IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JANE DOE, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 293857
	:	
MONTGOMERY COUNTY BOARD OF ELECTIONS,	:	
	:	
Defendant.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/ CROSS-MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, JANE DOE, *et al.*, by undersigned counsel, Jonathan S. Shurberg and Jonathan S. Shurberg, P.C., and respectfully oppose the Motion for Summary Judgment filed by Defendant MONTGOMERY COUNTY BOARD OF ELECTIONS. This filing also stands as Plaintiffs' Cross-Motion for Summary Judgment. For the reasons set forth in the accompanying Memorandum of Points and Authorities and attached exhibits, Plaintiffs respectfully submit that the Motion should be granted. A proposed Order is attached.

Date: June 2, 2008

Respectfully submitted,

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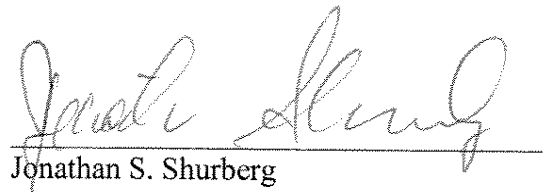
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2008, a copy of the foregoing was sent by e-mail and first-class mail, postage prepaid, to: Kevin Karpinski, Esquire, 120 East Baltimore Street, Suite 1850, Baltimore, MD 21202-1605.



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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Civil Action No. 293857

JANE DOE, *et al.*,

Plaintiffs,

v.

MONTGOMERY COUNTY BOARD
OF ELECTIONS,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/CROSS-MOTION FOR SUMMARY JUDGMENT

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 293857
	:	
MONTGOMERY COUNTY BOARD OF ELECTIONS,	:	
	:	
Defendant.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE BOE'S MOTION FOR SUMMARY JUDGMENT/CROSS MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, JANE DOE, *et al.*, and in opposition to the Motion for Summary Judgment filed by Defendant MONTGOMERY COUNTY BOARD OF ELECTIONS, and in support of Plaintiffs' Cross-Motion for Summary Judgment, submit the following Memorandum of Points and Authorities. For the reasons set forth herein, Plaintiffs respectfully submit that Defendant's Motion for Summary Judgment should be denied, Plaintiffs' Cross-Motion for Summary Judgment should be granted, and this Court should issue a written declaratory judgment as to the issues raised herein.

PRELIMINARY STATEMENT

Plaintiffs, twelve registered Montgomery County voters, represent a cross-section of this County. They include a Captain in the County police department, a homemaker, a student, a decorated veteran, an educator, a banker who is chairman of the Greater Silver Spring Chamber of Commerce, members of the clergy, the Mayor of Takoma Park, the head of the County chapter of the National Organization of Women, and a former Vice President of the

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Maryland NAACP — among them two individuals who are transgender and another who has a transgender sibling.[1]

Plaintiffs submit this Memorandum of Law in opposition to the motion for summary judgment filed by Defendant Montgomery County Board of Elections (hereinafter the "BOE") and in support of Plaintiffs' cross-motion for summary judgment. This Memorandum also responds to the *amicus* submission of the State Board of Elections (hereinafter the "State Board," referred to collectively with the BOE as the "Boards").

Plaintiffs bring this complaint pursuant to Maryland Election Law § 6-209 for judicial review of the certification of a referendum petition submitted by a group calling itself "Maryland Citizens for Responsible Government" (hereinafter "CRG"). CRG was organized to oppose a duly enacted law unanimously passed by the Montgomery County Council to remedy historical discrimination against transgender people, an ill that had previously gone unaddressed (hereinafter the "Law"). By submitting purported voter signatures in support of the petition, CRG blocked the anti-discrimination law from going into force on its scheduled effective date, February 20, 2008. Rather than allow the Law to go into effect as intended, CRG's referendum effort seeks to put the question whether to enact the Law before County registered voters in the November 2008 general election.

In a long line of consistent decisions, the Maryland Court of Appeals has affirmed that the right to referendum is meant to be used sparingly, only when the specific requirements

[1] Short descriptions of the Plaintiffs appear at ¶¶ 1-12 in their Complaint filed on March 14, 2008, attached as Exhibit 1 to the accompanying Affidavit of Jonathan S. Shurberg (hereinafter "Shurberg Aff.").

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prescribed by governing constitutional, statutory and local code provisions for its exercise are complied with strictly. *See, e.g.*, *City of Takoma Park v. Citizens for Decent Gov't*, 301 Md. 439, 448, 483 A.2d 348, 353 (1984); *Pickett v. Prince George's County*, 291 Md. 648, 659, 436 A.2d 449, 456 (1981); *Tyler v. Sec'y of State,* 229 Md. 397, 402, 184 A.2d 101, 103-04 (1962); *Beall v. State*, 131 Md. 669, 103 A. 99 (1917); *see also Gittings v. Bd. of Sup. of Elections,* 38 Md. App. 674, 681, 382 A.2d 349, 353 (Md. Ct. Spec. App. 1978).

The Montgomery County Council passed the Law after hearings and a deliberative process taking into account the interests of the transgender and broader communities in the County, while the referendum process gives a tiny minority the opportunity to block this popularly-supported legislation from taking effect. The "referendum is a concession to an organized minority and a limitation upon the rights of the people." *Takoma Park*, 301 Md. 448, 493 A.2d at 353 (internal quotation marks omitted). According to the Court of Appeals:

> The exercise of the right of referendum is drastic in its effect. The very filing of the petition, valid on its face, suspends the operation of any of a large class of legislative enactments and provides an interim in which the evil designed to be corrected by the law may continue unabated, or in which a need intended to be provided for, may continue unsatisfied.

Id., quoting *Tyler,* 229 Md. at 402, 184 A.2d at 103-04. For this reason, the Court of Appeals has held that petition efforts must strictly comply with the letter of the law to ensure that the "drastic" referendum process is not abused. Moreover, the right of judicial review provided in the Maryland Election Law is an integral check to ensure that invalid referendum petitions are not permitted to suspend operation of a much-needed law.

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The petition in this case did not strictly comply with the clearly articulated legal standards for certification of a referendum petition. It is insufficient both in numbers of valid signatures required for certification of a referendum and in its failure to advise voters properly about the true nature of the referendum effort and the effect of signing the petition. This petition never should have been certified. It certainly should not be permitted to continue to suspend effect of a law enacted to protect an historically marginalized group from unlawful discrimination. Maryland and Montgomery law would be further violated if the transgender anti-discrimination Law were to go to public referendum.

The Boards urge the Court to ignore specific, unequivocal requirements for a referendum petition and the legal standards that govern judicial review under exactly the circumstances here. Instead, they suggest that referendum sponsors, boards of elections and reviewing courts are free to discard constitutional, statutory and code requirements and Court of Appeals rulings so long as there has been compliance with just *some* of the requirements and neither the petition sponsor nor the boards are burdened by the effort of complying fully with the law.

Towards this end, the Boards attempt to paint this case not as what it is — a referendum effort to halt operation of and overturn a Law passed through the process of deliberative representative democracy — but as a challenge to the very right of suffrage of the people of Montgomery County. They neglect to cite a *single one* of the long string of Court of Appeals cases governing referendum petitions and dictating that such petitions must strictly comply with all relevant laws. Rather than so much as acknowledge the direct governing authority,

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they instead invoke two inapposite cases involving a materially different kind of signature petition — those of political groups to form new political parties and field political candidates. Those cases, *Nader for President 2004 v. Maryland State Board of Elections*, 399 Md. 681, 926 A.2d 199 (2007), and *Maryland Green Party v. Maryland Board of Elections*, 377 Md. 127, 832 A.2d 214 (2003), specifically turned on concerns about disenfranchising individual voters from participating in general elections to select governing officials, in violation of the fundamental right of suffrage. The present case, however, in no way implicates disenfranchisement from voting. Disqualifying a purported referendum petition signature because the signer or petition circulator failed to comply with legal requirements does not undermine the purported signer's right or ability to vote in any election or for any candidate. Requiring adherence to specific safeguards against insufficient referendum petitions that halt operation of enacted laws and the goals of representative government should not be confused with efforts to put up roadblocks to anyone's right to vote or to participate in the political process. The Boards' rhetoric aside, this case involves straightforward application of very specific constitutional, statutory and code requirements governing the petition referendum process, which the Court of Appeals has held must be complied with strictly.

Specifically, the petition includes, for example, a very significant number of incomplete, and therefore, invalid, signatures; signatures attested to not by the required circulator but merely by the signer her or himself; and purported signatures that circulators attested to having witnessed days before the signatures were even dated, or made by persons

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obviously not the purported signer. These defects violate specific provisions of the Maryland Constitution, Election Law and Montgomery County Code governing referenda.

And beyond the thousands of invalid signature entries, the petition is fatally defective overall because text on the petition pages used to induce Montgomery residents into signing it mischaracterizes the already-enacted transgender rights Law merely as an un-enacted "Bill," suggesting that signing the referendum petition would support placing it on the ballot for "approval" — i.e., initial enactment. In reality, however, contrary to these misrepresentations, signing the petition could lead only to (1) halting the already enacted and self-executing law from taking effect, and (2) contributing to an effort to repeal, not enact, it. This disinformation violated Montgomery County Code and Maryland Election Code requirements.

The BOE also raises two preliminary arguments apart from the merits of the case. First, the BOE claims that certain aspects of Plaintiffs' judicial review claims are time-barred, citing Maryland Election Code (hereinafter "Elec. Code") § 6-210(e). However, the BOE has ignored entirely the fact that Plaintiffs, in addition to their request for judicial review pursuant to Elec. Code § 6-209(a), also seek a declaratory judgment pursuant to Elec. Code § 6-209(b). There is no 10-day statute of limitations governing such claims for declaratory relief, which encompass all issues "with respect to the provisions of this title or other provisions of law." As a result, none of Plaintiffs' claims is time-barred. Furthermore, the BOE's construction of § 6-210(e), which as written is clearly directed to sponsors, not opponents, of referendum petitions, would result in Plaintiffs having been required to assert in piecemeal fashion three separate claims for judicial review of BOE determinations, two of which they had no knowledge of, and which

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were given no publicity whatsoever. Imposition of such a requirement would both unnecessarily squander judicial resources and create serious due process issues as applied to the circumstances of this case. Moreover, the BOE concedes that Plaintiffs' claims regarding the deficiencies in the second half of CRG's signature submissions — which in and of themselves require de-certification of the petition — are in no event time-barred.

