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 REPLY BRIEF

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INTRODUCTION

Appellees criticize the proposed Harborplace redevelopment, claiming the expansion of areas set aside for retail and other commercial uses is bad for Baltimore. But, in fact, that is precisely why Baltimore City voters should have their say on the merits of Question F. Just as the voters adopted the original parkland dedication amendment in 1978, and modified the dedication in 2016 to permit two restaurants, the electorate should decide this question on November 5. Appellees seek to prevent the voters of Baltimore City from making their votes count on Question F.

Appellees complain that "never in 50 years has any portion been stripped from the public park for exclusive commercial use by a specific private company." (Appellees' Br., at 1-2). In fact, this is how the original Harborplace was created in 1978, when the City entered into an exclusive agreement with the Rouse Company to construct Harborplace, and set aside 3.2 acres of parkland for specific use by Rouse for that purpose. That decision was ratified in the 1978 referendum. (MCB App. at 1-2).

Art. I, Sec. 9 of the Baltimore City Charter does not "protect a public asset for posterity" or "perpetuity" as Appellees claim. (Appellees' Br., at 5, 47-48). Instead, it provides a parkland dedication that can be modified by the electorate with a charter amendment. This is exactly what happened in 2016 when the voters overwhelmingly ratified Question H to permit two restaurants on land covered by the parkland dedication.[1]

[1] 73.2% of voters voted for the 2016 charter amendment. *See* State Board of Elections, "Official 2016 Presidential General Election results for Baltimore City," (Dec. 9, 2016),

Appellees make numerous inaccurate statements in their brief. Although most are irrelevant to the issues before the Court, they must be addressed to correct the public record.

Appellees characterize the City's agreement with Appellant MCB HP Baltimore LLC ("MCB") as a "gift to a specific local developer." (Appellees' Br., at 11). In fact, MCB purchased the property from receivership, where any other party had the right to bid or object to bids.[2] No one, including Appellees, did either. This was in contrast to what occurred in 1978, when the City actually first conveyed municipal property to the Rouse Company to construct the original Harborplace.

Appellees wrongly state that MCB "announced plans they had developed to construct luxury apartments with parking garages" to "replace the iconic Harbor pavilions." (Appellees' Br., at 12). Contrary to Appellees' assertion, while MCB believes parking is needed for the long-term success of the site, no parking garage plans have been finalized and only one pavilion site is proposed for residential use, which will include both affordable and market rate dwelling units. The other site is proposed for retail and commercial uses.

The long and sad decline of Harborplace has been well-documented, reaching its nadir with the recent receivership. Despite Appellees' rhetoric about "paving paradise"

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https://elections.maryland.gov/elections/2016/results/general/gen_qresults_2016_4_03_1.html.

[2] 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/.

and "profit to the developer," the Mayor and City Council have an obligation to attract a developer who can make Harborplace an economic and cultural success. This was true with Mayor Schaefer and the Rouse Company in 1978. It is true with Mayor Scott and MCB today, who have identified the reimagined Harborplace as a major economic development priority for the City.

Under Art. XI-A, Sec. 5 of the Maryland Constitution, the Mayor and City Council have full authority to propose amendments to the Charter to be voted on by City voters. If the Mayor and City Council identify language in the Charter which is an impediment to this economic development—as they did here—they are free to propose amendments. This is not improper "dealmaking," and Question F is not improper charter material. It is municipal government, and democracy, at work.

Appellees' challenges were neither timely nor meritorious. Contrary to Appellees' assertion, the prejudice is palpable and self-evident. Voters are now casting ballots on a referendum declared dead on arrival by the circuit court. The potential for confusion is obvious. If the lower court judgment is affirmed, future challengers will be given license to sit on their claims until the eve of ballot printing, after the ballot is arranged and certified. This is completely contrary to the orderly election process created by the General Assembly.

This Court need not reach the "charter material" question. But if it does, the Court should reject Appellees' convoluted theory that Question F is not proper "charter material" but that the section it amends, Art. I, Sec. 9, is somehow valid. If Question F is invalid, Art. I, Sec. 9 must also be invalid.

