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IN THE SUPREME COURT OF MARYLAND

September Term, 2024

No. 26

MARYLAND STATE BOARD OF ELECTIONS, *et al.*,

Appellants,

v.

ANTHONY J. AMBRIDGE, *et al.*

Appellees.

On Appeal from the Circuit Court for Anne Arundel County
(Hon. Cathleen M. Vitale, Presiding)

APPELLANT MCB HP BALTIMORE LLC'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……………………………..…………………….....…….iii

STATEMENT OF THE CASE………………………..…………………….….….…1

A. Background…………………………………………………………………3

QUESTIONS PRESENTED ……………………………………………….....……6

STATEMENT OF FACTS AND PROCEEDINGS BELOW………….…………………6

A. Article I, Section 9 of the Baltimore City Charter…………….……………………7

B. Question F……………………………….……………………………....…9

C. Appellees' petition for judicial review……………………..………………12

STANDARD OF REVIEW………....…………….……………………….……..……17

ARGUMENT………………………………….……...……….…………..……17

I. Appellees' judicial review action was not the proper method of challenging the language or legality of a proposed charter amendment……...18

II. Appellees' challenge to Question F is barred by the doctrine of laches and the statutory limitations provisions in EL § 12-202……...…………...….23

III. The language of Question F meets the qualifications under the Election Law Article…………………………………………...…………….27

IV. Question F is a lawful attempt to amend Article I, Section 9 of the City Charter……………………………………………………………………...37

V. If Question F is not proper charter material, then Article I, Section 9 is also not proper charter material and is necessarily invalid………...………42

CONCLUSION……………………………………………………………………..46

APPENDIX……………………………………………………………………….App. 1

TABLE OF AUTHORITIES

Cases

Ademiluyi v. Md. State Bd. of Elections, 458 Md. 1 (2018)……..…………………17, 23, 24

Anne Arundel Co. v. McDonough, 277 Md. 271 (1978) …….……………………..…..29, 30

Bd. of Supervisors of Elections v. Smallwood, 327 Md. 220 (1992).…….…………….…..40

Bryant v. Parker, 580 S.W.3d 408 (Tex. App. 2019)…….…………….……………..31

Burger v. Judge, 364 F. Supp. 504 (D. Mont. 1973)………………...…………………..32

Cabrera v. Penate, 439 Md. 99 (2014). …….……….……………………………………..17

Cheeks v. Cedlair Corp., 287 Md. 595 (1980)..…...………………………..8, 9, 38, 39, 41

Chicago v. McKinley, 176 N.E. 261 (Ill. 1931).……….………….…………………………..46

Commerce Oil Refining Corp. v. Miner, 170 F. Supp. 396 (D.R.I. 1959). …….…….….46

Donaldson v. Dep't of Transp., 414 S.E.2d 638 (Ga. 1992)……………………....…..32

Dutton v. Tawes, 225 Md. 484 (1961)………………………………………….…..32

Griffith v. Wakefield, 298 Md. 381 (1984)……………………..…….…………..39, 40, 41

Hill v. Ashcroft, 526 S.W.3d 299 (W.D. Mo. 2017) ……………….………….……………..31

In re Proposed Initiative Concerning Drinking Age, 691 P.2d 1127 (Colo. 1984) ……..31

Kelly v. Vote Know Coalition, Inc., 331 Md. 164 (1993) …………………..28, 29, 33, 34

Kohler v. Tugwell, 292 F. Supp. 978 (D. La. 1969)……………….……………………..32

Lamone v. Schlakman, 451 Md. 468 (2017) …...….……………………..…...…..17, 24

Lassiter v. Atlantic City, 90 A. 675 (N.J. 1914) ……………………………………..…….46

Liddy v. Lamone, 398 Md. 233 (2007) …….…………...…………………….……..24, 25

Matter of Proposed Constitutional Amendment Under the Designation "Pregnancy" 757 P.2d 132 (Colo. 1988) ……………………..…………………..30, 31

Miami-Dade Cnty. v. Village of Pinecrest, 994 So. 2d 456 (Fla. App. 2008)……..……..31

Ross v. State Bd. of Elections, 387 Md. 649 (2005)…….…………………………..19, 20, 25

Save our Streets v. Mitchell, 357 Md. 237 (2000).…………………..……………………..40

Stop Slots Md 2008 v. State Bd. of Elections, 424 Md. 163 (2012)..………..28, 30, 33, 37

Surratt v. Prince George's Cnty., 320 Md. 439 (1990)………..…….……………………29, 30

Statutes

Md. Code Ann., EL § 6-205………………………..……..…….…………………….38

Md. Code Ann., EL § 7-103..………..…………………….…………...…..12, 13, 22, 28, 33

Md. Code Ann., EL § 9-203…………………………..……...…….…………………….28

Md. Code Ann., EL § 9-205…………………………..…….…………………..5, 20, 36

Md. Code Ann., EL § 9-206…………………………..……..…….……………………..19

Md. Code Ann., EL § 9-207…………………………..……...…….……………………..19

Md. Code Ann., EL § 9-209…………………………..……..…….………………...*passim*

Md. Code Ann., EL § 12-202………..…………….……..…….……….…….*passim*

Md. Code Ann., LU § 10-202………..………….……..…….…………………..41

Constitution and Charter

Baltimore City Charter, Article I, Section 9…………..………..………………..…*passim*

Baltimore City Charter, Article II, Section 15………..……..………………………..38

Baltimore City Charter, Article II, Section 49………..……..…….……………………..45

Md. Const., Article XI-A, § 1 ………..………………………...…………………..8

Md. Const., Article XI-A, § 3 ………..…………………….…….……………………..15

Md. Const., Article XI-A, § 5 ……………………………………………………………..11, 37

Md. Const., Article XVI, § 3 ……………………………………………………………..27

Md. Const., Article XVI, § 5 ……………………………………………………………..30

Other Authority

79 Attorney General Op. 154 (1994)……………………………………………………..32, 33

Baltimore City Council Bill No. 1748………………………………………………………..45

Baltimore City Council Bill No. 16-0660 (Resolution 16-029)…………………………..9

Baltimore City Council Bill No. 23-0444…………………………..10, 11, 26, 34, 41, 42

Baltimore City Council Bill No. 23-0446…………………………………………..10, 41

Baltimore City Council Bill No. 23-0448…………………………………………..10, 41

STATEMENT OF THE CASE

MCB HP Baltimore LLC ("MCB") is the owner of certain improvements and developer of certain areas within Inner Harbor Park in Baltimore City commonly known as "Harborplace." The breadth and scope of Inner Harbor Park is defined by Article I, Section 9 of the Baltimore City Charter.

MCB has intervened in this case and filed this appeal to prevent a "dead referendum" from occurring that would directly impact the Harborplace redevelopment and the revitalization of Baltimore's Inner Harbor. Such a dead referendum is virtually unprecedented. It would undermine public confidence in the election system and potentially distort the results of the "Harborplace referendum.

The electorate has now been told by the trial court that while they can vote on Question F, their votes will be nullity. This may well cause many voters to either skip Question F altogether or, even worse, to vote against it simply because the trial court has declared it invalid. The potential for confusion is so great that the State Administrator of Elections has issued a statement to all City voters encouraging them "to vote the entire ballot."[1]

MCB has consistently supported the right of Baltimore City voters to vote on this question. Question F is a valid attempt by the City Council to narrow the parkland dedication requirements of Art. 1, Sec. 9, subject to voter approval. Baltimore City voters should have the right to vote on Question F without being confused or burdened by a

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[1] @JaredDeMarinis, X (Sept. 20, 2024, 3:34 p.m.), https://x.com/JaredDeMarinis/status/1837213683963097250.

judicial decision that preemptively tells them that their votes would not count and the confusion that would naturally follow.

Appellees improperly used the "content and arrangement" provision of Election Law Article, § 9-209(a) to challenge the language of the ballot question, which had been prepared and submitted by the City Solicitor on August 2, 2024. (E. 35, 40). Additionally, Appellees improperly used the same § 9-209(a) "content and arrangement" challenge to raise the "charter material" question. This is plainly outside the "content and arrangement" authority of the State Board of Elections ("the State Board) or its overall purview. The State Board made this clear in the circuit court, appropriately focusing on the procedural issues. As a result, the court only heard one side of the merits of these arguments.

Nevertheless, the court wrongly determined that the ballot language and the "charter material" challenge were proper "content and arrangement" challenges under EL § 9-209(a). (E. 26-29). Moreover, the court declined to consider any remedies to the ballot question issue because of its "charter material" determination. (E. 30).

The extreme lateness of both the "charter material" and "content and arrangement" challenges to the language of Question F were entirely avoidable. Appellees waited until after the ballots were being printed to raise the "charter material" issue, even though the City Council passed the resolution more than six months ago, on March 4, 2024, and Appellees were aware of the language of the resolution at least as of April 19, 2024.[2] (E.

[2] Appellees had been actively working against the development approval process and testifying in opposition to the development at City Planning Committee meetings. *See*

22, 39, 65). Similarly, Appellees waited 34 days after the City Solicitor certified the ballot question to raise the ballot language challenge. (E. 31, 40). Both challenges violated the ten-day requirement in EL §12-202, which was enacted to avoid precisely this type of situation.

A. Background.

As part of the development approval process, both Baltimore City and MCB determined that certain areas set aside for retail and other commercial uses within Inner Harbor Park needed to be expanded to facilitate the redevelopment of Harborplace.

