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Amicus Curiae Brief filed in Fraternal Order of Police v. Montgomery County, Maryland Court of Appeals, Case Docket Nol 141

Steven J. Andre

IN THE COURT OF APPEALS

Petition Docket No. 141
September Term, 2013

FRATERNAL ORDER OF POLICE, et al.

Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND, et al.

Respondents.

On Writ of Certiorari to the Court of Special Appeals of Maryland

Brief of Amici Curiae Mark Dierolf and Angie Morfin in Support of Petitioners

Jan I. Berlage
Gohn Hankey Stichel & Berlage LLP
201 N. Charles Street, Suite 2101
Baltimore, Maryland 21201
Telephone: 410-752-9300
Telecopier: 410-752-2519
jberlage@ghsllp.com

Attorneys for Amici Curiae

Steven J. Andre

Counsel Pro Hac Vice for Amici Curiae

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I. STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as set forth in Petitioner's Opening Brief.

II. STATEMENT OF THE FACTS

Amici Curiae adopt the facts as set forth in Petitioner's Opening Brief.

III. QUESTIONS ADDRESSED BY THIS BRIEF

1) Is a county's expenditure of public funds to campaign on a ballot measure pending before county voters unlawful? 2) Are appellants entitled to an award of attorney's fees?

IV. STATEMENT OF INTEREST OF AMICI CURIAE

Amici obtained the consent of Petitioners to file this brief. The Respondents did not consent to the filing of this brief.

V. ARGUMENT

A. Application of the Rule of Law

If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

James Madison, *Federalist Paper No. 51* (1788)

A basic precept forms the foundation for the political and legal understanding that a government official may not spend funds without proper authority. The reason for embracing the concept of the Rule of Law was stated by Aristotle over two thousand years ago in basic terms: "The rule of law is better than that of any individual." Aristotle, *Politics*. The concept itself is summarized by the assertion that "the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens." Fallon, R. Jr., *'The Rule of Law' as a Concept in Constitutional Discourse* (1997) 97 Col. L. Rev. 1,7. Applying this concept to the necessary evil of government was a concern at the time of the Magna Carta and was a concern at the time of the drafting of our nation's Constitution. Those who declared independence and drafted the Constitution did so in light of the Stamp Act and other incursions by English

authorities regarded as occurring without lawful authority. To address the difficulties in formulating a popular government expressed by Madison in his Federalist Paper arguments supporting ratification of the Constitution, our nation's supreme law was designed with safeguards against tyranny. The Founders established *inter alia* a Bill of Rights and a system of checks and balances constraining majorities from imposing certain policies upon minorities in our society, preventing each governmental branch from exceeding the constitutional role established for that branch of government and, above all, restricting government from usurping the authority and eroding the liberties of the sovereign People whose constitutional role it is to serve.

Justice Felix Frankfurter expressed the danger of disregarding the Rule of Law: "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." *U.S. v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring). Acceptance of the Rule of Law by those who "framed the Declaration of Independence and founded the Republic" was "the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power." *Id.* at 308.

This case presents precisely such a danger from government failure to act in accordance with lawful authority and to adhere to the Rule of Law. Both government taxation and spending have Rule of Law implications. See, Racheter, D. and Wagner, R., ed., *Politics, Taxation and the Rule of Law* (Springer Science, 2012) ("The 'rule of law' implies not merely that there are governmental laws enforced on a population, but the stronger principle that policy adhere to law rather than the caprice of officials." (at p. 191); Epstein, R., *Why the Modern Administrative State is Inconsistent with the Rule of Law* (2008) 3 NYU Journal of Law & Liberty 491; Beckett, J., *Public Management and the Rule of Law* (Sharpe 2010) pp. 4-12, 19-22; Evans, C., Freedman, J., Krever, R., eds., *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, 2011) pp. 16-37, 43.

Maryland's Constitution contains constraints upon the power to tax precluding delegation of that legislative power to non-law-makers and reflecting the historic principle "that free people ought not be taxed without their own consent or that of their elected representatives." Lewis, W., *The Tax Articles of the Maryland Declaration of*

Rights (1953) 13 Md.L.Rev. 83, 85-87. The power of the purse is constrained as well and based upon the same reasoning (i.e., that public funds should not be committed to private aims, but reserved for purposes recognized as public by the People or their elected representatives), although the limitations are found in statute and common law rather than constitutional provisions.

This was seen in the case of *Bowling v. Brown*, 57 Md. App. 248, 258, 469 A.2d 896, 901 (Md. Ct. Spec. App. 1984), where the court concluded a town did not have the authority to reimburse two town employees (the mayor and a council member) for their criminal defense legal fees arising from their conduct outside the scope of employment. The absence of a public purpose distinguished the case from *Snowden v. Anne Arundel County*, 295 Md. 429, 456 A.2d 380 (1983), where a county law creating a fund to reimburse legal expenses of employees charged with a criminal offense arising out of performance of their duties was held to serve a public purpose. The *Bowling* court observed that identifying a breach of the officials' authority involves first looking to duly enacted legislation: "[S]uch executive officials are not free to spend public funds for any 'public purpose' they may chose, but must utilize appropriated funds in accordance with the legislatively designated purpose." *Id.* [551 P.2d at] 6 [130 Cal. Rptr. at 702]." *Id.* at 900; see also, *Smith v. Edwards*, 292 Md. 60, 69 (1981) (relying upon the Dillon rule limiting local government powers to those expressly granted or necessarily or fairly implied as incidental to the express power).