The BOE next contends that the scope of this Court's review is narrowly circumscribed, and should address solely "whether the Montgomery County Board of Elections, the only Defendant herein, properly verified and certified the Petition based upon the applicable statutes, regulations, and guidelines." *See* Mem. in Supp. of BOE Motion for Summary Judgment (hereinafter "BOE Mem.") at 20. Plaintiffs submit, however, that insofar as they have requested a declaratory judgment, and done so in comprehensive terms, *see* Shurberg Aff., Exh. 1, Complaint, ¶¶ 55-61, all challenged aspects of the referendum petition are subject to this Court's scrutiny and determination. Maryland law in this area is clear — once a declaratory judgment is requested, in ordinary circumstances a trial judge must declare the rights of the parties as to the issues raised by the parties. As a result, this Court's inquiry is in no way limited, and encompasses all potential claims under the Election Code and other provisions of law, including those involving the BOE and those relating directly to the referendum petition itself.

The material facts in this case are indisputable. Plaintiffs submit as affidavit exhibits paper and digital copies of each demonstrably invalid signature, numbering in the thousands, along with other supporting evidence. Based on this incontrovertible evidence and the

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governing legal standards, Plaintiffs are entitled to summary judgment as a matter of law and a declaration decertifying the petition for referendum.

STATEMENT OF FACTS

A. Enactment of the Law

On November 13, 2007, following public hearings, the Montgomery County Council unanimously passed Montgomery County Bill No. 23-07, the "Non-discrimination — Gender Identity" Law (the "Law"), Shurberg Aff., Exh. 2. It was signed into law by County Executive Isiah Leggett on November 21, 2007. *Id.*

The Law adds "gender identity" to the categories protected under the County's anti-discrimination provisions. *Id.* at § 27-6. Its effect is to protect transgender people in the County from discrimination in employment, public accommodations, housing, and cable television and taxicab service. *Id.* at § 27-1. It is similar to the many transgender anti-discrimination provisions already enacted in more than 90 jurisdictions nationally, including in 13 states, Baltimore City, and Washington, D.C. *See* Transgender Law & Policy Institute, Non-Discriminations Laws That Include Gender Identity and Expression, *at* http://www.transgenderlaw.org/ndlaws/index.htm (last updated Dec. 20, 2007).

The County Council enacted the Law to address discrimination on the basis of gender identity, which has been the cause of unemployment, poor housing, poverty, lack of safety and other social ills for transgender people in the County. *See* Shurberg Aff., Exh. 2, § 27-1, Statement of Policy. The Law was scheduled to go into effect on February 20, 2008. *Id.*

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B. CRG's Efforts to Thwart Operation of the Law

A small contingent of foes of anti-discrimination protections for transgender people, unable to persuade a single one of the duly elected Council representatives of the people of Montgomery County to vote against the measure, turned to the referendum process in their effort to halt the Law from taking effect. Calling themselves Citizens for Responsible Government, they launched a website opposed to transgender rights protections, www.notmyshower.net, and commenced a signature-gathering drive. Applying fear-mongering tactics, CRG miscast this thoroughly-vetted law designed to protect transgender people from being turned away from jobs, stores, restaurants and taxicabs, as a means to allow imposters to threaten children in shower stalls. *See, e.g.*, http://www.notmyshower.net/bathrooms.shtml.

On the face of the petition signature forms, the petition further mischaracterized the already enacted Law as merely an un-enacted "Bill," and the referendum as an opportunity to vote for "approval" of the un-enacted Bill. *See, e.g.*, Affidavit of Anna Lucas (hereinafter, "Lucas Aff." or "Lucas Affidavit"), Exh. 2 *et seq.*; Shurberg Aff., Exh. 9. This text was misleading encouragement to *supporters* of transgender rights to sign the petition in the belief that if they wanted to see such an anti-discrimination law passed and in effect they should lend their signatures. In fact, a signature on the petition was a contribution to stop the already enacted Law from taking effect and to open it to *disapproval* by voters who would not have the benefit of the information and testimony that led the County Council to enact it unanimously. Nevertheless, CRG distributed its misleading petition to Montgomery County citizens in its effort to undermine protections against discrimination for transgender people.

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This is not the first time this same band of individuals has launched an attack against Montgomery County's minority communities and the elected officials who have taken steps to ensure their equal treatment. CRG is the latest incarnation of a group previously calling itself "Citizens for Responsible Curriculum," or "CRC." Last year CRC brought an unsuccessful administrative and court challenge to Montgomery County School Board's sexuality health curriculum, objecting to the curriculum because it was not condemning of a same-sex sexual orientation. Following rejections by the County school board, State school board, and Circuit Court, *see Citizens for a Responsible Curriculum v. Montgomery County Public Schools,* Civil No. 284980, Memorandum Opinion dated 1/31/08, William J. Rowan, III, J, attached as Exh. 3 to Shurberg Aff., the CRC band set its sights on Montgomery County's transgender residents, launching this referendum effort.[2]

C. The Process and Requirements for Bringing a Law to Referendum

The process and requirements for bringing a County-enacted law to a referendum are laid out in a series of provisions contained in Article XI of the Maryland Constitution; Title 6 of the Election Laws in the Maryland Code; COMAR Title 33, Subtitle 6; §§ 114-15 of the Montgomery County Charter; and Article II of Chapter 16 of the Montgomery County Code. The referendum procedure and requirements are highly detailed, requiring compliance with a number of specific preconditions before a petition may be certified. *See, e.g.*, Md. Code §§ 6-

[2] For example, Ruth Jacobs, the resident agent and director of CRG, *see, e.g.,* Shurberg Aff., Exh. 4 (CRG Articles of Incorporation), was also CRC's official representative on the school curriculum issue, *see* Minutes at 37, Jan. 10, 2006 Meeting of the Bd. of Educ. of Montgomery County, available at http://www.montgomeryschoolsmd.org/boe/meetings/minutes/2006/011006.pdf. CRG's local counsel, John Garza, was CRC's President. *See, e.g.,* http://www.mcpscurriculum.com/pdf/Allan_Lichtman_wrote_an_op_ed_in_the_Gazette_entitled_Sex.pdf.

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203, 6-206 - 08, 6-210. For example, every petition page must contain a "fair and accurate" summary of the subject of the referendum, *id.* at § 6-201, in the text format further specified in Montgomery County Code § 16-5. Only registered Montgomery County voters may sign petitions. Elec. Code § 6-203(b)(2). For their signature to be deemed valid, their name must be signed as it appears on the statewide voter registration list or with their surname of registration and at least one full given name and the initials of any other names. *Id.* at § 6-203(a)(1). They must also provide, in print, their name as signed, their address and the date of signing. *Id.* at § 6-203(a)(2); Montgomery County Code § 16-6. Every signature must also be witnessed by a circulator in whose presence the signatures on the page were affixed, who observed the signing, and who swears in an affidavit to this and other specific information. *See, e.g.*, Elec. Code § 6-204(a).

The referendum process requires a referendum sponsor to submit valid signatures of 5% of registered Montgomery County voters, or a total of 25,001, within specified time-frames, to bring the Law to a referendum. *See* Montgomery County Charter, Art. I, § 114. Two stages must be satisfied in this process. *See id.*; *see also* Aff. of Margaret Jurgensen in Supp. of BOE's Mot. for Summ. J. (hereinafter "Jurgensen Aff."), Attachment 3. In order for this petition to be entitled to certification, CRG was required to submit 12,501 valid signatures by February 4, 2008. It was then required to submit 12,501 more valid signatures by February 19, 2008. *See* Montgomery County Charter, Art. I, § 115.

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D. Certification of the Petition by the BOE

CRG attempted to satisfy this procedure by filing 15,146 purported petition signatures on February 4 and 15,506 purported signatures on February 19, 2008. *See* Jurgensen Aff. ¶¶ 4-5. These filings caused the Law to be halted from going into effect pending the determination by the BOE whether to certify the petition, and, if certification resulted, pending the outcome of the referendum. Montgomery County Charter, Art. I, § 115. In the meantime, transgender individuals, who the County Council had unanimously recognized to be victims of discrimination, continue to suffer from the lack of anti-discrimination protections that had been mandated by the Law.

Subsequent to filing their complaint, Plaintiffs learned in discovery that the BOE had made an "advance determination" pursuant to Elec. Code § 6-202(a) that the form of the petition was sufficient. *See* Shurberg Aff., Exh. 5 (letter from K. Karpinski to R. Jacobs dated Dec. 3, 2007). As BOE's counsel himself confirmed to CRG, this advance determination is not binding on the court, which "may or may not" find the advance determination to be "persuasive." *See* Shurberg Aff., Exh. 6 (email from K. Karpinski to R. Jacobs dated Nov. 27, 2007).

With CRG's filing of purported petition signatures by the required dates, it became the responsibility of the BOE to determine whether the petition complied with the legal requirements for a referendum to go forward. Pursuant to these requirements, BOE's primary responsibility was to verify that sufficient numbers of valid signatures were submitted within the required deadlines. Thus, if CRG failed to meet *either* the February 4 or February 19

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deadline with sufficient valid signatures, BOE was required to reject the petition as legally insufficient. *See, e.g.*, Charter, Art. I, § 115 (requiring "fifty percent of the required signatures" to be filed "within seventy-five days following the date on which the legislation becomes law," and the remaining fifty percent to be filed within ninety days of that date).

The BOE asserts in its summary judgment papers that its review of CRG's petition was mainly limited to determining whether information provided by a purported signer was sufficient to verify whether the individual was a registered Montgomery County voter. According to the BOE, even if the person had not provided a full signature, a printed name or an address, so long as some information provided on the petition page matched with a registered County voter, the signature was credited by the BOE towards CRG's total. *See* BOE Mem. at 6. The BOE concedes that it intentionally disregarded many of the specific requirements spelled out in the Election Law and Montgomery Code, such as those dictating that the signer's full name of registration or surname of registration and at least one full given name and initials of others be provided by the signer in order for the signature to be validated. *Id.* at 24-29. Likewise, the BOE concedes that it counted towards the petition total hundreds of signatures where the signatory and circulator were one and the same person, so that the signature was not made in the presence of or observed by a circulator witness. *Id.* at 32-33.

