside in favor of the other chamber's companion bill, and never enacted.[7]

---

[6] (...continued)
maintaining the State Government, or for maintaining or aiding any public institution . . . shall be subject to rejection or repeal under this Section.

[7] Petitioners suggest that the circuit court should have entered a declaratory judgment in their favor or not at all. (Petitioners' Br. at 3.) They are wrong. *See Mauzy v. Hornbeck*, 285 Md. 84, 90-91(1979) (when declaratory judgment action is properly presented, trial court ordinarily should issue a declaration of the parties' rights one way or the other).

ARGUMENT

Although the circuit court's opinion is riddled with factual errors and imprudent dicta, the court was right on the law. Petitioners evidently recognize this, because they feature here a set of arguments concerning the slots legislation that they did not even raise below. Those new arguments are just as unfounded as their old argument, but they are also procedurally barred and unripe. Petitioners additionally advance the same adjournment argument they made below, which should fail for the reasons stated by the circuit court.

I. PETITIONERS CANNOT PREVAIL ON THEIR NEWLY CONCEIVED CHALLENGES TO THE SPECIAL SESSION'S VIDEO LOTTERY ENACTMENTS.

Petitioners focus their attack primarily on HB 4, which proposes a constitutional amendment on video lottery terminals, and SB 3, which will implement the video lottery program if voters approve it. In the circuit court, petitioners attacked these bills only on the basis they together constituted an invalid referendum on fiscal legislation under Article XVI, § 2. Petitioners abandon that argument in this Court. Their substitute contentions are procedurally barred because they were not presented to the circuit court and are directed at election language that has yet to be drafted. The new arguments, moreover, lack legal merit.

A. Petitioners Have Not Preserved Their Current Arguments.

In the circuit court, petitioners argued that the proposed constitutional amendment on slots (HB 4) and the contingent implementing legislation (SB 3) together constituted a referendum on fiscal legislation in violation of Article XVI of the Maryland Constitution.

(E. 28-32, 49-50, 56-59, 69.) Petitioners have abandoned that argument. In both the petition for a writ of certiorari and their opening brief, petitioners only alluded in a footnote to their former argument under Article XVI. (Petition at 18 n.8; Petitioners' Br. at 19 n.8.) Accordingly, the only argument on the slots bills that was before the circuit court is not before this Court. *See* Md. Rule 8-131(b); *Oak Crest Village, Inc. v. Murphy*, 379 Md. 229, 241-42 (2004) (footnote in appellant's brief did not adequately present issue for appellate review, because "[a]n appellant is required to articulately and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief").[8] In any event, as the circuit court correctly recognized (E. 31-32), the restriction on petitioning fiscal legislation to a voter referendum that is found in Article XVI, § 2 is utterly irrelevant to this case, which does not involve any petition to overturn legislation.

The flip-side of petitioners' failure to raise the old argument is their failure to preserve the new arguments. In the circuit court, the only argument petitioners presented with respect to HB 4 and SB 3 was based on Article XVI and *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437 (1987). Any other argument may not be raised for the first time on appellate review.

---

[8] Md. Rule 8-131(b)(2) would not allow petitioners, having failed to present the Article XVI argument in their opening brief, to revert to it in a reply brief. There was no briefing in the Court of Special Appeals during which petitioners could have raised the Article XVI issue, *see Simmons v. State*, 392 Md. 279, 292 n.1 (2006), and it would be too late to raise the issue for the first time in reply, *see Oak Crest Village*, 379 Md. at 241-42. Furthermore, the Article XVI issue is not apparent in the two questions on which this Court granted a writ of certiorari. (Petition at 2 (Questions Presented); *see South Easton Neighborhood Ass'n, Inc. v. Town of Easton*, 387 Md. 468, 475-76 (2005).)

See Md. Rule 8-131(a); *Fitzgerald v. State*, 384 Md. 484, 505 (2005) (the Court, "in accordance with Rule 8-131, ordinarily will not consider any point or question not plainly raised or decided by the trial court"). All of the arguments that petitioners now muster against HB 4 and SB 3 are beyond the scope of the Article XVI/*Kelly* argument they made below. (*See* Petitioners' Br. at 17-25.) Accordingly, this Court should not consider any of the new arguments.