If Appellees ultimately prevail, the reimagined Harborplace cannot go forward without either a total repeal of Art. I, Sec. 9 or the time and expense of litigation challenging its validity. MCB seeks neither outcome but instead seeks only a valid, public referendum on Question F so the voters can have their say.

ARGUMENT

A. Section 9-209 was not the proper vehicle for Appellees to challenge the language of Question F or whether Question F is "charter material."

The plain language of the Election Law Article does not support Appellees' expansive reading of what is considered "content" under EL §§ 9-205 and 9-209. Because a challenge to the validity of the language of Question F is not "content" under § 9-205, it could not be the subject of a judicial review challenge under § 9-209.

Appellees attempt to differentiate *Ross v. State Bd. of Elections*, 387 Md. 649 (2005) to no avail. Even though *Ross* concerned EL § 9-205(4), not EL § 9-205(2), the rationale in *Ross* similarly applies to § 9-205(2). Section 9-205(2), which serves the basis of Appellees' challenge here, provides that, "Each ballot shall contain: (2) a statement of each question that has met all of the qualifications to appear on the ballot." Section 9-205(4) provides that, "Each ballot shall contain: (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."

The Court determined that "[t]he **errors** subject to judicial review under Section 9-209, whether arising from the content and arrangement of the ballot **or other facial aspects of the ballot**, are confined to the various characteristics of the ballot, not the

qualifications or lack thereof of the candidates." *Ross*, 387 Md. at 665 (emphasis added). The Court found that, because the candidate's eligibility had been certified by the State Board, the candidate's inclusion on the ballot was appropriate:

> The plain language of Section 9-205, when read in relation to Section 9-209(f)(4), does not provide a vehicle for a registered voter to challenge the candidate's underlying eligibility as determined by the State Board. Rather, it only provides a mechanism by which such a voter may contest the inclusion of the name of a candidate who is not certified by the State Board or the exclusion of the name of one who is certified.

Id. at 666-67. In other words, the State Board's role—in including on the ballot the name of a candidate who had been certified and in including on the ballot a statement of each question that met all of the qualifications to appear on the ballot—is a ministerial one.

While Appellees acknowledge that § 9-205(4) only requires that the State Board confirms that a candidate has been certified, they read more into what the State Board must do in considering whether "a statement of each question…has met all of the qualifications to appear on the ballot." (Appellees' Br., at 19). In arguing that *Ross* is inapplicable, Appellees cite to *Toler v. MVA*, 373 Md. 214 (2003) for the proposition that a legislature likely "intends different things" if it "uses different words." (Appellees' Br. at 19). But that principle is actually more helpful to Appellants, as the Election Law Article includes a section on "qualifications" for questions, separate and apart from the section on "standards."

This Court has "consistently stated" that "the best source of legislative intent is the statute's plain language, and when the language is clear and unambiguous, our inquiry

ordinarily ends there." *Ross*, 387 Md. at 661. The Court will "assign the words their ordinary and natural meaning," when interpreting the language of a statute. *Id.* at 662. "[T]he provisions must be read in a commonsensical perspective to avoid a farfetched interpretation." *Id.* (internal quotations omitted).

Title 7 of the Election Law Article—titled "Questions"—concerns ballot questions. Section 7-102 is titled "Qualifications of questions," and is where the General Assembly has set forth what the "qualifications" are for ballot questions relating to the amendment of a county charter. *See* EL § 7-102(c)(3)(i) (stating that "A question relating to the amendment of a county charter shall qualify either upon: (i) the passage by the governing body of the county of a resolution proposing the amendment;"…). It is unambiguous, based on the plain language of the statute and in reading the provisions of the Election Law Article together, that the General Assembly meant that the qualifications for a charter amendment to appear on a ballot would be contained in § 7-102. *See Ross*, 387 Md. at 661-62.

Instead of following the plain text of the Election Law Article, and, in particular, EL § 7-102 ("Qualifications of question"), Appellees have cherry-picked for a definition of "qualifications" that they believe fits their arguments. Among the several definitions they cite, they point to one of Merriam-Webster's definitions of "qualification" as "a condition or standard that must be complied with." (Appellees' Br., at 20). Appellees are improperly adding the term "standards" to EL § 9-205(2) to expand the plain language of that provision.

