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**IN THE  
COURT OF APPEALS OF MARYLAND**

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September Term, 2007

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No. 122

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**STATE BOARD OF ELECTIONS,**

*Appellant,*

v.

**CLIFFORD E. SNYDER, JR.,  
on behalf of Carl Phillip Snyder, his son, *et al.*,**

*Appellees.*

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On Appeal from the Circuit Court for Anne Arundel County  
(Paul A. Hackner, Judge)

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**RECORD EXTRACT**

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CLIFFORD E. SNYDER, JR, ESQUIRE  
4964 Flossie Avenue  
Frederick, Maryland 21703  
(301) 473-5408

JONATHAN S. SHURBERG, ESQUIRE  
8720 Geogia Avenue, Suite 703  
Silver Spring, Maryland 20910  
(301) 585-0707  
Attorney for Appellee Botluck

DOUGLAS F. GANSLER  
Attorney General of Maryland

AUSTIN C. SCHLICK  
MARK J. DAVIS  
SANDRA B. BRANTLEY  
Assistant Attorneys General  
200 St. Paul Place, 20<sup>th</sup> Floor  
Baltimore, Maryland 21202  
(410) 576-6324  
Attorneys for State Board of Elections

February 5, 2008

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Circuit Court of Maryland  
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**Case Information**

Court System: Circuit Court for Anne Arundel County - Civil System  
Case Number: 02C08128760  
Title: Clifford E Snyder Jr, Et Al Vs State Board Of Elections  
Case Type: Declaratory Judgment Filing Date: 01/18/2008  
Case Status: Open/Active  
Case Disposition: Disposition Date:

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**Plaintiff/Petitioner Information**

(Each Plaintiff/Petitioner is displayed below)

Party Type: Plaintiff Party No.: 1  
Name: Snyder, Jr, Clifford E  
Address: 4964 Flossie Avenue  
City: Frederick State: MD Zip Code: 21703

*Attorney(s) for the Plaintiff/Petitioner*

Name: Shurberg, Jonathan Seth  
Practice Name:  
Address: Suite 700  
8720 Georgia Ave  
City: Silver Spring State: MD Zip Code: 20910

---

Party Type: Plaintiff Party No.: 2  
Name: Snyder, Carl Philip  
Address: 4964 Flossie Avenue  
City: Frederick State: MD Zip Code: 21703

---

**Defendant/Respondent Information**

(Each Defendant/Respondent is displayed below)

Party Type: Defendant Party No.: 1  
Business or Organization Name: State Board Of Elections  
Address: PO Box 6486  
City: Annapolis State: MD Zip Code: 21401-0486  
Address: Administrator Of Elections  
City: Annapolis State: MD Zip Code: 21401

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**Court Scheduling Information**

Event Type: HearingNotice Date:  
Event Date: 02/01/2008Event Time:09:00 AM  
Result: Held/ConcludedResult Date:02/01/2008

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**Document Tracking**

(Each Document listed. Documents are listed in Document No./Sequence No. order)

Doc No./Seq No.: 1/0

File Date: 01/18/2008Close Date:Decision:

Party Type: PlaintiffParty No.:1

Document Name: Complaint Under Section 12-202 Of The Election Law Article  
Filed by PLT001-Snyder, PLT002-Snyder

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Doc No./Seq No.: 2/0

File Date: 01/18/2008Close Date:Decision:

Party Type: PlaintiffParty No.:1

Document Name: Case Information Sheet Filed  
Filed by PLT001-Snyder, PLT002-Snyder

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Doc No./Seq No.: 3/0

File Date: 01/22/2008Close Date:01/22/2008Decision:

Party Type: DefendantParty No.:1

Document Name: Writ of Summons - Civil Issued

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Doc No./Seq No.: 8/0

File Date: 02/01/2008Close Date:Decision:

Party Type: DefendantParty No.:1

Document Name: Defendants Motion to Dismiss or for Summary Judgment

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Doc No./Seq No.: 9/0

File Date: 02/01/2008Close Date:02/01/2008Decision:

Party Type: DefendantParty No.:1

Document Name: Memorandum in Support of Motion to Dismiss or for Summary Judgment

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Doc

No./Seq 10/0

No.:

File Date: 02/01/2008Close Date:Decision:

Document Name: Hearing Sheet

Case called for Hearing on Declaratory Judgment in Open Court before Judge Paul A. Hackner. Counsel heard. By agreement of all parties court consolidated C-08-128755 with C-08-128760. C-08-128760 is Main Case. Appearance of John Shurberg as attorney for

Richard Boltuck filed in open court. Memorandum in Support of Plaintiff Complaint filed in open court. Defendants Motion to Dismiss or for summary Judgment filed in open court. Opposition to Defendants Motion to Dismiss and Summary Judgment filed in open court. Summary filed in open court. Plaintiffs orally amended requested relief to Declaratory Judgment. Court finds that persons age 17 who will reach the age of 18 by the general elections are permitted to vote on partisan and nonpartisan items on ballot on a provisional ballot. Mr Shuberg to prepare order and submit to court.

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Doc  
No./Seq 11/0  
No.:  
File Date: 02/01/2008Close Date:02/01/2008Decision:Granted

Document  
Name: Order of Court

Ordered, that Defendants Motion to Dismiss/Motion for Summary Judgment is Denied. The Motion for Summary Judgment filed by Plaintiffs is Granted in Part. The Oral Motions for Declaratory Judgment are Granted. This court declares that all 17 year old voters, whether or not affiliated with any political party, who will be 18 on or before the November 4, 2008 general election, shall be entitled to vote in both the partisan and non-partisan primary elections on February 12, 2008. Defendant State Board of Elections may use provisional ballots in the February 12, 2008 primary elections for all 17-year old voters, whether or not affiliated with any political party, who will be 18 on or before the November 4, 2008 general election. (Copies to Atty Davis, Boltuck, & Clifford Snyder)

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Doc No./Seq No.: 12/0  
File Date: 02/01/2008Close Date:Decision:  
Document Name: Notice of Appeal to COA filed by atty. Mark Davis, Office of the Attorney General. (No fees due).  
Fifty dollars cash, to be returned to Mark Davis, by mail, per phone conversation.  
\*\*\* Case to be transmitted on an expedited basis, ASAP \*\*\*

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Doc No./Seq No.: 13/0  
File Date: 02/04/2008Close Date:Decision:  
Document Name: Original records sent to COA including 1 Volume of Pleadings and 1 Volume of transcript dated 2/01/08,  
by BWA Courier 2/05/08.

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The complete case file can be obtained from the Circuit Courthouse.

Circuit Court of Maryland  
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**Case Information**

Court System: Circuit Court for Anne Arundel County - Civil System  
Case Number: 02C08128755  
Title: Richard D Boltuck, Et Al Vs State Board Of Elections  
Case Type: Declaratory Judgment Filing Date: 01/18/2008  
Case Status: Open/Active  
Case Disposition: Disposition Date:

---

**Plaintiff/Petitioner Information**

(Each Plaintiff/Petitioner is displayed below)

Party Type: Plaintiff Party No.: 1  
Name: Boltuck, Richard D  
Address: 6015 Cairn Terrace  
City: Bethesda State: MD Zip Code: 20817-5405

*Attorney(s) for the Plaintiff/Petitioner*

Name: Shurberg, Jonathan Seth  
Practice Name:  
Address: Suite 700  
8720 Georgia Ave  
City: Silver Spring State: MD Zip Code: 20910

---

Party Type: Plaintiff Party No.: 2  
Name: Boltuck, Sarah Elizabeth  
Address: 6015 Cairn Terrace  
City: Bethesda State: MD Zip Code: 20817-5405

---

**Defendant/Respondent Information**

(Each Defendant/Respondent is displayed below)

Party Type: Defendant Party No.: 1  
Business or Organization Name: State Board Of Elections  
Address: PO Box 6486  
City: Annapolis State: MD Zip Code: 21401-0486  
Address: Administrator Of Elections  
City: Annapolis State: MD Zip Code: 21401

*Attorney(s) for the Defendant/Respondent*

Name: Davis, Esq, Mark Jason

Practice Name: Assistant Attorney General, Ed Affairs Division  
Address: 200 St Paul Place  
17th Floor  
City: Baltimore State: MD Zip Code: 21202

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**Court Scheduling Information**

Event Type: Hearing Notice Date:  
Event Date: 02/01/2008 Event Time: 09:00 AM  
Result: Held/Concluded Result Date: 02/01/2008

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**Document Tracking**

(Each Document listed. Documents are listed in Document No./Sequence No. order)

Doc No./Seq No.: 1/0  
File Date: 01/18/2008 Close Date: Decision:  
Party Type: Plaintiff Party No.: 1  
Document Name: Complaint Under Section 12-202 Of The Election Law Article  
Filed by PLT001-Boltuck, PLT002-Boltuck

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Doc No./Seq No.: 2/0  
File Date: 01/18/2008 Close Date: Decision:  
Party Type: Plaintiff Party No.: 1  
Document Name: Case Information Sheet Filed  
Filed by PLT001-Boltuck, PLT002-Boltuck

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Doc No./Seq No.: 3/0  
File Date: 01/22/2008 Close Date: 01/22/2008 Decision:  
Party Type: Defendant Party No.: 1  
Document Name: Writ of Summons - Civil Issued

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Doc No./Seq No.: 4/0  
File Date: 01/28/2008 Close Date: Decision:  
Document Name: Request to Re-Issue Writ of Summons for Defendant

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Doc No./Seq No.: 5/0  
File Date: 01/28/2008 Close Date: 01/28/2008 Decision:  
Party Type: Defendant Party No.: 1  
Document Name: Return of Service - Unserved  
CV-Writ of Summons returned 01/28/08

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Doc No./Seq No.: 6/0

File Date: 01/28/2008 Close Date: 01/28/2008 Decision:  
Party Type: Defendant Party No.: 1  
Document Name: Writ of Summons - Civil Issued

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Doc  
No./Seq 7/0  
No.:

File Date: 02/01/2008 Close Date: Decision:

Document  
Name: Hearing Sheet

Case called for hearing on Declaratory Judgment in open court before Judge Paul A. Hackner. Counsel heard. By agreement of all parties court consolidated C-08-128755 with C-08-128760. C-08-128760 is main case. Appearance of John Shurberg as attorney for richard Boltuck filed in open court. Memorandum in support of Plaintiff Complaint filed in open court. Defendants Motion to Dismiss or for Summary Judgment filed in open court. Opposition to Defendants Motion to Dismiss and Summary Judgment filed in open court. Summary filed in open court. Plaintiffs orally amended requested relief to Declaratory Judgment. Court finds that persons age 17 who will reach the age of 18 by the general elections are permitted to vote on partisan and nonpartisan items on ballot on a provisional ballot. Mr. Shuberg to prepare order and submit to court.

