IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 2015

Docket No. 45

FRATERNAL ORDER OF POLICE, *et al.*,

Petitioners/Cross-Respondents,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,

Respondents/Cross-Petitioners.

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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STATEMENT OF THE CASE

Amicus curiae agrees with petitioners' statement of the case.

QUESTIONS PRESENTED

Amicus curiae agrees with petitioners' statement of the questions presented.

STATEMENT OF FACTS

The facts of this case starkly reveal how the government of Montgomery County, Maryland, launched a massive electioneering campaign to accomplish a political result that deprived County police officers below the rank of lieutenant of an important benefit.

Previously, the Montgomery County Code provided to those officers the right of "effects bargaining," according to which certain decisions of the County Executive, including budgetary allocations and changes to the structure of County agencies, were subject to collective bargaining based on their effects on those police officers. Opinion of the Court of Special Appeals ("CSA Op.") at 1-2. But on August 1, 2011, County Executive Isiah Leggett signed into law a bill, which the County Council had passed unanimously, eliminating such effects bargaining. *Id.* at 2. The Fraternal Order of Police, Montgomery County Lodge 35, Inc. ("FOP") thereupon gained sufficient signatures to have the bill, in accordance with County law, submitted to the voters themselves, as "Question B," for approval or disapproval in a referendum. Circuit Court Memorandum and Order ("Cir. Ct. Mem.") at 5.

What followed was a remarkably thorough political campaign by the County government to urge voters to approve the bill. The County paid for giant bus signs displaying the County seal and reading, "Who Do <u>You</u> Want to Run the Police

Department? The Police Chief or Union Leaders? Vote for Question B." Cir. Ct. Mem. at 7-8. These ads "reached over 25% of the Montgomery County market every day and were viewed approximately 540,000 times per day." *Id.* at 8. The County also placed inside the buses ad cards urging voters to "Vote for Question B," which were viewed at least 90,000 times per day. *Id.* Yet when FOP asked to display its own signs in opposition to Question B on the buses, it was denied permission on the ground that they were "political advertising" not allowed by County advertising rules. Eventually (after the American Civil Liberties Union became involved), Leggett authorized a "one-time exception" to the rules, but too late in the campaign to allow FOP to place any such ads. *Id.*

The County campaigned for Question B in many other ways. It spent $90,344.92 to send out mass mailings that reached over 326,000 households. *Id.* It campaigned extensively through its website and mass emails. *Id.* at 9. It had County employees, on County time, design "posters, yard signs, bumper stickers, T-shirts, stickers and flyers" and distribute such materials widely. *Id.* at 11. It did much else besides. *See id.* at 6-13. As the trail court found, "The only traditional political campaign activity not used by the County was robo-calling." *Id.* at 7. The County spent at least $122,350.17, or over ten percent of the operating expenses of its Office of Public Information that year, on its campaign for Question B. *Id.* at 12; CSA Op. at 6. It kept no records of the hours put in by

County employees on the campaign, and so no calculation of the value of those hours can be made. Cir. Ct. Mem. at 13.

In addition to all this, Leggett took actions of his own to garner support for Question B. Six days before the election, he emailed all of his subordinate County employees, except members of the FOP bargaining unit, urging them to vote for Question B. Cir. Ct. Mem. at 11. In an email urging 400 Democratic precinct officials to support Question B, he explained, in highly partisan terms, his motivation: as a Democrat, he wanted to improve government efficiency to make it more popular. Pointing out that he and all of the County Councilors who had voted unanimously to end effects bargaining were "progressive Democrats," he wrote, "As Democrats, it is our duty to protect our government and make sure that it serves our residents well. We have seen what Republicans will do with government services – starve them, make them fail, and get people to turn against them." *Id.* at 10 & n.12.

The County government's massive political effort was not in vain. In the election, Question B was approved by a vote of 58.05% to 41.95%, and effects bargaining for police officers below the rank of lieutenant came to an end. CSA Op. at 9.

ARGUMENT

Petitioners convincingly argue in their brief that the County's electioneering violated a variety of State and County laws and also the Maryland Constitution. For its part, the Court of Special Appeals recognized that electioneering by the government in political races involving candidates for public office was both illegal and, presumably, undesirable. CSA Op. at 48-49. Yet that same court found government electioneering that injects itself into an exercise in direct democracy – that is, a referendum or ballot initiative where a question is presented directly to the voters for resolution – both legal and acceptable (regardless of how much public money the government might spend, or how much public-employee manpower it might commandeer). *Id.* at 33-36, 42, 48-49. For the Court of Special Appeals, the distinction between political races involving candidates and ballot referenda was crucial.

Yet that distinction works far more in favor of petitioners' position than against it. Indeed, the purpose behind the legal and constitutional provisions petitioners rely on applies with especial force to ballot referenda. That purpose, in a word, is to strengthen democracy – and government electioneering in direct democracy weakens, in a particularly perverse way, the vital corrective role that referenda play in self-government.