The City Council adopted such an amendment earlier this year, on March 4, 2024, along with other development approvals, and referred the charter amendment to the voters for ratification in the November 5 general election in what is now Question F. (E. 37-39). No challenge to the amendment itself was filed in the ensuing five months.

Then, three weeks ago, on September 5, Appellees filed a petition for judicial review in the Circuit Court for Anne Arundel County challenging the ballot language prepared by the City Solicitor. *See Anthony J. Ambridge, et al. v. Maryland State Board of Elections*, Case No. C-02-cv-24-002246. (E. 31). Four days later, after the ballots were already being printed, Appellees amended their challenge to also allege the charter amendment was not proper "charter material" and therefore invalid. (E. 33).

Lorraine Mirabella, "Opponents of Harborplace redevelopment in Baltimore form coalition to block plan," The Baltimore Sun (Jan. 12, 2024), https://www.baltimoresun.com/2024/01/12/opponents-of-harborplace-redevelopment-in-baltimore-form-coalition-to-block-plan/.

This late amendment became the centerpiece of the court's opinion below, which determined that Question F was not proper "charter material." (E. 23-26). Although the question would still appear on the ballot, the court ordered election officials not to certify the results of Question F after the votes were counted. (E. 30). The court also determined that the ballot language itself was insufficient but declined to attempt to fashion any remedy because of its determination that the amendment itself was not proper "charter material." (E. 30).

The court rejected the State Board's argument that EL § 9-209, which is limited to challenging the "content and arrangement of the ballot" or "to correct any administrative error," was not a vehicle to challenge the legal sufficiency of a ballot question's language or the validity of the charter amendment. (E. 152, 160). The court rejected the State Board's argument that Appellees' attempt to bring a "charter material" challenge under EL § 12-202, more than five months after Baltimore City passed the resolution authorizing the charter amendment, was barred by laches. (E. 21-23).

MCB's position is that Question F represents a lawful attempt by the Council to amend portions of Article I, Section 9 of the Charter. But if Question F is not proper "charter material," as the court ruled, then neither is the underlying charter provision, Art. I, Sec. 9.

Question F cannot be viewed in a vacuum. The analysis of the validity of Art. I, Sec. 9 and the amendment to it are inseparable. The court's "charter material" ruling is predicated upon parkland dedication not being an issue concerning the "form and

structure" of the government. (E. 23-26). So it cannot be that Question F is invalid but the provision it seeks to amend, Art. I, Sec. 9, is somehow valid. Both cannot be.

But these should be questions for another day. Appellees waited too long, and they improperly used the "content and arrangement" vehicle to raise the charter material and the ballot language issues. The "charter material" challenge should not have been brought under a judicial review of "content arrangement" at the last minute. Instead, it should instead have been brought as a declaratory judgment action shortly after it was qualified by the Mayor and Council on March 11, 2024.

Any party with standing can challenge the validity of Art 1., Sec. 9, the parkland dedication provision of the Charter. This can occur whether the electorate ratifies Question F or not. But the issue here is different: because the "charter material" challenge was untimely and because it relied upon the improper vehicle of a "content and arrangement" challenge, the court should not be allowed to order a "dead referendum" after the ballots have been printed.

This Court need not and should not reach the merits of Appellees' "charter material" challenge. But if it does, the Court should find that Question F is a valid attempt to narrow the reach of Art. I, Sec. 9. And if this Court were to determine that Question F is improper charter material, then it must also determine that Art. I, Sec. 9 in its entirety is invalid.

For similar reasons, the Court should reverse the circuit court's ruling as to the ballot language issue because it was filed too late and under the improper "content and arrangement" vehicle. Should the Court reach the merits of the ballot language issue, the

Court should reverse the circuit court's decision because the ballot language fairly apprises the voters of the nature of Question F.

QUESTIONS PRESENTED

1. Whether Appellees could challenge the language and legality of Question F through a petition for judicial review brought pursuant to EL § 9-209.

2. Whether the circuit court erred in finding that Appellees' EL § 12-202 challenge was not barred by the doctrine of laches.

3. Whether the circuit court erred in finding that Question F is not proper "charter material" and therefore violates Article XI-A, § 3 of the Maryland Constitution.

4. Whether the circuit court erred in finding that the language of Question F does not satisfy the requirements of EL § 9-205.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

MCB is the owner of certain improvements and developer of certain areas of the reimagined Harborplace and is seeking to deliver revitalized public space for Baltimore. After struggling for years, and after Harborplace's previous owner Ashkenazy Acquisition Corporation defaulted on its mortgage, Harborplace was put into a court-appointed receivership in May 2019.[3] MCB reached an agreement to acquire Harborplace in April 2022.[4] The Baltimore City Circuit Court approved the sale of Harborplace to MCB in December 2022.[5]

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[3] Hallie Miller, Adam Willis, and Brenda Wintrode, "Harborplace developer pitches 900 residential units, rooftop park at Inner Harbor," The Baltimore Banner (Oct. 30, 2023), https://www.thebaltimorebanner.com/economy/growth-development/harborplace-developer-design-plans-E2XBQBIQX5FGXPUHHO5P2OKVPU/.
[4] Giacomo Bologna, "Judge approves deal to sell Harborplace to Baltimore developer," The Baltimore Sun (Dec. 20, 2022), https://www.baltimoresun.com/2022/12/20/judge-approves-deal-to-sell-harborplace-to-baltimore-developer/.
[5] *Id.*

The reimagined development includes more public open space, new parks, and a renovated waterfront promenade for residents, and space for community events, arts, and culture.[6] MCB's development plan involves increasing and revitalizing ~18.7 acres of public space, which includes the addition of ~4.8 acres of new parks and public spaces. MCB's plan includes, but is not limited to, ~1.4 acres of new promenade; ~2.3 acres of new park space through the Park at Freedoms Port; ~5.5 acres of enhanced activation space at West Shore Park; and ~1.1 acres of elevated public space. [7]

The plans for the mixed-use development include four new buildings: a 200,000 square foot commercial building on Pratt Street; a 200,000 square foot retail and commercial building on Pratt Street; two conjoined residential towers on Light Street with ~900 residential dwelling units and retail and commercial uses; and an ~8,500 square foot retail building in a 30,000 square foot park and 2,000-person capacity amphitheater on Light Street.[8]

A. Article I, Section 9 of the Baltimore City Charter.

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[6] "Governor Moore and Mayor Scott Join MCB Real Estate to Unveil Design Renderings for a Reimagined Harborplace," Gensler (Oct. 30, 2023), https://www.gensler.com/press-releases/reimagined-baltimore-harborplace-renderings.

[7] *Id.*; Ed Gunts, "$500M Harborplace redevelopment plan calls for two residential towers, offices, shops, restaurants and public space," Baltimore Fishbowl (Oct. 30, 2023), https://baltimorefishbowl.com/stories/500m-harborplace-redevelopment-plan-calls-for-two-residential-towers-offices-shops-restaurants-and-public-space/.

[8] Gunts, *supra* note 7. In April 2023, the Board of Estimates approved a three-year extension for the Harborplace ground lease. *See* Gunts, Baltimore Fishbowl (April 19, 2023), https://baltimorefishbowl.com/stories/a-milestone-baltimore-city-amends-the-ground-lease-for-harborplace-paving-the-way-for-its-redevelopment/.

Pursuant to Article XI-A, § 1 of the Maryland Constitution, Baltimore voters adopted a charter in the 1918 general election. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 599 (1980). Sixty years later, in 1978, the Baltimore City voters adopted a legislatively-proposed charter amendment permitting the use of 3.2 acres of public parkland to be developed by the Rouse Company as Harborplace, provided that an additional 26 acres remain available as public parkland.[9] (App. 1).

The 1978 referendum was widely publicized and heavily contested.[10] The amendment essentially involved a compact with City voters that future parkland dedication would be enshrined in the charter and could not be changed without a charter amendment which would be subject to voter approval in a referendum.[11]

The language of the 1978 amendment was contained in Resolution No. 11 (Council No. 1748), which set forth certain areas along the waterfront, the Inner Harbor Park, dedicated to "public park uses" and other areas that "shall be set aside" for "eating places and other commercial uses." A copy of the 1978 amendment is included in the Appendix. (App. 1-2). The amendment was approved by voters that year by a vote of

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[9] Yvonne Wenger, "To build cafes in Baltimore's Inner Harbor, city voters must OK," The Baltimore Sun (June 29, 2019), https://www.baltimoresun.com/2016/06/18/to-build-cafes-in-baltimores-inner-harbor-city-voters-must-ok/.
[10] *Id.*
[11] The 1978 referendum, Question K, was passed by the Council and advocated by Harborplace proponents. A citizen-initiated referendum proposing a charter amendment that would have blocked Harborplace, Question N, failed at the same general election. *Id.* Voters were clearly able to distinguish between and understand the differences between Question K, which passed, and Question N, which failed.

54%-46%. Later, as part of a charter review, this provision was recodified in the Charter as Article I, Section 9 (“Inner Harbor Park”).

The 1978 Harborplace amendment was proposed two years before this Court adopted the “charter material” test in *Cheeks*. 287 Md. at 597. *Cheek*s involved a citizen-initiated rent control amendment that the Court invalidated. *Id.* at 597, 608. The validity of the 1978 Harborplace amendment has not previously been challenged since *Cheeks*.