For these reasons and the reasons set forth in Appellants' briefs, EL § 9-209 was not an appropriate method for Appellees to challenge the language of Question F, as § 9-209 does not involve substantive challenges regarding whether a question should have qualified to appear on a ballot.[3]

B. The doctrine of laches bars Appellees' petition for judicial review, as Appellees did not diligently pursue their claims.

1. Appellees did not make a request for the language of Question F after it was prepared and sent to the State Board.

Appellees did not diligently pursue a challenge to the language of Question F. They waited 37 days after Question F was transmitted from the City Solicitor to the State Board to file their petition, after the printing of ballots had already begun. The doctrine of laches bars Appellees' challenge.

Appellees contend that their petition was timely because Question F was not made publicly available until September 2, 2024. But Appellees have been actively involved in opposing the referendum and were aware of the procedural deadlines, including the August 2 deadline for transmittal of the ballot title. Though Appellees had been vocal for months with concerns about the ballot question language, they did nothing to request the language of Question F from the State Board after August 2. Instead, they sat on their

[3] MCB adopts the arguments in the State Board and Mayor and City Council's replies concerning § 9-209 not being the proper method for challenging the language of Question F and the arguments in the Mayor and City Council's reply as to the language of Question F.

hands and waited 37 days, until September 9, 2024, to bring a challenge under EL § 12-202.

While the 10-day deadline for bringing a challenge under EL § 12-202 is not a statute of limitations, it does "provide[] a benchmark for the application of laches." *Lamone v. Schlakman*, 451 Md. 468, 485 (2017). The ten-day window is designed to preclude "eleventh hour challenge[s]" that would throw an election into chaos. *Id.* at 489.

The doctrine of laches "has particular import in the election context." *Trump v. Biden*, 951 N.W.2d 568, 636 (Wis. 2020). "Extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election." *Id.* Such extreme diligence and promptness are important because "[a]s time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990).

It is well-established that "in the context of election matters, any claim against a state electoral process must be expressed expeditiously." *Liddy v. Lamone*, 398 Md. 233, 245 (2007) (internal quotations omitted). *See also Ademiluyi v. Egbuonu*, 466 Md. 80, 127 (2019) (stating that an election challenge "must be expressed expeditiously" and "without unreasonable delay").

"For laches to bar a particular claim, a defendant must generally demonstrate that the opposing party…had knowledge, **or the means of knowledge**, of the facts which created his cause of action." *Id.* (quoting *Parker v. Bd. of Election Supervisors*, 230 Md. 126 (1962)) (internal quotations omitted) (emphasis added).

Appellees argue that they filed their claim "as soon as they could." (Appellees' Br. at 27). That is not the case. While Appellees contend that they did not know the language of Question F until it was made publicly available on September 2, Appellees do little to dissuade the fact that they had the "means of knowledge" as to what Question F would say during the prior month.

Appellees try to argue around their blatant lack of diligence by arguing their delayed challenge was permissible because Question F was not on the State Board or City Solicitor's websites until September 2 and the City Solicitor's certification of Question F received "little to no media attention." (Appellees' Br., at 24-25). But the websites of the State Board and City Solicitor and news reports are not the only ways in which a party can have the "the means of knowledge of the facts" that form their cause of action. *Ademiluyi*, 466 Md. at 127.

This Court in *Abrams v. Lamone*, 398 Md. 146, 159 n.18 (2007), stated that "[a] reasonable interpretation [of § 12-202] would place an obligation on a registered voter seeking to challenge the qualification of a candidate to keep informed as to the relevant acts and omissions of that candidate." The Court explained that "[t]he State Board's website, along with media coverage, would have been the principal places from which" the plaintiff could have found candidacy information. *Id.* But the State Board's website and media coverage are not the only ways that a party can keep informed of a ballot question.