Recognizing that even a legislative enactment may not signify a genuine public purpose (in *Bowling*, the three member town council enacted a resolution allowing the reimbursement by a two-to-one vote - the majority consisted of the recipients), the court elaborated a second aspect of the standard for evaluating whether a public expenditure is proper or *ultra vires*: "The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. [citations]" *Id.* at 901. Thus, to be lawful and, *inter alia*, comport with the Rule of Law, a public expenditure must be pursuant to a lawful enactment and must not

be for a private purpose. Neither requirement is met with regard to the County expenditures on Question B.

B. The Lack of Any Proper Public Purpose

Even if there had been some enabling legislation or inherent power authorizing the County's expenditure of funds here, the spending to influence the election outcome regarding Question B was for an entirely private purpose, as contemplated in *Bowling*, supra, at 901. An election is a contest among private factions competing for ballots cast in private by individual voters. This is the nature of the beast in view of the fact that the People are the sovereign and employ the franchise as the overarching mechanism for self-governance. The government has a role in that process, but that role does not include picking up the gauntlet and entering the fray in favor of one private faction. The neutral nature of government's role while the sovereign People govern was described by one constitutional scholar: "The intent of the Constitution is that, politically, we shall be governed by no one but ourselves. . . . We are the sovereign and the legislature is our agent. And as we play our sovereign role in what Hamilton calls 'the structure and administration of the government,' that agent has no authority whatever to interfere with the freedom of our governing." Meiklejohn, A., *Political Freedom* (1960 Harper & Row) p. 106.

As a general matter government's constitutional role, at least at the administrative level, is to provide for sovereign citizen participation in the political process and to implement decisions of the electorate and its elected representatives.¹ Both individuals and government play roles and speak in the process of governance. They just do this differently. For a private actor it involves an exercise of rights - seeking to influence the legislature or other voters to change the status quo or to maintain it. For a government actor it does not.

¹ Government's role is entirely responsive, incidental or collateral to private activity involving speech, petitioning and voting rights. Its agents accept and process and decide and regulate based upon individual participatory activity. They facilitate exercises of rights, but do not engage in such rights-based conduct themselves. Their participation is limited to simply performing governmental functions - holding meetings, making reports, accepting public input, advancing adopted policies and implementing adopted programs.

Addressing the boundaries of a government agency's authority to spend a citizen's contributed funds on private political or ideological messages with which that person disagrees, the U.S. Supreme Court in *Keller v. State Bar of California*, 496 U.S.1 (1990), looked to the purpose served by the government agency. The Court held expenditures on speech by a government agency charged with advising regarding regulation of professional conduct of attorneys are restricted as to political and ideological content "not reasonably related" to such goals: "[T]he extreme ends of the spectrum are clear: compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum, petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession." *Id.* at 15-16.

Consistent with *Keller*, this Court should conclude Montgomery County's public purpose in the referendum as to Question B was limited to carrying out enacted laws, and that consistent with the holding in *Stanson v. Mott*, 17 Cal.3d 206, 551 P.2d (1976), public "officials are not free to spend public funds for any 'public purpose' they may choose, but must utilize appropriated funds in accordance with the legislatively designated purpose" (*Id.* at 213, 551 P.2d 1) and that during an election the county's role is to facilitate the fair and free decision of the electorate and to "avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice" (*Id.* at 219, 551 P.2d 1) by maintaining an "electoral process free of partisan intervention by the current holders of governmental authority or the current trustees of the public treasury." (*Id.* at 227, 551 P.2d 1) As such, the outer limits of its role during an election on an issue are established, so on the one end a county "may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions" (*Id.* at 217, 551 P.2d 1), and on the other end giving it only "authority to spend funds, budgeted for informational purposes, to provide the public with a 'fair presentation' of relevant information" relating to a measure on which it has labored. (*Id.* at 221, 551 P.2d 1). Financially aiding one faction

in the election battle was a use of public funds for a private purpose and was, therefore, *ultra vires*.

C. Separation of Powers Problems: A Government Expenditure is Not Authorized Until the People or Their Elected Representatives Enact a Law to Adopt the Policy or Program which is the Subject of the Public Spending

The root of the problem with the position that implied or traditional authority allows expenditures of citizens' tax dollars to promote policies and programs that have not been adopted is that the executive branch of Montgomery County government and its officials responsible for mounting the election campaign in favor of Question B *cannot enact laws*. The view held by administrators that passage of a ballot measure represents sound policy, even if correct, cannot be elevated to the status of law. It is simply one point of view the electorate may consider. Like any other point of view, its promotion needs to be made at private expense. Once that viewpoint has been ratified by voters and becomes law, but not before, local officials can implement budgetary measures involved in implementing the electorate's mandate.

The term "government" commonly connotes the offices of administrative functionaries in government. However, the executive branch does not "govern" in terms of enacting laws, but by carrying them out. Lawmaking is reserved by constitutional design accepted for over 200 years, to the legislative branch – here, by delegation to the Montgomery County Council - or, when a referendum is obtained, to the sovereign People. (Md. Const., Art. XVI, §2)

An election is the seminal act of American governance. It is the process whereby the People consent to their representatives and accept policies and programs as law. A referendum is precisely such an act of direct governance by the People. (Md. Const., Art. XVI, §1(a)) It operates as a check upon actions of elected representatives, subjecting the decision of those representatives to review by the ultimate sovereign. While the matter is before the voters that legislative conception lacks the status of law. For that reason, the executive branch lacks any mandate as to that matter.