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Doc  
No./Seq 8/0  
No.:

File Date: 02/01/2008 Close Date: 02/01/2008 Decision: Granted/Denied in Part

Document  
Name: Order of Court

Ordered, that Defendants Motion to Dismiss/Motion for Summary Judgment is Denied. The Motion for Summary Judgment filed by Plaintiffs are Granted. the Oral Motions for Declaratory Judgment are Granted. This Court declares that all 17 year old voters, whether or not affiliated with any political party, who will be 18 on or before the November 4, 2008 general election, shall be entitled to vote in both the partisan and non partisan primary elections on February 12, 2008, and it is further Ordered, that Defendant State Board of Elections may use provisional ballots in the February 12, 2008 primary elections for all 17 year old voters, whether or not affiliated with any political party, who will be 18 on or before the November 4, 2008 general election. (copies to Attys Davis, Shurberg, & Clifford Snyder)

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Doc No./Seq No.: 9/0

File Date: 02/01/2008 Close Date: 02/04/2008 Decision:

Party Type: Plaintiff Party No.: 1

Document Name: Attorney Appearance Filed  
Jonathan S Shurberg

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Doc No./Seq No.: 10/0

File Date: 02/04/2008 Close Date: Decision:



Document Name: Notice of Appeal to COA filed by aty. Mark Davis, Office of the Attorney General. (No fees due).  
Fifty dollars cash, to be returned to Mark Davis, by mail, per phone conversartion.  
\*\*\* Case to be transmitted on an expedited basis, ASAP \*\*\*

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Doc No./Seq No.: 11/0  
File Date: 02/04/2008Close Date:Decision:  
Document Name: Original Pleadings sent to COA including 1 Volume of Pealdings and 1 Volume of transcript dated 2/01/08, by BWA Courier.  
  
\* Note: This case is consolidated with C-08-128760, Case C-08-128760 is the main case.

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Doc No./Seq No.: 12/0  
File Date: 02/01/2008Close Date:02/04/2008Decision:  
Party Type: DefendantParty No.:1  
Document Name: Attorney Appearance Filed  
Mark J Davis

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The complete case file can be obtained from the Circuit Courthouse.

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR.  
on behalf of  
Carl Philip Snyder, his son  
PLAINTIFF  
4964 Flossie Avenue  
Frederick, MD 21703  
(301) 473-5408

versus

STATE BOARD OF ELECTIONS  
DEFENDANT  
P.O. Box 6486  
151 West Street, Suite 200  
Annapolis, MD 21401-0486  
(410) 269-2840

Serve: Linda H. Lamone, Administrator of Elections  
151 West Street, Suite 200  
Annapolis, MD 21401

CIVIL  
ACTION

No. C-08-128760

\*\*\*\*\*

COMPLAINT UNDER SECTION 12-202 OF  
THE ELECTION LAW ARTICLE

Count One – Violations of Election Law Article

1. Plaintiff is Clifford E. Snyder, Jr. Plaintiff's address is within the boundaries of Frederick County.
2. Plaintiff makes this complaint on behalf of Carl Philip Snyder ("Carl"), his son, a minor.
3. Carl was born on October 11, 1990 in Frederick County, Maryland and has resided there since birth.
4. Carl applied for voter registration in early May 2007.

5. Carl received a Voter Notification Card stating a "Date of Issue" of "5/21/2007," identifying Orchard Grove Elementary School as his polling place, and indicating his association with the Democratic Party.

6. Said Voter Notification Card states, "Your registration in Maryland is permanent as long as you remain a resident of Maryland and keep your address current with your local election office."

7. Carl first became aware of a possible issue with respect to his voting status on December 2, 2007 by reading a letter from Richard Boltuck published that day in a newspaper, *The Washington Post*. Said letter was captioned, "In Maryland, A Quiet Loss of Voting Rights."

8. Carl consulted the web site of the State Board of Elections ("State Board") and saw under a heading for Primary Elections a statement that a voter must be 18 years old or older on or before the date of the election in which he wishes to vote, even if that election is a primary election.

9. Given Carl's date of birth, he will not attain the age of 18 years by February 12, 2008 but he will attain that age by the date of the Presidential election on November 4, 2008.

10. In view of the inconsistency between statements on said Voter Notification Card and the State Board's web site, Plaintiff submitted, on Carl's behalf, to the State Board a Petition for Declaratory Ruling on Carl's

ability to vote in the February 12, 2008 Democratic party primary.

11. The State Board's response, dated December 6, 2007, stated that it had declined to issue a Declaratory Ruling.

12. On Carl's behalf, Plaintiff sent a letter to the Frederick County Board on December 8, 2007 requesting a determination on Carl's right to vote on February 12, 2008.

13. The Frederick County Board sent a letter dated December 12, 2007 stating that Carl was not eligible to vote in the Democratic Party primary election on February 12, 2008.

14. Plaintiff submitted an administrative complaint to the State Board on or about December 15, 2007.

15. On December 21, 2007, the designee of the State Administrator issued a "Final Determination" that dismissed Plaintiff's administrative complaint as being moot. In a paragraph captioned, "Mootness," designee Judith Arnold stated, "Because of the State Board's December 20, 2007 resolution to permit individuals in the class to which Carl Philip Snyder belongs to vote in the February 12, 2008 primary election, the Complainant has achieved the result sought by this proceeding, and his Complaint is therefore moot."

16. By letter dated January 8, 2008, the State Board informed Carl that he is eligible to vote by provisional ballot for "party offices in the Presidential Primary Election scheduled for Tuesday, February 12, 2008."

17. As of January 14, 2008, the State Board's position, as made public on its web site, is that 17 year olds (like Carl) who will be 18 years old on or before November 4, 2008 will not be permitted to cast votes in non-partisan contests in the Presidential Primary Election on February 12, 2008.

18. In Frederick County, there is a non-partisan contest on February 12, 2008, namely a primary election to nominate candidates for the Frederick County Board of Education.

19. On January 12, 2008, Plaintiff requested by e-mail that the State Board reconsider its Final Determination of his administrative complaint. In pertinent part, Plaintiff stated, "(1) Without legally sufficient reason, the State Board will require Carl to vote by provisional ballot; and (2) Without legally sufficient reason, the State Board will not allow Carl's votes in the non-partisan primary election for the Frederick County Board of Education to be counted. As to (1), the requirement to use a provisional ballot makes Carl a second-class voter, as is clear by a fair reading of Title 9, Subtitle 4: Under section 9-404(b)(1), Carl will apparently be required to declare in a written affirmation submitted with the provisional ballot that he is a registered voter in the State and is eligible to vote in that election. As to (2), there is nothing in the Election Law Article to justify a denial of Carl's right to vote in the non-partisan primary election for the Board of Education. Carl's right to vote does not depend on associational rights; he has, under settled Maryland law and decades of past practice, the right

to vote in both his party's primary election and in the non-partisan primary election."

20. In reply to Plaintiff's message of January 12, 2008, the State Board's Deputy Administrator Ross Goldstein by e-mail said that COMAR did not provide for reconsideration of the Final Determination of Plaintiff's administrative complaint.

21. On January 14, 2008 Plaintiff submitted, by electronic means, an administrative complaint regarding the State Board's imposition of a provisional ballot requirement on Carl's vote on February 12, 2008 and its action declaring Carl ineligible to vote in the non-partisan contest on that date.

22. By denying Carl, a duly registered voter, the use of a regular ballot and by declaring Carl ineligible to vote for candidates for the Frederick County Board of Education, the State Board has acted contrary to several provisions of the Election Law Article, including, but not necessarily limited to, sections 3-102 and 3-501, governing qualifications for voter registration and the statewide voter registration list, respectively; and section 8-802 of the Election Law Article, governing who may vote in a primary election to nominate board of education candidates.

23. This Court has subject matter jurisdiction over this case pursuant to section 12-202 of the Election Law Article. Plaintiff learned only after January 8, 2008, that Carl would have to vote by provisional ballot and that he could not

vote in a non-partisan contest. Plaintiff's request for reconsideration of dismissal of his administrative complaint has been rejected. Plaintiff expects that the State Board will decline to consider Plaintiff's administrative complaint submitted January 14, 2008. While one or more petitions for judicial review of State Board action on the administrative complaints, available under section 3-602 of the Election Law Article, might be an appropriate avenue of relief in this Court, this Complaint appears to be a more straightforward approach warranted by the need for timely judicial action before February 12, 2008. It is axiomatic that even one vote may change the outcome of an election.

WHEREFORE, Plaintiff requests an injunction requiring the State Board to allow Carl to vote by regular ballot, and to have his votes counted in the usual way, in all contests on the ballot in Frederick County on February 12, 2008; payment by the State Board of court costs; and any and all such other relief as justice may require.

Count Two – Violations of Maryland Declaration of Rights

24. Paragraphs 1 to 22 are incorporated by reference.

25. When the State Board determined that Carl must use a provisional ballot and that he is not eligible to vote in the non-partisan board of education contest on February 12, 2008 it exercised legislative and judicial duties contrary to the separation of powers required by Article 8 of the Declaration of Rights. The State Board has purported to create election law; it then applied Board law

in derogation of Carl's right to vote, a right that was established under Maryland law in May 2007 when Carl was registered to vote. The State Board's administrative actions are not within the scope of delegated authority; they are arbitrary, capricious, or unreasonable, and cannot stand under Maryland law.

26. Carl's right to vote by regular ballot, and his right to vote in a non-partisan election, have been imperiled without due process of law. In May 2007, Carl became a registered voter. Since May 2007, Carl's voting status, as determined by the State Board, has been as follows: (a) Eligible to vote on February 12, 2008 in party primary contests and in relevant non-partisan contests; (b) Not eligible to vote on February 12, 2008, period; and (c) Eligible to vote on February 12, 2008 only in the party primary contests. There have been two changes of status although there have been no relevant changes in Maryland's enacted law since May 2007. The State Board's failure to provide due process as required by Article 24 of the Declaration of Rights is inexcusable.

WHEREFORE, Plaintiff requests an injunction requiring the State Board to allow Carl to vote by regular ballot, and to have his votes counted in the usual way, in all contests on the ballot in Frederick County on February 12, 2008; payment by the State Board of court costs; and any and all such other relief as justice may require.