In an affidavit from Melissia Dorsey, the State Board's Assistant Deputy for Election Policy, whose work involves "overseeing coordination of responses to public requests for records," she attested that:

> In the normal course of business where the response to an information request affects an election critical deadline such as ballot production, SBE would have responded to a request for the Baltimore City Solicitor's letter that certified a ballot question within 48 hours by providing that letter to the requestor.

(E.49). Appellees would have been provided with a copy of the City Solicitor's letter—which included the language of Question F—within 48 hours of making a request to the State Board. (*Id.*). Appellees failed to make any such request.

Appellees have been actively involved in opposing MCB's redevelopment of Harborplace. They have been closely monitoring Harborplace-related actions. At least one Appellee, Anthony Ambridge, had been in communication with the City Solicitor's Office and Attorney General's Office to make requests related to the referendum. In an April 19, 2024 email to the City Solicitor's Office, Ambridge stated that he is part of a group of City residents who "have a great concern about this proposed change" to the Charter and have an "immediate interest" in assuring that "the language as presented to our Citizens represents the true meaning of this proposal." (E.66).

Appellees were well aware of the August 2 for the City Solicitor to prepare and certify Question F to the State Board. In his April 19 email, Ambridge stated that, "The Baltimore City Law Department is now required to provide language for the short title and narrative as it will be shown on the ballot, **and that language must be Certified by August 2, 2024 by the State Board of Elections**. (E.65-66) (emphasis added). He again

acknowledged in a July 16, 2024 email to Attorney General Anthony Brown that the language must be certified by August 2. (E.67-68).

Appellees did not make any request to the State Board on or after August 2 for a copy of the letter that had been sent by the City Solicitor with the language of Question F. They instead waited 37 days, until September 9, to bring their § 12-202 challenge. Appellees argue that they were "actively seeking and awaiting" the language of Question F based on Ambridge's emails. (Appellees' Br., at 27). But Ambridge was requesting access to the ballot language *before* it was finalized or certified and made no requests after.

Ambridge proposed in his April 19 and July 16 emails that that his group be permitted to review and "suggest changes" to the proposed language of Question F before it was transmitted to the State Board. (E.66-68). On May 13, 2024, he emailed the City Solitor asking about his "citizen group weighing in on the short title of the referendum before it is sent to the State Board of Elections." (E.65). The City responded that "[t]here will be no input from any group or individual other than those required by the law." (E.64). Ambridge was making requests to be involved in reviewing the proposed language of Question F.

Despite Appellees clear interest in obtaining the ballot language as soon as possible in order to mount a possible challenge to the language, there is no evidence that Appellees made a request after August 2 for the language of Question F. While Appellees may have "made their interest" in Question F known, as Appellees contend, they did not actually request a copy of the language after August 2, the date by which

they demonstrably knew it must be transmitted to the State Board and would, therefore, be available. (Appellees' Br., at 27-28). If Appellees' argument were to prevail, the City Solicitor and State Board would need to proactively contact anyone who had expressed interest in any ballot questions to let them know what the language said once certified. There is no requirement in Maryland law that either would need to do so, and doing so would be impractical and unreasonable.

Appellees seemingly contend they would not be able to get a copy of the language by pointing to an assertion by a reporter that she "called the Board of Elections" on August 19, the day before recording a WYPR radio show, but was not provided with the ballot language. (Appellees' Br., at 25). There is no additional information from the reporter as to which "Board of Elections" she contacted, who she spoke with, what she asked for, what she was told in response, and whether she was subsequently provided a copy. In contrast, a State Board official has attested that someone who requests the certification letter will receive it within 48 hours. (E.49).

There is nothing in the record showing that Appellees made a request between August 2 and September 2 for the language of Question F, even though they were well aware of the August 2 deadline. Instead, Appellees just sat on their hands for 37 days, despite the need for "[e]xtreme diligence and promptness that are required in election-related matters." *See Trump*, 951 N.W.2d at 636. Appellees' challenge to the language of Question F was not "expressed expeditiously" and should be barred by laches. *Liddy*, 398 Md. at 245.