Elemental constitutional principles compel *a fortiori* that *before* the election occurs, all branches of government are deprived of making the political decision on whether to promote or protest the subject policy or program through expenditures of scarce tax dollars via government speech or otherwise. Any viewpoint on what policy or program might be best for the commonweal - whether it has a "governmental" source or otherwise - is just a private opinion, not a public law. It stands on its merit to garner support and warrants no grant of funds from the public treasury to assist its ability to persuade the electorate.²

Respondents err in failing to account for separation of powers principles. Respondents' position misconceives the fundamental nature of American government. It is the People who govern at the polls or through their elected representatives and "free" elections (Md. Const., Decl. of Rights, Art.7) can only mean the People decide how to do so unfettered by one-sided impact of their tax dollars upon their sovereign decisional process.

D. The Lack of Lawful Authority For The County's Expenditures Renders Them Ultra Vires

A city, county or other local official seeking to use public funds to advance a particular social agenda purportedly promoting the general welfare must act pursuant to some enabling legislation. Explaining the basis for this limitation upon local officials in terms of Maryland's constitutional system of government, this Court in *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 388 A.2d 523 (1978)

² In this regard, the dissent in the split decision relied upon by Respondents is the better reasoned position. The dissenting justice in *Kidwell v. City of Union*, 462 F.3d 620 (2006), rejected the notion that funds spent for election campaigning by a government agency are used to promote policies in the public's best interest. Prior to enactment into law by the electorate, such funds are spent for ideological or political purposes:

More curious is the district court [in *Alabama Libertarian Party v. City of Birmingham*, 694 F.Supp. 814 (N.D.Ala. 1988)]'s conclusion that the governmental advertising campaign exhorting the citizens to "VOTE YES!" was neither political nor ideological, but rather "related to the common needs of all citizens." I do not endorse a distinction between electioneering expenditures for the common needs of citizens versus expenditures for political purposes. To determine that something is in the common needs of citizens is itself a *political* decision. Thus, I do not think that a principled basis for such a distinction exists, and I do not find this approach to be useful in this context.

Id. at 632 (Martin, J., dissenting).

recognized the delegation of state legislative authority to local governing bodies was an allowance of a measure of independence, not a wholesale grant of autonomy. *Id.* at 56.

This Court noted that limitations upon local power imposed by constitutional requirements and the scope of the express powers specifically delegated remained in place:

The exercise of local legislative powers is subject at all times to provisions of the Constitution and general law, and is limited to those matters allocated by the express powers which the Legislature has delegated under Article 25A of the Annotated Code. Md. Const., Art. XI-A, §§ 1 & 3; [Citations]. Article XI-A does not in and of itself confer *legislative* power upon the counties. Instead it mandates that the General Assembly expressly enumerate and delegate those powers exercisable by counties electing a charter form of government. Md. Const., Art. XI-A, § 2. In compliance with this constitutional injunction, the Legislature enacted in 1918 the Express Powers Act, which, as amended, endows charter counties with a wide array of legislative and administrative powers over local affairs. Art. 25A, § 5. These "legislative powers" are those usually associated with the objects of government — that is, powers to legislate for the benefit of the health, safety and general welfare of the local community.

Id. at 57.

Montgomery County, a charter county, is granted authority by the state's General Assembly to legislate on limited matters. (Maryland Const., Art. XI-A, §2; Maryland Codes, Title 10, §10-201 - 206). Pursuant to that delegation of power, "the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said . . . County . . . upon all matters covered by the express powers granted as above provided[.]" (Maryland Const., Art. XI-A, §3) Implicit in this grant is authority to implement and administer the County's enactments — i.e., to spend money on lawfully adopted policies and programs. Missing from this delegation of power, however, is any authority to act in areas where empowering legislation is absent.

The proposed law — Question B — towards which the County expended public funds had not yet been duly adopted as law and, in fact, remained the subject of review through the referendum process. Where there is not yet any explicit authority emanating

from the legislative power granted to a county, there can be no implicit authority for the county to act on proposed or pending legislation. The County expenditures promoting passage of Question B were, therefore, *ultra vires*.

E. Compelled Speech and the Government Speech Doctrine

Courts addressing compelled speech claims challenging government expenditures to promote official policies advancing a position with which the lawsuit's proponent disagreed rapidly recognized that the claim is essentially no different than a refusal to pay income tax because, for example, one disagrees with American involvement in a war. The proper challenge to non-discriminatory, adopted government policies is made at the ballot box, not by means of a lawsuit asserting infringement of First Amendment rights. Thus, the courts determined that the government had the ability (as distinguished from "right") to advance views relating to officially adopted programs even though some persons did not share the perspective being advanced. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 192-200 (1991).

The compelled speech analysis, has continuing vitality where an individual is challenging use of that person's funds paid as taxes or part of a mandatory membership in an organization to advance political or ideological views with which the person disagrees and which are not germane to a governmental or organizational purpose. This distinction between a government agency promoting its legitimately adopted policies and its use of funds to advance agendas not germane to its authority was drawn by the U.S. Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1, 9-14 (1990). The latter use of funds to which an individual contributes is an impingement upon that person's freedom of association.

Thus, a government speech analysis does not apply to a use of funds that is not germane to a government agency's purpose. Such a use of funds is no different than any other unauthorized governmental act or use of public monies – e.g., purchasing a mansion for the mayor without proper city voter or council approval; use of an agency credit card to finance a wild week in Cabo San Lucas. Such expenditures are unauthorized and

ultra vires and, while they might involve financing of government speech, this does not insulate the expenditure from challenge.

The County expenditures at issue in this case were not authorized by any legislative authority and the Special Court of Appeals, in its decision below, acknowledged as much. That court looked to the “traditional” authority of a government agency to manage its budgetary issues. Evidently, the idea being floated is that because a government agency has to plan its budget it should be able to influence the electorate regarding what ballot measures deserve funding or not. But this puts the cart before the horse or at least places the wrong entity in charge of political decision-making on what social and other policies and programs deserve public funding. Voters decide what policies should be adopted before the bean-counters do any fiscal analysis on how to fund such a mandate. The lower court got things backwards. Fiscal personnel do not get to pick the destination, they just get to drive the car.