Respectfully submitted,



---

Clifford E. Snyder, Jr.  
Plaintiff  
4964 Flossie Avenue  
Frederick, MD 21703  
(301) 473-5408

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

RICHARD D. BOLTUCK  
on behalf of  
Sarah Elizabeth Boltuck, his daughter  
PLAINTIFF  
6015 Cairn Terrace  
Bethesda, Maryland 20817-5405

versus

STATE BOARD OF ELECTIONS  
DEFENDANT  
P.O. Box 6486  
151 West Street, Suite 200  
Annapolis, MD 21401-0486  
(410) 269-2840

Serve: Linda H. Lamone, Administrator of Elections  
151 West Street, Suite 200  
Annapolis, MD 21401

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CIVIL  
ACTION

No. \_\_\_\_\_

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COMPLAINT UNDER SECTION 12-202 OF  
THE ELECTION LAW ARTICLE

Count One – Violations of Election Law Article

1. Plaintiff is Richard D. Boltuck. Plaintiff's address is within the boundaries of Montgomery County.
  
2. Plaintiff makes this complaint on behalf of Sarah Elizabeth Boltuck ("Sarah"), his daughter, a minor.
  
3. Sarah was born on July 21, 1990 in Takoma Park, Maryland and has resided in the State of Maryland since birth, and in Montgomery County since 1998.

4. Sarah completed and submitted a Maryland Voter-Registration Application Form to the Montgomery County Board of Elections ("MCBOE") in May or June 2007.

5. Sarah received a letter from the MCBOE dated June 11, 2007 notifying her that her application to register to vote had been rejected. The letter stated, "[r]eview of the application indicates that you do not qualify for registration and voting in this county because you will not have reached 18 years old by the date of the next election."

6. On Sarah's behalf, Plaintiff consulted the web site of the State Board of Elections ("State Board") and saw under a heading for Primary Elections a statement that a voter must be 18 years old or older on or before the date of the election in which he wishes to vote, even if that election is a primary election.

7. Given Sarah's date of birth, she will not attain the age of 18 years by February 12, 2008 (the date of the scheduled next Maryland primary election) but he will attain that age by the date of the general election on November 4, 2008.

8. In view of inconsistencies between the MCBOE's rejection of Sarah's application, on the one hand, and eligibility guidance on the application form, and other related evidence of Sarah's right to register and vote in the forthcoming February 12, 2008 primary election, including historical practice in

Maryland and the language of Maryland's unchanged voter-registration statute (Election Law Article, § 3-102), on the other hand, Plaintiff contacted the MCBOE on Sarah's behalf via email message dated June 13, 2007. In this message, Plaintiff asserted that the MCBOE had erred in assessing Sarah's eligibility to register, and requested the board correct its action.

11. In response to Plaintiff's message, the Plaintiff received an email message from Betty Ann Lucey, a MCBOE staff member, dated June 14, 2007. This message asserted that the MCBOE had acted properly in rejecting Sarah's application, based on its then-current understanding of Maryland law.

12. Plaintiff then sent Ms. Lucey and the MCBOE an email message on June 15, 2007 specifically citing Election Law Article, § 3-102, and demanding that the MCBOE register Sarah.

13. In response, Plaintiff received an email message from Ms. Margaret Jurgensen, Election Director, MCBOE, dated June 26, 2007, which included an attached memorandum prepared by Mark Davis, Maryland Assistant Attorney General, dated June 19, 2007. Mr. Davis's memorandum explained why he had concluded that, notwithstanding Maryland statutory law to the contrary, citizens must be 18-year-old or older by the February 12, 2008 primary election in order to register and vote in that primary election.

14. By letter dated January 11, 2008, the State Board informed Sarah

that she is eligible to vote by provisional ballot for "party offices in the Presidential Primary Election scheduled for Tuesday, February 12, 2008."

15. As of January 17, 2008, the State Board's position, as made public on its web site, is that 17-year-olds (like Sarah) who will be 18 years old on or before November 4, 2008 will not be permitted to cast votes in non-partisan contests in the Presidential Primary Election on February 12, 2008.

16. The February 12, 2007 primary election in Montgomery County will have non-partisan school board candidate-nomination contests on the ballot.

17. Plaintiff became aware that Clifford Snyder, acting on behalf of his son, Carl Snyder ("Carl"), had sought to bring an administrative complaint ("Snyder's complaint") challenging the State Board's actions in requiring Carl to vote on a provisional ballot, and prohibiting Carl from voting in non-partisan contests, based on longstanding Maryland statutory law. Plaintiff became aware subsequently that the State Board had declined to consider Snyder's complaint.

18. The basis of Snyder's complaint is summarized in paragraph 19 of the complaint to this Court by Clifford E. Snyder, Jr. in the related civil action, *Clifford E. Snyder, Jr. versus State Board of Elections*, to wit,

" 19. On January 12, 2008, Plaintiff requested by e-mail that the State Board reconsider its Final Determination of his administrative complaint. In pertinent part, Plaintiff stated, '(1) Without legally sufficient reason, the State Board will require Carl to vote by provisional ballot; and

(2) Without legally sufficient reason, the State Board will not allow Carl's votes in the non-partisan primary election for the Frederick County Board of Education to be counted.

As to (1), the requirement to use a provisional ballot makes Carl a second-class voter, as is clear by a fair reading of Title 9, Subtitle 4:

Under section 9-404(b)(1), Carl will apparently be required to declare in a written affirmation submitted with the provisional ballot that he is a registered voter in the State and is eligible to vote in that election. As to (2), there is nothing in the Election Law Article to justify a denial of Carl's right to vote in the non-partisan primary election for the Board of Education. Carl's right to vote does not depend on associational rights; he has, under settled Maryland law and decades of past practice, the right to vote in both his party's primary election and in the non-partisan primary election."

19. Sarah received a letter from the Montgomery County Board of Elections dated January 3, 2008 inviting her to apply to serve as an election judge. The letter stated, "[w]elcome to the Montgomery County community of citizens registered and qualified to vote."

20. By denying Sarah, a duly registered voter, the use of a regular ballot and by declaring Sarah ineligible to vote for candidates for the Montgomery County Board of Education, the State Board has acted contrary to

several provisions of the Election Law Article, including, but not necessarily limited to, sections 3-102 and 3-501, governing qualifications for voter registration and the statewide voter registration list, respectively; section 8-802 of the Election Law Article, governing who may vote in a primary election to nominate board of education candidates; and contrary to Article I, Section 2 of the Maryland Constitution.

21. This Court has subject matter jurisdiction over this case pursuant to section 12-202 of the Election Law Article. Plaintiff learned only after January 11, 2008, that Sarah would have to vote by provisional ballot and that she could not vote in a non-partisan contest. Plaintiff is aware that the State Board has declined to consider an administrative complaint filed by Clifford Snyder posing squarely the issues raised by this case. While one or more petitions for judicial review of State Board action on the administrative complaints, available under section 3-602 of the Election Law Article, might be an appropriate avenue of relief in this Court, this Complaint appears to be a more straightforward approach warranted by the need for timely judicial action before February 12, 2008. It is axiomatic that even one vote may change the outcome of an election.

WHEREFORE, Plaintiff requests an injunction requiring the State Board to allow Sarah to vote by regular ballot, and to have his votes counted in the usual way, in all contests on the ballot in Montgomery County on February 12, 2008; payment by the State Board of court costs; and any and all such other

relief as justice may require.

Count Two – Violations of Maryland Declaration of Rights

22. Paragraphs 1 to 20 are incorporated by reference.

23. When the State Board determined that Sarah must use a provisional ballot and that she is not eligible to vote in the non-partisan board of education contest on February 12, 2008, it exercised legislative and judicial duties contrary to the separation of powers required by Article 8 of the Declaration of Rights. The State Board has purported to create election law; it then applied Board law in derogation of Sarah's right to vote, a right that was established under Maryland law in January 2008 when Sarah was registered to vote. The State Board's administrative actions are not within the scope of delegated authority; they are arbitrary, capricious, or unreasonable, and cannot stand under Maryland law.

24. Sarah's right to vote by regular ballot, and her right to vote in a non-partisan election, have been imperiled without due process of law. In January 2008, Sarah became a registered voter. Since May or June 2007, when Sarah first applied to register to vote in Montgomery County, Sarah's voting status, as determined by the State Board, has been as follows: (a) Not eligible to register to vote; and (b) Eligible to register and to vote on February 12, 2008 in all races; and (c) Eligible to register and vote only in the Democratic or Republican party primary contests (provided Sarah sought to affiliate with one of those two



parties). There have been two changes of status although there have been no relevant changes in Maryland's enacted law since May 2007. The State Board's failure to provide due process as required by Article 24 of the Declaration of Rights is inexcusable.

WHEREFORE, Plaintiff requests an injunction requiring the State Board to allow Sarah to vote by regular ballot, and to have her votes counted in the usual way, in all contests on the ballot in Montgomery County on February 12, 2008; payment by the State Board of court costs; and any and all such other relief as justice may require.

Count Three – Violation of Maryland Constitution

25. Paragraphs 1 through 20 are incorporated by reference.

26. The State Board's determination that Sarah must vote by provisional ballot, and cannot vote in the February 12, 2007 non-partisan primary races, violates Article I, Section 2 of the Maryland Constitution, which guarantees that voter registration "shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; . . . "

WHEREFORE, Plaintiff requests an injunction requiring the State Board to allow Sarah to vote by regular ballot, and to have her votes counted in the usual way, in all contests on the ballot in Montgomery County on February 12,

2008; payment by the State Board of court costs; and any and all such other relief as justice may require.

Respectfully submitted,



---

Richard D. Boltuck  
Plaintiff  
6015 Cairn Terrace  
Bethesda, MD 20817  
(301) 320-0349

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR.  
on behalf of  
Carl Philip Snyder, his son  
PLAINTIFF

Versus

STATE BOARD OF ELECTIONS  
DEFENDANT

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

CIVIL  
ACTION

02-C-08-128760

\*\*\*\*\*

MOTION FOR EXPEDITED HEARING AND DECISION PURSUANT TO  
SECTION 12-203 OF THE ELECTION LAW ARTICLE  
and  
MOTION TO SHORTEN TIME REQUIREMENTS

1. Plaintiff has sought judicial relief in this proceeding pursuant to section 12-202 of the Election Law Article (ELA).
2. Section 12-203 of ELA provides, in pertinent part, "the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require."
3. Plaintiff's Complaint has requested injunctive relief pertaining to his son's right to vote on February 12, 2008.
4. It is evident that the circumstances require expedited hearing and decision prior to February 12, 2008. Accordingly, Plaintiff requests issuance of an Order establishing the following schedule: Defendant to file its answer with the court by

February 1, 2008, with a hearing to be conducted by February 5, 2008.