Using this methodology, the BOE validated 13,467 of the signatures from CRG's February 4 submission and 13,416 from the February 19 submission, a total of 26,883[3]; most of

[3] The Petition Signers Report produced by the BOE to Plaintiffs in discovery, which is an exhibit to the Lucas Affidavit, shows materially different numbers at issue in this case. According to that BOE record, 26,300 signatures, not the 25,001 the BOE now asserts, were required for certification of the petition. Furthermore, according to that record, 26,802 signatures — just 502 more than a 26,300 signature requirement — were deemed valid by the

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the invalidated signatures were of individuals not registered to vote in Montgomery County or where signatures appeared more than one time. *See* Jurgensen Aff., ¶¶ 4-7. On the basis of this review, on March 6, 2008, the BOE certified CRG's petition for a referendum at the November 2008 general election. Jurgensen Aff., Attachment 4.

As the numbers show, there is a relatively small margin between the quantities of signatures verified as valid by the BOE and the quantities necessary for certification. Specifically, if 966 signatures of those verified as valid by the BOE in the February 4 submission *or* 915 of those verified as valid in the February 19 submission do not comply with legal requirements to be counted as valid, the petition is not entitled to certification. Likewise, if 1,881 overall of the 26,883 total signatures validated by the BOE are in fact invalid, the petition must be decertified.[4]

E. The Complaint and Cross-Motions for Summary Judgment

On March 14, 2008, Plaintiffs filed the complaint in this action pursuant to Maryland Election Code § 6-209, seeking judicial review of the certification of the petition for referendum and requesting that the Court enter a declaratory judgment decertifying the

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BOE, not the 26,883 the BOE now asserts it counted as valid. *See* Shurberg Aff., Exh. 12. If the Petition Signers Report reflects the accurate numbers, then Plaintiffs assert that that data be deemed the controlling numbers in this case. In that event, if 503 signatures are found to be invalid (as is the situation here) the petition must be decertified. At a minimum, the BOE is obligated to explain to the Court and to Plaintiffs exactly why and how the numbers it now relies on in its motion papers are accurate while those reflected in the Petition Signers Report it produced to Plaintiffs are not.

[4] For the reasons discussed in footnote 3, the numbers of invalid signatures needed to disqualify the petition may in fact be far lower.

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petition.[5] Extensive review of all the signatures on the CRG petition pages validated by the BOE, and comparison with Montgomery County voter registration records provided by the BOE, reveal that thousands of the signatures submitted by CRG and credited as valid by the BOE in fact do not comply with basic, specific legal requirements detailed in controlling Maryland and Montgomery County election law. The review methodology is described in the accompanying Lucas Affidavit. Exhibits consisting of paper and digital copies of all petition pages with demonstrable signature defects, organized by categories of defect, accompany this motion as exhibits to the Lucas Affidavit. These signature defects and the numbers of defective and hence invalid signatures are summarized in the Chart of Signature Defects attached as Exhibit 1 to the Lucas Affidavit. For the Court's convenience, the Chart is also appended to this Memorandum of Law.

Taken either alone or in conjunction with one other, the sum result of these flaws is the necessary de-certification of CRG's petition.

ARGUMENT

In order to bring the Law to a referendum, CRG was required to satisfy the carefully prescribed referendum procedures, which must be adhered to strictly. *Takoma Park*, 301 Md. at 448, 483 A.2d at 353. On the basis of indisputable facts, the petition fails to meet these requirements and so must be decertified.[6]

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[5] On April 4, 2008, CRG, represented by John Garza and the Alliance Defense Fund, moved to intervene as a defendant in the case. By order dated April 25, 2008, the Court denied CRG's motion to intervene but granted CRG leave to file amicus submissions.

[6] Plaintiffs move for summary judgment at this time because the indisputable evidence demonstrates that, as a matter of law, the petition fails to comply with Maryland state and local law. Furthermore, the BOE's motion for summary judgment should be denied on the same legal bases. However, should the Court determine that there remain any disputed issues of

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Plaintiffs can establish as a matter of law that at least 966 of the signatures submitted on February 4 *or* 915 of the signatures submitted on February 19 *or* 1,881 of the signatures overall were invalid. Therefore, the numbers of valid signatures submitted in the petition fall below the legally required numbers to be entitled to referendum. Under Maryland's strict compliance guidelines, these signatures should have been rejected as invalid.

Moreover, the petition in its entirety was invalid under both state and local election law because of its erroneous, misleading summary of the referendum and failure to include mandatory text required under Montgomery County law. The entire form of the petition was so misleading as to render it legally insufficient as a whole. It should be decertified on this basis as well.

Summary judgment is appropriate where, as here, there is no genuine issue of material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law. *See* Md. Rule 2-501(f); *see also Charles County Comm'rs v. Johnson*, 393 Md. 248, 262-63, 900 A.2d 753, 761 (2006).

> [O]nce the moving party ha[s] provided the court with sufficient grounds for summary judgment, [i]t is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact . . . by producing factual assertions, under oath, based on the personal knowledge of the one swearing out an aff[i]davit, giving a deposition, or answering interrogatories. Bald, unsupported statements or conclusions of law are insufficient.

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material fact and to defer decision until after evidentiary determinations at the hearing scheduled in this case for June 11-12, 2008, Plaintiffs respectfully request that this motion alternatively be considered as Plaintiffs' brief in connection with that hearing.

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Miller v. Ratner, 114 Md. App. 18, 27, 688 A.2d 976, 980-81 (Md. Ct. Spec. App. 1997) (quoting *Lowman v. Consol. Rail Corp.*, 68 Md. App. 64, 70, 509 A.2d 1239, 1242 (Md. Ct. Spec. App. 1986) (1986)) (citations and internal quotation marks omitted).

I. The Petition Must Be Decertified Because It Fails Strictly To Comply With All Specified Legal Requirements For A Referendum.

The election law provisions governing referenda are not merely general guidelines to take or leave when circulating and evaluating a petition challenge to duly enacted legislation. Acknowledging the significant impact on representative democracy from bringing an enacted law to referendum, and the rarity with which such an event should occur, the Court of Appeals has repeatedly confirmed that only strict compliance with the prescribed procedures will suffice.

Representative democracy is the prevailing form of government provided by the United States Constitution, all 50 states and local home rule governments. The founding fathers established a republican form of government to protect minority and civil rights from the "tyranny of the majority." During the Progressive Era, concerns about legislative abuses by elected officials who had become the captives of "great corporations" led Maryland and a number of other states to allow for public referenda of legislative enactments, as a "supplement to the principle of representation." *Kelly v. Marylanders for Sports Sanity, Inc.*, 310 Md. 437, 451, 530 A.2d 245, 252 (1987) (internal quotation marks omitted). *See also* D. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective,* 19 Seattle U. L. Rev. 47, 48-53 (1995).

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While initially designed as a check on the political influence of robber barons, "[t]oday, direct democracy is used comparatively infrequently to curb abuses in government or otherwise to control elected officials." Derek A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 2, 18 (1978). Instead, in more recent decades referenda increasingly have been used by conservative minorities as a tool to try to undermine legislative civil rights advances of historically persecuted groups. Civil rights laws enacted to rectify discrimination against African-Americans, gay people, and — most currently — transgender people, have been targeted in referenda efforts sponsored by civil rights opponents. *See id.* at 14-15; William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 Ohio St. L.J. 583 (1994). In deciding whether to enact anti-discrimination laws, legislators have the benefit of testimony and scientific data and are charged with representing the needs of *all* their constituents and not just the majority, while referenda call on voters to make often ill-informed decisions on emotionally charged issues. In this arena, "referenda are often used to appeal to the worst types of irrational fears." *Id.* at 595.

Maryland's constitutional and statutory provisions governing referenda balance the interests behind direct democracy with concerns about its shortcomings. Thus referenda may subvert representative democracy only where procedural and substantive checks on its exercise are satisfied. Moreover, Maryland courts vigorously enforce these checks on the referendum process. Contrary to the Boards' claims, these requirements are not counter-democratic or "hyper-technical" efforts to "disenfranchise voters," but rather meaningful safeguards built into the referendum process to protect legislative advances from unjustified attack.

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The referendum attempt in this case joins other ignoble — and ill-fated — efforts in Maryland history to stop anti-discrimination laws from taking effect. *Takoma Park*, a leading case affirming the requirement of strict compliance with referendum requirements, involved judicial review of a referendum effort by a group calling itself *Citizens for Decent Government* ("CDG") — a name, doubtless not coincidently, nearly identical to *Citizens for Responsible Government*, sponsor of the present petition. CDG in *Takoma Park* sought repeal of Montgomery County's sexual orientation non-discrimination law — a precursor to the transgender anti-discrimination law under attack here. *See Takoma Park*, 301 Md. at 444, 483 A.2d at 351.

Unlike in this case, however, where the BOE seems only to have rubber-stamped CRG's efforts, the BOE in *Takoma Park* denied certification of CDG's petition to bring the anti-discrimination law to a referendum, finding that the petition misdescribed the law at issue, much as CRG's did here. *See* 301 Md. at 446, 483 A.2d at 351. On appeal, CDG argued that substantial compliance with the referendum requirements mandated by the Montgomery County Code should suffice. 301 Md. at 449, 483 A.2d at 351. The Boards now echo the same arguments made then by CDG, claiming that only substantial or lesser compliance with referendum requirements is necessary.

Takoma Park expressly rejected this very argument, holding that *strict* — not substantial or partial — compliance with referendum requirements is *mandatory*. The Court distinguished between pre-election petition review, where strict compliance must apply, and post-election review, where substantial compliance arguments might be permissible: "'When the court considers, prior to an election, an attempt to prevent the statute from going into force

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by use of a referendum petition, there must be strict compliance with the prerequisite of such suspension.'" *Id.* at 446, 483 A.2d at 352 (quoting *Pickett v. Prince George's County*, 291 Md. 648, 659, 436 A.2d 449, 455 (1981)). The Court held that *"[t]he statutory provisions [which establish the referendum procedure] are mandatory*" because access to such a procedure is a "privilege" that was "conce[ded]" to the citizens by the Maryland Constitution. 301 Md. at 448-50, 483 A.2d at 354 (quoting *Gittings,* 38 Md. App. at 681, 382 A.2d at 353) (emphasis added). The Court found that the failure to include an accurate description of the subject of the referendum meant that the petition sponsors had not properly availed themselves of that privilege, and, therefore, the "decision made by the lawfully designated representatives of the entire body politic" must stand. 301 Md. at 449, 483 A.2d at 353.