B. Petitioners' Arguments About How The Proposed Constitutional Amendment Will Be Presented To Voters Are Unripe.

Petitioners' new attack on HB 4 and SB 3 suffers from an additional jurisdictional defect. Petitioners contend that, when the constitutional amendment proposed by HB 4 is put to Maryland voters, the ballot question will not sufficiently "apprize voters" about the consequences of approving the amendment and, in particular, will not "mention" that adoption of the constitutional amendment will render SB 3 – the contingent implementing legislation that petitioners dislike – effective. (Petitioners' Br. at 18; *see id.* at 21-25.) To support that argument, petitioners rely on decisions that, they say, struck "otherwise valid acts which were presented in a confusing or misleading manner." (*Id.* at 25.) To be ripe for judicial consideration, however, petitioners' claim must be based "upon a state of facts *which must have accrued*." *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 690 (1987) (internal quotation marks omitted; emphasis in original). The claim that the voters will be misled when they vote on the slots amendment is unripe, because the language voters will see has not been decided.

HB 4 requires a vote on the proposed constitutional amendment at the general election to be held in November 2008. (E. 411.) But HB 4 does not establish the language of the ballot question. Under Election Law Article ("EL") § 7-103(c), the Secretary of State will prepare the language of the ballot question. The ballot question prepared by the Secretary of State must contain, among other things, "a condensed statement of the purpose of the question" and "the voting choices that the voter has." EL § 7-103(b). This language has not yet been drafted, and it can be prepared as late as August 18, 2008. *See* EL § 7-103(c)(1).

Before the November 2008 election, moreover, each local election board must provide its voters notice of the proposed constitutional amendment by mail or by publication in a major newspaper. *See* EL § 7-105(a). In addition to a specimen ballot containing the language prepared by the Secretary of State, the mandatory notice includes a statement explaining each ballot question. *See* EL § 7-105(b)(1). The explanatory statement for HB 4 will be prepared by the Department of Legislative Services, approved by the Office of the Attorney General, and submitted to the State Board of Elections by August 25, 2008. *See* EL § 7-105(b)(2). To comply with the requirements of the Election Law Article, the explanatory statement must be "prepared in clear and concise language" and "devoid of technical and legal terms to the extent practicable." EL § 7-105(b)(1).

Petitioners assume that the ballot question and explanatory statement will fail to comply with all legal requirements, when they do not know what the ballot language or explanatory statement will say. Furthermore, petitioners can present their arguments about

adequate disclosure to the Interim Secretary of State in connection with his drafting of the ballot question, and to the Department of Legislative Services in connection with its drafting of the explanatory statement. Petitioners' notice arguments are unripe because they assume facts that do not exist and circumvent procedures that petitioners have not exhausted.

Furthermore, none of the cases that petitioners cite supports their notion that the bill proposing a constitutional amendment (HB 4) had to recite provisions of the associated implementing legislation (SB 3). (*See* Petitioners' Br. at 21-25.) To the contrary, *Anne Arundel County v. McDonough*, 277 Md. 271, 291-308 (1976), and *Surratt v. Prince George's County*, 320 Md. 439, 445-51 (1990), involved challenges under the predecessor to EL Title 7 (Article 33 of the 1957 Code), and serve to emphasize that petitioners' claims would more properly be brought (if at all) as a pre-election challenge to the actual ballot question and voter notification that are prepared under the Election Law Article. *See McDonough*, 277 Md. at 292-94.

Petitioners' other cases – *Shipley v. State*, 201 Md. 96, 101-04 (1953), *Bell v. Board of County Comm'rs*, 195 Md. 21, 28-34 (1950), and *Culp v. Commissioners of Chestertown*, 154 Md. 620 (1928) – all involve the titling requirement set forth in Article III, § 29 of the Constitution. A bill proposing a constitutional amendment is not subject to the titling requirements of Article III, § 29. *Hillman v. Stockett*, 183 Md. 641, 646-47 (1944). In any event, petitioners do not suggest any deficiency in the robust titles of HB 4 and SB 3. (*See* E. 332-37, 408.)

Petitioners principally object to the *substance* of the proposed slots program, asserting that "[u]nlike cases in which a title or summary may be a bit confusing, the slots amendment is rotten to the core." (Petitioners' Br. at 25.) What petitioners mean is that they disagree with the policy choices underlying HB 4 and SB 3. (*See id.* at 18, 21-23.) Such policy disagreements are not a basis on which this Court could invalidate any action of the Legislature. *See Ridgely v. Mayor and City Council of Baltimore*, 119 Md. 567, 573 (1913) (per curiam) ("The Court is not concerned with the wisdom, expediency, or policy of the law . . . . These are political questions, exclusively committed by the Constitution to the judgment of the Legislature.").