MOTION TO SHORTEN TIME REQUIREMENTS

1. As noted above, time is of the essence in deciding Plaintiff's Complaint.
2. Accordingly, pursuant to Rule 1-204, Plaintiff requests issuance of an Order requiring Defendant to respond to the above-stated MOTION FOR EXPEDITED HEARING AND DECISION PURSUANT TO SECTION 12-203 OF THE ELECTION LAW ARTICLE by February 1, 2008.

Respectfully submitted,

---

Clifford E. Snyder, Jr.  
Plaintiff  
4964 Flossie Avenue  
Frederick, MD 21703  
(301) 473-5408

CERTIFICATE OF SERVICE

I hereby certify that on this day, January 28, 2008, I mailed, postage prepaid, a copy of the foregoing to Mark J. Davis, Esquire, Office of the Attorney General, 200 Saint Paul Place, Baltimore, MD 21202.

Clifford E. Snyder, Jr.

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

RICHARD BOLTUCK, *etc.*,

Plaintiff,

v.

Case No. 02-C-08-128755

STATE BOARD OF ELECTIONS, :

Defendant.

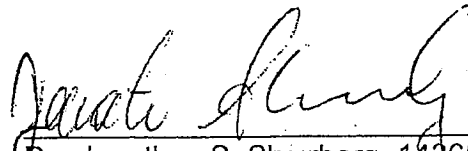
**LINE**

THE CLERK OF THE COURT will please enter the appearance of Jonathan S. Shurberg and Jonathan S. Shurberg, P.C. as counsel for the Plaintiff in the above-captioned matter.

Date: January 29, 2008

Respectfully submitted,

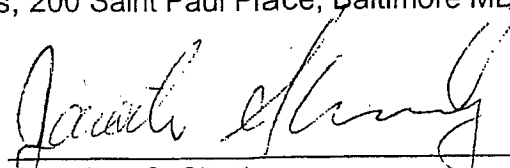
JONATHAN S. SHURBERG, P.C.



By: Jonathan S. Shurberg, 14365  
8720 Georgia Avenue  
Suite 703  
Silver Spring, MD 20910  
(301) 585-0707

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 29, 2008, a copy of the foregoing was sent by fax and first-class mail, postage prepaid, to: Mark J. Davis, Esquire, Assistant Attorney General, Counsel for State Election Laws, 200 Saint Paul Place, Baltimore MD, 21202.



Jonathan S. Shurberg

JC  
LAW OFFICES  
JAN S. SHURBERG, P.C.  
8720 GEORGIA AVENUE  
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SILVER SPRING, MARYLAND 20910  
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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR.	*	
on behalf of	*	
Carl Philip Snyder, his son	*	
PLAINTIFF	*	CIVIL
	*	ACTION
Versus	*	
	*	02-C-08-128760
STATE BOARD OF ELECTIONS	*	
DEFENDANT	*	
	*	
*****		

BRIEF TO THE COURT

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SUMMARY

The State Board of Elections (State Board) has without legally sufficient reason determined that Carl Philip Snyder (Carl), a registered voter, is not entitled to vote on February 12, 2008 in the nominating contest for the Frederick County Board of Education, a non-partisan primary election. Additionally, the State Board has wrongfully determined that Carl may not vote on February 12, 2008 by regular ballot. The State Board's actions run contrary to the provisions of sections 3-102, 3-501, 8-802, 9-404, 9-405, 9-406 and 10-312 of the Election Law Article; Article I of the Constitution of Maryland; and Articles 8 and 24 of the Maryland Declaration of Rights. Judicial action as requested in Plaintiff's Complaint would be justified by reasons of law and public policy.

STATEMENT OF THE FACTS

Plaintiff is not aware of any dispute regarding the essential facts of this case, which are Carl's age (17 years old now and on February 12, 2008; age 18 by the time of the general election in November 2008); his

registration as a voter in May 2007; the contests on the ballot on February 12, 2008 in Frederick County; and the State Board's actions mandating that Carl vote by provisional ballot and declaring him ineligible to vote for Board of Education candidates.

## ARGUMENT

### 1. The State Board Violated the Election Law Article

#### A. Violation of § 3-102

Carl met the statutory requirements for voter registration at the time he applied in May 2007 and he still meets them. With reference to the requirements stated in § 3-102 of the Election Law Article, Carl was a citizen of the United States; by the passage of time Carl would be 18 years old before the day of the next general election; Carl was a resident of Maryland as of the day he sought to register; and Carl registered pursuant to Title 3. None of the disqualifying factors applied to Carl, or apply now: Carl has not been convicted of a felony; he is not under guardianship for mental disability; and he has not been convicted of buying or selling votes. The State Board has correctly determined that Carl is eligible to vote on February 12, 2008 in the partisan primary contests, but incorrectly determined that he is not also eligible to vote in the primary contest for the Frederick County Board of Education; it has placed him in a voter registration category unknown to Maryland law. The State Board's action should be remedied.

B. Violation of § 3-501

Carl was duly registered as a voter pursuant to the specific terms of § 3-102 and was given a Voter Notification Card that, under § 3-301, is evidence of registration. There is no statutory basis for the State Board's determination that Carl, a registered voter, is not eligible to vote on February 12, 2008 for Board of Education candidates. There has not been any basis for removal of Carl from the list of registered voters, standards and procedures for which are established by § 3-501 of the Election Law Article. Applying the statute to the facts, Carl has made no request for removal from the list; there is no issue of felony and imprisonment, mental disability, or conviction for buying or selling votes; there is no issue of moving outside the state, or of inactive voter status; and there has been no determination, pursuant to an administrative complaint process initiated by the Frederick County Board, that Carl is not qualified to register to vote.

The right to vote is one of, if not the most, important and fundamental rights granted to Maryland citizens. Nader for President 2004 v. Maryland State Board of Elections, 399 Md. 681 (2007). The State Board has acted to deprive Carl of a fundamental right and its action runs contrary to the intention of the Election Law Article, expressed in § 1-201, that the conduct of elections "should inspire public confidence and trust." Since there is no legal basis for removing Carl from the list of voters eligible to vote in Frederick County on February 12, 2008 for school board candidates, judicial relief would be merited.

C. Violation of § 8-802

This section says, in pertinent part, "In a primary election to nominate board of education candidates, any registered voter of the county, regardless of party affiliation or lack of party affiliation, is eligible to vote in those contests for nomination." Given the clarity of the statutory text, there can be no question that Carl, a registered voter, is eligible to vote for Frederick County Board of Education candidates on February 12, 2008. The State Board's declaration of Carl's ineligibility to vote for those candidates runs contrary to statute and should be remedied.

D. Violation of § 9-404, § 9-405, § 9-406 and § 10-312

The State Board has determined that Carl, a registered voter, must vote by provisional ballot. The use of provisional ballot appears to be limited by statute to situations in which the individual's right to vote has been challenged (§ 10-312); the individual is disabled or unable to vote by regular ballot (§ 9-406); or voting is during a period established by court or other order (§ 9-404). None of these situations apply to Carl; while Carl is "disabled" in the sense that he has not reached the age of majority, the legal disability of infancy does not appear to be the kind of disability contemplated by these subsections; in any case, Carl would be eligible to use a regular ballot, according to the State Board's position, if he were a voter in Prince George's County or any county without a non-partisan primary contest. There is no legally acceptable reason to require Carl to

vote by provisional ballot while a hypothetical Carl in Prince George's County votes by regular ballot. Under Maryland law, it appears that Carl would have to apply for a provisional ballot in order to vote by such ballot (§ 9-405); the State Board has invented a procedure whereby Carl will be given a provisional ballot even though he has not applied for one. The State Board's imposition of a provisional ballot requirement on Carl has no basis in Maryland law and should be remedied.

## 2. The State Board Violated Article I of the Constitution of Maryland

### A. Article I Permits Voting by Persons Under Age 18

The Court of Appeals has stated that Article I, § 1, "defines who may vote, where he or she may vote, and the qualifications for doing so." Lamone v. Capozzi, 396 Md. 53 (2006). As a preliminary matter, that seems to be an oversimplification, since Article I, § 1 says nothing that would allow the General Assembly to restrict voting in a partisan primary to persons affiliated with that party. Article I, §1, tells citizens who are 18 years old or older that they are entitled to vote in Maryland. It contains no language prohibiting younger citizens from voting. In this respect, the language of Article I, §1, is permissive with respect to voting age, and contrast sharply, for example, with the clearly prohibitory language of Article 2, Section 1, Clause 5 of the United States Constitution, which establishes the qualifications for President:

No person except a natural born Citizen, or a Citizen of the United

States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States (emphasis supplied).

It would be reasonable, in view of the example of prohibitory language in the United States Constitution cited above, which clearly requires the President to be at least 35 years old, to believe that the persons who drafted Article I, § 1 of the Maryland Constitution were aware of language that could be used to prohibit persons under age 18 from voting. The absence of prohibitory language suggests the absence of prohibitory intent. Given the absence of prohibitory language in Article I, § 1, one must search elsewhere within the Maryland Constitution for evidence of intent to exclude persons under age 18 from voting. Plaintiff has found no such evidence.

The reference to age incorporated within Article I, § 1, helps Maryland conform to the requirements of the 26<sup>th</sup> Amendment to the United States Constitution, the supreme law of the land under its Article VI. Article I, § 2, commands the General Assembly to enact voter registration legislation to provide for uniform registration of persons who "possess" (note the use of the present tense) the required qualifications; it further says that the list of registered voters is conclusive evidence of their right to vote. If §2 were interpreted as allowing the

registration of only those citizens who are at least 18 years old at the time of registration, citizens who attain the age of 18 years after registration but before an election would be denied the right to vote in that election, and Maryland would not conform to the requirements of the United States and Maryland constitutions. Thus, Maryland must permit citizens under the age of 18 years to register to vote. As mandated by Article I, § 2, Carl, a duly registered voter, must be allowed to vote on February 12, 2008. The State Board's error threatens to unravel the tapestry created by the Maryland and United States Constitutions. This Court can, and should, place the stitch in time.

#### B. Capozzi Does Not Support the State Board's Actions

A reading of the Court of Appeals opinion in Capozzi, particularly part B.4. of that opinion, might lead to the conclusion that the Court of Appeals has interpreted Article I, § 1 as a bar to voting by persons under the age of 18 years. That conclusion would be unwarranted for three reasons: (1) Capozzi did not involve the issue of age of voting; thus, any part of the opinion that touched on age should be regarded as *dicta* and not determinative of Carl's right to vote. Capozzi presented the Court of Appeals with an obvious conflict between the Constitution of Maryland, which in Article XV, § 7 specifically identifies the day for general elections (the Tuesday after the first Monday in November), and a recently enacted statute that allowed for voting in advance of that day. The Court of Appeals declined to interpret the Constitution of Maryland broadly enough to

turn one day into several days. (2) Capozzi involved the issue of location of voting, not at issue here. (3) Plaintiff has no quarrel with the conclusion reached in the Capozzi opinion on the issue of whether primary elections come within the scope of Article I, § 1: Plaintiff agrees that Article I, § 1 applies to primary elections in Maryland and contends that, as to voting age, Article I, § 1 permits Carl to vote in the February 12, 2008 primary, in both party and non-partisan contests.