2. The doctrine of laches bars Appellees' claim that Question F is not "charter material."

Appellees waited more than six months from the date the Mayor and Council enacted Council Bill 23-0444 on March 11, 2024, to bring their petition for judicial review challenging Question F as not being "charter material." This extreme delay flies in the face of well-established principles that election challenges should be "expressed expeditiously." *Liddy*, 398 Md. at 245.

First, for the reasons previously set forth, Appellees waited 37 days after Question F was certified and transmitted to the State Board to file a claim challenging Question F as not concerning "charter material." Appellees—who were highly motivated to oppose the charter referendum and were well-informed of the procedural process—had the means of knowing the language of Question F on August 2, 2024, or immediately thereafter. *See Ademiluyi*, 466 Md. at 127. Yet, Appellees chose to bury their heads in the sand and not obtain a copy of Question F, as they could have done by making such a request to the State Board.

Second, Appellees did not need to actually see the exact language of Question F in order to challenge the proposed charter amendment as not being "charter material." Appellees had actual knowledge, or the means of knowledge, of the proposed charter amendment when it was enacted on March 11. The enactment of Bill 23-0444 was covered by the media and the legislative history related to its enactment were available on the City Council's website. Ambridge also clearly was familiar with the language of Bill 23-0444 and the proposed charter amendment, writing in his April 19 email to the City

Solicitor that "[t]he recent ordinance passed by the Baltimore City Council and signed by the Mayor puts on the forthcoming November, 2024 ballot, that Referendum to remove these restrictions and allow development of residential towers and take from Charter the requirement of parkland/open space." (E.65-66).

Appellees are arguing that the proposed charter amendment was not charter material, which is a challenge that should have been brought within 10-days of the enactment of Bill 23-0444 or expeditiously thereafter. In March 2024, Appellees knew what Bill 23-0444 said and what its implications were: that City voters would be voting in November as to whether they were in favor or against an amendment to Art. I, Sec. 9 as set forth in Bill 23-0444. Whether the proposed amendment to Art. I, Sec. 9, which is included in full in Bill 23-0444, is charter material does not depend on the language of the ballot question.

In an October 4, 2024 interview with The Baltimore Banner, Appellees' counsel expressed that he came up with the idea to argue that the proposed amendment was not charter material when watching oral arguments before this Court on August 28, 2024 in *Frederick v. Baltimore City Bd. of Elections*, 2024 Md. LEXIS 323 (Aug. 29, 2024) and *Baltimore City Bd. of Elections v. Mayor of Baltimore*, 2024 Md. LEXIS 369 (Aug. 29, 2024), two cases involving charter amendment referendums brought by citizen-petition:

> Thiru Vignarajah, the attorney representing anti-redevelopment petitioners, said the legal argument only occurred to him while livestreaming the high court cases about the two measures the city wanted blocked.

> "I was like, huh?" said Vignarajah. "Then you start digging into the case law, and what's good for the goose ought to be good for the gander."[4]

Just because Appellees thought of a potential legal basis for challenging the proposed amendment to Art. I, Sec. 9 in late August—nearly six months after Council Bill 23-0444 was enacted—does not mean they have a right to "try out" that legal theory after the printing of ballots had already begun and when such a challenge should have been brought six months earlier.

Third, Appellees state that they were "unable to locate a single case where a challenge [under § 12-202] was filed prior to certification." (Appellees' Brief at 26). They cite *Save our Streets v. Mitchell*, 357 Md. 237 (2000); *Cheeks v. Cedlair Corp.*, 287 Md. 595 (1980); *Griffith v. Wakefield*, 298 Md. 381 (1984) in support of their claim. (*Id.*). But *Save Our Streets*, *Cheeks*, and *Griffith* do not discuss or involve EL § 12-202, and they all involved petition-initiated charter amendments, not legislatively-initiated charter amendments as is the case here.

Fourth, Appellees attempt to refute the untimeliness of their challenge by citing *Smigiel v. Franchot*, 410 Md. 302 (2009), for the proposition that "a ballot measure is not ripe for constitutional challenge until the ballot language itself is formulated and final." (Appellees' Br. at 26). But Appellees' reliance on *Smigiel* is misplaced, and *Smigiel* is readily distinguishable from the instant case.