Eight years ago, this same charter section was amended in connection with a restaurant proposal which would be partially located on parkland dedicated in Art. 1, Sec. 9. (E. 130); (App. 3). On June 13, 2016, the City Council adopted Resolution 16-029 (Council Bill 16-0660), which proposed a charter amendment to amend Art. 1, Sec. 9 to expand the area in the Inner Harbor where “outdoor eating places” could be located. (App. 3). The charter amendment was proposed to permit construction of two outdoor cafes, one at Rash Field and the other at West Shore Park. (App. 3).

This 2016 amendment, which appeared as Question “H” on the ballot in the 2016 general election, was ratified by voters. (E. 19). No legal challenges ensued either before or after ratification of Question H.

B. Question F.

Since 2023, MCB’s redevelopment of the reimagined Harborplace has been proceeding through the Baltimore City development process.[12] During this process, MCB

[12] Giacomo Bologna, “City panel says Baltimore isn’t rushing the Harborplace redevelopment,” The Baltimore Banner (Dec. 21, 2023), https://www.thebaltimorebanner.com/economy/growth-development/city-panel-says-

and the City identified that the City Charter and the City Code should be amended to confirm allowable uses and expand certain areas set aside for such uses. Both the City and MCB agreed that the areas set aside for retail and other commercial uses needed to be expanded to facilitate the reimagined Harborplace development.

The City Council considered other changes to City zoning laws to advance the Harborplace development. On March 13, 2024, the City Council considered and enacted Bill 23-0446, which removed the height restriction in the C-5-IH Inner Harbor Subdistrict.[13] That same day, the City Council also enacted Bill 23-0448, which amended certain development restrictions, controls, and procedures in the Urban Renewal Plan for Inner Harbor Project I, including changing the use designation in certain development parcels under the Urban Renewal Plan.[14] Both bills passed.[15] Neither were petitioned to referendum.

At the same time, the City Council adopted Council Bill 23-0444 (Ordinance 24-318), which addressed the parkland dedication issue in the City Charter and proposed amending Art. I, Sec. 9 to clarify the types of uses allowed north of Conway Street in

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baltimore-isnt-rushing-the-harborplace-redevelopment-UIPOHYHTPNGGNINBN5MZ7WJ4C4/.

[13] https://baltimore.legistar.com/LegislationDetail.aspx?ID=6396875&GUID=51C55387-021A-4AC4-8B9D-4CC7F869A5BE&Options=ID|Text|&Search=inner+harbor (last accessed Sept. 25, 2024).

[14] https://baltimore.legistar.com/LegislationDetail.aspx?ID=6396874&GUID=F5B0FFC9-F7A2-4084-AC44-74E0AEFB7C61&Options=ID|Text|&Search=inner+harbor (last accessed Sept. 25, 2024).

[15] "Baltimore City Council approves trio of bills for redevelopment of Harborplace, WBAL (March 5, 2024), https://www.wbal.com/baltimore-city-council-approves-trio-of-bills-for-redevelpment-of-harborplace/.

Inner Harbor Park, including multifamily development, and modify the ground leased area. (E. 37). The City Council followed the same procedures as it had in 2016 when Art. I, Sec. 9 was amended to permit the two outdoor cafes. It followed the procedures established by Article XI-A of the Constitution of Maryland and codified within Article II of the City Charter of Baltimore City, which states that "[a]mendments to any charter adopted by the City of Baltimore…may be proposed by a resolution of the Mayor of Baltimore and the City Council of the City of Baltimore…An amendment so proposed shall be submitted to the voters of the City or County at the next general or congressional election." Md. Const., Art XI-A, § 5.

Section 2 of Council Bill 23-0444 stated, "[t]hat in enacting this Resolution of the Mayor and City Council, it is the intent of the Mayor and City Council to preserve the public park known as Rash Field and to preserve the existing development restrictions within the Inner Harbor Park south of Conway Street." (E. 38). Section 3 stated that the proposed amendment would be "submitted to the legal and qualified voters of Baltimore City, for adoption or rejection, in accordance with Article XI-A, § 5 of the Maryland Constitution, in the form specified by the City Solicitor." (E. 38). On March 4, 2024, the Baltimore City Council passed Bill 23-0444 by a vote of 14 to 1. (E. 37-39). On March 11, 2024, the Mayor signed Council Bill 23-0444, which was approved for legal sufficiency by the Chief Solicitor of the Baltimore City Law Department on March 12, 2024. (E. 39). No challenge was filed at that time.

As a charter amendment, Bill 23-0444 was subject to ratification by the Baltimore City voters. *See* Md. Const., XI-A, § 5. On August 2, 2024, the City Solicitor transmitted

a letter to the State Board certifying the language of the ballot question pursuant to EL § 7-103(c)(3)(i). (E. 40). The information transmitted was all that was required by § 7-103(b): the question letter, the designation of the source of the question, a descriptive title, and the voters' choices. Question F states:

> Question F is for the purpose of amending the provision dedicating for public park uses the portion of the city that lies along the Northwest and South Shores of the Inner Harbor, south of Pratt Street to the water's edge, east of Light Street to the water's edge, and north of the Key highway to the water's edge, from the World Trade Center around the shoreline of the Inner Harbor including Rash Field with a maximum of 4.5 acres north of an easterly extension of the south side of Conway Street plus access thereto to be used for eating places, commercial uses, multifamily residential development and off-street parking with the areas used for multifamily dwellings and off-street parking as excluded from the area dedicated as a public park or for public benefit.

(E. 41-43).[16] On September 2, 2024, as part of its "content and arrangement" decisions, the State Board certified Question F in the 2024 ballot for Baltimore City. (E. 44).

C. Appellees' petition for judicial review.

On September 5, 2024, Appellees filed a petition for judicial review of the State Board's "content and arrangement" decision in the Circuit Court for Anne Arundel County. (E. 31). This petition challenged the State Board's certification of Question F based on allegedly deficient ballot language. The next day, Appellees filed an amended petition. (E. 10). Three days later, on September 9, 2024, Appellees filed a second amended petition for judicial review, raising for the first time the "charter material" issue.

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[16] The version of Question F that was submitted to the State Board on August 2, 2024 did not include "Key" before "highway." (E. 41-43) The City confirmed with the State Board that "Key" should be added. (E. 43).

(E. 36). These claims arose under the umbrella of a petition under EL § 9-209 challenging the State Board's "content and arrangement" decisions and EL §12-202. (E. 21-23).

As amended, Appellees' "content and arrangement" challenge sought relief on two grounds: 1) The certified ballot language of Question F would confuse and mislead voters; and 2) Question F did not constitute valid "charter material" because it did not alter the "form and structure" of the local government. (E. 91).

The challenge to the State Board's "content and arrangement" decision created immediate issues. By the State Board's own admission, it has no authority or control over issues involving the underlying validity of the charter amendment, such as the "charter material question." (E. 146-48). For this reason, the circuit court only heard the Appellees' arguments about "charter material."

Similarly, the authority to draft and certify legislatively-initiated ballot questions in Baltimore City rests exclusively with the City Solicitor. EL § 7-103(c)(4)(1). The State Board has no authority, either in its "content and arrangement" decision or otherwise, to alter the language proposed by the City Solicitor. (E. 148-49). For this reason, because the State Board did not address it, the circuit court effectively only heard from one side, the Appellees, on the issue of whether or not Question F was "confusing" or "clouded by undue detail." (E.28, 195).

The State Board moved to dismiss the petition for judicial review on procedural grounds, raising the issues of laches and arguing that EL §§ 12-202 and 9-209(a) were not the proper vehicles for Appellees to challenge the qualification or certification of

charter amendment questions. (E. 152, 166-67, 175, 205). The State Board indicated it was not taking a position as to the merits of Appellees' challenge as to the legal sufficiency of the ballot question's qualification or certification. Instead, the State Board argued that Appellees' efforts to challenging legal sufficiency under EL § 9-209 were misplaced because the State Board was not involved in drafting or reviewing the question and had no legal responsibility to do so. (E. 152, 167-70).

The State Board argued that EL § 9-209(a) permits judicial review of the State Board's certification of the "content and arrangement" of a ballot or to correct an administrative error and is not meant to be a means of challenging the legal sufficiency of the language of a ballot question or the sufficiency of the underlying charter amendment, which the State Board does not control. (E. 152).

The State Board further argued that the doctrine of laches barred Appellees' cause of action under § 12-202 of the Election Law Article. (E. 157, 167). A § 12-202 action for judicial relief must be filed "10 days after the act or omission or the date the act or omission became known to the petitioner." EL § 12-202(b)(1). The State Board noted that the charter amendment question was qualified by the Mayor and City Council on March 11, 2024 and that Appellee Anthony Ambridge was aware of the City's resolution and qualification of the charter amendment question as of April 19, 2024. (E. 153, 173). The State Board asserted that Appellees knew of the alleged "charter material" issue as of April 19, 2024, and the petition should have been filed within 10 days of that date. (E. 65-66, 153)

The circuit court held a hearing on September 16, 2024, and issued an oral ruling. (E. 18). The Court issued a Memorandum and Order the following day, on September 17, 2024. (E. 18). During the hearing, the court raised the "predicated problem" that the charter amendment in 1978 was allowed and questioned what the remedies would be if Art. 1, Sec. 9 should never have been added to the Charter in 1978. (E. 121-23).