C. SB 3 Is Permissible Contingent Legislation.

Petitioners' argument that it is impermissible to make HB 4 contingent on approval of a constitutional amendment (Petitioners' Br. at 19-20) ignores both precedent and history. Because legislation may be contingent on the happening of a future event, *see State v. Kirkley,* 29 Md. 85, 102 (1869), legislation contingent on the passage of a constitutional amendment is permitted. *See Druggan v. Anderson*, 269 U.S. 36, 39 (1925) ("no reason has been suggested why the Constitution may not give Congress a present power to enact laws intended to carry out constitutional provisions for the future when the time comes for them to take effect"); *In re Thaxton,* 437 P.2d 129, 131 (N.M. 1968) ("It is generally held that the legislature may pass a statute in anticipation of adoption of an amendment to the constitution and to take effect thereon.") (citing cases); 80 Md. Op. Att'y Gen. 151, 1995 WL 709350 at

*3 ("the General Assembly has wide latitude in placing contingencies on the effectiveness of legislation"); 2 *Sutherland on Statutory Construction* § 33:7 (6th ed. 2001) ("A statute may take effect upon the happening of a contingency, such as . . . a vote of the people, or the passage of a constitutional amendment.") (footnotes omitted); *see also Richards Furniture Corp. v. Board of County Comm'rs*, 233 Md. 249, 257 (1964) (legislative power of the General Assembly in special session "is as broad as its powers in its regular sessions").

Petitioners emphasize that the circuit court cited only one Maryland case involving contingent legislation (E. 31-32 (citing *Kirkley*); Petitioners' Br. at 16 n.7), but they confuse litigation with legislation. The General Assembly often makes legislation contingent on adoption of a proposed constitutional amendment. *E.g.*, Chs. 422 & 575, *Laws of 2006* (jury trials); Chs. 95, 205 & 206, *Laws of 1998* (civil jury trials); Chs. 81 & 674, *Laws of 1996* (special elections in charter counties); Chs. 62 & 515, *Laws of 1990* (Clerks of Court - employees and funding); Chs. 523, 525 & 526, *Laws of 1980* (Supreme Bench consolidation); Chs. 886, 887 & 974, *Laws of 1978* (temporary replacement of State officers); Chs. 545 & 612, *Laws of 1976* (State Prosecutor); Chs. 364 & 365, *Laws of 1972* (State lottery); Chs. 1 & 532, *Laws of 1970* (Lieutenant Governor). The Judicial Branch advocated the contingent courts legislation in 1980 and 1990; the lottery measure in 1972, like SB 3, involved fiscal legislation. The obvious and untenable implication of petitioners' argument is that all these contingent enactments are, and always have been, void.

Not surprisingly, petitioners' supposed authorities are off-point. *Brawner v. Curran*, 141 Md. 586 (1922), states the rule that the General Assembly "cannot pass a valid act which can only become a law in the event the people of the state approve it." *Id.* at 599. That rule is inapposite here because SB 3 *is* law. SB 3 will not have a practical effect unless the slots amendment is approved, but laws are not required to have immediate effect; the existence of a contingency does not detract from the Legislature's "exclusive power of making laws," which is the power that *Brawner* safeguarded.[9] *Id.* at 601; *see Benson v. State*, 389 Md. 615, 641 & n.14 (2005) (discussing *Brawner*). *Brawner*, moreover, distinguished the situation of a constitutional amendment from ordinary legislation. The Court made clear that although voters may not act as legislators, "[t]he people adopted the Constitution and the people alone can change it." 141 Md. at 604.

McKeldin v. Steedman, 203 Md. 89 (1953), involved the appropriations restrictions of Article III, § 52, which are not at issue in this case. The constitutional problem in *McKeldin* was that the Legislature paid for a supplemental appropriation with general funds rather than a designated tax as required by Article III, § 52(8). *See* 203 Md. at 97-101. SB 3 is not a supplemental appropriations bill that must be specially funded.

[9] The General Assembly's lawmaking power is, however, subject to the voters' authority to reject certain laws through the referendum process of Article XVI.