Amici contend that had the court below reasoned through its conclusions and examined their implications, it would have recognized they run counter to principles the Founders carefully embedded in our nation’s Constitution and which are evident in Maryland’s own Constitution that reserves ultimate authority to govern to the People and restricts government’s role. There is a genuine danger in permitting government actors to advance policies and programs that have not been accepted by the electorate. Such latitude empowers government to manufacture the consent of the governed and threatens to undermine the twin foundational pillars upon which our constitutional form of government stands: popular sovereignty and limited government. (Shapiro and Tresolini, “American Constitutional Law” (6th Ed. 1983) p.9)

Bestowal of such discretion upon government functionaries alters the Founders’ conception of the roles of government agents versus the electorate by placing the servant on a par with the sovereign and endowing it with access to public resources to advance ends not accepted by the populace. It would fundamentally alter the Founders’ conception of popular sovereignty as maintained not merely by delicately balancing the powers of the three branches of government, but also by limiting those branches of

government to prevent them from encroaching upon the ability of the sovereign People to govern without obstruction, impediment or usurpation by the prerogatives of governmental servants. This honorable Court should reflect upon whether the Constitution is flexible enough to accommodate such erosion of popular sovereignty and limitations upon government aggrandizement.

F. The County's Authority to Speak Was Limited By Its Role

The Court in *Kelle*, recognized a government speaker's authority to speak is circumscribed by that speaker's role. This is true in many respects, not just with respect to spending. The U.S. Supreme Court has developed case law recognizing that a government speaker's role in the constitutional scheme bears upon the lawfulness of the speaker's speech. In *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. ____ (2013), the nation's high Court addressed a challenge by an elected official, Carrigan, to a conflict of interest disqualification requirement. Carrigan asserted the First Amendment shielded his vote from the state regulation. The Court held that a legislator, acting in the capacity of a legislator, is not engaging in First Amendment activity, but acting as a representative of the People, observing: "The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.*; See also, *Hoellen v. Annunzio*, 468 F.2d 522, *cert. denied*, 412 U.S. 953 (7th Cir. 1972) (holding use of the franking privilege to advance incumbent's candidacy was unlawful).

Previously, the Court had recognized a government employee's role as an employee is not analogous to that of a private citizen and limited the employee's freedom to speak in that capacity. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Most recently, in *Williams-Yulee v. Florida Bar*, 575 U.S. ____ (2015), the Court recognized that the nature of the judiciary and the need to secure the impartiality of that branch of government permits limitations upon direct campaign contributions to judicial candidates even before those candidates are voted into office.

Governmental role generally separates a government actor's speech from First Amendment speech and the protection bestowed upon an exercise of individual rights.

Specific governmental roles further circumscribe the governmental actor's speech and, likewise, the ability to spend public funds to advance certain speech. This follows from a correct conceptualization of the constitutional source of government speech as a power, not a right. Confusion on this point may be a product of ill-chosen judicial verbiage referencing government's power to speak as a "freedom" or "right" (E.g., "Indeed, it is not easy to imagine how government could function if it lacked this freedom. (*Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)) ; "A government entity has the right to "speak for itself." (*Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000)). Mistakenly treating communicative governmental activity like an ersatz exercise of individual rights fails to comprehend the vast difference between the constitutional roles of private and government conduct, including speech, and muddles the understanding that spending upon government expression absent proper authority is just as unlawful as any other unauthorized government act.

Just as the propriety of use of public funds for speech is determined by a government actor's authority granted by constitution, statute or voter approval, a government actor's placement in the constitutional scheme delimits that actor's speech in keeping with that actor's role. In terms of government campaign speech, Amici contend that this Court should hold that the County's role was to conduct an election to allow the voters to determine whether to enact Question B as law without injecting funds on behalf of one faction to alter the free and fair choice of voters, following the lead of the California Supreme Court in *Vargas v. City of Salinas*, 46 Cal.4th 1, 24-25, 205 P.3d 207 (2009) and *Gould v. Grubb*, 14 Cal.3d 661, 536 P.2d 1337 (Cal. 1976). In *Gould* the California high court held that government action affording an incumbent top position on a ballot was unlawful, stating:

A fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates. To that end, our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice; the state must eschew arbitrary preferment of one candidate over another by reason of incumbency or because of alphabetical priority of the first letter of his surname. In our governmental system, the voters' selection must remain

untainted by extraneous artificial advantages imposed by weighted procedures of the election process.

Id at 1348.

Given this fundamental goal of ensuring a free and pure choice by voters untainted by governmental preferences, the County's role as a speaker was circumscribed by the referendum process to expenditures limited to balanced, non-partisan, informational speech. There is no basis to construe the County's role as allowing it to open the public purse (with no apparent limitation) on behalf of one election faction in order to promote passage of a proposed law referred to the electorate.