In response to these questions from the Court, Appellees acknowledged that they had "wrestled" a little bit with those questions in its briefing but did so "candidly very superficially." (E. 123). Appellees stated in their briefing that it was not at all clear whether the original 1978 amendment or the 2016 amendment were "proper charter material" and that those provisions had not been challenged on the grounds that it was not proper charter material. (E. 124-25). Appellees stated, without authority, that if the Maryland Supreme Court wanted to preserve a narrow exception for circumstances where improper charter material had become part of the City's Charter, the court should only permit charter amendments that would repeal the entirety of the charter provision. (E. 125-26, 129).

In its written opinion, the circuit court focused only on Question F, stating that it was not proper charter material and therefore violated Article XI-A, § 3 of the Maryland Constitution." (E. 21). The court found that the language of Question F would leave "little, if any discretion to Baltimore City's legislature to exercise its legislative authority pursuant to Article XI-A, § 3," and the language "does not touch the fundamental character of 'form and structure' of government as is properly reserved for charter amendments proposed to the electorate." (E. 26). The court concluded that "by proposing

a final rezoning scheme of legislative character of Inner Harbor Park directly to the electorate of Baltimore City, the proposed charter amendment contravenes the Maryland Constitution and established Maryland Supreme Court precedent and is therefore unconstitutional." (E. 26).[17]

Additionally, the court held that Question F did not meet all of the qualifications under the Election Law Article because the court found it is "not easily understandable and does not fairly apprise voters of the nature of the question." (E. 29). The court found that the descriptive metes and bounds language in Question F was "unnecessary verbiage" and that the language does not sufficiently "apprise the voters of the Charter section and the proposed amendment's effect on what already exists." (E. 29). The court did not find that the metes and bounds language was inaccurate, but only "unnecessary." (E. 29). The court contrasted this with the "clarity" of the language of the ballot question for the 2016 charter amendment. (E. 29).

The court also held that Appellees' challenge to Ballot Question F pursuant to EL § 12-202 was not barred by the doctrine of laches. (E. 21-23). The court determined that the Petition for Judicial Review was timely because it found that the "act" for purposes of a challenge under § 12-202 was the State Board's "content and arrangement decision," the certification and public display of Ballot Question F on September 3, 2024. (E. 23).

[17] There is nothing in the record to suggest that Art. I, Sec. 9 is a "zoning" or "rezoning" measure, as opposed to simply a municipal dedication of public parkland.

The circuit court held that Question F would remain on the ballot, given that the ballots had already been printed, but the State Board was enjoined from certifying the results of the referendum. (E. 30).

On September 19, 2024, the City and MCB filed motions to intervene in this action in order to address certain issues that the State Board was not positioned to address. (E. 14). Following a hearing on September 20, 2024, the circuit court granted both motions to intervene. (E. 16).

These appeals ensued. (E. 16).

STANDARD OF REVIEW

If a circuit court's decision "rested on the interpretation of the Election Law Article," this Court reviews *de novo* the circuit court's decision. *Ademiluyi v. Md. State Bd. of Elections*, 458 Md. 1, 29 (2018); *Cabrera v. Penate*, 439 Md. 99, 106 (2014). "[W]here the issue is whether a party is precluded by [the doctrine of] laches from challenging an action of another party, we shall review the trial court's ultimate determination of the issue *de novo*." *Ademiluyi*, 458 Md. at 29 (quoting *Lamone v. Schlakman*, 451 Md. 468, 480 (2017)).

ARGUMENT

This Court need not and should not reach the merits of either the "charter material" issue or the ballot language issue. Neither were properly before the circuit court because of the lateness, and the vehicle Appellees' chose: judicial review under EL §9-209(a) of the State Board's "content and arrangement" decisions. The past "charter material" cases considered by this Court were declaratory judgment actions challenging

the proposed charter language, not petitions for judicial review. None were "content and arrangement" challenges under EL § 9-209 or challenges brought under EL § 12-202.[18] (E. 72-79).

If this Court does reach the "charter material" question, the Court should find that Question F is a lawful attempt to amend portions of Art. I, Sec. 9 of the City Charter. But if the Court determines that Question F is not lawful "charter material," it must also find that the underlying charter provision, Art. I, Sec. 9, is not lawful "charter material" and invalidate the entire provision. The legal merits of Question F should not be addressed in a vacuum. Appellees' claims that Question F is invalid "charter material" are really claims that the parkland dedication provisions of Art. I, Sec. 9 are invalid. Question F cannot be viewed in a vacuum.

For the same reasons, the Court need not and should not reach the merits of the ballot language challenge. But if it does, the Court should find that the ballot language is valid, not misleading, and fairly apprises the voters of the nature of the charter amendment.

I. Appellees' judicial review action was not the proper method of challenging the language or legality of a proposed charter amendment.

Appellees initially filed their petition for judicial review pursuant to EL § 9-209, which authorizes challenges to "content and arrangement." (E. 31). Appellees contend that §§ 9-209 and 12-202 of the Election Article allow voters to seek judicial relief and

[18] A chart of the cases in which Maryland appellate courts substantively considered "charter material" questions can be found at E. 72-79.

challenge the content and arrangement of the proposed ballot measure. But EL § 9-209 is not an appropriate method for Appellees to challenge the language or the validity of Question F.[19] These are not "content and arrangement" issues.

Section 9-209 of the Election Law Article provides that "[w]ithin 2 days after the content and arrangement of the ballot are placed on public display under 9-207 of this subtitle, a registered voter may seek judicial review of ***the content and arrangement, or to correct any other error,*** by filing a sworn petition with the circuit court for the county." EL § 9-209(a) (emphasis added).

In *Ross v. State Bd. of Elections*, 387 Md. 649, 665 (2005), the Court stated that EL § 9-209 "provides for judicial relief for errors in the 'content and arrangement' of the ballot." The Court held that "errors subject to judicial review under Section 9-209…are confined to the various characteristics of the ballot not the qualifications or lack thereof of the candidates." *Id.* The Court explained that EL §§ 9-206, 9-210, and 9-211 specify that "arrangement" consists of "the general format of the ballot, the order of offices, candidates' names, the placement of party designation and county of residence if applicable, and the order of questions as they appear on the ballot." *Id.* at 656-66. As such, the plain language of these statutes shows that "arrangement" only refers "to the appearance and order of the information contained on the ballot and does not embrace a candidate's eligibility." *Id.* at 665-66.

[19] MCB adopts and incorporates as if set forth herein Appellant State Board's arguments in their brief as to this issue and as to the doctrine of laches.

In considering whether a candidate's alleged ineligibility could be considered a challenge to the "content" of a ballot pursuant to § 9-209, the Court in *Ross* cited to EL § 9-205 as "delineat[ing] what is considered the 'content' of the ballot":

> (1) a heading as provided in § 9-206 (a) of this subtitle;
> (2) a statement of each question that has met all of the qualifications to appear on the ballot;
> (3) the title of each office to be voted on;
> (4) the name, as specified in the certificate of candidacy, or as otherwise provided in Title 5 of this article, of each candidate who has been certified by the State Board;
> (5) a party designation for certain candidates as provided in this subtitle;
> (6) a means by which a voter may cast write-in votes, as provided in this subtitle; and
> (7) instructions to voters as provided in this subtitle.

Ross, 387 Md. at 666. The Court concluded that §§ 9-205 and 9-209 do "not provide a vehicle for a registered voter to challenge the candidate's underlying eligibility as determined by the State Board." *Id.* at 666-67. For similar reasons, the Court should not allow § 9-209 to be a vehicle to challenge validity here, which is analogous to a candidate eligibility question.

While *Ross* concerned a question of a candidate's eligibility, as opposed to a charter amendment ballot question, it is still applicable to the present case as it shows what is to be considered "content and arrangement" under EL § 9-209. Appellees are not challenging the "content and arrangement" of the ballot nor are they alleging there is a need to correct an error. The "content and arrangement" of the ballot or errors in the ballot are matters that the State Board has control over and would have been proper for a § 9-209 judicial review action. There is nothing in the Election Law Article that gives the

State Board the authority to review or revise the language of a ballot question or to make determinations about the underlying validity of a proposed charter amendment.

It would be illogical if a judicial review action could be brought challenging the State Board's inclusion of a question on the ballot on the basis that the language of the question was legally insufficient or not proper "charter material," given that the State Board is not empowered or equipped to determine whether the language of a charter amendment is legally insufficient or to determine whether a charter amendment is proper "charter material." The State Board does not have authority or expertise in the validity of local government charter language or the ballot language drafted and certified by the City Solicitor.

Instead, the "charter material" issue should have been challenged by Appellees in a declaratory judgment action when the charter amendment question was qualified by the City Council six months ago, on March 11, 2024. Appellee Anthony Ambridge was aware of the language of the resolution at least as of April 19, 2024, if not before. (E. 65-66). Appellees therefore knew the language of the resolution, which set forth the language of the charter amendment, and therefore should have brought any "charter material" challenge to the charter amendment as at that time. Going back even further, Appellees knew the subject of the proposed charter amendment at the time the resolution was introduced in October 30, 2023 but did not raise an argument about "charter material" during the legislative process.

Significantly, in a separate action, Appellees filed a declaratory judgment action in the Circuit Court for Baltimore City against the State Board and the Baltimore City Board

Elections, but not until September 12, 2024. That case also challenges the ballot language and raises the "charter material" issue. *See Anthony Ambridge, et al. v. Maryland State Board of Elections*, Case No. C-24-cv-24002707. It remains pending in the Circuit Court for Baltimore City.