Similarly, in *Barnes v. State ex rel. Pinkney,* 236 Md. 564, 204 A.2d 787 (1964), the Court of Appeals did not permit a petition effort that failed to comply with the letter of the law to halt operation of Maryland's newly enacted public accommodations act prohibiting discrimination based on race, color, creed or national origin. 236 Md. at 568, 204 A.2d at 788-89. The Court declined to adopt a substantial compliance standard, instead holding that such requirements as that petition signers give their full names in print and provide their addresses were neither in conflict with state constitutional referenda provisions nor unduly burdensome. 236 Md. at 571-73, 204 A.2d at 791-92. Moreover, the Court held that the Secretary of State, responsible at that time to evaluate the sufficiency of petitions, had no authority to ignore these "mandatory" provisions. 236 Md. at 574-75, 204 A.2d at 792-93. Because an insufficient number of signatures complied with these requirements, the petition was not entitled to stop operation of the anti-discrimination law or put the law to a public vote. *Id.*

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In case after case the Court of Appeals has made clear that all applicable requirements must be followed for a referendum petition to succeed. "[S]tringent language employed [by the referendum procedure] . . . shows an intent that those seeking to exercise the referendum in this State must, as a condition precedent, strictly comply with the conditions prescribed." *Takoma Park*, 301 Md. at 448, 483 A.2d at 353 (quoting *Beall*, 131 Md. 669, 103 A. 99). The Court has specifically rejected precisely what the Boards suggest is proper here — simply ignoring the plain commands of the election laws that govern referenda to allow petitions that do not comply with the letter of the law to qualify for referenda. "[T]he Court cannot by construction eliminate a mandatory provision deliberately adopted by the General Assembly." *Takoma Park*, 301 Md. at 447, 483 A.2d at 353 (internal quotation marks and citations omitted). *See also Ferguson v. Sec'y of State*, 249 Md. 510, 240 A.2d 232 (1968) (holding provisions of referendum procedure to be mandatory, including affidavit requirement; affidavits made on knowledge, information and belief rather than on personal knowledge held to be so defective as to invalidate petition for referendum); *Abell v. Sec'y of State*, 251 Md. 319, 247 A.2d 258 (1968) (holding referendum petition deadlines to be mandatory, and approving refusal of Secretary of State to refer challenged enactment to referendum because petitions were not filed in strict compliance with those deadlines); *Tyler*, 229 Md. at 403, 184 A.2d at 104 (enforcing strict compliance with circulator affidavit requirement); *Phifer v. Diehl*, 175 Md. 364, 366, 1 A.2d 617, 618 (1938) (invalidating petition due to insufficient number of signatures); *see also Gittings*, 38 Md. App. at 679-680, 382 A.2d at 351-52 (affirming summary judgment entered in favor of referendum opponents due to petition sponsors' "fail[ure] to meet the constitutional and statutory requirements which authorize the exercise of the [referendum] privilege").

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Remarkably, the Boards neglect even to mention either *Takoma Park* or *Barnes* — two cases obviously squarely on point— or the many other Maryland appellate cases all confirming that strict compliance with legal requirements is required before a referendum petition may stop operation of a duly enacted law and be certified for public vote. Instead, the Boards rely on *Nader* and *Green Party*, two recent cases dealing not with referenda petitions but with a distinct type of voter signature petition — those to put a political party and candidate on the election ballot. The Court in both cases was concerned with the close ties between the petition process to qualify a political party and put a candidate on the ballot and the ability to vote for a political candidate — i.e., the fundamental right of suffrage. *See Nader,* 399 Md. at 703-04, 926 A.2d at 212 ("[T]his Court has . . . equated the nominating petition process to voting in this State."); *Green Party*, 377 Md. at 151, 832 A.2d at 228 ("[I]f the only method left open for the members of a political party to choose their candidates is via petition, then the right to have one's signature counted on a nominating petition is integral to that political party member's right of suffrage."). *See also, e.g.*, Elec. Code § 4-102(a)(1) (new political party may be established by filing signature petition).

In *Nader* the Court held unconstitutional as applied a provision not at issue here, § 6-203(b)(2) of the Election Code, which required petition signers to identify their county of registration. That provision had been applied by the election board in that case to disqualify some voters from participation in a statewide petition process to place a national party and presidential candidate on the Maryland ballot. The Court held that the impact of this requirement on the ability to vote for the candidate of a person's choice required that the government have a compelling interest for its enforcement, the well-settled standard Maryland

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applies for infringements on the basic right of suffrage. 399 Md. at 698-705, 926 A.2d at 209-13.

Green Party similarly turned on the direct relationship between the selection of a political candidate and the right of suffrage. 377 Md. at 151, 832 A.2d at 228. The Court held in that case that regulations promulgated by the election board could not pose greater restrictions on the right to vote than provided in the Maryland Constitution. Regulations disqualifying otherwise registered voters from nominating candidates because they had been designated "inactive" voters were thus unconstitutional. 377 Md. at 151-52, 832 A.2d at 228-29.

Notably, neither *Nader* nor *Green Party* even mentioned the long line of referenda cases that includes *Takoma Park* and *Barnes*. This is not surprising, given that the political candidate voting cases implicate far different concerns and apply far different standards from the distinct referendum context. The strict construction of election law requirements appropriate and, indeed, mandatory in the referendum context does not carry over to hinder the ability of voters to participate in nominating petitions or candidate elections. The Maryland cases specifically addressing pre-election referenda requirements, not cases addressing the distinct political candidate context, govern here.[7]

[7] *Takoma Park* itself illustrates that different standards of review are applied under Maryland election law depending on the context — and that in this context strict compliance is the mandatory standard. In that case the Court of Appeals explicitly distinguished standards that might apply to evaluate a referendum *post-election* with the strict compliance standard that governs in the referendum context *pre-election*. 301 Md. at 446-47, 483 A.2d at 352.

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II. Plaintiffs' Claims Are Timely And Call For A Determination By This Court That The Petition Must Be Decertified.

A. Plaintiffs' Claims Are Not Time-Barred

The BOE contends that the Plaintiffs "did not timely seek judicial review" of the BOE's advance determination of December 7, 2007 and that therefore Plaintiffs' claims are time-barred. *See* BOE Mem. at 8-9. Similar claims are advanced as to the BOE's determination of February 20, 2008, certifying 13,467 signatures as valid from the CRG submission of February 4, 2008. Plaintiffs submit that (1) the BOE has misconstrued the governing statutory provisions, (2) the BOE has ignored Plaintiffs' claims for declaratory judgment, which are not subject to a 10-day statute of limitations and encompass both of the above claims, and (3) even accepting the BOE's claims *arguendo*, the BOE still concedes that the signatures submitted by CRG on February 19, 2008 are properly before this Court, and as Plaintiffs demonstrate, there are more than sufficient bases for this Court to direct decertification of the CRG referendum petition based on defects with those signatures alone. For all of these reasons, Plaintiffs urge this Court to reject the BOE's claims regarding timeliness in their entirety.

Maryland Elec. Code § 6-209 provides for two types of court action, judicial review and declaratory judgment:

> Generally
>
> (a)(1) A person aggrieved by a determination made under § 6-202, § 6-206, or § 6-208(a)(2) of this subtitle may seek judicial review:
>
> > (i) in the case of a statewide petition, a petition to refer an enactment of the General Assembly pursuant to Article XVI of the Maryland Constitution, or a petition for a congressional or General Assembly candidacy, in the Circuit Court for Anne Arundel County; or
> >
> > (ii) as to any other petition, in the circuit court for the county in which

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the petition is filed.

(2) The court may grant relief as it considers appropriate to assure the integrity of the electoral process.

(3) Judicial review shall be expedited by each court that hears the cause to the extent necessary in consideration of the deadlines established by law.

Declaratory relief

(b) Pursuant to the Maryland Uniform Declaratory Judgments Act and upon the complaint of any registered voter, the circuit court of the county in which a petition has been or will be filed may grant declaratory relief as to any petition with respect to the provisions of this title or other provisions of law.

Pursuant to § 6-210(e), "any judicial review of a determination, as provided in § 6-209 of this subtitle, shall be sought by the 10th day following the determination to which it relates." Of significance, and not noted by the BOE, is § 6-210(b), pursuant to which "the chief election official shall notify *the sponsor* of the determination" (emphasis added) within "2 business days." No provision is made for notice to anyone other than the petition sponsor, leading to the conclusion that, for purposes of the statute of limitations, it does not apply to a non-sponsor.

The Court of Appeals has held, in applying § 6-210 to a petition sponsor seeking judicial review of a deficiency determination, that "§ 6-210 of the Election Law Article requires notice. . . ." *Roskelly v. Lamone*, 396 Md. 27, 41 n.18, 912 A.2d 658, 666 n.18 (2006). In that case, the Court of Appeals ruled that a judicial review action by a petition sponsor was barred by § 6-210 where the action was filed more than 10 days after the State Board's deficiency determination. The issue in that case was whether actual notice was required, and the Court of Appeals held that it was not. *Id.* As to the Plaintiffs herein, however, there was no notice of any kind, actual or constructive.

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Plaintiffs note that it is not even clear that they qualified for judicial review at the time the earlier determinations were made. Pursuant to § 6-209(a), judicial review may be sought only by "[a] person aggrieved by a determination" made by the State or local Board of Elections. Contrast this language with § 6-209(b), which provides that "any registered voter" may bring claims for declaratory judgment.

This is a critical distinction. Plaintiffs are the opponents, not the proponents, of the referendum petition at issue here. They were involved in neither the BOE's advance determination of December 7, 2007, *see* Jurgensen Aff., Attachment 2, nor the BOE's initial certification of signatures on February 20, 2008, *see* Jurgensen Aff., Attachment 3.[8] Had the BOE denied a favorable advance determination in December 2007, or had the BOE certified an insufficient number of signatures in February 2008, pursuant to the statutory language, CRG representatives, not the Plaintiffs, would have been required to adhere to the 10-day judicial review provisions of § 6-209(a), because as proponents of the referendum petition, CRG representatives would have been "a person aggrieved" and thus entitled to seek judicial review. *Roskelly* confirms this clear mandate.

Plaintiffs, on the other hand, as opponents of the CRG referendum petition, only became "persons aggrieved," if at all, following the March 6, 2008 determination by the BOE to certify the petition in its totality and notification of the County Council and the County Executive that the referendum would be placed on the ballot at the November 2008 general election. *See* Jurgensen Aff., Attachment 4. It was that determination that put Plaintiffs on

[8] Plaintiffs and their counsel were unaware of Attachment 3 to the Jurgensen Affidavit until it was filed with this Court on May 16, 2008. It was not provided as part of the BOE's discovery responses on or about May 5, 2008. See Shurberg Aff., ¶ 8.