G. This Court Should Adopt an Objective Approach to Evaluating When Government is Using Public Resources to Provide Partisan Support

In describing the limitations upon a government's role and restricting that role to an informational function, the court in *Vargas* reaffirmed its earlier holding in *Stanson v. Mott*, 17 Cal.3d 206, 551 P.2d 1. (1976), that government election advocacy was unlawful and "that 'the selective use of public funds in election campaigns . . . raises the specter of just such an improper distortion of the democratic electoral process.'" *Id.* at 31. The court went on to describe how *Stanson* set forth a practical and objective approach for evaluating when election expenditures cross the line into advocacy:

Acknowledging in *Stanson* that in some circumstances "[p]roblems may arise . . . in attempting to distinguish improper 'campaign' expenditures from proper 'informational' activities" (*Stanson, supra*, 17 Cal.3d 206, 221), we explained that "[w]ith respect to some activities the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity [citations], as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure. [Citations.] On the other hand, it is generally accepted that a public agency pursues a proper 'informational' role when it simply gives a 'fair presentation of the facts' in response to a citizen's request for information [citations] or, when requested by a private or public organization, it authorizes an agency employee to present the department's view of a ballot proposal at a meeting of such organization. [Citations.]" (*Ibid.*)

After so explaining that in many instances the distinction between campaign activities and informational activities is quite evident, we also recognized in *Stanson* that at times "the line between unauthorized campaign expenditures and authorized informational activities is not so clear. Thus, while past cases indicate that public agencies may generally publish a 'fair presentation of facts' relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, and which have refrained from exhorting voters to 'Vote Yes,' have nonetheless been found to constitute improper campaign literature. (See 35 Ops.Cal.Atty.Gen. 112 (1960); 51 Ops.Cal.Atty.Gen. 190 (1968); cf. 42 Ops.Cal.Atty. Gen. 25, 27 (1964).) *In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case.*" (*Stanson, supra*, 17 Cal.3d 206, 222, italics added.)

Id. at 24-25.

The *Vargas* court refused to depart from *Stanson* and rejected a government entity's argument that the government agency should be able to engage in advocacy that did not involve express exhortations to voters urging them to vote for or against a measure or candidate. The court held:

The City, and amici curiae supporting the City, contend nonetheless that the "express advocacy" standard is preferable to the standard adopted in *Stanson, supra*, 17 Cal.3d 206 . . . As we have seen, the *Stanson* decision explicitly identified a number of materials and activities that unquestionably constitute campaign activities (without any need to consider their "style, tenor and timing") -- for example, the use of public funds to purchase bumper stickers, posters, advertising "floats," or television and radio "spots" -- and also identified a number of activities that are clearly informational -- for example, providing a fair presentation of facts in response to a citizen's request for information. (*Id.* at p. 221.) The circumstance that *in some instances* it may be necessary to consider the style, tenor, and timing of a communication or activity to determine whether, from an objective standpoint, the communication or activity realistically constitutes *campaign* activity rather than *informational* material, does not render the distinction between campaign and informational activities impermissibly vague. Since our decision in *Stanson*, numerous out-of-state decisions have cited that opinion and utilized a

comparable analysis in evaluating the propriety of public expenditures for a variety of election-related material and activities (see, e.g., *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978), appeal dismissed for want of substantial federal question *sub nom. Boston v. Anderson*, 439 U.S. 1060 (1979); *Smith v. Dorsey*, 599 So.2d 529, 540-544 (Miss. 1991); *Burt v. Blumenauer*, 699 P.2d 168, 171-181 (Or. 1985); *Dollar v. Town of Cary*, *supra*, 569 S.E.2d 731, 733-734), and the City has failed to cite any authority that has concluded the *Stanson* standard is unconstitutionally vague. (See *Sweetman v. State Elections Enforcement Comm.*, 732 A.2d 144, 160-162 (Conn. 1999) [explicitly rejecting similar constitutional vagueness challenge].)

Id. at 33-34.

Amici propose that while this case unquestionably involved “express advocacy,” that as an expository device this court should reject adopting a “per se” approach, including an “express advocacy” standard, as inadequate for the same reasons of constitutional magnitude that the court in *Stanson* gave for declining to do so:

[T]his standard does not meaningfully address the potential constitutional problems arising from the use of *public funds* for *campaign activities* that we identified in *Stanson*. If a public entity could expend public funds for *any* type of election-related communication so long as the communication avoided “express words of advocacy” and did not “unambiguously urge[] a particular result” (Cal. Code Regs., tit. 2, § 18225, subd. (b)(2)), the public entity easily could overwhelm the voters by using the public treasury to finance bumper stickers, posters, television and radio advertisements, and other campaign material containing messages that, while eschewing the use of express advocacy, nonetheless as a realistic matter effectively promote one side of an election. Thus, for example, if the City of Salinas, instead of taking the actions that are at issue in this case, had posted large billboards throughout the City prior to the election stating, “IF MEASURE O IS APPROVED, SIX RECREATION CENTERS, THE MUNICIPAL POOL, AND TWO LIBRARIES WILL CLOSE,” it would defy common sense to suggest that the City had not engaged in campaign activity, even though such advertisements would not have violated the express advocacy standard.

Id. at 32.

Amici propose that any per se approach is inadequate to prevent the harm posed by governmental use of public funds to subvert the free expression of the will of the People at the polls. The contextual, reasonableness *Stanson* approach should be adopted by this court as a method for evaluating when government is providing assistance to one

faction in an election contest. That objective approach allows a government actor to recognize when their personal feelings are getting in the way of their appropriate role as a public servant and allows a trier of fact to evaluate when use of public resources is illegal. It sets a workable standard for lower courts to assess when government use of public resources cross the line from neutral conduct such as the proper education of voters to support such as advocacy.

A reasonableness test for assessing the context in which government expenditures of public funds are made and the manner in which they were made to determine whether they amount to support to a private party or lawful governmental speech comports with the approach proposed by Justice Souter in *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (Souter, J., concurring) for determining whether a government's funding of speech (or, for that matter, other use of public resources) is ultimately for a private or a public purpose. Justice Souter regarded this exercise as involving no different methodology than that employed for ascertaining a government endorsement of religion:

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.

Id. at 487.