Similarly, the ballot language was certified by the City Solicitor on August 2, 2024. (E. 40). The validity of the ballot language should have been challenged at that time. For obvious reasons, Appellees cannot wait until hours before the ballots are being printed to challenge the language of a question. Moreover, the responsibility to prepare ballot language for charter amendments adopted by the Baltimore City Council is exclusively delegated to the Baltimore City Solicitor. *See* EL § 7-103(c)(4)(1). It is not a "content and arrangement" decision of the State Board. Indeed, the State Board has no authority to prepare or modify ballot language prepared by the City Solicitor.

If the State Board's "content and arrangement" decisions can be used as a vehicle to challenge the validity of charter amendments or ballot language descriptions, it will invite chaos to the election process. It would turn routine "content and arrangement" decisions of the State Board into a forum for all manner of late election challenges, whether to candidate eligibility, question validity, or ballot language sufficiency. This was never the legislative intent behind EL § 9-209.

Moreover, the "content and arrangement" decisions are typically made just days before ballot printing. It would inevitably lead to what has happened here, where the circuit court has effectively declared that a referendum vote will be held but that its results will be "dead on arrival" because it is too late to remove the question from the

ballot. This is why the legislature adopted the ten-day statutory limitations provisions in EL §12-202.

II. Appellees' challenge to Question F is barred by the doctrine of laches and the statutory limitations provisions in EL §12-202.

Recognizing that EL § 9-209 may not have been the proper method to challenge the language of Question F and whether it was "charter material," Appellees also brought a challenge in the alternative under § 12-202 of the Election Law Article. (E. 33). But, given the significant delay in Appellees' bringing this action, any claim pursuant to § 12-202 is barred by the doctrine of laches.

Additionally, § 12-202 challenges may be brought only if there is "no other timely and adequate remedy":

> If no other timely and adequate remedy is provided by this article, a registered voter may seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission: (1) is inconsistent with this article or other law applicable to the elections process; and (2) may change or has changed the outcome of the election.

EL § 12-202(a). Appellees had other remedies that would have been both timely and adequate.

Section 12-202 of the Election Law Article includes "a statutory limitations period in which an election claim must be filed." *Ademiluyi*, 458 Md. at 30 (internal quotations omitted). Section 12-202 states that "[a] registered voter may seek judicial relief under this section in the appropriate circuit court within the earlier of: (1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or (2) 7 days after the election results are certified,…" EL § 12-202(b).

The purpose of this statute of limitations claim "is to ensure that any claim against a [S]tate electoral procedure [is] expressed expeditiously, [and] without unreasonable delay, so as to not cause prejudice to the defendant." *Ademiluyi*, 458 Md. at 30 (quoting *Liddy v. Lamone*, 398 Md. 233, 245 (2007)) (internal quotations omitted). "[T]he very short time limits for filing a suit challenging an aspect of an election pursuant to EL § 12-202(b) are evidence of this State's public policy that claims for judicial relief relative to an election must be prosecuted without delay." *Ademiluyi*, 458 Md. at 30-31.

The doctrine of laches "applies where there is an unreasonable delay in the assertion of one party's rights[,], and that delay results in prejudice to the opposing party." *Id.* at 32. "[T]here is no inflexible rule as to what constitutes, or what does not constitute, laches; hence, its existence must be determined by the facts and circumstances of each case." *Id.* (quoting *Schlakman*, 451 Md. at 485). "[A] statutory limitations period, such as that provided by [EL] 12-202(b)(1), provides a benchmark for the application of [the doctrine of] laches…against which this Court can assess whether the [plaintiff]s' delay in filing in the [trial c]ourt was unreasonable and whether it prejudiced the interests of [the defendants]." *Ademiluyi*, 458 Md. at 34.

In *Liddy v. Lamone*, 398 Md. 233, 236 (2007), the Court held that plaintiff's election claim, asserting that Attorney General candidate Douglas Gansler was ineligible, was barred by the doctrine of laches when it was filed 18 days before the general election. The Court determined that the circuit court had "erred in not invoking the doctrine of laches as a bar to the [plaintiff]'s untimely claim when it placed the determination of candidate's eligibility ahead of the urgency of the election itself and the

possible disenfranchisement of Maryland voters." *Id.* at 249-50. The Court further reasoned that allowing

> [C]hallenges to be brought at such a late date would call into question the value and the quality of our entire elections process[,] and would only serve as a catalyst for future challenges. Such delayed challenges go to the core of our democratic system[,] and cannot be tolerated.

Id. at 255. The untimely filing of plaintiff's complaint had prejudiced Gansler, who relied on the State Board's initial certification of his candidacy and the certification of the results of the primary election, and plaintiff could have brought a challenge closer in time to when Gansler had filed his certification of candidacy that June. *Id.* at 252-53.

This Court in *Liddy* emphasized that it was "paramount to this case" that the delay "prejudiced the electorate as a whole":

> The relief [that was] sought by the [plaintiff], *i.e.* the removal of Gansler's name from the ballot, or, in the alternative, signs being posted to indicate Gansler's ineligibility to voters, would have caused a great deal of uncertainty in the entire election process. The confusion that would have resulted from such last-minute changes would have, indubitably, interfered with the rights of Maryland voters, particularly those who had already cast absentee ballots, causing them to be disenfranchised and the value of their votes diluted[,] as they would not be able to vote again.

Id. at 254-55.

In *Ross*, the Court held that Ross's petition was barred by laches, even though it was filed in the statutory period of EL § 12-202(b), because he knew on October 13 of the candidate's failure to file campaign finance reports and was required to file his petition by October 23, and instead waited to November 5. 387 Md. at 667-68. The Court similarly emphasized the prejudice to the electorate:

> Most importantly, [the plaintiff]'s actions also prejudiced the electorate as a whole by denying them the efficacy of their vote and undermining their faith in a free and fair election. Thus, because [the plaintiff]'s delay would result in [the defendant]s and the people of the Thirteenth Councilmanic District being placed in a less favorable position due to their justifiable reliance on the circumstances in existence on Election Day, we find [the plaintiff]'s actions sufficiently prejudicial so as to warrant the application of [the doctrine of] laches.

Id. at 672-73.

For these very reasons, any challenge to the substance of the charter amendment should have been filed six months ago, when the City Council adopted Bill 23-0444. Any alleged "charter material" were apparent at that time. The subsequent drafting and certification of ballot language on August 2 was irrelevant to any alleged "charter material" deficiency.

Appellees have been actively involved in challenging the redevelopment of Harborplace since the fall of 2023. For instance, a number of Appellees, including Appellee David Tufaro, have been involved in the formation of the "Inner Harbor Coalition" to oppose the development, including speaking out against it at City Council Planning hearings and Economic and Community Development Committee public hearings since last year.[20] Members of the Coalition "spoke out or wrote letters against the proposed land use changes, including a charter amendment that would go before voters this November," during two Baltimore Planning Commission hearings in November and December 2023.[21] Appellee Tufaro told The Baltimore Sun in January

[20] Mirabella, *supra* note 2.
[21] *Id.*

2024 that Coalition members were looking into seeking an additional Harborplace ballot question, stating that "[i]t would be two battling referendums."[22]

Appellees could have filed a declaratory judgment action shortly after the amendment's March 11, 2024 enactment and qualifications fully address the merits of its "charter material" claim. This would have occurred well in advance of the printing of the ballots. But they chose not to. Instead, Appellees waited until the eleventh hour and wrongly characterized this as a "content and arrangement" decision, which always occurs on the eve of ballot printing. The Court should therefore find that Appellees' challenge to Question F was barred by the doctrine of laches and EL §12-202.

III. The language of ballot Question F meets the qualifications under the Election Law Article.

For the reasons stated, the Court does not need to even reach the merits of Appellees' challenge to the language of Question F because Appellees' petition for judicial review was barred by laches. But if the Court does consider this issue, it should find that the ballot language is valid and fairly apprises voters of the nature of the charter amendment. The circuit court improperly found that Question F is "not easily understandable and does not fairly apprise voters of the nature of the question on which they are voting." (E. 29).[23]

Article XVI, Section 3(b) of the Maryland Constitution provides, in part, that:

> All laws referred under the provisions of this Article shall be submitted separately on the ballots to the voters of the people, but if containing more than two hundred

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[22] *Id.*

[23] MCB adopts and incorporates as if set forth herein Appellant Mayor and City Council of Baltimore's arguments as to the sufficiency of the Question F ballot language.

> words, the full text shall not be printed on the official ballots, but the Secretary of State shall prepare and submit a ballot title of each such measure in such form as to present the purpose of said measure concisely and intelligently. The ballot title may be distinct from the legislative title, but in any case the legislative title shall be sufficient.

Under EL § 9-203, "[e]ach ballot shall: (1) be easily understandable by voters;…." Section 7-103(b) of the Election Law Article requires that each question that appears on the ballot includes "(1) a question number or letter as determined under subsection (d) of this section; (2) a brief designation of the type or source of the question; (3) a brief descriptive title in boldface type; (4) a condensed statement of the purpose of the question and (5) the voting choices that the voter has."