D. HB 4 Proposes A Permissible Constitutional Amendment.

Finally, petitioners point out that the Constitution does not currently restrict video lottery terminals. (Petitioners' Br. at 20.) From this they argue that the General Assembly should not "be permitted to . . . clutter[] up the Constitution with needless amendments." (*Id.*)

Article XIV, § 1 of the Constitution requires that each amendment proposed by the General Assembly must "embrace[] only a single subject." Beyond that, "[t]he legislature is entrusted with broad discretion in proposing amendments to the Constitution." *Andrews v. Governor*, 294 Md. 285, 297 (1982); *see Hillman*, 183 Md. at 648 ("There is nothing in the Constitution to prevent the Legislature from making as many proposals [under Article XIV] as it chooses."). "[T]here are few, if any, restrictions on what may be included in [the] state constitution." 80 Md. Op. Att'y Gen. 151, 1995 WL 709350, at *2; *see* 16 Am. Jur. 2d *Constitutional Law* § 20 (permissible constitutional amendments "cover a wide (if not limitless) range of subjects").

Petitioners, moreover, misunderstand the effect of the amendment proposed in HB 4. Instead of simply authorizing slots, the amendment, if approved, will restrict the number of video lottery operation licenses to five, require that the licenses be for the primary purpose of raising revenue for education, limit the total number of video lottery terminals to 15,000, designate the exclusive locations for video lottery terminals, and make video lottery facilities subject to local planning and zoning laws. These restrictions may be eased (and additional

forms of commercial gaming may be introduced) only if authorized by a majority of voters at a referendum. (E. 409-11.) The amendment proposed in HB 4 thus has a greater effect than ordinary legislation could have: If approved by the voters, the amendment will limit the General Assembly's future power to legislate on the subject of commercial gaming, and give the voters an additional referendum power. HB 4 proposes a real constitutional change.

Petitioners are wrong when they say that the 2007 Extraordinary Session was "fully empowered to approve the entire slots package" without any participation by the people. (Petitioners' Br. at 20.) Because HB 4 proposes to limit the authority of future Legislatures to regulate commercial gambling as the Constitution now allows, the bill had to be submitted to the voters as a constitutional amendment. *See Board of Supervisors of Elections for Anne Arundel County v. Attorney General*, 246 Md. 417, 428-29 (1967) ("[T]he general power of a state legislature to make, alter and repeal laws, pursuant to the constitution by which the people created the legislature, does not include the power or the right to make or remake the fundamental law, the constitution."). Contrary to petitioners' assertion, this is *not* a situation in which the General Assembly "burden[ed] the public with a decision" that the Legislature could itself have made. (Petitioners' Br. at 17.)

HB 4's status as a proposed constitutional amendment has political as well as legal implications. If HB 4 were merely legislation authorizing an expansion of commercial gambling, petitioners' failure to persuade their fellow legislators during the special session

would have been the end of the matter.[10] Because HB 4 proposes a constitutional amendment, however, petitioners have an opportunity to present their arguments directly to the people of Maryland. In rejecting petitioners' unprecedented theories as to why the voters should be denied a say on the slots issue, this Court will redirect petitioners' energies to the November ballot question – on which they should have been focused all along.

II. THE ENACTMENTS OF THE SPECIAL SESSION MAY NOT BE INVALIDATED UNDER ARTICLE III, § 25.

Petitioners further argue that all Acts of the 2007 Extraordinary Session are void under the adjournment restriction of Article III, § 25. (Petitioners' Br. at 27-31.) The circuit court correctly determined that this argument has "no merit." (E. 25.) Petitioners cannot properly invoke a provision of the Maryland Constitution that is intended to keep the General Assembly at its legislative work, when they are trying to undo work that the Legislature actually accomplished. Nor is there any basis for a judicial finding that Article III, § 25 was violated during the special session.

---

[10] Petitioners insist that their fellow legislators "rush[ed] to judgment." (Petitioners' Br. at 5.) The special session, though, lasted 22 days. Petitioners' rhetorical theme that the Legislature acted "hastily" and "without slowing down" (*id.* at 8 & n.2) is even harder to take seriously in light of the additional facts that Article III, § 15(1) of the Constitution caps the length of a special session at 30 days, and petitioners are simultaneously arguing that the Senate adjourned for too long during the session.

A. Article III, § 25 Does Not Support The Invalidation Remedy That Plaintiffs Seek.

Article III, § 25 provides in pertinent part that "[n]either House shall, without the consent of the other, adjourn for more than three days, at any one time."[11] Petitioners argue that the Senate violated this provision by adjourning while the House considered bills enacted by the Senate, and that every enactment of the 2007 Extraordinary Session was invalid because the Senate could not return to its business on November 15. In other words, Petitioners contend that the mandatory judicial remedy for enforcing the Constitution's three-day rule is preventing the Legislature from performing its duties. (*See* Petitioners' Br. at 27, 32.)