An objectively-based evaluation will effectively serve the purpose of establishing limits public actors must abide by and will allow a trier of fact to ascertain whether or not a public official's actions amount to private support of one side in an election contest.

H. Plaintiffs Who, at Their Own Expense, Successfully Challenged Government Actions Authorizing and/or Engaging in Electioneering Expenditures Are Entitled to an Award of Counsel Fees

The point of this lawsuit was to obtain a determination that Montgomery County could not use public funds to influence an election. In responding to plaintiffs' request

for an award of attorney's fees, the trial court took no exception to the position that the common fund doctrine allows such an award. Instead, the court denied the request purely on its belief there was no knowingly wrongful conduct by government employees in their misuse of public funds to distort the outcome of an election contest.³ By hinging a fee award upon knowing malfeasance by individual officials misusing public tax dollars the trial court misapplied the common fund doctrine.

1. The Individual Conduct Involved was Knowingly Wrongful

The trial court ruled it would not make any "economic award" – including any award of plaintiffs' fees – based upon its conclusion that County employees responsible for the unlawful expenditures had not knowingly committed "wrongdoing." (Trial Ct. Decision pp.28-29) This Court should seriously question whether the court could properly find the remedy of disgorgement should be denied based upon a conclusion that the misuse of public funds here was not wrongful. This conclusion is contrary to the standard defining what constitutes a misuse of public funds as properly reflected in the trial court's own reasoning which recognized that use of public funds is improper where not authorized by public law. In this case, the County and the individual public officials knew or should have known that there was no extant law authorizing the expenditure of funds. The reason such knowledge must be imputed to those spending the public funds is fundamental. The expenditures were made to obtain enactment of the law towards which the funds were spent. Any reasonable public actor must have understood *ex facie* that there was no law yet in place allowing the expenditures in question and that there was, therefore, no authority to use the public funds for the purpose for which they were employed. Assuming this Court accepts a due care standard for individual government

³ The trial court's analysis tracks the personal immunity from suits for tort damages allowed for illegal actions by government officials carried out in good faith. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The public entity's obligation for legal fees is not addressed. Prior to the decision in *Harlow*, the court of special appeals in *Smith v. Edwards*, 46 Md.App. 452, 418 A.2d 1227 (1980), rev'd on other grounds, 292 Md. 60, 437 A.2d 221 (1981), distinguished actions involving torts, such as the wrongful termination at issue in *Harlow*, from the suit here, dispensing with the argument that qualified immunity should apply, observing: "We are unable to follow the argument because qualified immunity applies to actions for tort and has no application to acts which are ultra vires." *Id.*, at 460.

employee liability for *ultra vires* expenditures, this would render the county employees subject to liability for disgorgement as well as fees on this basis. (See, *Bowling v. Brown*, 57 Md.App. 248, 469 A.2d 896, 904-05 (1984); *Stanson*, supra at 15).

2. Considerations Germane to the Common Benefit Doctrine

The court's use of a wrongful conduct standard is not the proper standard to be applied to a common benefit fee award which looks to equitable principles of unjust enrichment. Even if good faith illegality did allow employee resort to qualified immunity⁴, an award of fees against the government entity does not and should not turn upon bad faith. Maryland follows the American Rule and adheres to the common benefit exception to that rule. *Garcia v. Foulger Pratt Dev. Inc.*, 155 Md. App. 634, 845 A.2d 16 (2003). The U.S. Supreme Court in a case relied upon by the *Garcia* court, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), addressed the application of the common benefit exception that has developed to the American Rule. That judicially-created exception applies "where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. [citation] To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.* at 392.

In *Mills*, the Court made clear that in spite of the frequent denomination "common fund" there is no requirement that a monetary recovery be obtained. Declaratory relief or injunctive relief or other non-pecuniary benefit to the class (See also, *Hall v. Cole*, 412 U.S. 1 (1973)) will support award of fees incurred for the benefit of the others: "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale." *Id.*⁵ The Court made no mention of considerations involving the wrongfulness of a

⁴ The court in *Bowling*, supra, saw no difficulty with awarding common fund fees for *ultra vires* expenditures against individual local government employees. Under the view adopted elsewhere, good faith immunity may allow an individual public official immunity from a fee award in a case seeking injunctive or declaratory relief. See, *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 (11th Cir. 1995).

⁵ Dicta by the Court of Special Appeals in *Smith* expressing a view to the contrary (*Id.*, at 462) does not consider the pronouncement by our nation's high Court in *Mills* and *Hall*.

defendant's conduct. Instead, the Court explained, reimbursement of the plaintiff's fees has been properly upheld "where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Id.* at 393-94.

That a government functionary may have been earnestly "following departmental policy" in committing an unlawful government action should have no bearing upon the propriety of a common benefit fee award as to the offending agency. Other considerations prevail. The equitable objective is not designed to compensate for damages and is not punitive. Taxpayer suits such as the instant action, which challenge the lawfulness of the use of public funds, present precisely the unjust enrichment the common benefit exception was meant to address. (See, *Bowling*, *supra* (all taxpayers of a municipality were benefitted by action resulting in reimbursement of unauthorized disbursements and action benefitted all taxpayers of a special tax district); *Smith v. Edwards*, 46 Md.App. 452, 418 A.2d 1227 (1980), *rev'd* on other grounds, 292 Md. 60, 437 A.2d 221 (1981) (*ultra vires* expenditure of tax funds)).