The Court has "found sufficient questions contain[ing] concise statements concerning their true nature and purpose, and that the electorate had been adequately advised, from the wording of the question, as to their elective choice." *Stop Slots Md 2008 v. State Bd. of Elections*, 424 Md. 163, 198 (2012) (internal quotations omitted). "The true nature or purpose' of the question is captured…when the 'heart of the title' 'the essence of the heart of the title,' is contained within it." *Id.*

This Court has "emphasized that judicial review of the ballot title is limited to discerning whether the language certified conveys with reasonable clarity the actual scope and effect of the measure." *Kelly v. Vote Know Coalition, Inc.*, 331 Md. 164, 174 (1993) (internal quotations omitted). The Court stated that "the standard by which the question's validity will be judged…is whether the question posed, accurately and in a non-misleading manner, apprises the voters of the true nature of the legislation upon which they are voting." *Id.* at 172.

In *Anne Arundel Co. v. McDonough*, 277 Md. 271, 307-08 (1978) the Court determined that the ballot measure at issue, both as it was stated on the voting machines and as it was advertised before the election, "was so inaccurate, ambiguous and obtuse, that an ordinary voter, of average intelligence, could not, in a meaningful and comprehending manner, have knowledgably exercised his franchise when called upon to vote either 'FOR' or 'AGAINST' that question." Similarly, in *Surratt v. Prince George's Cnty.*, 320 Md. 439, 447 (1990), the Court found that the ballot measure "must convey with reasonable clarity the actual scope and effect of the measure." The circumstances of the ballot questions in both cases are readily distinguishable from the language being proposed in Question F.

McDonough was an extraordinary case. There, the referendum measure was actually 41 different amendments to comprehensive county rezoning, which the ballot title language failed to disclose to voters. 277 Md. at 291. The County Board of Elections had certified that voters should vote "for the amendments to the bill" or "against the amendments to the bill," but the ballot question only said "for" or "against," which meant voters "were asked to vote for or against the rezoning rather than for or against the amendments to the rezoning." *Id.* at 298; *Kelly*, 331 Md. at 174. Additionally, the amendments "would have accomplished numerous changes, none of which were even alluded to in the ballot language." *Kelly*, 331 Md. at 174. Given this combination, the Court held that the ballot language in *McDonough* was not a "clear, unambiguous and understandable statement of the full and complete nature of the issues." *McDonough*, 277 Md. at 300.

In *Surratt*, the Court held that the ballot title "*was* misleading, and it *was* calculated to suggest to the voter that the charter amendment would have virtually no effect – and certainly not the repeal of the waiver of immunity." 320 Md. at 449 (emphasis in original). The Court found that a voter would have "no inkling" from the ballot language "that a vote in favor of the charter amendment could be a vote in favor of repealing absolutely the waiver of governmental immunity." *Id.* at 448. Moreover, the Court determined that the ballot language "told the voter *nothing* about what really was involved." *Id.* (emphasis in original).

Unlike in *McDonough* and *Surratt*, this Court in *Kelly* held that the ballot title language, which summarized Chapter 1 of the Acts of 1991 addressing abortion and revised statutory provisions relating to abortion, was not misleading and did not violate Art. XVI, Sec. 5 of the Constitution of Maryland. 331 Md. at 166. The Court found that the ballot language in *Kelly* was not obtuse; clearly conveyed the purpose of the measure; and did "not on its face generate any confusion about whether the entire bill enacted by the General Assembly or some portion thereof was petitioned to referendum." *Id.* at 174. Further, the Court found that "[w]ithin the constraints of a 100-word summary it gives considerable detail about the nature of the issues addressed by the measure," and was not deceptive, like in *Surratt*, or vague, like in *McDonough*. *Id.*

Importantly, this Court is "not concerned with the question of whether this Court, the trial court, or any of the numerous advocates on either side of this issue, are capable of drafting better ballot language." *Id.; Stop Slots Md 2008*, 424 Md. at 207. *See also Matter of Proposed Constitutional Amendment Under the Designation "Pregnancy,"* 757

P.2d 132, 137 (Colo. 1988) ("[I]t is not the function of this court to rephrase the language of the summary and title to achieve the best possible statement of the intent of the amendment. If the chosen language fairly summarizes the intent and meaning of the proposed amendment, without arguing for or against its adoption, it is sufficient."); *In re Proposed Initiative Concerning Drinking Age*, 691 P.2d 1127, 1132 (Colo. 1984) (stating that the proposed language need not be "models for future draftsmanship"); *Hill v. Ashcroft*, 526 S.W.3d 299, 322 (W.D. Mo. 2017) ("[T]he test is not whether the ballot title, as written, was the best language, but whether the summary statement fairly and impartially summarizes the purpose of the initiative.").

In *In re Proposed Constitutional Amendment under Designation "Pregnancy*," the court rejected the challenge to the language of the ballot question where the state board of elections "utilized the language of the initiative nearly verbatim." 757 P.2d at 136. On the other hand, courts have found that the language of a charter amendment may be invalid if it is misleading. "Municipalities generally have broad discretion in wording" charter amendments as long as the ballot description "substantially submit[s] the question…with such definiteness and certainty that the voters are not misled." *Bryant v. Parker*, 580 S.W.3d 408, 414 (Tex. App. 2019). *See Miami-Dade Cnty. v. Village of Pinecrest*, 994 So. 2d 456, 459 (Fla. App. 2008) (stating that a ballot summary may be defective if the ballot summary does not specify what is being changed or gives the appearance of creating new rights or protections when the actual effect is to eliminate or reduce those rights or protections).

Courts have "placed emphasis on the voters' responsibility to come to the ballot box informed of the issues." *Donaldson v. Dep't of Transp.*, 414 S.E.2d 638, 641 (Ga. 1992) (stating that the full text and summary of the amendment had been "published in accordance with state law and were made available to the voters to read and discuss prior to the election"). *See also Burger v. Judge*, 364 F. Supp. 504, 510-12 (D. Mont. 1973); *Kohler v. Tugwell*, 292 F. Supp. 978, 981 (D. La. 1969))."A number of courts have held that achievement of the result intended by the requirement of statutes as to notice or publication -- that is, the apprising of the voters of the issue to be voted on -- by non-statutory methods, such as newspaper, radio and television discussions or private advertisements or circulars, will be enough to uphold an election at which there was a full and apparently free vote." *Dutton v. Tawes*, 225 Md. 484, 495 (1961).

In a 1994 published opinion from the Maryland Attorney General's Office, the Mayor and City Council had adopted a bill that made numerous substantive changes to the Baltimore City's Charter, including changes to qualifications and election of council members; the powers of the Mayor; appointment and tenure of a number of positions; and the qualifications and powers of the Board of Municipal and Zoning Appeals. 79 Attorney General Op. 154, *1-2 (1994). The ballot title prepared, Question "J," simply stated "Providing for a revised Charter of Baltimore City." *Id.* at *1. The Attorney General opined that the ballot title met the requirements under the Election Law Article, as it "was a condensed statement in understandable language of the question, and it accurately advised the voters of the true nature of the proposition without being

misleading." *Id.* at *4. The Attorney General advised that "it was not necessary to describe every particular change" to the Charter. *Id.* at *5.

In the opinion, Attorney General Curran also opined that "[t]he law recognizes the reality that" voters "who had not read materials about the question before election day would not be fully informed [about the detailed effect of the revised charter] by the ballot title." *Id.* at *5. But it is "[t]he reality of limited space, however, means that the ballot title of any complex measure will likely not be a self-sufficient tool of voter education." *Id.*

There is nothing inaccurate or misleading about the language in Question F. The ballot question provides the voter with an understanding of "the full and complete nature of what the charter amendment involved." *Surratt*, 320 Md. at 448 (internal quotations omitted). Like in *Kelly*, Question F "clearly sets forth the primary purpose of the legislation." 331 Md. at 173. Question F contains a condensed statement of the purpose of Council Bill 23-0444 and the voting choices that the voter has. *See* EL § 7-103(b). It presents the question in "a fair and non-discriminatory manner" and "accurately and in a non-misleading manner apprise[s] voters of the true nature" of the charter amendment. *Stop Slots Md 2008*, 424 Md. at 209.

While the circuit court found that the "descriptive language of metes and bounds is unnecessary verbiage," the court did not dispute its accuracy. (E.29). Instead, it provides descriptions that many City voters will likely be familiar with, provides an accurate description of what is being affected by the charter amendment, and mirrors the language

in Article I, Section 9. Moreover, whether the language is "unnecessary" is not the test, but whether it fairly apprises the voter of the ballot question.

It is not pertinent here whether a different or more informative ballot question could have been drafted. Instead, it is sufficient if the ballot title meets the recognized standard, as it does here. *Kelly*, 331 Md. at 174. The location description of Charter F is largely word-for-word from the language of the charter amendment. (E. 37, 41-43). Further, while the circuit court pointed to the 2016 charter amendment as an "easily understandable ballot question" regarding an amendment to Art. I, Sec. 9, courts have made clear that courts do not look at whether better ballot language could have been drafted.. *Kelly*, 331 Md. at 166. (E. 29).

Resolution 24-318 added just 24 words and one number to Article I, Section 9, which has been in the Charter since 1978, with a small amendment in 2016. The full text of the charter amendment has been available to City voters for at least six months to read and to discuss prior to the election. There has also been extensive voter awareness efforts by MCB about Question F and the purpose of it, including through engagement with communities and during the time when MCB has been going through the development process at public hearings before the City Council, Planning Commission, and the Urban Design and Architectural Advisory Panel. There has been extensive media coverage and endorsements by public officials, which provides information to the voters about Question F.[24]

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[24] https://www.ourharborplace.com/community-engagement.