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notice that a referendum to which they are opposed was headed for the general election ballot, and triggered their obligation to seek judicial intervention. Plaintiffs' Complaint in this matter was filed on March 14, 2008, within 10 days of the BOE's final determination, and therefore was timely.

Even if, *arguendo,* portions of Plaintiffs' claims for judicial review in Count I of the Complaint advanced pursuant to § 6-209(a) could be construed as time-barred, all the claims advanced in that Count are nevertheless reviewable by this Court under Count II, advanced pursuant to § 6-209(b), which provides for a declaratory judgment action to be brought by any registered voter. Critically, the 10-day statute of limitations in § 6-210(e) by its terms applies only to actions for "judicial review of a determination" — the route provided by § 6-209(a). It does not apply to claims for "declaratory relief" "with respect to the provisions of this title or other provisions of law" — the route provided by § 6-209(b). Nor does any other provision of the Election Code provide a statute of limitations for such a declaratory judgment action. As a result, whether styled as a judicial review action (Count I of Plaintiffs' Complaint) or as a declaratory judgment action (Count II), all the claims presented by Plaintiffs, including the advance determination of December 7, 2007 and the initial certification of signatures on February 20, 2008, are properly before this Court for adjudication.

Finally, even if this Court were to accept the BOE's meritless claims regarding timeliness, the BOE nevertheless concedes that Plaintiffs' claims with respect to the February 19 submission by CRG and the petition's ultimate certification are properly before this Court. Even if the scope of the case were reduced in this manner, there remain more than sufficient reviewable deficiencies in the CRG referendum petition to establish that it failed to meet the

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requirements of Maryland law and must be decertified. Because CRG's petition failed to comply with, and the BOE failed to enforce, the governing standards, it now falls to the Court to enforce strict compliance with the statutory requirements for a referendum, and to decertify the referendum.

B. The Court's Review Extends To All Issues Raised In Plaintiffs' Complaint Both For Judicial Review And Declaratory Relief.

The BOE raises one final point preliminary to a consideration of the merits. The BOE claims it had only limited responsibility to consider a relatively narrow set of referendum requirements and was free to certify the petition even if a number of other legally prescribed conditions were not satisfied by CRG. It then suggests that the scope of this Court's review is narrowly circumscribed solely to "whether the Montgomery County Board of Elections, the only Defendant herein, properly verified and certified the Petition based upon the applicable statutes, regulations, and guidelines." BOE Mem. at 20. Plaintiffs respectfully submit that this position is supported by no case law whatsoever and in fact is contrary to statute and a plethora of Maryland cases.

The BOE has, once again, ignored the fact that Plaintiffs' request for relief encompasses not only judicial review, but also declaratory judgment. Such an action is explicitly granted by Elec. Code § 6-209(b), which furthermore makes specific reference to the Maryland Uniform Declaratory Judgments Act, codified at Md. Cts. & Jud. Proc. Code Ann., § 3-401 *et seq.*

Numerous appellate cases stand for the proposition that, where declaratory relief is requested, the trial court is obligated to consider *all* of the issues raised by the plaintiff, and to declare the rights of the parties as to the question or controversy before the court. In the identical context of this case, the Court of Appeals has stated that "once an action for

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declaratory judgment was brought and the trial court was requested to determine whether the petition was a proper one to go on the ballot . . . [i]t then became necessary that the trial court pass upon and adjudicate the issues raised." *Takoma Park*, 301 Md. at 445, 483 A.2d at 352 (1984), *citing Mauzy v. Hornbeck*, 285 Md. 84, 90-91, 400 A.2d 1091, 1095 (1979):

> The repeated decisions of this Court, as well as the wording of the Declaratory Judgments Act, make it clear that in an action appropriately brought under the Declaratory Judgments Act, seeking a declaration of rights under a statute, regulation, contract, etc., there should ordinarily be a decree passing upon and adjudicating the issues raised.[9]

Count II of Plaintiffs' Complaint seeks declaratory relief as explicitly allowed by the Election Code. Plaintiffs direct the Court's attention to ¶ 61, which states that:

> Plaintiffs seek a declaratory judgment of this Court to the effect that the referendum petition submitted by CRG in opposition to Bill 23-07 is invalid and insufficient, that the actions of Defendant BOARD OF ELECTIONS in certifying the petition were in violation of applicable Maryland law, and that the referendum should not be submitted to the voters in the November 4, 2008 general election, and that the Bill as enacted by the Montgomery County Council shall have immediate force and effect.

Based on the statutory and case law cited above, this Court not only can but should address all issues encompassed in Plaintiffs' request for declaratory relief, which go beyond the limited scope of review espoused by the BOE. All issues involved in the propriety, validity and

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[9] This proposition has been enunciated in numerous cases since *Mauzy*. *See, e.g., Union United Methodist Church, Inc. v. Burton*, ___ Md. ___, ___ A.2d ___ (April 11, 2008), 2008 WL 1121632 at *3 ("This Court, on numerous occasions, has reiterated that 'whether a declaratory judgment action is decided for or against the plaintiff, there should be a declaration in the judgment or decree defining the rights of the parties under the issues made.'"), *quoting Bowen v. City of Annapolis*, 402 Md. 587, 608-609, 937 A.2d 242, 254-255 (2007).

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sufficiency of the CRG referendum petition are properly before this Court, and this Court has the power and the duty to address those issues.

III. Thousands Of Purported Petition Signatures Must Be Invalidated Because They Do Not Comply With The Signatory Information Requirements Specified In Elec. Code § 6-203(a).

In certifying CRG's petition, the BOE failed to apply § 6-203(a) of the Maryland Election Code, which imposes specific requirements on the form of signatures and other identifying information required from the signer of a referendum petition. The text of these provisions is unambiguous in what precisely is required. Yet the Boards now claim that they have the authority to set their own guidelines that are flatly inconsistent with these plain requirements. Indeed, the BOE credited as valid *thousands* of purported signatures that indisputably do not comply with the clear-cut statutory requirements. The Boards' position is inconsistent with the specific provisions of the law and the strict compliance standard mandated by the Court of Appeals. Because the indisputable evidence establishes that thousands of purported signatures validated by the BOE failed to satisfy § 6-203 and other requirements, the Court must decertify the petition.

According to § 6-203 of the Election Code,

> (a) To sign a petition [for referendum], an individual shall:
>
> (1) sign the individual's name as it appears on the statewide voter registration list or the individual's surname of registration and at least one full given name and the initials of any other names; and
>
> (2) include the following information, printed or typed, in the spaces provided:
>
> (i) the signer's name as it was signed;
> (ii) the signer's address; [and]

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(iii)the date of signing. . . .

Section 6-203(b) further provides that "[t]he signature of an individual shall be validated and counted *if* (1) the requirements of subsection (a) of this section have been satisfied" (emphasis added).

Section 6-203(a) leaves absolutely no ambiguity about its requirements: for an individual's signature to be counted as valid, the individual *must* sign his or her name as it appears on the statewide voter registration list, or with his or her full last name and at least one full given name and the initials of any other given names. If a signature fails to meet this unequivocal standard, it must be rejected as invalid, and cannot be counted towards certification. The Court of Appeals already held in *Barnes* that referenda petitions must comply with precise signer requirements like those provided in § 6-203(a). *See* 236 Md. at 571-72, 204 A.2d at 791. Such requirements "safeguard the privilege which the Constitution grants," *id.* at 571, 204 A.2d at 791, and may not be waived here.

Yet CRG submitted thousands of signatures that failed to meet this requirement, and the BOE uniformly counted them as valid. Thus, for example, the BOE counted towards the February 19 total the "signature" of someone signing merely as "Katie," apparently because a "Katie E. Toth" could be found in the voter registration records at the same address. *See* Shurberg Aff., Exh. 7, documents Bates-stamped 2LI00000011-12, and other included examples. The BOE validated 50 such signatures whose last names do not match the voter registration rolls from the February 4 set and 91 from the February 19 set. *See* Lucas Aff., Exhs. 19-23, 30, 35, 36, 40. Even more commonly, the BOE counted non-conforming signatures like that appearing as "A. Mars," apparently because an "Amy Ann Mars" could be

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found at the address given. *See* Shurberg Aff., Exh. 8, documents Bates-stamped I00003628-29, and other included examples. The BOE validated a total of 5,120 such non-conforming signature entries from the February 4 set and 5,646 from the February 19 set. *See* Lucas Aff., Exhs. 3, 5, 7, 9, 10, 13, 15, 17, 18, 20, 22, 27, 29, 33, 34, 36, 39. This widely prevalent defect alone requires invalidation of the entire referendum petition.

Though less pervasive a shortcoming, many of the purported signatures counted by the BOE do not comply with other mandatory features of § 6-203, such as that *both* a signature *and* a printed name be provided. *See* Lucas Aff., Exhs. 26-40. Such deficiencies require that these purported signatures be deemed invalid as well.

The BOE and State Board resort to a number of strategies to excuse their decision to ignore these mandates of the General Assembly. *First*, for example, they grossly exaggerate what Plaintiffs argue, claiming that Plaintiffs demand "an exact match between names on a petition and the names on the registration list." BOE Mem. at 28; *see also* State Board Mem. at 4. Plaintiffs agree that an "exact match" is not required. But what indisputably *is* required by the plain language of the § 6-203(a)(1) is a match at least between the surname of the signer and one full given name and the initials of any others.

Second, the Boards argue that this requirement is a "hyper-technical" burden on voters, many of whom "do not even know how their name appears on the statewide voter registration list" and so could not "easily" comply with the requirement. BOE Mem. at 28; *see also* State Board Mem. at 4. The Boards suggest that enforcing this statutory requirement infringes on the rights of voters to participate in the referendum process. This argument is wrong on at least two counts. Maryland law is clear that referendum requirements cannot be jettisoned by the

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Board or petition sponsors simply because compliance poses a burden. "If the burden [of a referendum provision] is too heavy, the remedy is by an appropriate [legislative] amendment" to the provision, not simply by disregarding it. *Ferguson*, 249 Md. at 517, 240 A.2d at 236 (citing *Buchholtz*, 178 Md. 280, 286, 13 A.2d 348, 351 (1940)).