Unlike Capozzi, which involved new legislation, this case challenges the State Board's departure from its past practice of allowing persons under age 18 to vote, a change in practice not occasioned by new statutes or new judicial interpretation of Maryland law as it relates specifically and explicitly to voting age. To Plaintiff's knowledge, no Maryland appellate court has used Article I, § 1 of the Maryland Constitution to restrict the voting rights of persons eligible to vote under § 3-102 of the Election Law Article. Thus, this is a matter of first impression. To the extent, however, that Capozzi is regarded by this Court as having precedential value as to the issues raised in this case, and to the extent that Capozzi is used to justify denial of Carl's right to vote, Plaintiff respectfully states his intention to seek a change in law from the Court of Appeals.

#### C. Considerations of Policy

To the best of Plaintiff's knowledge, the Court of Appeals has never analyzed the interplay between § 1 and § 2 of Article I, and the relationship of



these provisions to the 26<sup>th</sup> Amendment to the United States Constitution, which plainly requires that persons be permitted to vote at age 18 years but does not require that persons be at least 18 years old to vote. The Court of Appeals has not considered whether eligibility in terms of voting age for a non-partisan primary may rationally be distinguished from eligibility in terms of voting age for a party primary and, if so, whether the consequences of such a distinction would include legal issues. Finally, the Court of Appeals has not dealt with the legal issues implicated by changing a voter's registration in the way the State Board has acted with respect to Carl. In the absence of such guidance from the Court of Appeals, the following considerations of policy may have some value to this Court's determination.

(1) Carl May Vote in Partisan Contests; There Is No Reason Why He and Others So Situated Are Not Equally Competent to Vote in Non-Partisan Contests

There is no obvious reason why a person under age 18 should be permitted to vote in a party primary but not in a non-partisan primary election held on the same day; there is, for example, no reason to believe that the wisdom needed for voting in a non-partisan contest is greater than that needed for voting in a party primary. Carl should be permitted to vote in both his party's primary and in the non-partisan primary.

(2) The Non-Partisan School Board Primary is Structured to be the First Part of a Two-Part Election; Nature of Party Primaries

The election of members of the Board of Education could be considered a

process that begins on primary day on February 12, 2008 and culminates on the day of the general election in November 2008. Seen that way, the relevant question is whether Carl will be 18 by November, not whether he will be 18 on February 12. Since Carl will be permitted to vote at the culmination of the process, there is no reason to prohibit him from participating in the beginning of the process on February 12, 2008; such participation would be consistent with the rule in Maryland that anyone who may vote in the general election for Board of Education candidates may vote in the primary contest for the Board of Education. Note well that the nine month interval between primary day and general election day captures more people in an "ineligible to vote in non-partisan primary election because of age" category than would be the case with, say, a two week interval between the non-partisan primary and the general election. It may be asked whether, if exclusion of people under the age of 18 from the non-partisan primary must be done pursuant to the Maryland Constitution, the interval between the non-partisan primary and the general election should be the shortest feasible interval, so as to minimize the number of people permitted to vote in one but not the other.

The election of persons to office that begins with a partisan primary election that enables the association of individuals in ways permitted by Maryland election law and culminates in a general election could be characterized as a two-step process, with voting requirements applied to each of the elections. In

such an analysis, the voting requirements need not be the same; for example, one could rationally restrict voting in a party's primary election to individuals who have affiliated themselves with that party, unless a political party sought broader participation in its primary election, in which case the party's associational rights could be implicated. Other departures from the standards established for the general election could be justified on the basis of associational interests. One need not analyze every possible departure from such standards in order to determine whether any given departure would be legally permitted.

### (3) Public Confidence and Trust in Maryland's Elections

Plaintiff believes that, for over 30 years, those 17 year-olds who would turn 18 by the next general election have voted in Maryland, and they have voted without jeopardizing the integrity of the Maryland Constitution or the public institutions created pursuant to its provisions. Carl's first vote may be seen as a rite of passage on the way to being an adult, one anticipated on the basis of stability in relevant law, practice, and tradition. Carl's first vote can generate attachment to an electoral system in which Carl, and others like him, will participate for a lifetime. In that context, the State Board's determinations on voting by persons under the age of 18 in the February 12, 2008 primary election could not do anything but engender consternation and frustration in Carl and other young citizens of Maryland who had well-founded expectations that they would be permitted to participate fully in the February 12, 2008 primary elections.

#### (4) There Is a Need for Judicial Action to Determine this Issue

The State Board's actions with respect to Carl's right to vote on February 12, 2008, and the rights of others under the age of 18, have created the need for judicial action. The State Board has affected the voting rights of thousands of Maryland citizens; the State and local boards have had to scramble since December 20, 2007 to register persons who, but for the State Board's actions earlier in 2007, would have been registered several months ago. The changes in Carl's status have not come as a result of changes in enacted law or as a result of judicial determination of the issue of voting age; they have come because of the State Board's actions. Plaintiff welcomes the opportunity to obtain judicial determination of Carl's status and thus, it is hoped, illuminate relevant Maryland Constitutional and statutory law for the benefit of the people of Maryland and their elected representatives.

#### 3. The State Board Violated Article 8 of the Declaration of Rights

When the State Board determined, contrary to the relevant provisions of the Constitution of Maryland and the Election Law Article, that Carl is not eligible to vote on February 12, 2008 in the non-partisan primary contest, it exercised legislative and judicial duties in a way that violated the separation of powers required by Article 8 of the Declaration of Rights. In essence, the State Board created election law and then applied it in derogation of Carl's right to vote, a right that had been established several months previously. The courts will act

where an administrative decision is not supported by facts, or where an action is not within the scope of delegated authority, or is arbitrary, capricious, or unreasonable. Baltimore Import Car Service & Storage, Inc. v. Maryland Port Authority, 258 Md. 335 (1970). Here, the State Board's determination of Carl's voting status was unsupported, not within the scope of its authority, and demonstrably unreasonable. It cannot withstand an informed judicial review.

#### 4. The State Board Violated Article 24 of the Declaration of Rights

Carl has been deprived of a fundamental right in clear violation of due process requirements. In May 2007, Carl became a registered voter. Without prior notice and a hearing, his rights to vote on February 12, 2008 by regular ballot and for Board of Education candidates have been threatened. This Court will give Carl the due consideration that the State Board clearly has not provided.

#### CONCLUSION

The State Board of Elections acted contrary to provisions of the Maryland Declaration of Rights, the Constitution of Maryland, and the Election Law Article when it determined that Carl Philip Snyder is not eligible to vote by regular ballot for Board of Education candidates in the primary election of February 12, 2008. The appropriate remedy for these violations is the issuance of an order requiring the State Board to permit Carl to cast his votes by regular ballot in the Democratic party primary and in the non-partisan primary on February 12, 2008.

Respectfully submitted,

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Clifford E. Snyder, Jr.  
Plaintiff  
4964 Flossie Avenue  
Frederick, MD 21703  
(301) 473-5408

## TEXT OF RELEVANT PROVISIONS

### Constitution of the United States

Article 2, Section 1, Clause 5. No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

Article 6, Clause 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Amendment XXVI. Section 1. The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

### Maryland Declaration of Rights

§ 8. That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

§ 24. That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

## Maryland Constitution

### Article I (Elective Franchise)

§ 1. All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

§ 2. The General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless his name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

### Election Law Article, Maryland Code

§ 1-201. The intention of this article is that the conduct of elections should inspire public confidence and trust by assuring that: (1) all persons served by the election system are treated fairly and equitably; (2) all qualified persons may register and vote and that those who are not qualified do not vote; (3) those who administer elections are well-trained, that they serve both those who vote and those who seek votes, and that they put the public interest ahead of partisan interests; (4) full information on elections is provided to the public, including disclosure of campaign receipts and expenditures; (5) citizen convenience is emphasized in all aspects of the election process; (6) security and integrity are maintained in the casting of ballots, canvass of votes, and reporting of election results; (7) the prevention of fraud and corruption is diligently pursued; and (8) any offenses that occur are prosecuted.

§ 3-102. (a) Except as provided in subsection (b) of this section, an individual may become registered to vote if the individual: (1) is a citizen of the United States; (2) is at least 18 years old or will be 18 years old on or before the

day of the next succeeding general or special election; (3) is a resident of the State as of the day the individual seeks to register; and (4) registers pursuant to this title. (b) An individual is not qualified to be a registered voter if the individual: (1) has been convicted of a felony and is actually serving a court-ordered sentence of imprisonment, including any term of parole or probation, for the conviction; (2) is under guardianship for mental disability; or (3) has been convicted of buying or selling votes.

§ 3-301. (a) When a voter registration application is received by a local board, the local board shall: (1) if the applicant resides in the county of the local board, determine whether the applicant is qualified to become a registered voter; or (2) if the applicant resides in a different county in the State, immediately forward the application to the proper county. (b) A qualified applicant shall be electronically entered into the statewide voter registration list on an expedited basis at the time voter registration information is provided to the local board and shall be assigned to the county in which the applicant resides unless registration is closed pursuant to § 3-302 of this subtitle. (c) (1) The election director in the county where an applicant resides shall send a voter acknowledgment notice, in a format prescribed by the State Board, to each applicant informing the applicant whether he or she is qualified to become registered, and, if not qualified, the reasons why. (2) (i) A voter notification card sent to a qualified applicant may serve as a voter acknowledgment notice. (ii) 1. The voter notification card shall contain the name and address of the voter, the date of issue, and the district or ward and precinct of the voter. 2. The card is evidence that the individual to whom it is issued is a registered voter on the date appearing on the card. 3. The election director shall issue a replacement card on request of the voter and a new card when a relevant change is made in the voter's registration record if the voter continues to reside in the county.