Petitioners acknowledge the purpose of Article III, § 25: It "keep[s] legislators on the job." (E. 45; *see* Petitioners' Br. at 30.) Like the similar provision in Article I, § 5 of the United States Constitution, Maryland's three-day rule prevents prolonged adjournments by one chamber of the bicameral legislature that could frustrate the other chamber's efforts to address "public exigencies." (Petitioners' Br. at 28 (quoting reports of federal constitutional convention).) The provision "prevent[s] the inconvenience and delay, which would result from the adjournment of one branch for a considerable period, without the consent and knowledge of the other." Cushing, *Elements of the Law and Practice of Legislative Assemblies* § 511 (9th ed. 1874); *see Frame v. Sutherland*, 327 A.2d 623, 626-27 (Pa. 1974)

[11] Article III, § 25 was added to the Constitution in 1851 and was retained in similar form in the Constitutions of 1864 and 1867.

("Because each house is powerless to enact legislation alone, each has a strong interest in insuring that bills passed by it are considered by the other house. The greatest threat to this interest is the possibility that the other house might adjourn, thus disabling itself from the consideration of bill.") (footnote omitted).

Virtually every state has a constitutional provision that echoes Article I, § 5 of the federal Constitution and forbids either legislative chamber from effectively boycotting a legislative session.[12] Yet petitioners have not cited a single instance in the history of our nation in which any federal or state law has been invalidated due to a violation of an adjournment restriction. Courts and state attorneys general have uniformly rejected the invalidation remedy that petitioners ask this Court to adopt. That is the only sensible conclusion, because a rule that impermissible adjournment by one chamber nullifies all legislation enacted after the chamber's return, and effectively terminates a legislative session, would subvert the very purpose of restricting adjournments. The absent chamber's boycott

---

[12] *See* Ala. Const. art. IV, § 58; Alaska Const. art. II, § 10; Ariz. Const. art. IV, pt. 2, § 9; Ark. Const. art. V, § 28; Cal. Const. art. IV, § 7(d); Colo. Const. art. V, § 15; Del. Const. art. II, § 12; Fla. Const. art. III, § 3(e); Ga. Const. art. III, § 4, 1(b); Haw. Const. art. III, § 11; Idaho Const. art. III, § 9; Ill. Const. art. IV, §15; Ind. Const. art. IV, § 10; Iowa Const. art. III, § 14; Kan. Const. art. II, § 8; Ky. Const. § 41; La. Const. art. III, § 10(c); Me. Const. art. IV, pt. 3, § 12; Mass. Const. pt. 2, ch. I, § 2, art. VI & § 3, art. VIII; Mich Const. art. IV, § 21; Minn. Const. art. IV, § 12; Miss. Const. art. IV, § 57; Mo. Const. art. III, § 20; Mont. Const. art. V, § 10(5); Nev. Const. art. 4, § 15; N.J. Const. art. IV, § 4, 5; N.M. Const. art. IV, § 14; N.Y. Const. art. III, § 10; N.C. Const. art. II, § 20; N.D. Const. art. IV, § 7; Ohio Const. art. II, § 14; Okla. Const. art. V, § 30; Or. Const. art. IV, § 11; Pa. Const. art. II, § 14; R.I. Const. art. VI, § 9; S.D. Const. art. III, § 16; Tenn. Const. art. II, § 16; Tex. Const. art. III, § 17; Utah Const. art. VI, § 15; Vt. Const. ch. II, § 6; Va. Const. art. IV, § 6; Wash. Const. art. 2, § 11; W. Va. Const. art. VI, § 23; Wis. Const. art. IV, § 10; Wyo. Const. art. 3, § 15; *see also* S.C. Const. art. III, § 21 (deleted 2007).

would defeat any future action by the other chamber. A provision designed to get legislators back to work would prevent the legislature from doing its work.