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[4] Lee O. Sanderlin and Adam Willis, "How Baltimore's legal wins over ballot questions were turned against Harborplace," The Baltimore Banner (Oct. 4, 2024), https://www.thebaltimorebanner.com/politics-power/local-government/baltimore-harborplace-ballot-questions-BX7S6XZWHVGMBLEDYHWD2MXXDI/.

In *Smigiel*, the General Assembly sought to address a significant fiscal shortfall by creating a comprehensive regulatory scheme for slot machine usage throughout the State. 410 Md. at 305–06. Since the use of slot machines was illegal at the time, the legislation was contingent on an amendment to the Maryland Constitution enabling their use. *Id.* The *Smigiel* appellants challenged the proposed constitutional amendment by alleging that "any ballot question that was to be drafted would be misleading." *Id.* at 319. The Court held that the challenge was "premature" because the constitutional amendment had not even been drafted. *Id.* at 320–21. The Court reasoned that since "there was no ballot question" at all, "if this Court were to address the sufficiency of a ballot question that had yet to be drafted, then this Court would be placed in the position of rendering purely advisory opinions, a long-forbidden practice in this State." *Id*. at 320.

Critically, *Smigiel* is not a "charter material" case and is not a challenge under EL § 12-202. At issue in *Smigiel* was whether the ballot question would be misleading, whereas the basis for Appellees' "charter material" claim here is their argument that the ballot measure does not speak to the "form and structure" and government. The "charter material" claim does not require the actual language of the ballot question; whether something is "charter material" could be determined by the language of the proposed charter amendment. The language of the charter amendment at issue here is set forth in Council Bill 23-0444, which was enacted six months before Appellees' challenge.

Appellees knew about the initial language of the proposed charter amendment in the Fall of 2023 and they knew what the proposed charter amendment contemplated, *i.e.*, that certain areas set aside for retail and other commercial uses within Inner Harbor Park

would be expanded to facilitate the redevelopment of Harborplace. They knew the final language of the proposed charter amendment when Bill 23-0444 was enacted on March 11, 2024. Appellees' decision to file their EL § 12-202 challenge just weeks before the election amounts to "inexcusable delay" which has significantly prejudiced Appellants. *Ross*, 387 Md. at 670. The challenge was filed after ballots had already begun printing and has effectively halted the City's right to self-determination. *Lamone*, 451 Md. at 484–90. Appellees' "eleventh hour" challenge is improper and barred by the doctrine of laches.

3. Appellants were prejudiced by the lateness of Appellees' challenge.

Appellees seek to minimize the prejudice that has occurred as a result of their late challenge to Question F and the charter amendment. Their argument that there was no prejudice because the State Board was still able to meet its timetable for printing and mailing ballots strains credulity and should be flatly rejected.

"Whether prejudice has been established is dependent upon the facts and circumstances of each case, but it is generally held to be anything that places [an opposing party] in a less favorable position." *Ademiluyi*, 466 Md. at 124 (internal quotations omitted). Appellees' delay undoubtedly put MCB, as well as the State Board and the Mayor and City Council, in a "less favorable position." *Id.*

"[A] State indisputably has a compelling interest in preserving the integrity of its election process." *Liddy*, 398 Md. at 250. The United States Supreme Court has stated that "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy." *Id.* (quoting *Purcell v. Gonzales*, 549 U.S. 1 (2006)). In

Ross, the Court found that the petitioner's actions, in waiting three weeks after he knew of a candidate's failure to file a campaign financial report, "prejudiced the electorate as a whole by denying them the efficacy of their vote and undermining their faith in a free and fair election." 387 Md. at 673.

In *Perry v. Judd*, 471 Fed. Appx. 219, 220 (4th Cir. 2012), plaintiff filed an emergency motion for an injunction ordering that his name appear on the ballot in the Republican primary in Virginia or that ballots not be ordered, printed, or mailed while his appeal was being considered. In finding that the plaintiff improperly waited until the eleventh hour, the court reasoned that "[i]f we were to find Movant's delay excusable, we would encourage candidates to wait until the last minute to bring constitutional challenges to state election laws." *Id.* at 225.