§ 3-501. (a) An election director may remove a voter from the statewide voter registration list only: (1) at the request of the voter, provided the request is: (i) signed by the voter; (ii) authenticated by the election director; and (iii) in a format acceptable to the State Board or on a cancellation notice provided by the voter on a voter registration application; (2) upon determining, based on information provided pursuant to § 3-503 of this subtitle, that the voter is no longer eligible because: (i) the voter is not qualified to be a registered voter as provided in § 3-102(b) of this title; or (ii) the voter is deceased; (3) if the voter has moved outside the State, as determined by conducting the procedures established in § 3-502 of this subtitle; or (4) if, in accordance with the administrative complaint process under § 3-602 of this title, the local board has determined that the voter is not qualified to be registered to vote. (b) An election director may not remove a voter from the list in accordance with subsection (a)(2)



or (3) of this section during the period that: (1) begins 30 days before the close of registration before an election; and (2) ends at the close of the polls on the day of the election.

§ 8-802. (a)(1)(i) Members of boards of education shall be elected on a nonpartisan basis. (ii) In a primary election to nominate board of education candidates, any registered voter of the county, regardless of party affiliation or lack of party affiliation, is eligible to vote in those contests for nomination. (2) Candidates for election to boards of education shall, without party designation or regard to party affiliation: (i) file certificates of candidacy;(ii) be certified to the ballot;(iii) appear on the ballot; (iv) be voted on; and (v) be nominated and elected. (b) This section does not apply to candidates for nomination or election to a board of education if Title 3 of the Education Article requires a partisan election.

§ 9-404. (a) If an individual is eligible under subsection (b) of this section, the individual shall be issued and may cast a provisional ballot: (1) at a polling place on election day; or (2) at the local board office in the county where the individual resides after the close of registration and before the closing of the polls on election day. (b) An individual is eligible to cast a provisional ballot if: (1) the individual declares in a written affirmation submitted with the provisional ballot that the individual is a registered voter in the State and is eligible to vote in that election; and (2) (i) the individual's name does not appear on the precinct register; (ii) an election official asserts that the individual is not eligible to vote; or (iii) the individual does not have the necessary identification. (c) In addition to the individuals who cast provisional ballots under subsections (a) and (b) of this section, any individual who appears to vote during a period covered by a court order or other order extending the time for closing the polls shall cast a provisional ballot. A provisional ballot cast under this subsection shall be separated and held apart from other provisional ballots cast by those not affected by the order.

§ 9-405. Before an individual casts a provisional ballot: (1) the individual shall complete and sign the provisional ballot application prescribed by the State Board; and (2) the election official issuing the ballot shall give the individual written information advising the individual that, and describing how, the individual will be able to ascertain whether the vote was counted and, if it was not counted, the reason it was not.

§ 9-406. (a) A voter who requires assistance in casting a provisional ballot by reason of disability, inability to write, or inability to read the ballot may be assisted by any individual other than: (1) a candidate who is on that ballot;

(2) the individual's employer or an agent of the employer; or (3) an officer or agent of the individual's union. (b) An individual rendering assistance under this section shall execute a certification as prescribed by the State Board and included in the instructions under § 9-408 of this subtitle.

§ 10-312. (a) (1) The right of an individual to vote may be challenged at the polls only on the grounds of identity. (2) An individual whose right to vote is challenged at the polls may establish the individual's identity by presenting any of the following forms of identification: (i) the individual's voter registration card; (ii) the individual's Social Security card; (iii) the individual's valid Maryland driver's license; (iv) any identification card issued to the individual by a political subdivision of the State, the State, the federal government, or any unit of a political subdivision of the State, the State, or the federal government; (v) Any employee identification card of the individual that contains a photograph of the individual and is issued by the employer of the individual in the ordinary course of the employer's business; or (vi) a copy of a current bill, bank statement, government check, paycheck, or other government document that shows the name and current address of the individual. (3) If an individual establishes the individual's identity under paragraph (2) of this subsection, an election judge shall authorize the individual to vote a regular ballot. (b) A challenge to an individual's right to vote shall be made before the individual is issued a ballot or a voting authority card. (c) If a challenge is made, and the challenged individual does not present any of the forms of identification specified under subsection (a)(2) of this section, the election judge receiving the challenge shall: (1) require the challenger to provide in writing, under penalty of perjury, the reasons for the challenge; (2) offer the challenged individual the opportunity to: (i) cast a provisional ballot; and (ii) submit an attestation, witnessed by the election judge, of the individual's identity; and (3) submit the provisional ballot and other materials related to the challenge to the local board. (d) During the canvass of provisional ballots, the local board shall determine, based on the information submitted by the challenger and the challenged individual, whether the challenged individual is: (1) the registered voter he or she claims to be; and (2) otherwise qualified to vote.

#### ACKNOWLEDGMENT

Plaintiff thanks Richard Boltuck for his attention to voters' rights and contributions to the developments of the arguments presented herein.

#### CERTIFICATE OF SERVICE

I hereby certify that on this day, January 29, 2008, I mailed, postage

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prepaid, a copy of the foregoing to Mark J. Davis, Esquire, Office of the Attorney General, 200 Saint Paul Place, Baltimore, MD 21202.

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Clifford E. Snyder, Jr.

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

RICHARD BOLTUCK, *etc.*,

Plaintiff,

v.

STATE BOARD OF ELECTIONS,

Defendant.

Case No. 02-C-08-128755

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S COMPLAINT  
UNDER SECTION 12-202 OF THE ELECTION LAW ARTICLE**

COMES NOW the Plaintiff, RICHARD BOLTUCK, as parent and guardian of SARAH ELIZABETH BOLTUCK, a minor child, and submits the following Memorandum in support of his Complaint in the above-captioned matter. For the reasons set forth herein, Plaintiff respectfully submits that the relief requested in the Complaint should be granted, and his daughter should be permitted to vote without restriction in the primary election scheduled for February 12, 2008.

**Introduction**

For more than 40 years, 17 year olds in Maryland have been able to vote in state primary elections if they will be 18 at the time of the November general election. This practice has taken place as a matter of explicit statutory right. Md. Election Law Code Ann., § 3-102. Then, in December, 2006, a single lawyer in the Attorney General's office extrapolated from one sentence of dicta in a Court of Appeals decision on a different question of law to find that this long-standing statutory command and practice was suddenly unconstitutional. See Exhibit 1 (memorandum from Mark Davis, Esquire to Linda Lamone, administrator of the State Board of Elections, dated December 18, 2006).

Mr. Davis' conclusions, set forth in Exhibit 1, were reaffirmed by him in a subsequent memorandum to Ms. Lamone dated June 19, 2007. See Exhibit 2.

As public outrage spread about the denial of this right, the Maryland Democratic and Republican Parties adopted internal rules restoring the right of 17 year olds to vote in their primary elections. The Attorney General, in response to a letter seeking advice from a State Senator, agreed that the 17 year olds could indeed vote in the party primaries as a matter of First Amendment law. See Exhibit 3 (letter dated December 19, 2007 from Attorney General Douglas Gansler to State Senator Jamie Raskin). However, Exhibit 3 expressly reaffirmed the conclusions of Mr. Davis in Exhibits 1 and 2, blocking 17 year olds from voting in nonpartisan school board elections under the new finding about the unconstitutionality of state law. That is the sole point of controversy in this case.

It is the plaintiff's position that (1) the Attorney General has no constitutional authority to declare a Maryland law unconstitutional and to refuse to enforce it; on the contrary, his exclusive role is to defend the constitutionality of laws passed by the General Assembly; and (2) even if the Attorney General had the authority and responsibility to approve or disapprove the constitutionality of laws passed by the General Assembly, the Attorney General has erred egregiously in finding that the Court of Appeals' ruling in the *Capozzi* decision silently implies and compels the invalidation of the law granting 17 year olds the right to vote in primary elections.

### Undisputed Facts

1. SARAH BOLTUCK was born on July 21, 1990.
  2. SARAH BOLTUCK is a resident of Montgomery County.
  3. SARAH BOLTUCK applied to register as a voter with the Montgomery County Board of Elections in May or June, 2007.
  4. Via a letter from the Montgomery County Board of Elections dated June 11, 2007, SARAH BOLTUCK was advised that her registration application had been rejected. The letter stated in pertinent part that “[r]eview of the application indicates that you do not qualify for registration and voting in this county because you will not have reached 18 years old by the date of the next election.”
  5. Maryland Election Law Code Ann. (hereinafter, “ELC”), § 3-102 states as follows:

“(a) Except as provided in subsection (b) of this section, an individual may become registered to vote if the individual: (1) is a citizen of the United States; (2) is at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election; (3) is a resident of the State as of the day the individual seeks to register; and (4) registers pursuant to this title. (b) An individual is not qualified to be a registered voter if the individual: (1) has been convicted of a felony and is actually serving a court-ordered sentence of imprisonment, including any term of parole or probation, for the conviction; (2) is under guardianship for mental disability; or (3) has been convicted of buying or selling votes.”
- Pursuant to this statute, SARAH BOLTUCK was and is eligible to vote in the February 12, 2008 primary, as she will be 18 years of age “on or before the day of the next succeeding general or special election.”

6. Subsequent to receipt of the June 11, 2007 letter from the Montgomery

County Board of Elections, Plaintiff RICHARD BOLTUCK contacted the local Board and expressed his view that § 3-102 expressly permitted SARAH BOLTUCK to vote in the February 12, 2008 primary.

7. In response to Plaintiff's inquiries, Plaintiff received an e-mail from Margaret Jurgensen, Director of the local Board, with an attached memorandum from Mark Davis, Esquire, an Assistant Attorney General. See Exhibit 2.

8. Exhibit 2 expresses the view that the Court of Appeals' decision in *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006) compelled the conclusion that (1) Section 3-102 of the Election Code is unconstitutional; and (2) despite several decades of practice to the contrary, 17 year olds who will be 18 before the general election are no longer constitutionally permitted to vote in primary elections. As a result, Mr. Davis advised the State Board of Elections (hereinafter, "SBE") to change its practice and to no longer allow such individuals to register to vote in the primary election prior to their 18<sup>th</sup> birthday.

9. By subsequent letter dated December 19, 2007, the Attorney General refined the view set forth in Exhibits 1 and 2, and concluded that, as to partisan primary elections, the federal constitutional associational rights of the respective political parties trumps the Maryland constitutional provision as construed in Exhibit 1, and that 17 year olds who will be 18 prior to the general election will be allowed to vote in partisan primary elections. See Exhibit 3.

10. In Montgomery County, where SARAH BOLTUCK resides, in addition to partisan primary elections, there are several non-partisan elections taking place on

February 12, 2008, and even following Exhibit 2, SARAH BOLTUCK will be barred from voting in these electoral contests based on a decision of the SBE or its staff first announced in early January, 2008.

9. Plaintiff has brought this action to challenge the extraordinary action of the State Board of Elections in refusing to follow the clear dictates of a properly enacted statutory provision.