Moreover, the factual premise of this argument does not withstand scrutiny. It is impossible to see how it would burden voters to ask that they sign using at least their last name, one full given name and the initials of any other names. Montgomery County residents may not know exactly how their names appear on the voter registration list, but they surely can be presumed to know their own first, middle and last names. Petition circulators need only ask interested signers to include this statutorily-required information. As it was, the majority of signers – though not enough to certify the referendum – had no difficulty signing with their required names or initials. Even if there were any leeway in applying this requirement — and the bottom line is that it must be complied with strictly — it is just plain nonsense to claim it imposes an unfair burden on Montgomery County voters.[10]

Nor would enforcing this requirement unduly burden the BOE (even could this excuse the BOE's obligation to comply with state law). As the BOE admits in its motion papers, BOE staff already check each purported signature against the voter registration list to confirm registration. BOE Mem. at 6. BOE staff can confirm at that step whether the signature is complete or not. On Plaintiffs' side, volunteers have been able to perform this analysis using

[10] Plaintiffs again stress that the considerations raised in *Nader* and *Green Party* about disenfranchising voters when it comes time to vote in the election booth are not implicated here. And as those cases demonstrate, requiring strict compliance with the requirements of § 6-203(b) in the referendum petition context does not lead to a similarly strict compliance requirement for exercise of the right to vote guaranteed under the Maryland Declaration of Rights, Article 7.

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BOE-provided voter registration databases, as evidenced in the accompanying exhibits and Lucas Affidavit. Surely the BOE is capable of performing the same analysis as these volunteers. Indeed, the election law squarely places the responsibility to perform this analysis on "the chief election official" of the relevant "election authority," here, the BOE. *See* Elec. Code § 6-206(a). If the BOE does not live up to its responsibility to enforce these mandatory statutory requirements, Plaintiffs are entitled to seek enforcement by the Court. *See* Elec. Code § 6-209.

Third, the Boards claim that the purpose of the name requirement is only to verify that the signer is a registered voter, and admit that the BOE simply approved signatures of anyone who provided information sufficient to suggest they are a registered voter. BOE Mem. at 23; State Board Mem. at 4. But, again, this ignores the plain language of § 6-203(a)(1), which is exceedingly clear about the precise information required. The BOE has no authority to excuse petition sponsors from strictly complying with statutorily-mandated requirements and substitute a standard of only partial compliance. The General Assembly did not state in the Election Code that signers are merely required to provide enough information for the BOE to determine registration. It demanded that more detailed information be provided than what the BOE relied upon here, which, frankly, was no more than could be pulled from the County telephone directory. Without the information the General Assembly wisely required, an overly-zealous petition circulator could simply leaf through the Montgomery County phonebook and sign for County residents using the name and address information provided. Based on the standards the BOE admits it applied, these "signatures" would all pass muster, even though only partial name

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information was provided, so long as there was overlap with some of the data in the voter registration list.[11]

Fourth, the Boards next claim that § 6-103(a) of the Election Code authorizes them to adopt guidelines for signatures that depart from the specific requirements of § 6-203(a). *See* BOE Mem. at 26; *see also* State Board Mem. at 6. Section 6-103(a) provides that the "State Board shall adopt regulations, *consistent with this title*, to *carry out the provisions of this title*" (emphasis added). This provision obviously does not give the Boards carte blanche to adopt guidelines that are plainly *inconsistent* with the detailed requirements specified in § 6-203 of this title. A Board policy requiring less information than is required by § 6-203(a)(1) could not possibly be "consistent" with the statute's mandate that "[t]o sign a petition, an individual *shall"* supply at least their surname and one full given name and other initials. Nor could it be consistent with § 6-203(a)(2)'s mandate that there also appear in *print* the signer's name as signed, an additional requirement the BOE jettisoned for this petition.

Fifth, in the face of the obvious inconsistency between § 6-203(a)'s specific requirements and the Boards' policies *waiving* these requirements, the Boards point to a different provision of the Election Code, § 6-207(a)(2), and claim that it should be read to negate the plain terms of § 6-203(a). Section 6-207(a) provides:

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[11] The BOE's claim that birth date data provided by signers is an added check against forgery or mistaken identity where incomplete name information is provided, even if it were legally relevant, would not change the analysis. Date of birth is in fact one item of information that the Election Code does not specify as required, and COMAR specifically provides it is only *optional* and its absence "does not invalidate the signature." *See* COMAR 33.06.03.06(C). Indeed, the BOE validated numerous incomplete signatures even where the signer did not include a date of birth. *See, e.g.,* Shurberg Aff., Exh. 8 (examples of incomplete signatures *without* date of birth information nonetheless counted as valid by the BOE).

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(1) Upon the filing of a petition, and unless it has been declared deficient under § 6-206 of this subtitle, the staff of the election authority shall proceed to verify the signatures and count the validated signatures contained in the petition.

(2) The purpose of signature verification under paragraph (1) of this subsection is to ensure that the name of the individual who signed the petition is listed as a registered voter.

The Boards suggest that § 6-207(a)(2) negates the detailed requirements of § 6-203. Under the Boards' logic, so long as the BOE can figure out a way to determine whether an individual who seems to have signified *some* intent to sign a referendum petition is a registered voter, there need be no compliance with other, more specific, signature and information requirements.

This reasoning contravenes the text of the relevant provisions, canons of statutory construction and the legislative history of § 6-203. First, § 6-203(a) could not be clearer or more precise in what it requires. Adherence to the literal language of § 6-203 is required not only by the strict compliance standard that applies specifically to referendum measures, but also by more general rules of statutory construction. In ascertaining the meaning of a statutory provision, the court first will look to the "normal, plain meaning of the language," and, if the language is clear and unambiguous, will not look past those terms. *Bienkowski v. Brooks,* 386 Md. 516, 536-37, 873 A.2d 1122, 1134-35 (2005) (internal quotation marks and citations omitted). Moreover, the Court of Appeals has repeatedly stressed that it "construe[s] a statute as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory." *Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park*, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006) (citing *Moore v. State*, 388 Md. 446, 452, 879 A.2d 1111, 1115 (2005)). Interpreting § 6-203(a) to allow

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noncompliant signatures to stand as "genuine" valid signatures would render these provisions meaningless. *See Barnes*, 236 Md. at 571, 204 A.2d at 790. The Boards' tortured efforts to read other provisions of the Election Code into these unambiguous terms should be rejected.

On its face, § 6-207(a)(2) cannot reasonably be read as trumping and nullifying the specific language of § 6-203(a). Indeed, the two are separate, distinct commands, each of which must be complied with strictly. Section 6-207(a)(2) requires the BOE to "verif[y]" signatures to determine if they are "registered," and to count those that are registered *and* "validated." "Validated," in turn, is the term used in § 6-203(b)'s directive, quoted above, that a "signature of an individual shall be validated and counted if: (1) the requirements of subsection (a) of this section have been satisfied." "Validation" and "verification" of signatures thus are two distinct requirements under the Election Code, the first hinging on whether the detailed identifying information required under § 6-203(a) has been provided by the signer, and the second on whether the signer is a registered voter. *Both* sets of requirements must be met; it is not enough that a person who apparently affixes something short of a full signature and other required information on a petition is a registered voter.

It is particularly inappropriate for the Boards to take the position that § 6-203(a)(1) can be construed out of existence given its relatively recent enactment and the subsequent legislative history of that subsection and of § 6-207(a)(2). The Maryland General Assembly passed § 6-203 in 1998. Acts 1998, c. 585 § 2, eff. Jan 1, 1999. It amended the provision in 2005 for greater clarity. Acts 2005, c. 572, § 1, eff. Jan. 1, 2006. Among the changes was replacement in § 6-203(a)(1) of the words "registration list" with "statewide voter registration list." The fact that the General Assembly has revisited the wording of this provision so recently

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and preserved the precise requirements of § 6-203(a)(1) reinforces that it intended these provisions to continue to apply with full force. Moreover, the legislative history of § 6-207(a)(2), added in 2006, demonstrates that it was intended to relieve election boards of the requirement that they "verify the authenticity of signatures, in acknowledgment of the administrative and practical difficulty in adhering to that requirement." Maryland 90 Day Rep., 2006 Sess., Part C, Senate Bill 101 (Ch. 65). Thus § 6-207(a)(2) relieves election boards of the affirmative obligation to compare the handwriting on petition signatures with the handwriting on voter registration cards. While making this clarification, the General Assembly left intact § 6-203(a)(1), further demonstration that its specific provisions were not intended to be ignored by the election boards. Indeed, had the General Assembly intended for § 6-203(a)(1) to cease to apply, it could have amended the Election Code further to reflect that goal. Neither the Boards nor the courts have the "right under the law to grant such a dispensation." *Gittings*, 38 Md. App. at 678, 382 A.2d at 351. Instead, any alterations to the plain dictates of the statute must come from the General Assembly, not "by judicial construction." *Selinger v. Governor of Md.*, 266 Md. 431, 437, 293 A.2d 817, 820 (1972).

Finally, the Boards suggest that their past disregard of § 6-203 relieves them from any obligation to comply with its clear terms now. This argument contradicts well-established Maryland law. As the Court of Appeals explained in *Bouse v. Hutzler*, 180 Md. 682, 687, 26 A.2d 767, 769 (1942):

> Where the language [of a statute] is clear and explicit, and susceptible of a sensible construction, it cannot be controlled by extraneous considerations. No custom, however long and generally it has been followed by officials, can nullify the plain meaning and purpose of a statute. An administrative practice contrary to the plain language of a statute is a violation of the

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> law; and a violation of the law, even though customary, does not repeal the law.

Maryland courts thus have routinely held that "[a]n administrative agency's construction of [a] statute is not entitled to deference . . . when it conflicts with unambiguous statutory language." *Marriott Employees Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 446, 697 A.2d 455, 459 (1997); *see also Himes Assocs., Ltd. v. Anderson*, 178 Md. App. 504, 535-36, 943 A.2d 30, 48-49 (2008).

Thousands of purported signatures in the petition do not satisfy the requirements of § 6-203 to be counted as valid, causing the entire petition to fall far short of the required number of valid signatures. Plaintiffs have submitted incontrovertible evidence on this point. Accordingly, on this ground alone, summary judgment should be entered in Plaintiffs' favor, declaring the petition invalid and decertifying the referendum.

IV. The Petition Did Not Include A "Fair and Accurate" Statement Of The Referendum Proposal And Therefore Must Be Decertified.