The court in *Smith*, observed: "The doctrine is based on the idea that, where a taxpayer has gone into court taking the risk of litigation upon himself, and has thereby conferred a benefit upon other taxpayers similarly situated, it is equitable to allow counsel fees out of the recovery." *Id.* at 462. Avoidance of unjust enrichment is accomplished by awarding fees against the County agency whose officials expended the public funds pursuant to an improper policy. This prevents the inequity of imposing the entire burden of litigation over a tax amount which pro rata dwindles in comparison to the litigation expenses upon the litigant willing to challenge the propriety of the government action. It spreads the indemnified expense among the multitude of taxpayers who generally benefit from the cessation of the unlawful expenditure. It prevents sheltering the government entity from liability for the unlawful spending of employees carrying out unlawful, official policies, thereby encouraging repetition of similar conduct.

The historic origins of the rule and the policy basis for this equitable exception provide no place for the culpability of the government actor in analyzing whether those benefitting will be unjustly enriched at the expense of the citizen who was willing to bring the issue to court. Instead, two key components can be identified as germane to the analysis: 1) a benefit to a larger class, and; 2) an unfair burden upon the litigant who bestows the benefit. A third related component can also be recognized: the public policy promoting legal challenges to improper government action.

a. The General Benefit Bestowed Upon Taxpayers

Plaintiffs' lawsuit was, for all intents and purposes, a taxpayer's suit seeking to vindicate the rule that government expenditures to persuade the electorate regarding election issues are not authorized by law and are unlawful. Such an action is not brought for private reasons but is "an action . . . on behalf of a public entity to recover moneys misappropriated or illegally expended by a public employee . . ." *Stanson v. Mott* , supra. It is a representative action seeking redress of a public wrong.

The importance of the benefit conferred upon Montgomery County taxpayers and, likewise, for Maryland taxpayers is apparent from a number of perspectives. Legally, as detailed supra, the use of tax dollars to advocate on issues that are contested and before the voters for decision is an expenditure lacking lawful authority and amounting to compelled speech. The importance of the trial court's holding that government agents must remain neutral with respect to expenditures of public funds in the election setting cannot be diminished. This articulation of an essential separation necessary between the political process where the People make laws and the legal aspects of government where laws are applied and interpreted is a statement of constitutional governance recognizing the place of the Rule of Law and of precepts essential to the process of self-governance that fundamentally distinguishes the American system from autocratic regimes. It illuminates the basic need to separate governmental functions from the exercise of popular sovereignty.

Upholding an award of fees to a public interest litigant challenging such unlawful use of public funds to electioneer, the court in *California Common Cause v. Duffy*, 200

Cal.App.3d 730, 246 Cal.Rptr. 285 (1987), recognized the sweeping significance of this non-pecuniary benefit. It rejected the public agency's challenge to the fee award, stating plaintiff's championing "what the [California] Supreme Court has characterized as "[a] fundamental precept of this nation's democratic electoral process" (Stanson v. Mott, supra, 17 Cal.3d at p. 217) . . . vindicated an important right affecting the public interest." (*Id.* at 748-749.).

Economically, the effect of allowing a government entity to tip in the public till to advance positions in the advent of an election is broadly significant in impacting the pocketbooks of Maryland taxpayers. The potential effect of allowing local and state government agencies to spend funds to advocate regarding proposed laws is millions if not billions of dollars annually on a statewide basis. Putting an end to such practices is unequivocally a benefit to those taxpayers.

Politically, the corrosive impact upon voter confidence in the election process must be considered. If votes and political contributions are devalued by use of public funds to "drown out" privately funded political campaign messages and votes, confidence in the fairness of the political process will suffer irreparable harm.

b. The Inequity in Having Plaintiffs Bear the Burden of Achieving the Common Benefit

Plaintiffs stood to benefit not one whit more than any other taxpayer from the prospective result of their lawsuit. The election that prompted them to file suit was over. No disgorgement would inure to them, other than pro rata. It cannot be argued that fees should be denied because the litigation here was pursued out of "sour grapes" for the purely private interests of opponents of the referendum measure allegedly affected by the County's expenditures. The court in *Duffy* dispensed with this argument, noting "it 'is irrelevant' that the plaintiff's personal interest in the subject matter of the litigation was sufficient to induce him or her to bring an action". *Id.* at 750. What matters is not a plaintiff's abstract personal stake, but the financial incentives and benefits involved in filing the lawsuit. *Id.* at 751. Analyzing this a step further, another California court in *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 24 Cal.Rptr.3d 72 (2005),

recognized that in litigation raising questions concerning elections, ballot participants may be the ideal plaintiffs to take up the standard in the name of the public interest. *Id.* at 89-90. Had plaintiffs not acted in the trial court and persevered on appeal, a misguided policy of spending public funds to influence ballot outcomes would have persisted and, even worse, the decision of the Special Court of Appeal would stand as an incorrect statement of the law, effectively licensing government agencies to engage in improper expenditures of public funds throughout the state.

c. Discouragement of Public Interest Litigation to Prevent Misuse of public Funds

The importance of taxpayer actions has been tied to the foundation of our constitutional system of governance:

[T]he judicial process is the only means by which the individual citizen is guaranteed an influence on official conduct. In the end, the foundation of democratic government rests in the individual. If he is unable to do no more than ratify in the voting booth political decisions that have already been made or support with his vote some general policy trend that he favors, he is left without the ability to influence the day-to-day affairs of state. These daily decisions determine how far and in what direction our society will advance. Consequently, the individual citizen must be able to take the initiative through taxpayers' suits to keep government accountable on the state as well as on the local level.

Note, *California Taxpayers' Suits*, 28 Hastings L.J. 477, 508.