### Argument<sup>1</sup>

As an initial matter, Plaintiff notes that the Attorney General in this matter has taken an action, unilaterally, that it does not have standing to pursue in Court. See *State of Maryland v. Burning Tree Club, Inc.*, 301 Md. 9, 34, 481 A.2d 785, 797 (1984) (Attorney General's "duties include prosecuting and defending cases on behalf of the State in order to promote and protect the State's policies, determinations, and rights.") If the Attorney General cannot bring a declaratory judgment action to have a statute declared to be unconstitutional, how can it possibly have the power to do so unilaterally through an advice letter to a state agency? Plaintiff submits that the Attorney General has usurped the role of the judiciary and violated the separation of powers — only a court has the power to declare a statute unconstitutional, not an executive branch officer such as the Attorney General.

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<sup>1</sup> In addition to the arguments set forth herein, Plaintiff adopts by reference, to the maximum allowable extent, the arguments put forth by Cliff Snyder in the companion case of *Snyder v. State Board of Elections*, Case No. 02-C-08-128760, which is being heard simultaneously with this case.



Turning to the merits, based on the undisputed facts set forth above, SARAH BOLTUCK is eligible to register and to vote pursuant to § 3-102. What is in dispute, however, is whether the provisions of that statute are constitutional in light of the Court of Appeals' ruling in *Lamone v. Capozzi*. Examination of that opinion is therefore the next step of the process in this case.

*Capozzi* involved a challenge to the General Assembly's 2006 action in passing what is known as an "early voting" law. That challenge was based in part<sup>2</sup> on Md. Constitution, Art. I, § 1, which states as follows:

"All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State."

Exhibit 1 argues that, pursuant to *Capozzi*, this constitutional provision invalidates § 3-102 of the Election Code. Plaintiff submits that it does no such thing.

Plaintiff agrees with the conclusions of Exhibit 1 insofar as Exhibit 1 states that: (1) the statute must not be in conflict with the constitutional provision; (2) the constitutional provision applies to primary as well as general elections; and (3) for purposes of the argument presented in this memorandum, assumes that Art. I, § 1 establishes the minimum age for voting as "18 years or upwards." What Exhibits 1, 2 and 3 fail to analyze in any way, however, is what is the relevant date for determining when a voter must have

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<sup>2</sup> The challenge in *Capozzi* was also based on other constitutional provisions not pertinent in this case.

attained the age of 18.

On this point, the constitutional provision is silent. It does not state when a voter must have reached the age of 18. In short, it is ambiguous on this point. As a result, the General Assembly, within bounds of reasonable interpretation of the constitutional provision, was and is free to make such a determination consistent with the language and the intentions of the constitutional provision.

The legislative determination, set forth in § 3-102, is that the relevant date for determining the age eligibility for voters is "on or before the day of the next succeeding general or special election." Plaintiff submits that this interpretation is in complete harmony with the constitutional provision – what other date would make more sense?

The General Assembly in § 3-102 further made the determination that being eligible to vote in such a general election also makes the voter eligible for participation in the primary election that determines the choices available in the general election.<sup>3</sup>

Is this a rational reading of the constitutional provision? Plaintiff submits that it is.

In this regard, the Court should note the significance of the difference between partisan and non-partisan primary elections. A partisan primary is conducted as part of the decision-making process of a political party, so that those voters who the party wishes to take part have the opportunity to select the party-endorsed nominee, or standard-

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<sup>3</sup> Md. Constitution, Art. I, § 2 provides that: "The General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at *any* election thereafter held in this State." (emphasis added) The SBE interpretation of *Capozzi* would run afoul of this provision. 17 year olds would be allowed to vote in *some* elections, but not *all* elections.

bearer, in the general election. In most cases in Maryland, for instance, voters in a party primary are restricted to those who have chosen to affiliate with the party through the voter-registration process. Exhibit 3 explicitly recognizes this fact.

By contrast, a non-partisan primary (for example, a Board of Education primary) is, in fact, the first part of a two-part election. Every candidate who seeks election must appear on the primary ballot. The outcome of the primary winnows the field to twice the number of candidates as positions to be filled. (ELC, § 8-804). Voters who take part in the first part of the election, the primary, are not restricted by party affiliation or any other criteria; all registered voters may vote in the non-partisan primary. The Board of Education contest on the day of the general election, the second part of the Board of Education election, then selects the winners of Board of Education seats from among these remaining candidates.

It is important to appreciate that every person who wishes to be considered for election to a Board of Education seat must be on the primary ballot, and cannot otherwise eventually be elected. It is also important that voters in both parts of the election, primary and general election, are not restricted by any criteria other than the requirement to be a registered voter. Finally, candidates who appear on the ballot in the contest on general election day have won nothing other than the right to contest the second part of the election; for instance, they are not the endorsed candidates of any party or organization as a result of having prevailed in the primary election.

In crafting a two-part election procedure, the General Assembly recognized that

it is both inequitable and illogical for a voter to be eligible to participate in the second part of this procedure and not the first part, particularly based on an arbitrary qualification such as the timing of one's birthday. Restricting a voter to participation in only the general election deprives the voter of the opportunity to have a say in the selection of the candidates who will appear on the ballot for the general election. As a result, the General Assembly made the determination, unchallenged for over 40 years by anyone save for a single Assistant Attorney General, that eligibility to participate in a general election is tantamount to eligibility to participate in the primary election preceding that general election. Nothing in Art. I, § 1 bars such a policy; the constitutional provision is wholly silent on this question.

In short, the General Assembly made a legislative determination that for any given election process, the general and primary elections are to be treated as one process, and that eligibility for the general election shall be treated as eligibility for the primary election as well.

Exhibit 1 contends that *Capozzi* made this legislative determination unconstitutional.<sup>4</sup> Exhibit 1 spends a great deal of time hammering home the point that

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<sup>4</sup> As an initial matter, Plaintiff submits that Exhibit 1 is entitled to no deference whatsoever from this Court. While the Attorney General is authorized to issue advisory opinions at the request of state agencies or public officials, none of the three memoranda promulgated by the Attorney General are in fact a formal opinion of the Attorney General. The Attorney General's website (<http://www.oag.state.md.us/Opinions/faq.htm>) states as follows:

"The Maryland Constitution directs that the Attorney General is to give an 'opinion in writing whenever required by the General Assembly ... the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject.' Article V, §3. An Opinion of the Attorney General represents the considered views of the Attorney General on a significant legal question, generally involving Maryland law or other law that governs the actions of public officials in Maryland.

*Capozzi* made clear that “[a]ny prior interpretation that ‘election’ only referred to general or special elections has been overruled.” This point was a minor one in *Capozzi*, almost an afterthought, as the following makes clear:

“We adopt the analysis offered by the Circuit Court in holding that primary elections are included within the meaning of ‘at all elections to be held in this State’ in Article I, § 1: if Article I, § 1 were read to exclude primary elections, ‘such a reading could lead to an absurd result, as it would eliminate all Constitutional qualifications for primary elections. Thus, a 12 year-old, non-U.S. citizen, residing in Virginia, would not be barred by the [Maryland] Constitution from voting in the Maryland primary election.’ **Such a reading simply cannot be correct.**”

*Capozzi*, *supra*, 396 Md. at 89, 912 A.2d at 695 (emphasis added). It cannot have come as a surprise that the Court of Appeals ruled as it did with respect to the application of the constitutional provision to primary elections. As a result, if § 3-102 is in conflict with Art. I, § 1, it has been unconstitutional since it was enacted. Considering that no such

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“An Opinion of the Attorney General is usually drafted by an Assistant Attorney General and undergoes an extensive process of editing and review by other lawyers in this office who are knowledgeable about the subject matter before it is reviewed and adopted by the Attorney General.

“A formal Opinion of the Attorney General should be distinguished from a letter of legal advice written by an attorney in this office. Because the Office of the Attorney General is the legal adviser to most State agencies, its lawyers write many letters and memoranda each day to State officials analyzing legal issues. Only a letter that has undergone the review process described above and has been adopted by the Attorney General is an Opinion of the Attorney General.

“Formal Opinions are labeled as such and consecutively numbered. After an Opinion is issued, it is sent to the official who requested it and is posted on this web site. Opinions are ultimately compiled for each year in hardbound volumes that may be found in local law libraries. Copies of Opinions can also be obtained through legal research subscription services such as Westlaw and Lexis.”

None of Exhibits 1, 2 and 3 are Formal Opinions. Exhibits 1 and 2 have never been published and are is not numbered. While Exhibit 3 has in fact been published on the Attorney General’s website (<http://www.oag.state.md.us/Topics/Raskin%20advice%20letter.pdf>), it is not a numbered Formal Opinion, nor is it included in the section of the website containing the 2007 Formal Opinions of the Attorney General (<http://www.oag.state.md.us/Opinions/2007/07index.htm>).

suggestion has ever been made, either prior to or subsequent to *Capozzi*, except for a single memorandum written by an Assistant Attorney General whose office is charged with defending rather than attacking such statutes, such a conclusion is inherently suspect.

As noted above, *Capozzi* dealt solely with the issue of early voting. It did not address in any fashion the question of eligibility to vote based on age, and it did not in any manner address the interpretation of § 3-102 of the Election Code. Nevertheless, based on nothing more than the opinion of a single Assistant Attorney General, the State Board of Elections, charged with administering the Election Code, overturned decades of its own practice and proceeded to disenfranchise an entire class of voters. Plaintiff notes that there was not even a complaint raised from the public or from any other entity that prompted the promulgation of Exhibit 1.

As a final point, Plaintiff notes two legal principles of construction that support his argument: first, "the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler v. Doe*, 457 U.S. 202, 233, 102 S. Ct. 2382, 2403 (1982) (Blackmun, J., concurring). Second, as a matter of statutory and constitutional construction, "[i]t is well settled that we should construe the statute so that it will survive the test of constitutionality." *Maryland-National Capital Park and Planning Commission v. McCaw*, 246 Md. 662, 685, 229 A.2d 584, 596 (1967). *Capozzi* was a case that dealt

solely with the manner and time of voting; it in no way suggested that an entire group of otherwise qualified citizens should be barred from voting, which is what the State Board of Elections and the Attorney General seek to accomplish in this case.<sup>5</sup>

### Conclusion

Plaintiff submits that nothing in *Capozzi* even suggests, much less mandates, the abrogation of a properly enacted statute and the disenfranchisement of an entire class of potential voters. In this case, SARAH BOLTUCK is eligible to vote based on the clear language of § 3-102, and that statute is no way violative of Art. I, § 1 of the Maryland Constitution. Plaintiff therefore respectfully requests this Court to enter an injunction directing the State Board of Elections to allow SARAH BOLTUCK to vote without restriction in the February 12, 2008 primary election, and for such other and further relief as the Court deems proper in the circumstances of this case.