Appellees cite *Anne Arundel Co. v. McDonough*, 277 Md. 271, 308 (1976) for the proposition that the court can invalidate ballot measures even after they go into effect. (Appellees' Br., at 32-33).[5] This was certainly true when *McDonough* was decided in 1976, and it is true today. But the point is that this should be an avoidable result. Voters should not be casting ballots on dead referendums or those likely to be invalidated, especially when it is both avoidable and contrary to statute.

[5] *McDonoug*h involved 31 amendments to a comprehensive zoning ordinance that were petitioned to referendum. It was decided 24 years before the comprehensive revision of Maryland election laws in 1998. *See* Chapter 585, Laws of 1998. *See also* Comm'n to Revise the Election Code, *Report of the Commission to Revise the Election Code* 56 (Dec. 1997); *In re Emergency Remedy by the Md. State Bd. of Elections*, 483 Md. 371, 408 (2022).

The purpose of the 10-day rule in EL § 12-202 was to require prompt action that did not result in delays or confusion, or in this case, a potentially dead referendum. As the Fourth Circuit reasoned in *Perry*, if Appellees are successful here, it will give license to future challengers to sit on their rights and file last-minute challenges (such as this one) that introduce chaos into an election system that requires stability and predictability.

A dead referendum on the ballot would undermine public confidence in the election system. Right now, Baltimore City voters have been presented with a ballot that includes Question F but, if the circuit court's decision is not reversed, will not be certified. MCB has suffered prejudice by the lateness of Appellees' petition for judicial review because it has led to voter confusion. Voters may not know whether they should even vote on Question F. They may believe that Question F is not going to be counted or that their vote will be a nullity. As a result, there may be voters who skip Question F or vote against it because the circuit court has declared their vote invalid. The election is 28 days away, and it is still unresolved. This could potentially distort the results of the referendum.

C. The Court should reject Appellees' contention that Question F is not proper "charter material" but that the underlying Charter provision is.

The Court need not and should not reach the "charter material" issue. This Court "will avoid constitutional questions when an alternative basis of decision fairly presents itself." *Bank of Am. v. Stine*, 379 Md. 76, 86 (2002). Appellees' claims were not raised in the correct court at the correct time or with the correct vehicle. The constitutional claims are easily avoided. Moreover, Appellees are free to challenge the overall

constitutionality of Art. I, Sec. 9, without interfering with the orderly process of the election.

Appellees describe "the most vexing conundrum" of how Art. I, Sec. 9 could be valid if Question F is invalid. (Appellees' Br., at 47). But there is no conundrum here. This issue is simple. If Appellees are correct, and Question F does not address the "form and structure" of government and is not proper "charter material," then neither is the section it amends, Art. I, Sec. 9. Indeed, Appellees' validity challenge to Question F is essentially derivative of any underlying invalidity in Art. I, Sec. 9 itself.

What is truly vexing to Appellees is that they filed their belated charter material challenge without recognizing where it must inevitably end if successful. Appellees profess such strong affinity for the parkland dedication provision. But they have unleashed a challenge that, if successful, would kill it entirely. It is Appellees who have let the proverbial cat out of the bag.[6]

Appellees' "charter material" argument begs this question: if the Council (and electorate) wished to narrow the scope of Art. I, Sec. 9, how, exactly, can they do that? If the Council and the electorate had the authority in 1978 to adopt a charter amendment dedicating 3.2 acres of land within Inner Harbor Park to be set aside for certain retail and commercial uses, then surely they have the authority to expand or modify it. Yet,

[6] Once the cat is out of the bag, you cannot "get the cat back in the bag." *United States v. Bayer*, 331 U.S. 532, 541 (1947) (Jackson, J.).

Appellees essentially argue that the Mayor and Council—and the electorate—are powerless to modify Art I., Sec. 9 now that it has been adopted.

Appellees would freeze Art. I, Sec. 9 in stone by claiming that any amendment to it is not proper "charter material." Under their argument, it is impervious to any amendment short of repeal. This reveals the circularity of Appellees' argument. If amendments to Art. I, Sec. 9 are not "charter material," it is only because the underlying amendment itself is not "charter material."