The petition also fails to comply with both Montgomery County and Maryland state law requirements with respect to the substantive form of the petition, thereby rendering the entire petition defective. Specifically, Maryland law requires every signature page of a local referendum petition to contain a "fair and accurate" statement of the proposal advanced by the petition. Elec. Code § 6-201(c)(2). Contrary to this mandate, the summary of the proposal on CRG's petition sheets was significantly misleading. Moreover, CRG employed this facially misleading statement of purpose in plain violation of Montgomery County Code § 16-5, which requires that every Montgomery County referendum petition contain prescribed text summarizing the petition's purpose. Because a reasonable fact-finder would be compelled to

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find that CRG's petition failed to comply with these state and county law dictates, the Court should grant summary judgment in favor of Plaintiffs and decertify the entire petition.[12]

A. The Petition Does Not Comply With Montgomery County Code § 16-5.

The Montgomery County Code requires all referendum petitions distributed in the County to include the following language, "in substantially the following form":

> We, the undersigned registered voters of Montgomery County, Maryland, do hereby petition for a referendum vote on [the provisions (identifying them briefly) of] **the act entitled** 'An Act [inserting title], enacted by the County Council for Montgomery County, Maryland, at its [insert month and year] legislative session.

Montgomery County Code § 16-5 (emphasis added).

As the Montgomery County Attorney has stated, "a misleading petition," including a petition that does not comply with § 16-5, "leave[s] a reasonable person fundamentally in doubt as to [the petition's] intent," thereby rendering the petition "fundamentally flawed." Op. Montgomery Co. Att'y (Sept. 3, 1992), *available at* http://www.amlegal.com/pdffiles/MCMD/09-03-1992.pdf. "If a petition is misleading, it is impossible to determine that the ballot question has received the necessary approval of [the required number of] voters." *Id.*

The Court of Appeals has held that compliance with § 16-5 is mandatory and that failure to comply requires rejection or de-certification of a referendum petition. For example,

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[12] As noted above, Plaintiffs learned through discovery that the BOE made an "advance determination of sufficiency" of the referendum form pursuant to Elec. Code § 6-202. The BOE was wrong to do so — the form of petition was far from sufficient. As BOE counsel himself acknowledged, the advance determination is not binding on the Court. *See* Shurberg Aff., Exh. 6. It certainly does not relieve a petition sponsor or the BOE from the obligation to comply with election law requirements governing the fairness and accuracy of referendum proposals.

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in *Takoma Park*, the Court of Appeals held that a referendum petition violated § 16-5 both by failing to include the title of the law at issue and by providing an inappropriately ambiguous summary of the petition's effect. *Takoma Park*, 301 Md. at 446-49, 483 A.2d at 352-54. For example, the summary failed to include the title of the challenged act, as required by §16-5, referring to the act instead as "Bill No. 65-83." The act's opponents argued that this step was necessary because the act's name was excessively long. The court concluded, however, that the Maryland Constitution requires strict compliance with all referendum petition requirements. 301 Md. at 446-47, 483 A.2d at 352-53. The Court also found the petition summary defective because "[a]s read literally, the petition called for the removal from the act of the definitions of 'sexual orientation,' 'homosexuality,' 'heterosexuality,' *or* 'bisexuality.'" 301 Md. at 449, 483 A.2d at 354 (emphasis in original). The Court held that the use of "or" rather than "and" created ambiguity as to which definitions would be deleted. *Id.*

Like the decertified petition in *Takoma Park*, the CRG petition signature form uses text that materially departs from the language dictated by § 16-5. The petition omits the phrase "the act" specified in § 16-5 and replaces it with a reference to "Bill 23-07":

> We, the undersigned registered voters of Montgomery County, Maryland, do hereby petition for a referendum vote of the registered voters of the County for **approval** or rejection in the next general election on **Bill 23-07, Non-Discrimination—Gender Identity, entitled**: "An Act to prohibit discrimination in housing, employment, public accommodation, cable television service, and taxicab service on the basis of gender identity; and generally to amend County laws regarding discrimination," enacted on November 13, 2007 by the County Council for Montgomery County, Maryland.

See Shurberg Aff., Exh. 9 (emphasis added). In other places the signature form uses the terms: "Bill 23-07," "this Bill," and "the bill," but never uses the term dictated by the Montgomery

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County Code — "the act" — or any synonym thereof. This omission of any reference to the Law as an "act" is a significant deviation from the County's required language.

This deviation from the mandatory language was not only facially inconsistent with the requirements of the Montgomery Code but also materially misleading. First, as a legal matter, "bill" and "act" are mutually exclusive terms referring to legislation at different stages of the legislative process. A bill is most commonly understood as a "legislative proposal offered for debate before its enactment." Black's Law Dictionary (8th ed. 2004). An act, on the other hand, is "the formal product of a legislature or other deliberative body." *Id.* A bill, then, categorically cannot be an act and, by definition, cannot become effective without further action on the bill by the state. Moreover, under Maryland law, legislation that has been enacted but is facing a potential referendum is appropriately referred to as an act or a law, rather than as a bill.[13] Thus, only enacted legislation, in the form of an "Act" or a "law" may be brought for a referendum; bills cannot be sent to a referendum, because doing so is not authorized by Maryland law.

The misleading effect of the use of the incorrect term "bill" was compounded by the petition's use of the phrase "for approval or rejection." This phrase in a referendum petition might be permissible *if* in combination with an appropriate description of the law at issue, *see, e.g.*, Md. Const. Article XVI § 1(a). But, in combination with the mischaracterization of the Law as a "bill," a reasonable person would be led to believe that the goal of the petition was

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[13] *See* Maryland Const., art. XVI, § 1(a) (creating the power of referendum for Maryland state legislation, and referring to legislation on which a referendum is sought as an "Act"); Md. Code Ann. art. 25A, § 8 (formally authorizing charter counties to include power of referendum in their charters, and referring to legislation on which referendum is sought as "local law"); Montgomery County Code § 16-4 (referring to piece of legislation on which referendum is sought as a "County law").

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actually to *enact* protections for transgender people from discrimination through voter "*approval*" of the measure in the November election, not to strip already enacted protections. Yet repeal of the Law is exactly what the referendum petition sought to accomplish, and what signatories to the petition would help accomplish without their awareness or permission.

Finally, although the petition signature pages do at one point state that the legislation at issue was "enacted . . . by the County Council for Montgomery County, Maryland," they proceed to refer to the Law as a "Bill" multiple times without again referring to it as an already enacted law. *See* Shurberg Aff., Exh. 9. At best, the inclusion of language stating that the bill was enacted by the County Council transforms the signature pages from false to incoherent. As the Montgomery County Attorney has stated, even if "an extremely cautious and perceptive signer might be able to untangle [a] petition," if it would tend to mislead a reasonable person, the Court may declare the entire petition to be defective. Op. Montgomery Co. Att'y (Sept. 3, 1992), *available at* http://www.amlegal.com/pdffiles/MCMD/09-03-1992.pdf.

Because a reasonable person would be unable to decipher the goal of CRG's petition with any degree of certainty, the petition was fatally flawed in its entirety. Accordingly, the Court should grant summary judgment in favor of Plaintiffs, and decertify the petition.

B. <u>The Petition Does Not Comply With Maryland Election Code § 6-201(c)(2).</u>

The misleading text of CRG's petition is not only inconsistent with the Montgomery County Code, but also with the Maryland Election Code. Petitions for local referenda, as "local petitions" under Elec. Code § 6-101, are subject to § 6-201(c)(2), which requires that each signature page of a petition seeking to bring a law to referendum include either "the full text of the proposal" or "a fair and accurate summary of the substantive provisions of the proposal."

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By providing a misleading and incorrect summary of the status of the Law and the effect of the petition, the signature pages plainly failed fairly or accurately to summarize CRG's proposal, and, therefore, violated § 6-201(c)(2).

The Court of Appeals has consistently invalidated referenda in the post-election context where the summary of the referendum appearing on the ballot had failed to "apprise[] the voters of the true nature of the legislation upon which they are voting," *Anne Arundel County v. McDonough*, 277 Md. 271, 296, 354 A.2d 788, 803 (1976), the same concern animating the requirements of § 6-201(c)(2). For example, in *McDonough*, the Court of Appeals upheld a post-election invalidation of a local referendum on the ground that the summary of the referendum provided on the ballot lacked the "clarity and objectivity required to permit an average voter, in a meaningful manner, to exercise an intelligent choice" and "did not present a clear, unambiguous and understandable statement of the full and complete nature of the issues undertaken. . . ." 277 Md. at 300, 354 A.2d at 805. Similarly, in *Surratt v. Prince George's County*, the Court invalidated a charter amendment resulting from a ballot measure because the title of the proposed amendment on the ballot was misleading as to the actual effect of the amendment. 320 Md. 439, 441-52, 578 A.2d 745, 747-51 (1990). *Cf. Kelly v. Vote Know Coal. of Md., Inc.*, 331 Md. 164, 174, 626 A.2d 959, 965 (1993) (summary of law is misleading if "the average voter" cannot understand the goal of the referundum; ballot summary in that case was not misleading because it was neither "deceptive" nor "vague").

While *McDonough* and *Surratt* addressed challenges under § 6-201(c)(2) to referendum text placed on the ballot, the use of fair and accurate language on a pre-election referendum petition is just as "'crucial to the integrity of the constitutional safeguard of (the) referendum,'"

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McDonough, 277 Md. at 307, 354 A.2d at 809 (quoting *Markus v. Trumbull County Bd. of Elections*, 259 N.E.2d 501, 505 (Ohio 1970)), as the use of fair and accurate language on ballots themselves. Indeed, § 6-201(c)(2)'s fairness and accuracy requirement exists to prevent precisely the same evil identified in *Surratt* and *McDonough* — the manipulation and confusion of voters by referendum sponsors. The petition as a whole fails the requirements of § 6-201(c)(2) and should be decertified.[14]

V. Many Petition Signatures Are Invalid Because Only The Signers Themselves, Not A Separate Petition Circulator, Certified The Signatures In Violation Of The Election Laws.

The BOE improperly validated petition signatures where the signer purported to act as the statutorily required circulator witness to his or her own signature, in disregard of well-established circulator affidavit requirements. Specifically, 688 signatures with this defect were validated in the February 4 set of petition pages and 343 were validated in the February 19 set. *See* Lucas Aff., Exh. 6-10, 12, 23, 32, 33, 38.