In *Frame v. Sutherland*, Pennsylvania's highest court rejected the approach suggested by petitioners here and held that one chamber could not terminate the work of a legislative session by adjourning without the consent of the other chamber. 327 A.2d at 628 ("consent of the House of Representatives is a prerequisite for a valid final adjournment of the Senate"). The Alabama Supreme Court reached the same conclusion in *Opinion of the Justices*, 257 So. 2d 336 (1972), holding that a legislative session continues notwithstanding an impermissible adjournment by one chamber. *Id.* at 339. In *Abbott v. Town of Highlands,* 277 S.E. 2d 820, *review denied,* 283 S.E. 2d 136 (N.C. 1981), the Court of Appeals of North Carolina dismissed "summarily" the argument that adjournment of one chamber of the North Carolina General Assembly, without the consent of the other chamber as required by the North Carolina Constitution, was a basis for invalidating a law. *Id.* at 827 ("Even if the adjournment had been for more than three days, the recess could not serve as the basis for declaring legislation enacted by the General Assembly to be unconstitutional."). Other state court decisions are in accord. *See In re Legislative Adjournment*, 27 A. 324 (R.I. 1893) (adjournment issues "are legislative questions, necessarily left to the decision of the body whose action is proposed, and when decided by such body can only be reviewed by the approval or rebuke of the electors"); *see also Wilson v. City of Fargo,* 186 N.W. 263, 266 (N.D. 1921) (Robinson, J. concurring) (violation of North Dakota's adjournment clause

would not "render void an act that is passed by the unanimous vote of each house and approved by the Governor").

State attorneys general have reached the same conclusion that a violation of adjournment rules does not bar legislative action after the adjournment ends. Minnesota's Attorney General determined "that adjournment of the House alone, whether lawful or not, does not constitute an adjournment of the legislature or the end of the session" and does not "prohibit the transactions of lawful business." Minn. Op. Att'y Gen. 280-A, 1986 WL 288998, at *3.

The Attorney General of Iowa likewise explained that "logic and common sense compel the conclusion" that one chamber may not use a three-day-adjournment rule to bring a legislative session to a halt, because such an interpretation "would mean that either house has power to evade [the three-day rule]." *Opinion No. 78-7-5*, 1978 Iowa Op. Att'y Gen. 573, 1978 WL 17432, at *4. Thus, the Iowa Attorney General stated, "the failure to reconvene within three days does not render it impossible for the two houses to meet again and transact business. Moreover, any action taken at such reconvened session would be valid since otherwise the noncompliance would produce the prohibited adjournment." *Id.*

Opinions of the South Carolina and Idaho attorneys general, interpreting comparable constitutional provisions, are to the same effect. *See Opinion No. 82-83*, 1982 S.C. Op. Att'y Gen. 25, 1982 WL 154993 ("unless both houses adjourned the regular session, that session could not be regarded as officially adjourned"); *Opinion No. 80-12*, 1980 Idaho Op. Att'y

Gen. 57, 1980 WL 97134, at *1 (Senate cannot adjourn "sine die" without concurrence of the House).

This uniform national authority is consistent with the language and structure of the Maryland Constitution. Neighboring provisions of Article III provide specifically that the General Assembly's failure to comply with a required procedure would preclude valid legislation. *See* Md. Const. art. III, § 27(a) ("A bill may not become law" unless read three times); Md. Const. art. III, § 28 ("No bill . . . shall become a law" without a majority vote of both Houses). The absence of such language in Article III, § 25 must be understood as deliberate, and as confirmation that the invalidation remedy petitioners seek is unavailable. *See Simpson v. Moore*, 323 Md. 215, 225 (1991) (where Legislature was aware of a statutory provision that it did not include when drafting a new law, courts "are not free to judicially place in the statute [the] language which is not there."); *County Comm'rs of Dorchester County v. Meekins*, 50 Md. 28, 44 (1878) (applying same canon to Maryland Constitution).

There is nothing novel about interpreting the constitutional time limit on unilateral adjournment as directory, rather than mandatory. Article IV, § 15, for example, requires this Court to file its opinions in writing within three months after argument. In *McCall's Ferry Power Co. v. Price*, 108 Md. 96 (1908), an unsuccessful appellant sought reargument of its case on the ground that the Court issued its opinion after the deadline. This Court held that the three-month rule is directory rather than mandatory and elaborated: "The object of the constitutional provision is to have prompt decisions of causes" and "[i]t certainly would not

be within either the letter or the spirit of this provision" to require that the Court's consideration of a case be re-started just because an opinion was not on file within three months, "thereby causing further delay." *Id.* at 113. *See also Snyder v. Cearfoss,* 186 Md. 360, 370 (1946) (circuit court's failure to issue decision within two months as required by Article IV, § 23 does not deprive court of jurisdiction). So too, it "would not be within either the letter or the spirit of" Article III, § 25 to require a reconvened General Assembly to re-pass legislation that was enacted when legislators returned to work after an adjournment.