Appellees' position presumes that Art. I, Sec. 9 was valid when proposed by the Council in 1978 and ratified by the voters, an action taken for one specific private developer, the Rouse Company, to improve 3.2 acres of Inner Harbor Park for its own for-profit, commercial use. But now that it is part of the Charter, Appellees suggest that the Council cannot exercise its legislative prerogative to amend it, only "altogether repeal" it. (Appellees' Br. at 48). Appellees provide no authority for this "all-or-nothing" proposition. Such an approach would mean that legislative bodies could no longer narrow the scope of potentially invalid charter amendments. For example, Question H in 2016, which narrowed the scope of parkland dedication to permit two restaurants, would be invalid. (MCB App. at 3-4).

Appellees cite to five "charter material" cases to attack Question F, but these cases are inapplicable. (Appellees' Br. at 39-41). Each of these cases involved petitions to institute new legislative schemes into the Charter. *See Save Our Streets v. Mitchell*, 357 Md. 237 (2000) (speed bumps); *Griffith v. Wakefield*, 298 Md. 381 (1984) (arbitration); *Cheeks v. Cedlair Corp.*, 287 Md. 595 (1980) (rent control); *Bd. of Sup'rs of Elections of*

Anne Arundel Cnty. v. Smallwood, 327 Md. 220 (1992) (property tax); and *Atkinson v. Anne Arundel Cnty.*, 428 Md. 723 (2012) (arbitration for collective bargaining). None of these cases involved narrowing the scope of an existing charter amendment. To the extent these cases are applicable, they would apply to overall invalidity of Art. I, Sec. 9, not to an amendment like Question F which actually narrows the scope of the Charter provision.

Appellees also suggest that a different standard might exist for charter amendments that are legislatively initiated, as opposed to those initiated by petition. But this would discard any principled analysis of what is "charter material" – which focuses on the "material" itself, not its source. It is certainly true that all reported "charter material" invalidations have involved voter-initiated language. (E.72-79). But this does not mean that local legislators are not also incapable of adopting amendments which are not charter material. (Indeed, Appellees argue that here.). It could not be that the "speed bump" language in *Save our Streets* or the language in *Cheeks* establishing a comprehensive system of rent control could suddenly become proper charter material because they were legislatively-initiated instead of petition-initiated.

While the overwhelming majority of local legislative enactments involve amendments to city and county codes and ordinances, there are occasions when local legislators might be motivated to do so. One motivation might be to prompt a referendum on a topic. Another might be to bind future legislative bodies.

Further, Appellees variously label Question F a "zoning ordinance," a "zoning regulation," a "zoning law," and "rezoning." (Appellees' Br., at 11, 17, 37, 45). It is, of

course, none of these things. Instead, it amends Art. I, Sec. 9, which in 1978 "dedicated to public park use" certain municipal property in the Inner Harbor.

Baltimore City has a robust zoning ordinance in Article 32 of the City Code ("the Zoning Code."). At the same time that enacted Bill 23-0444, which proposed Question F, the Council passed Bills 23-0446 and 23-0448. Both were zoning enactments, sometimes called text amendments. Bill 23-0448 modified the Inner Harbor Urban Renewal Plan, essentially the City's waterfront masterplan, by changing certain development restrictions in certain development parcels. Unlike Question F, this was, in fact, a zoning amendment. Bill 23-0446, which eliminated the height restriction in C-5-IH Inner Harbor Subdistrict, was similarly a zoning text amendment. They belie the notion that question F interfered with the City Council's zoning authority or left the legislative body "with nothing left to do."

The Court should not reach the "charter material" question. If it does, it should find Question F a valid amendment. But if it invalidates Question F, it should invalidate the entirety of Art. I, Sec. 9 as improper charter material.

CONCLUSION

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

Respectfully submitted,

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

This brief contains 6,309 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 8th day of October, 2024, a copy of the foregoing was filed by MDEC.

/s/

Alyse L. Prawde