In this digital age, voters have direct, online access to the full text of the charter amendment, as well as all of the details of its legislative history, which is something that was not available when the Court originally found that "newspaper publicity" would mitigate challenged ballot language.[25] The Attorney General's Office and the courts have clearly recognized that publicity pertaining to charter amendments and ballots, including explaining their purpose and the effect they would have, helps mitigate any ballot language issues. Since MCB announced its plans for Harborplace in the fall of 2023, there has been extensive coverage in the media about what its plans entail and that there would need to be a proposed amendment to the Charter in order for its redevelopment plans to move forward.[26] Additionally, there is already a long and heavily publicized history of City voters voting on charter amendments related to Article I, Section 9, both in 1978 and again in 2016.

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[25] https://baltimore.legistar.com/LegislationDetail.aspx?ID=6396873&GUID=6 43DAE0C-C641-4915-B24E C7A1AD1606EA&Options=ID|Text|Attachments|Other|& Search=23-0444(last accessed Sept. 26, 2024).

[26] Pamela Wood, Hallie Miller & Emily Sullivan, "5 things we noticed about the plans to overhaul Harborplace," The Baltimore Banner (Oct. 31, 2023), https://www.thebaltimorebanner.com/economy/growth-development/5-things-harborplace-plans-UKYJOAC7UBG5JBVLA4SAK227EE/ ("[A] proposed amendment to the city charter would ask voters to expand the ground lease for the project to 4.5 acres from the 3.2 acres"); Brian Overs and Giacomo Bologna, "Build it and they will come? Harborplace redevelopment hinge on potential tenants," Baltimore Banner (Aug. 22, 2024), https://www.thebaltimorebanner.com/economy/growth-development/harborplace-inner-harbor-baltimore-ANQ56LWPHBDPHPQJ3UCZZJRCEY/.

After Council Bil 23-0044 was adopted on March 4, 2024, there was media coverage about the language of the charter amendment, such as a March 4 WYPR article that explained:

> Voters will get to decide if they will amend the charter to make way for the rest of the MCB's development plans. Per the charter, the Inner Harbor area is considered a public park "for the benefit of this and future generations of the City of Baltimore." The charter amendment passed by the council proposes expanding that footprint from 3.2 acres to 4.5 acres. Current plans achieve that by shrinking Pratt and Light streets and getting rid of the Calvert Street spur. That amendment would also allow residential housing and off-street parking to be built in that space.[27]

The Baltimore Sun Editorial Board also recently acknowledged the extensive media coverage that the plans for the Harborplace development have received, indicating that voters are aware of what the purpose is of the charter amendment:

> But are we really going to claim the electorate is completely unaware of Bramble's plan at this point? Has any matter before Baltimore's elected officials gotten more attention in the media (aside, perhaps, from the destruction of the Francis Scott Key Bridge)?[28]

For these reasons, it was an error for the circuit court to find that Question F did not meet the qualifications to appear on the ballot under EL § 9-205.

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[27] Emily Hofstaedter, "Harborplace designs get the 'all clear' from Baltimore City Council," WYPR (March 4, 2024), https://www.wypr.org/wypr-news/2024-03-04/harborplace-designs-get-the-all-clear-from-baltimore-city-council.

[28] "Baltimoreans deserve final say on future of Harborplace," The Baltimore Sun (Sept. 17, 2024), https://www.baltimoresun.com/2024/09/17/baltimoreans-deserve-final-say-on-future-of-harborplace-staff-commentary/. The Editorial Board highlighted the confusion that has been caused among the electorate by the circuit court's ruling. *Id.* It also expressed the rights of self-determination of the electorate to vote on the charter amendment: "But we are wary of letting stand any judicial ruling that denies the voters of Baltimore the power to reconsider a choice made more than four decades ago." *Id.*

IV. Question F is a lawful attempt to amend Article I, Section 9 of the City Charter.

Like the ballot language issue, there is no need for this Court to even address the merits of the "charter material" issue because Appellees' "charter material" challenge to Question F is barred by the laches, EL §12-202, and the "content and arrangement" mechanism Appellees chose to challenge it. However, if the Court does address the merits of the "charter material" question, it should find that Question F is a lawful attempt to amend Art. I, Sec. 9. If the Court determines that Question F is not lawful "charter material," it must also determine that Art. 1, Sec. 9 is not lawful "charter material" and that provision of the Charter should be invalidated in its entirety.

The purpose of Article XI-A of the Maryland Constitution—the Home Rule Amendment—"is to share with the counties and Baltimore City, within well-defined limits, powers formerly reserved to the General Assembly, so as to afford the subdivisions certain powers of self-government." *Stop Slots Md. 2008*, 424 Md. at 205. Article XI-A provides that voters in the counties and Baltimore City can adopt home rule charters, that the General Assembly must delegate express powers to those governments as created by the charters, and that voters can amend the charters. *Id.* Amendments to charters may be proposed by resolution of the Mayor and City Council or be a petition of the voters. Md. Const., Art. XI-A, § 5. Article II, Section 49 of the Baltimore City Charter provides that City voters have the power to make changes to provisions of the Charter:

> The voters of Baltimore City shall have and are hereby expressly granted the power to make such changes in Sections 1 to 6, inclusive, of Article XI

> of the Constitution of the State of Maryland, as they may deem best; such power shall be exercised only by the adoption or amendment of a charter as provided in Article XI-A of said Constitution…

Art. II, Sec. 15(d) of the City Charter states that the Mayor and City Council has the power "[t]o preserve for the United States of America, the State of Maryland, or the Mayor and City Council of Baltimore, or any departments or agencies thereof, any of said land or property, or any rights or interests therein, for public use, irrespective of the manner or means in or by which it may have been acquired."

In *Cheeks*, the Court first articulated a distinction between proposed charter amendments that are legislative in nature and "proper charter material" charter amendments that "delineate the basic form and structure of the local government." 287 Md. at 607. This was two years after the 1978 vote to amend the Charter to include the "Inner Harbor Park" provision. Since *Cheeks*, Maryland appellate courts have substantively addressed whether charter amendments were "proper charter material" in eight cases. (E. 72-79). None of those cases were brought under EL § 12-202. (*Id.*). Almost all of them were initiated by petitions by citizens and were brought as declaratory judgment actions, or challenges to decisions of the local election boards not to certify the questions.[29] (*Id.*).

The then-Court of Appeals in *Cheeks* stated that "[a] charter is thus a permanent document intended to provide a broad organizational framework establishing the form

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[29] Unlike legislatively initiated charter amendments, local election boards, with advice of counsel, are charged with certifying the legal sufficiency of amendments initiated by petition. EL § 6-205(c).

and structure of government in pursuance of which the political subdivision is to be governed and local laws enacted." 287 Md. at 607. The Court continued that "a charter amendment within the context of Art. XI-A is necessarily limited in substance to amending the form or structure of government initially established by adoption of the charter." *Id.*

At issue in *Cheeks* was a proposed amendment to the Charter to establish a tenant-landlord commission to implement a comprehensive rent controls system. *Id.* at 602. The proposed charter amendment set forth "in lengthy detail, the powers and duties of the Commission in administering the system of rent control." *Id.* at 607. The Court held that the charter amendment was "essentially legislative in character." *Id.* at 608. The Court reasoned that the proposed amendment was an attempt to "divest" the Baltimore City Council of "its acknowledged…power to legislate on the subject of rent control." *Id*. at 609.

In *Griffith v. Wakefield*, 298 Md. 381, 391 (1984), there was a proposed charter amendment to create a comprehensive collective bargaining system with binding arbitration for Baltimore County and firefighters. Finding that the charter amendment was "essentially legislative in character," the Court held that the proposed charter amendment set forth a "complete and specifically detailed legislative scheme" that left "nothing for the determination of the…County Council." *Id.* at 388. The Court found that the "binding arbitration feature of the amendment" would have "divest[ed] the elected officials of Baltimore County of any discretion in reaching an agreement on the wages, benefits, hours and working conditions' of the fire fighters" *Id.* at 388.

In *Bd. of Supervisors of Elections v. Smallwood*, 327 Md. 220, 236 (1992), the Court upheld the proposed charter amendments, which would place a percentage cap on the amount the Council Councils of Anne Arundel and Baltimore County could raise local property taxes. The Court held that the amendments were not essentially legislative in nature. *Id.* at 240. The *Smallwood* Court found that the proposed amendments were "not back-door attempts by the voters to enact detailed legislation." *Id.* at 240 (internal quotations omitted). The proposed amendments did not "divest the county councils of the ability to set the property tax rates," but instead "would have merely precluded a particular type of enactment by the legislative body." *Id.* The amendments "directly involved the relationship between the people and the government by limiting the power of the government to tax." *Id.* at 237.

In *Save our Streets v. Mitchell*, 357 Md. 237, 241 (2000), the Court reviewed a proposed amendment to the Montgomery County Charter which would have "prohibit[ed] the county expenditure of county funds to install or maintain speed bumps on county roads and streets." The Court held that the charter amendments were not proper charter material because the amendments at issue would "completely remove any meaningful exercise of discretion from County Councils." *Id.* The Court stated that a charter that authorizes or precludes specific types of enactments is distinguishable from "a charter itself containing all of the…provisions concerning the subject." *Id.* at 254. In reaching this conclusion, the Court "relied on a distinction that we had made previously in *Griffith* between proposed charter amendments that authorize, or preclude, specified

types of enactments by legislative bodies, and thus are ordinarily valid, and those that constitute specific legislative schemes." *Id.* at 251.