Petitioners are wrong in suggesting that the dismissal of their adjournment claim gives legislators license to "disregard the law without consequence." (Petitioners' Br. at 30.) Just like judges and officers of the Executive Branch, Delegates and Senators are sworn to abide by the Constitution. Md. Const. art. I, § 9. Disputes concerning compliance with constitutional procedures may be presented for resolution within the House or Senate – as the lead petitioner in this case actually did. (E. 124-26.) *See generally Wilson,* 186 N.W. at 266 (Robinson, J., concurring) ("all such rules of procedure, whether in the Constitution or out of it, are addressed to the members"); *Opinion No. 78-7-5*, 1978 WL 17432, at *4 (remedy for noncompliance with adjournment clause "must be left to the members of the General Assembly themselves"); *see also* Md. House Rule 11(a) (Speaker of the House is final authority on points of order, unless reversed by a majority of members). In addition, obstructionist adjournments could be sanctioned by the other legislative chamber, or even by the Governor, through the give-and-take of the legislative process. Finally, the voters have

the power to remove legislators at the next general election, and they surely would exercise that power if the Senate or House thwarted necessary lawmaking by adjourning in violation of Article III, § 25. *See In re Legislative Adjournment*, 27 A. at 326 (adjournment longer than allowed under constitutional adjournment clause "can only be reviewed by the approval or rebuke of the electors").

B. The Merits Of Petitioners' Adjournment Claim Are Not Justiciable.

Even if this Court *could* grant the remedy petitioners' seek, addressing the merits of petitioners' adjournment claim would be unwarranted. The General Assembly alone is vested with the power to "determine the rules of its own proceedings." Md. Const. art. III, § 19. In light of that express constitutional delegation, this Court has rightly been reluctant to examine the manner in which the General Assembly undertakes to comply with constitutional requirements. *Thrift v. Towers*, 127 Md. 54 (1915), for instance, explains that courts should not be involved in "going into the details of legislative procedure, critically examining the methods of a co-ordinate department of the government, and declaring that its members have failed or refused to obey constitutional directions or commands as to the manner in which they should perform their duties." *Id.* at 61-62. *Ridgely*, 119 Md. 567, similarly deemed it "definitely settled in this State that an authenticated statute cannot be impeached" by either legislative journals or parol evidence – the two sources of evidence on which petitioners rely in advancing their adjournment argument.

Richards Furniture involved an attempt, similar to petitioners', to invalidate authenticated legislation based on implications drawn from testimony by the Chief Clerk of the House. *See* 233 Md. at 261. Relying on *Ridgely* and other authorities, the Court rejected that effort and reaffirmed that a law that has been duly authenticated "bears a strong presumption that all constitutional provisions have been complied with, and it has been validly enacted into law"; parol evidence such as deposition testimony of the Chief Clerk cannot overcome that presumption. *Id.*; *see Mayor and City Council of Baltimore v. State*, 281 Md. 217, 238 (1977) (legislator's affidavit purporting to show that bill passed after midnight on last authorized day of a legislative session was "insufficient to rebut the presumption of validity which has attached to [an authenticated Act]," where the authenticated bill was supported by journal entries showing passage before midnight).

The six bills challenged by the petitioners have each been duly authenticated. (E. 215-467.) Under this Court's decisions, the bills bear a strong presumption that all constitutional provisions have been complied with, and that they have been validly enacted. Indeed, particularly given the absence of a judicial remedy as described above, the issue whether the Senate's adjournment was consistent with Article III, § 25 rises to the level of a political question, "which is not justiciable . . . because of the separation of powers provided by the Constitution," *Burris v. State*, 360 Md. 721, 744-45 (2000) (quoting *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969)), and its constitutional commitment to the Legislature, *see*

Lamb v. Hammond, 308 Md. 286, 293 (1987) (citing *Powell* and *Baker v. Carr*, 369 U.S. 186 (1962)).