The circulator affidavit requirement, specified in many provisions of Maryland election law, is "designed to assure the validity of the signatures and the fairness of the petition process." Elec. Code § 6-204(b). The "purpose of the requirement of the affidavit is to give a prima facie presumption of validity to the petition to which it is attached." *Tyler,* 229 Md. at 404, 184 A.2d at 104. Article 16, § 4 of the Maryland Constitution provides: "There shall be

[14] The BOE also counted 10 signatures on petition pages that appear to have been "home-made" efforts diverging even further than CRG's "standard" form from the requirements of Montgomery County Code § 16-5 and Elec. Code § 6-201(c)(2). These pages, included in Exhibit 16 of the Lucas Affidavit, bear only the legend "Montgomery County residents who will be future voters, waiting for citizenship, U.S. citizens but have not registered to vote, etc. who protest against Bill 23-07 and will be affected by it." They contain no summary at all of the referendum. For the reasons asserted above, the signatures counted by the BOE on these pages must all be invalidated.

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attached to each paper of signatures filed with a petition an affidavit of the person procuring those signatures that the signatures were affixed in his presence." Section 6-204(a) of the Maryland Election Code similarly provides: "Each signature page shall contain an affidavit made and executed by the individual in whose presence all of the signatures on that page were affixed and who observed each of those signatures being affixed." COMAR 33.06.03.08(B)(3) references Elec. Code § 6-204 and requires the circulator to have "personally observed each signer as the page was signed." Section 16-6 of the Montgomery County Code similarly provides: "[T]here shall appear an affidavit stating that each signature on the sheet was affixed in the presence of the affiant."

Each of these provisions requires that every signature in a referendum petition be affixed in the "presence" of the circulator, who then must attest to having witnessed the signing. *See Ferguson*, 249 Md. at 516, 240 A.2d at 235. "It is established that the affidavit is an integral part of the referendum petition [and] that the one procuring the petitions or circulating them is the agent of the signers." *Tyler,* 229 Md. at 404, 184 A.2d at 104.

The Boards have adopted the position that there is no independent affidavit requirement, instead asserting that self-certified petitions suffice. *See* BOE Mem. at 32-33; State Board Mem. at 7. But this interpretation is manifestly unreasonable. "[T]he normal, plain meaning of the language of the statute" compels only one conclusion, *see Barbre v. Pope*, 402 Md. 157, 172, 935 A.2d 699, 708 (2007) (internal quotation marks and citations omitted), that the signer and attesting circulator cannot be one and the same person. The requirements of the circulator affidavit are highly specific. The circulator must be another adult who can confirm under penalty of perjury based on knowledge and belief that the signer is a registered

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voter, that he or she "*personally observed each signer*" affix their signature, that the signature is genuine, and that it was affixed voluntarily. *See* COMAR 33.06.03.08(B)(3) (emphasis added).

Furthermore, the noun "presence," consistently included in the various affidavit requirements, *see* Md. Const. art. XVI, § 4; Elec. Code § 6-204(a); Montgomery County Code § 16-6, is defined as "the state or fact of being present, as with others" or as "immediate vicinity; proximity: *in the presence of witnesses*." *See Random House Unabridged Dictionary, available at* www.dictionary.com. The verb "to observe" is defined as "to see, watch, perceive, or notice: *He observed the passersby in the street*." *Id.* It is evident from the "ordinary and popularly understood meaning" of these provisions that the circulator must be a person who is with — and distinct from — the signer, and who independently sees the signer affix the signature to the petition. *See, e.g., Abrams v. Lamone*, 398 Md. 146, 173, 919 A.2d 1223, 1239 (2007) (quoting *Brown v. Brown*, 287 Md. 273, 278, 412 A.2d 396, 399 (1980)).

The requirement of an independent affiant who can testify to the authenticity of the signatures serves an important function in the referendum process. The "prima facie presumption of validity" of the petition is contingent on a properly executed affidavit. If the affidavit is fraudulent even as to a "part of the petition it supports, the prima facie presumption of the validity of the petition must fail." *Tyler,* 229 Md. at 404, 184 A.2d at 104-05. Without independent circulators who can vouch for the signatures to which they attest, a challenge to the legitimacy of the signatures would require that every signer be available to come into court and testify as to the validity and genuineness of his or her signature. This unworkable approach is obviated by the multiple Maryland provisions calling for an independent individual who

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swears under oath that they have observed the voters voluntarily sign and have done basic diligence to ensure compliance with legal requirements.

By disregarding the affidavit requirement, the BOE and the Board disregard established Maryland law in favor of their own faulty interpretation of the referendum procedure. The BOE did not have authority to "eliminate a mandatory provision deliberately adopted by [the legislature]." *Ferguson*, 249 Md. at 517, 240 A.2d at 236. *See also Takoma Park*, 301 Md. at 447, 483 A.2d at 353 (same). Accordingly, the Court should enter summary judgment for Plaintiffs on this issue.

VI. Signatures That Post-Date The Circulator's Affidavit Or Are Suspect On Their Face Are Invalid And Give Rise To The Presumption That The Attesting Circulator Engaged In Active Or Constructive Fraud.

The flaws on CRG's petition extend beyond the deficiencies described above to situations of "actual or constructive fraud." *Tyler,* 229 Md. at 405, 184 A.2d at 105. The BOE counted as valid 24 of the February 4 signatures and 13 of the February 19 signatures where the circulator signed and dated the affidavit *prior* to the signatories' signatures. *See* Lucas Aff. Exhs. 11-15. Maryland election law disqualifies a petition signature if "the date accompanying the signature is [] later than the date of the affidavit on the page." Elec. Code § 6-203(b)(5). This requirement ensures that the circulator actually witnesses the signature as it is affixed to the petition and attests truthfully and under oath to having carried out that duty. Elec. Code § 6-203(a); *Tyler,* 229 Md. at 404, 184 A.2d at 104-05.

Despite the clear statutory rule that a petition signature dated after the circulator affidavit is *per se* invalid, the BOE nonetheless validated all of these signatures. Moreover, these circulators falsely stated under oath that they "personally observed each signer as he or

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she signed the[] [petition] page" when, in fact, the signatures had not yet even been made. All the signatures pre-dating the circulator's affidavit are invalid as a matter of law.

The BOE likewise validated a number of signatures where it was patently obvious that one person signed on behalf of another. Yet, in direct violation of Elec. Code § 6-204(a), the circulator attested under penalty of perjury to witnessing *each signature* as it was affixed to the petition. For example, on one petition sheet the names "Eugene & Lucy Foeckler" are printed on the second line where the signer is meant to print his or her name, but only one purported signature appears for *both* names. *See* Lucas Aff., Exh. 41, Bates-stamp page X00000017. This one purported signature reads: "Eugene & Lucy Foeckler." Despite it being obvious that at most only one, not two, individuals signed the petition for the "Foecklers", the circulator, Lawrence P. Grayson, attested that Eugene and Lucy Foeckler *both* signed the petition. Moreover, the BOE validated *two* signatures, where at most only one person signed. Furthermore, on other petition pages included in Lucas Affidavit Exhibits 41 and 42, multiple signatures evidently from the same hand were attested to as genuine by circulators. *See, e.g.*, Exh. 41, X00000014, X00000025; Exh. 42, 2X00000006-8. At a minimum, all these signatures should be invalidated.

But the problem runs deeper than the fact that the suspect signatures were inappropriately counted as valid. The circulators who attested to having witnessed each of these so-called "signers" affix their "signatures" to the petition pages engaged in actual or constructive fraud. *See Tyler*, 229 Md. at 405, 184 A.2d at 105 ("Whether such fraud be actual or constructive is immaterial. Constructive fraud, sometimes called legal fraud, is, nevertheless, fraud, although it rests more upon presumption and less upon furtive intent, than

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moral fraud.") (internal quotation marks omitted). Their claims under oath to have witnessed signatures are demonstrably false. As Court of Appeals precedent makes clear, *every signature* witnessed by circulators who falsely claimed in their affidavits to have witnessed the signatures first-hand are subject to invalidation.[15]

The Court of Appeals in *Tyler* held that the prima facie presumption of validity of petition signatures is negated by proof of a falsified circulator affidavit. 229 Md. at 404, 184 A.2d at 104-05. "If it is shown that the affidavit is fraudulent as to all or part of the petition it supports, the prima facie presumption of the validity of the petition must fail." *Id. See also Ferguson,* 249 Md. at 514-15, 240 A.2d at 234 (holding that summary judgment invalidating referendum petition was properly granted where circulator affidavits were made not on personal knowledge). The burden then shifts to the party asserting the validity of the petition signatures to "affirmatively show that the remaining signatures on such petition or sheet thereof are genuine and bona fide." *Tyler*, 229 Md. at 406, 184 A.2d at 105.[16]

Thus the Court of Appeals has held that in circumstances like those here, the presumption of validity of *all* signatures witnessed by those circulators no longer applies. This holding, coupled with the burden on the party opposing summary judgment to demonstrate *with*

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[15] A computer disc accompanying the Shurberg Affidavit as Exhibit 10 contains digital copies of hundreds of additional petition signature pages certified by the same circulators who falsely attested to the signatures referenced above and included in Exhibits 41-42 to the Lucas Affidavit. As discussed above, *all* the hundreds of signatures counted by the BOE on these pages, along with any others that may have been witnessed by these circulators, must be presumed invalid.

[16] Plaintiffs attempted to investigate further the extent of the fraudulent activity by seeking to depose several circulators and signers with suspect signature entries and by requesting relevant voter registration signatures on file with the BOE to compare with suspect signatures. The BOE refused to comply with these discovery requests, however, and the Court determined not to extend discovery to permit depositions. *See* Shurberg Aff. ¶ 9 and Exh. 11 (BOE response to Plaintiffs' document request ¶ 10). Plaintiffs now have demonstrated that circulators indisputably claimed, falsely, to have witnessed a number of signatures.

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admissible evidence a dispute of fact, *see* Md. Rule 2-501; *Miller*, 114 Md. App. at 27, 688 A.2d at 980-81, 114 Md. App. at 27, squarely places the burden on the BOE to demonstrate the validity of the signatures. If it cannot, all the signatures attested to by these circulators are invalid.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their cross-motion for summary judgment, deny the BOE's motion for summary judgment, issue a declaration decertifying the petition for referendum, and such other and further relief as the Court may deem appropriate.

Date: June 2, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2008, a copy of the foregoing was sent by e-mail and hand delivery to: Kevin Karpinski, Esquire, 120 East Baltimore Street, Suite 1850, Baltimore, MD 21202-1605.

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