The need to protect and encourage citizens who bring such actions is plain. It has been recognized that "the amount at stake for an individual taxpayer is often too insignificant for the taxpayer to justify an individual lawsuit". Bruce R. Braun & W. G. Dobie, *Litigating the Yankee Tax: Application of the Lodestar to Attorneys' Fee Awards in Common Fund Litigation*, 23 Fla. St. U. L. Rev. 897, 915 (1996). The effect upon counsel's willingness to take up the standard on behalf of an individual taxpayer is chilling without the ability to recover fees. Deprived of the likelihood of fee awards there is no incentive to challenge government misuse of public funds. Unlawful government practices will be left to stand, government will remain unaccountable for all manner of illegal activity and misfeasance, and tax dollars will continue to be misspent, save for

those rare occasions where the well-heeled philanthropist or pro bono attorney is willing to take up the legal cause. Public policy supports compensating the successful taxpayer litigant reasonable attorney's fees.

3. The Trial Court Erred in Failing to Consider the Germane Considerations Bearing Upon a Common Benefit Fee Award

Discretion in awarding fees, as in any case, is framed by the reason giving rise to that exercise. The exercise of a trial court's discretion is not a "whimsical, uncontrolled power", but is "subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." [citation] *City of Sacramento v. Drew*, 207 Cal.App.3d 1287,1297, 255 Cal. Rptr. 704 (1989). Where the record does not support that the trial court reached its conclusion in accordance with those guiding principles, there is no basis for a reviewing court to defer to the lower court's conclusion.

The wrongful conduct of the individual government actor responsible for making an unlawful expenditure of public funds has no part in the pertinent considerations under the common benefit exception to the American Rule. Even if culpability of the government agent were a factor in the trial court's equitable evaluation of the appropriateness of a fee award, it would be error for the court to consider only that factor as dispositive in denying an award of fees. In *Patzkowski v. U.S.*, 576 F.2d 134 (8th Cir. 1978), the court considered the Civil Rights Attorney's Fees Awards Act of 1976 which included a number of factors as germane to a public interest fee award. The trial court had denied a fee award in a taxpayer penalty challenge case on the basis the government defendant had not been shown to have acted in bad faith. It was not sufficient to rely merely upon a determination that the government actor did not act in bad faith: "A showing of subjective bad faith on the Government's part is not, however, a sine qua non for an allowance of attorney's fees. It is merely one of several criteria which a district court should consider in exercising its discretion under the Act." *Id.* This limited basis for the discretionary denial of fees was error and the court remanded: "The District Court in the present case limited its analysis of Patzkowski's request for attorney's fees to the

issue of governmental bad faith; it did not consider the full range of criteria relevant to an exercise of discretion under the Act.” *Id.*

Remand is proper here to require the trial court to consider the appropriate factors relevant to a common benefit fee award.

VI. CONCLUSION

Whether or not money “makes the world go round,” it undeniably influences election outcomes. That the end result of elections is largely controlled by the amount of funds one private faction can muster has been the subject of much concern before and after *Citizens United v. FEC*, 558 U.S. 310 (2010). The U.S. Supreme Court recognized in *Citizens United* that this contest remains one between private factions and the fairness of such expenditures influencing an election outcome cannot be second-guessed by government regulators. *Id.* at 38-40.

In the final analysis, government suppression of certain election expenditures benefitting one faction is no different than its financial support of the other faction. The evil is the same. It derogates the Founders’ conception of the roles of government agents in relation to the electorate to place the servant on a par with the sovereign and endow it with access to public resources to advance ends not accepted by the populace. This Court should hold that government cannot lawfully use public funds for election expenditures to tell the People how to vote.

This Court should affirm the trial court’s decision and hold that a government agency’s use of public funds to support one side in an election contest, such as the expenditures by Montgomery County at issue here, is *ultra vires* and amounts to compelled speech. In addition, the Court should adopt an objective, reasonableness standard for future application which eschews any bright line standard for determining when a government agency has crossed the line, such as restricting inquiry to the presence of traditional campaign devices (bumper stickers, mass media advertisement spots, billboards, door-to-door canvassing) or “express advocacy”. Instead, evaluation should proceed on a case-by-case consideration of the context of the spending and the

conduct of the public agency similar to the evaluation utilized to assess whether or not an establishment clause violation through government support of religion has occurred.

The issue of a common fund fee award should be remanded to the trial court for consideration of the factors of whether a common benefit was bestowed, whether it would be unfair to impose the burden of litigation benefitting a broad class upon the plaintiff and whether the public interest is served by awarding fees.

Respectfully submitted,

Jan I. Berlage
Gohn Hankey Stichel & Berlage LLP
201 N. Charles Street, Suite 2101
Baltimore, Maryland 21201
410-752-9300
jberlage@ghsllp.com

Attorney for *Amici Curiae*

Steven J. Andre
Counsel *Pro Hac Vice* for *Amici Curiae*

STATEMENT CONCERNING TYPEFACE

The above Brief was composed in Times New Roman font, 13-point type.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2015, two copies of the foregoing Motion to Allow Amicus Participation with propose brief was served by U.S. Mail, first-class postage prepaid on:

Marc P. Hansen, Esq.
Montgomery County Attorney
101 Monroe St.
Rockville, MD 20850
Counsel for Respondent Montgomery County, Maryland

William J. Chen Jr.
200A Monroe Street, Suite 300
Rockville, MD 20850

Martha L. Handman
Martha L. Handman, P.C.
17604 Parkridge Drive
Gaithersburg, MD 20878
Attorneys for Petitioners

Molly Elkin, Esquire
Woodley & McGillivary LLP
1101 Vermont Avenue, NW, Suite 1000
Washington, DC 20005

Carey R. Butsavage
Butsavage & Durkalski, PC
120 L Street, NW, Suite 301
Washington, DC 20036

Jan I. Berlage