That the General Assembly believed the Senate's adjournment, and the Legislature's subsequent enactments, were constitutional is reflected by: the House Journal for November 12, 2007, which, consistent with Article III, § 22 of the Constitution, shows that the Senate requested consent for its adjournment until November 15 and the House granted the requested consent (E. 191.); the fact that the House and Senate conducted business after the Senate returned to session on November 15, rather than requesting that the Governor call a new special session; the House Parliamentarian's rejection of Delegate Smigiel's argument that Article III, § 25 forbade further proceedings (E. 124-26); and the presentation of authenticated bills to the Governor for his signature (E. 215-467). The Governor indicated his agreement by signing the Acts of the special session. This Court should not look behind the political branches' shared determination that the Legislature was validly in session after the Senate returned from its adjournment.[13]

[13] It is doubly clear that the Court should not examine whether the Legislature complied with its own internal rules. *See Heaton v. Mayor and City Council of Baltimore*, 254 Md. 605, 613 (1969) ("[E]ach branch of the Legislature has the power to make its own rules, subject to the constitutional provisions, and may change and suspend its rules at will; and generally, courts will not inquire whether such rules have been complied with in the enactment of the statute") (citing *Baltimore Fid. Warehouse Co. v. Lumber Co.,* 118 Md. 135, 149 (1912)).

C. Petitioners' Attacks On The Leadership Of The General Assembly Are Unsupported By The Evidence.

Despite all these established principles foreclosing judicial review, petitioners have laced their filings in this case with inflammatory accusations of constitutional wrongdoing. The circuit court likewise issued misstatements of fact and unfounded dicta. Against that background, the members of this Court understandably may have an interest in the facts surrounding the Senate's adjournment. Those facts are nothing like what petitioners and the circuit court suggest.

The only document in this case that has significance under Article III, § 25 is the House's message "consenting to the Senate adjourning until Thursday, November 15, 2007." (E. 157.) The House's message was dated November 12, 2007. (*Id.*) It is undisputed that the message was prepared by the office of the Chief Clerk of the House on that date and that the message is in the "customary" form. (E. 108; *see* E. 166-67, 194-95.) The message granting consent was entered into the House Journal for November 12, 2007. (E. 191.) The petitioner legislators and other members of the House of Delegates were aware of the consent. (E. 109, 124-26.) These record facts resolve any constitutional question about the Senate's adjournment.

Petitioners would have this Court look instead at the Senate's request for consent, which lacks any constitutional status. (Article III, § 25 requires "the consent of the other [chamber]," without establishing any requirement as to whether there must be a request from the adjourning chamber, or what form such a request should take.) The Senate's request is

the document to which petitioners laboriously attach the epithets "backdated" and "fabricated." (Petitioners' Br. 9, 10, 13, 14, 28, 31.) Yet there is *no evidence* of any bad-faith conduct by any member of the legislative staff (much less a member of the legislative leadership) in preparing the Senate's message. The record shows that assistants to the Chief Clerk of the House drafted the document on behalf of the Senate Secretary in light of his absence from Annapolis, using Senate stationary in accordance with the Senate Secretary's direction. (E. 103-08.) The House staff decided that the most appropriate date for the Senate's message was the last day on which the Senate had been in session (November 9), rather than the actual date (November 12), which was a day on which the Senate was adjourned. (E. 104.) It was no secret to anyone that the Senate leadership determined on November 12 to extend that chamber's adjournment until November 15, or that the Senate sent its message dated November 9 on November 12. (E. 155, 191.)

Petitioners' politically charged rhetoric thus does not match the facts. More important, the Constitution provides no basis for disapproving the consent provided by the House. *See Opinion of the Justices*, 257 So. 2d at 338 (emphasizing that, under Alabama's version of Article III, § 25, "[a] particular mode of manifestation of such consent [to an adjournment of more than three days] is not constitutionally required"). Principles of deference and comity instead counsel against second-guessing the procedures that the Legislative Branch used to conduct its routine business.

CONCLUSION

For the foregoing reasons, the Declaratory Judgment of the Circuit Court for Carroll County (E. 33-34) should be affirmed with respect to the challenged enactments of the 2007 Extraordinary Session.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

AUSTIN C. SCHLICK
SANDRA B. BRANTLEY
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for the State Respondents

February 28, 2008

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

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2007

No. 121

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

Petitioners,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2008, two copies of the Brief of Petitioner in this matter were sent by first-class mail, postage prepaid, to Irwin R. Kramer, Kramer & Connolly, 500 Redland Court, Suite 211, Owings Mills, MD 21117, counsel for Petitioners and Terry Berger, Esquire, counsel for Respondent Carroll County Board of Elections, at Suite 500, 9141 Reisterstown Road, Owings Mills, MD 21117

_____

Austin C. Schlick
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6324