Question F is not an attempt to "initiate detailed legislation through the guise of charter amendments." *Smallwood*, 327 Md. at 239. Unlike the charter amendments in *Cheeks* or *Griffith*, the charter amendment here is not creating a comprehensive legislative scheme that would divest the City Council of its power to legislate related to the use of the City's parkland. The charter amendment is not introducing a "detailed legislative scheme." It does not create new obligations for the City government and does not create a procedure for implementation and execution of any government function. Indeed, it simply narrows and redefines the scope of parkland dedication in Art. 1, Sec. 9. By identifying the types of uses allowed north of Conway Street in Inner Harbor Park.

Moreover, the court seemingly misunderstood the charter amendment to be improper zoning legislation. (E. 26). But Art. I, Sec. 9 is not a zoning or rezoning provision nor is the charter amendment at issue a zoning provision. It is a municipal dedication of parkland by the Mayor and Council in the Charter, which has been ratified by the electorate. The Council's ability to legislate zoning is not affected or infringed by Art. 1, Sec. 9. *See* Md. Code Ann., LU § 10-202. The City's zoning authority was not affected by the charter amendment approvals in 1978 or 2016.

Indeed, at the very same time the Council exempted areas of North of Conway Street for multifamily development and off-street parking, it also exercised its zoning authority to permit this development. When it adopted Council Bill 23-0444, it also adopted Council Bills 23-0446 and 23-0448, which made zoning changes to the C-5-IH

district and amended development restrictions and procedures in the Urban Renewal Plan for Inner Harbor Project I.

Here, the effect of Bill 23-0044 was to modify narrow the reach of the parkland dedication north of Conway Street going forward, which cannot be an unconstitutional act, and is a proper way for Art. I, Sec. 9 of the Charter to be changed.

V. If Question F is not proper charter material, then Article I, Section 9 is also not proper charter material and is necessarily invalid.

If this Court affirms the circuit court's determination that Question F is not proper "charter material," the Court must also find, for the same reasons appellees challenged Question F, that the underlying Charter provision being amended, Art. I, Sec. 9, is also not proper "charter material," and should therefore be invalidated.

The court found that the proposed charter amendment, as reflected in Question F, is not proper charter material because it "sets out to rezone Inner Harbor Park" and,"[r]eading the metes and bounds description and permitted uses in the language of Question 'F' leaves little, if any, discretion to Baltimore City's legislature to exercise its legislative authority." (E. 26). But if the court were applying this reasoning to the underlying charter provision, it would have similarly found, based on this reasoning, that Art. I, Sec. 9 is not proper charter material.

In its oral opinion from the bench, the court indicated that Art. 1, Sec. 9 may not itself be proper charter material:

> **It continues to be apparent that § 9 is not a form and structure amendment.** For whatever reason that it was put in 50 years ago, if I were to look at the resolution that was filed in the court matters and was approved by the Council, it spoke to the intent of those that placed this item

> in the charter to be of such a level of significance that I think, as both counsel would agree, charter amendments, some people may believe, are easily passed and very difficult to repeal. And so, you mentioned the Swantz (phonetic) matter -- easy to pass and difficult to repeal should the cause occur. But that doesn't make those charter amendments by definition something that they're not. The inclusion of Inner Harbor Park in the charter, from a factual standpoint here in 2024, is just that. It's a charter amendment if it's part of the charter. But whether or not to continue taking inappropriate steps to modify provisions that perhaps shouldn't be there is not necessarily the appropriate course of action either.

(E. 199) (emphasis added). At the hearing on the motions to intervene on September 20, 2024, the circuit court clarified its position, stating that it had not made any ruling in its oral opinion as to whether Art. I, Sec. 9 was charter material.

The court later disclaimed that it was addressing the underlying validity of Art. 1, Sec. 9. But the judge made other statements during the September 16, 2024 hearing that highlighted the issue of whether or not Art. I, Sec. 9 itself may not be proper charter material:

> THE COURT: Let me stop right there a minute. **Don't we have a predicated problem in that, would you say 50 years ago a legislative body, a Mayor of a city, the voters of the city allowed this term.** And it became a piece of the charter. And the only way to change a piece of the charter, at least as I understand the argument is to go back to the voters. So is there, did you find any law, any cases that would say when -- and I'm not suggesting this is correct, or that I would do that, but if section 9 shouldn't have been there in the first place that you're stuck with it. That in '16 when they modified, as I recalled, nobody challenged then.
> […]
> I'm struck with that in the back of my head, and I haven't decided how that fits, that if we're going to change as this amendment suggests. I'm not sure how, but if it's going to change the intercity -- I mean Inner Harbor in that we're now going to have multi-family dwellings, apartments, condos. Whatever that looks like for whatever happens. Is that not a legislative meaning, City Council function of zoning, as opposed to an amendment? And if the answer to that is yes, what do you do with the difficulty that this particular identifiable public park happens to be in your charter?

> MR. VIGNARAJAH: Yeah. Lot of terrific questions in there we have wrestled with a little of them in a briefing but candidly, very superficially.

(E. 121, 123) (emphasis added).

When the judge questioned whether "we have this predicament where we have a…zoning buried into a charter," Appellees articulated their position that if the language of Art. I, Sec. 9 should never have been in the charter in the first place, then "[t]he remedy to that is not to allow improper charter material":

> MR. VIGNARAJAH: Correct. And so we have a couple of responses and I'm going to end by noting what the Maryland Supreme Court said about this argument just a month or so ago. If the Charter was never supposed to include a zoning regulation around the Inner Harbor but the voters, Mayor Schaefer, the Courts blinked in 1978 and blinked again in 2016. **<u>The remedy to that is not to allow improper charter material, correct that</u>**. In fact, presumably the correct fix would be to legislatively challenge it. In theory, we have seen instances where improper charter material found its way into the law. [….]
>
> So, there's nothing that stops the developer from saying I want to challenge the Inner Harbor Park protection. And look Petitioners are not gonna love this in the long run, but they're gonna, you know, you have to understand that this is a fight. **<u>The developer in theory could challenge the validity of the 1978 and 2016 partitions on the ground that it's not in proper charter material</u>**. What you can't do is try to achieve what you're supposed to get through judicial challenges through too wrongs make a right approach.
>
> The other thing I would note, Your Honor, is the Maryland Supreme Court could certainly fashion an exception to this foreman charter problem. For this scenario. They could say, for example, in this is why you need the Supreme Court to write some new law. They could say, for example, when you have improperly embedded into your Charter something that is not proper charter material. Though people and the legislature must have a remedy, but that remedy is to repeal it wholesale. You can't take a scalpel to it and remove it, because that is really quintessential legislature.

(E. 124-25).

If Appellees are truly concerned about preserving parkland dedication, then it is unfathomable why they choose to mount a “charter material” challenge to Question F. Such a challenge can only be successful if the underlying parkland dedication language of Art. 1, Sec. 9 is itself not “charter material.” That would be the inevitable result of their “charter material” challenge if successful.

In the short run, Appellees’ “charter material” challenge has created ballot chaos. But in the long run, if Appellees are successful, it can only lead to invalidation of the entire parkland dedication provision. It cannot be that Question F would be improper charter material but that the remainder of the existing charter provision would not be. There is no other logical or principled result. Appellees have injected a potentially fatal poison into the very parkland dedication provision they claim to so ardently support.

Whether Art. I, Sec. 9 is invalid charter material or not, an amendment which narrows its reach would be valid. Question F partially repeals and modifies the boundaries of the parkland dedication. Appellees’ position is that the City Council can repeal it altogether but cannot partially repeal it or narrow the scope of the parkland dedication in Art. 1. Sec. 9. In other words, Appellees’ position, in effect, is that if the parkland dedication provision invalid, then the only remedy is to repeal Art I, Sec. 9 in its entirety or challenge it in court.

This is an improper restriction on the legislative authority of the Baltimore City Council. If the Council determined that the parkland dedications in Art. I, Sec. 9 should be reduced or usages modified, for whatever policy reason, then it falls within their

legislative authority to do so. This is true even if the underlying Art. I. Sec. 9 is unconstitutional. Amendments to potentially unconstitutional laws can be valid if they have a valid effect going forward. *See Commerce Oil Refining Corp. v. Miner*, 170 F. Supp. 396, 401 (D.R.I. 1959). *See also Lassiter v. Atlantic City*, 90 A. 675, 676 (N.J. 1914); *Chicago v. McKinley*, 176 N.E. 261 (Ill. 1931).

The Court should not reach the "charter material" issue. If it does, it should declare Question F is a valid amendment to Art. I, Sec. 9. But if it invalidates Question F on "charter material" grounds, then the entirety of Art. I, Sec. 9 must be invalidated.

CONCLUSION

For the reasons set forth herein, Appellant MCB HP Baltimore LLP requests that the Court reverse the decision of the circuit court in its entirety.

Respectfully submitted,

/s/

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MD. RULE 8-112

This brief contains 12,987 words, excluding the cover and the parts of the brief exempted from the word count by Rule 8-503. This brief complies with the font, spacing, and type size requirements stated in 8-112.

/s/
Alyse L. Prawde

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2024, a copy of the foregoing was filed by MDEC and two copies were sent via first-class mail to all counsel.

/s/
Alyse L. Prawde