BECAUSE DIRECT DEMOCRACY ALLOWS THE PEOPLE TO BYPASS ELECTED OFFICALS, GOVERNMENTS COMPOSED OF THOSE OFFICIALS SHOULD NOT INTERFERE IN THE REFERENDUM PROCESS.

From the standpoint of democratic accountability, referenda are necessary when the will of the people has been frustrated by the ordinary processes of representative democracy. Such frustration happens frequently,[1] though the precise mechanics vary. Often, it arises when a majority of voters take one side of an issue, but also give it a comparatively low priority, allowing candidates, often at the urging of special interests, to rely on other issues for their election, even as they oppose the majority on that one, lower-priority issue. In such situations, direct democracy makes it unnecessary for a majority to become "single-issue voters," and often constitutes the only practical way for the voters to enact their will.

In other words, when an issue has been put on the ballot for the peoples' decision, often it is because the elected government has failed, at least on that one issue. *E.g., Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct.

[1] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, Perspectives on Politics, Sept. 2014, Vol. 12/ No. 3, at 564-81, available at http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf (setting forth a groundbreaking study demonstrating that, over the last few decades, at the national level (where there is no direct democracy), the causal influence of average voters on national policy has been roughly *zero,* whereas the influence of economic elites and national lobbying groups has been very high).

1623, 1636 (2014) (upholding the results of a ballot initiative because "[b]y approving Proposal 2 . . . . Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority"); *Michigan United Conservation Clubs v. Sec'y of State,* 464 Mich. 359, 382 (2001) (Young, J., concurring) (observing that the referendum power "provides a means for citizens directly to challenge legislative action or inaction"); *Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996) ("[I]n the initiative process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether."). For that same government, often urged by special interests behind it, then to spend government funds to influence the people's vote on that very question undercuts the efficacy of the referendum process in a starkly perverse way.

Put yet another way, representative democracy, for all of its virtues,[2] creates space – often, very substantial space – between the voters and the enactment of their policy preferences. Strategizing politicians, either because their views, conditioned by their relatively-higher social status, tend to be different from those of average voters, or because they seek campaign contributions from large donors

[2] *But see* Robert G. Natelson, *A Republic, Not A Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 848 (2002) (debunking the myth that direct democracy is not included in the idea of a republican form of government; "[i]n the eighteenth-century context, the novel point was not that citizen lawmaking could be republican: it was that *representative* lawmaking could also be republican.") (emphasis added).

whose views might also differ from such voters',[3] can and do exploit this gap to stay in office even when, as a group, they repeatedly fail to work the majority's will on a given issue. Direct democracy is the obvious and vital corrective for this failure in representative democracy.

Occasionally, of course, the government may have less nefarious-seeming reasons than the above for electioneering in some direct-democracy contests, but on close examination such reasons may be just as problematic. In this case, the Court of Special Appeals found that electioneering in referenda was acceptable (and did not violate the law) only because it was not "partisan." CSA Op. 48-49. Yet Leggett explained the reasons for the County's campaign in frankly partisan terms. "As [a] Democrat[]," he wrote, he wanted to make government work more efficiently so that Republicans would fail in their efforts to undermine its popularity. As he indicated, this efficiency would strengthen the Democratic Party, which he implied is perceived as the party of government. Cir. Ct. Mem. at 10 & n.12. His motive, that is, was the preservation of his political party, and indirectly of his own political future. Such a motive is "partisan" to the highest degree. To be sure, he may also have had a public-spirited motive; indeed, the constant, often-inextricable mixture of political and civic motives is to be expected

[3] Gilens & Page, *supra* n.3, at 568 (defining "average voters" as those of average income, and using voters at the ninetieth percentile of income as a proxy for "economic elites").

in elected officials. But this mixture is all the more reason why it is both unlawful and undesirable for the government to electioneer about a question before the people; the officials' purpose is very likely to be, at least in part, partisan.

And the corrosive effect of government electioneering is very real. Of course, campaign spending by the government, or anyone else, *does* reliably affect the outcome of elections. Otherwise, it is doubtful that our political system would be flooded, as it is flooded, by immense amounts of money from wealthy individuals, corporations, and lobbying groups, and there could hardly be a problem with the in-fact highly-problematic idea of public officeholders using public money to fund their own (but not their opponents') reelection campaigns. *See, e.g.*, Ellen L. Weintraub & Alex Tausanovitch, *Reflections on Campaign Finance and the 2012 Election*, 49 Willamette L. Rev. 541, 547-48 (2013) (noting that less than half of the roughly $7 billion spent on the 2012 federal elections came from small contributions, and that the source even of these often consisted of donors who gave multiple times). Here, the County did not limit itself to providing information to the voters. It used its prestige and resources freely in a potent, political effort to persuade, and when it succeeded in doing so, a group of citizens that previously had been protected were harmed. The County's electioneering on Question B was nothing less than the contamination of a political process that is vital to democracy.

CONCLUSION

For these reasons, the judgment of the Court of Special Appeals should be reversed.

Respectfully submitted,

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Oct. 30, 2015