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<sup>5</sup> Plaintiff notes that if the Attorney General's interpretation of *Capozzi* and Art. I, § 1 of the Constitution is upheld, this will not be a one-time problem. Instead, every two years, certain individuals who would otherwise be qualified to vote in the primary under § 3-102 will have to vote by provisional ballot for partisan races, while being barred from voting for non-partisan races. Even more dismally, this jerry-rigged vote will in all cases be those individuals' first involvement with the right to vote. What kind of message does it send to first-time voters for the Attorney General and the State Board of Elections to hobble their right to vote in this haphazard fashion? This cannot be what the authors of the Maryland Constitution, § 3-102 or *Capozzi* had in mind. Moreover, such unequal treatment of otherwise qualified voters would, Plaintiff submits, raise serious equal protection issues under both the federal and state Constitutions.

Date: January 30, 2008

Respectfully submitted,

JONATHAN S. SHURBERG, P.C.

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By: Jonathan S. Shurberg  
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Silver Spring, MD 20910  
(301) 585-0707

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Jamin B. Raskin, *of counsel*  
7209 Holly Avenue  
Takoma Park, MD 20912

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 30, 2008, a copy of the foregoing was sent by e-mail and first-class mail, postage prepaid, to: Mark J. Davis, Esquire, Assistant Attorney General, Counsel for State Election Laws, 200 Saint Paul Place, Baltimore MD 21202.

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Jonathan S. Shurberg



OFFICE OF THE ATTORNEY GENERAL  
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MEMORANDUM

December 18, 2006

TO: Linda Lamone

FROM: Mark J. Davis

SUBJECT: Analysis of Court of Appeals Decision in *Lamone v. Capozzi*.

On December 11, 2006, the Court of Appeals issued its opinion explaining its order dated August 25, which affirmed a circuit court order that declared the early voting statute unconstitutional. As I explain below, the Court's opinion has ramifications for provisional voting, absentee balloting, and voter registration.

**I. The Opinion**

On April 9, 2005, the General Assembly passed Senate Bill 478, which authorized early voting in Maryland. The Governor vetoed the bill on May 20, 2005. On January 16, 2006, both houses of the General Assembly overrode the veto, enacting Senate Bill 478 as Chapter 5, Maryland Laws 2006, and adding a new §10-301.1 to the Election Law Article ("EL"). During the 2006 legislative session, HB 1368, another early voting bill, was passed as emergency legislation and vetoed by the Governor. That veto, too, was overridden and the bill became Chapter 61, Laws of Maryland 2006. The bill repealed and reenacted §10-301.1 with amendments, creating early voting as follows: a voting period for eleven hours each day for a five-day period beginning the Tuesday before a primary or general election through the Saturday before election day at designated sites.

On July 16, 2006, plaintiffs filed suit alleging that the early voting legislation violated various state constitutional provisions, claiming essentially that Article I only permitted in-person ballot voting and absentee voting. On August 8, 2006, the Circuit Court for Anne Arundel County declared §10-301.1 unconstitutional and void. On August 25, 2006, the

December 18, 2006

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Court of Appeals heard argument and affirmed the circuit court in an order for reasons to be stated in an opinion to follow.

In the opinion that followed on December 11, the Court emphasized importance of the plain language principle of constitutional interpretation. Slip Op. at 18-20. Thus, the Court held that authorizing voters to cast ballots beginning the Tuesday through the Saturday before the election “is clearly inconsistent with the words of, and the plain meaning of Article XV, §7 and the other constitutional provisions that designate the “Tuesday next after the first Monday of November,” as the date of the general election.” *Id.* at 24-25. The Court read §7 to require that “the election shall be held *on* a specific day. . .[and] any statute that allows for a ballot to be cast before the prescribed day must be in derogation of the Constitution.” *Id.* at 33.

The Court also literally interpreted Art. I, §1, which provides that a voter can only vote in the election district or ward in which he resides. Noting that EL §10-301.1 allows for early voting to occur outside of a person’s district or ward, the Court held that the statute violated Art. I, §1, because “[w]e view the language in Article I, §1, as a mandatory requirement, not as a mere ‘entitlement,’ capable of being waived.” *Id.* at 35-36.

Finally, the Court held that “primary elections are included within the meaning of ‘at all elections to be held in this State’ in Article I, §1,” *id.* at 40; and that early voting is not a form of absentee voting, holding that “Article I, §3 clearly indicates that the inability to vote personally applies to ‘absent’ voters, not those who find the voting day to be inconvenient.” *Id.* at 41.

## **II. Ramifications of the Opinion.**

### **A. Provisional Voting.**

The opinion makes clear that a provisional ballot cast outside the voter’s district cannot be counted, even for candidates, such as statewide candidates, that the voter would be eligible to vote for in his or her district. As explained below, EL §§9-404(a) and 11-303(e) must be interpreted to apply to circumstances where a voter who is at the wrong polling place is in the same district as the correct polling place.<sup>1</sup>

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<sup>1</sup> A polling place is located within a district or ward which may consist of multiple precincts. A local board may combine or abolish precincts, *see* EL §2-303, but may not change a district or ward, which are established by local government.

December 18, 2006

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Although provisional ballots are required by the federal Help American Vote Act (HAVA), "the individual's vote shall be counted as a vote . . . in accordance with state law." HAVA, §302(a)(4). Maryland law provides that an individual is eligible to cast a provisional ballot if the individual declares that he or she is a registered voter in the State and is eligible to vote in the election; and the individual's name does not appear on the precinct register, an election official asserts the individual is not eligible to vote, or the individual does not have the necessary identification. EL §9-404(b). An individual who is eligible may cast a provisional ballot at a polling place on election day; or at the local board office in the county where the individual resides. EL §9-404(a).

Under *Capozzi*, a ballot cast at other than the voter's correct district or ward may not be counted, which requires that the EL §11-303(e) be interpreted differently than it has been in recent elections. That provision states:

A local board shall count:

- (1) the entire provisional ballot if the address on the provisional ballot application is within the precinct where the provisional ballot was cast; or
- (2) only the votes cast by the voter for each candidate or question applicable to the precinct in which the voter resides, as determined by the address on the provisional ballot application of the voter.

SBE issued guidelines for the 2006 November elections that mirrored the language of the statute. *See* Guidelines for the Administration of Provisional Voting (June 21, 2006), §7.4D.<sup>2</sup> SBE instructed local boards to count ballots that the voter would have been eligible to vote for in his home precinct. For example, a vote cast by a Towson resident at a polling place in Essex would have been counted for the statewide races and for county executive, but not for any of the local races (e.g., House of Delegates, State Senate or County Council) that were not on the ballot at the voter's Towson precinct.

As a result of *Capozzi*, however, no votes cast by the Towson voter would be counted; his vote will count only if his out-of-precinct vote is cast in the same Towson district in which he resides. The election judges at the Essex polling place should be instructed to advise the Towson voter to go to his correct polling place or his vote will not be counted.

---

<sup>2</sup> EL §11-303(a) provides that the canvass is to be conducted in accordance with the regulations and guidelines established by the State Board. SBE regulations relating to provisional ballots—found at COMAR 33.16—do not describe how provisional ballots are to be counted.

Although an individual who is eligible to vote a provisional ballot may do so at the local board office, *see* EL §9-404(a), that vote will not count if the board office is outside the voter's ward or district. An absentee ballot cast at the local board offices beginning on the Wednesday before the election until the closing of the polls on election day, *see* EL §9-305(c), is not subject to *Capozzi* and will be counted. Thus, local board staff should inform voters of their option to cast an absentee ballot to avoid the *Capozzi* problem and assure that their votes are counted.

### **B. Absentee Voting**

*Capozzi* did not involve the constitutionality of the new no-excuse absentee voting statute, EL §9-304, but the Court read Article I, §3 very strictly.<sup>3</sup> The Court held that early voting is not a form of absentee voting and that "the inability to vote personally applies to 'absent' voters, not those who find the voting day to be inconvenient." *Sip. Op.* at 41.

The current language of the absentee voter's oath does not contain a statement that the voter will be absent or will be unable to vote in person on election day.<sup>4</sup> We therefore recommend that the absentee voter's oath be changed to track the language of Article I, §3.

### **C. Voter Registration.**

Article I, §1 provides that an individual must be 18 in order to vote. *Capozzi* holds that "primary elections are included within the meaning of 'at all elections to be held in this State' in Article I, §1." *Sip. Op.* at 40. EL §3-102(a) provides that a qualified voter includes an individual who "is at least 18 years or will be 18 years old on or before the day of the next succeeding general or special election."

The statute thus violates §1 because it permits an individual who has not yet turned 18 to vote in a primary election. The statute should be amended to add the word "primary" so that the pertinent phrase reads "next succeeding general, *primary*, or special election." In any event, only individuals who will turn 18 before the next election should be permitted to register.

---

<sup>3</sup> Article I, §3 provides in part that the General Assembly may provide for voting by qualified voters "who are absent at the time of any election in which they are entitled to vote and for voting by other qualified voters who are unable to vote personally."

<sup>4</sup> COMAR 33.11.03.03 provides that the State Board prescribe the form and content of the instructions for marking and returning the absentee ballots.

December 18, 2006

Page 5

Please let me know if you require clarification of these issues or require further assistance.

cc: Ross Goldstein

Donna Duncan

Nikki Trella

Mary Wagner

OFFICE OF THE ATTORNEY GENERAL  
OPINIONS AND ADVICE  
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Baltimore, Maryland 21202  
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(410) 576-7036  
e-mail: [mdavis@oag.state.md.us](mailto:mdavis@oag.state.md.us)

MEMORANDUM

June 19, 2007

TO: Linda Lamone

FROM: Mark J. Davis

SUBJECT: Age Requirement for Voting

You asked me to respond to questions about the recent change which prohibits individuals who fulfill the statutory age requirement set forth in the Election Law Article §3-102, but will not be eighteen by the primary election, to register and to vote in a primary election. In my view, and as I advised in my memorandum to you dated December 19, 2006, an individual who is not eighteen on the date of the primary may not vote in the primary election without violating Article 1, Sections 1 and 2 of the Maryland Constitution and the Court of Appeals decision in *Lamone v. Capozzi*, 396 Md. 53 (2006).

In *Capozzi*, the Court of Appeals reiterated that “[i]t is well settled that a State Legislature may not enact laws that are in derogation of the [State] Constitution.” *Capozzi*, 396 Md. at 73. The Constitution provides that an individual may only vote if he or she is eighteen or older. Thus, the General Assembly lacks the authority to permit someone who is less than eighteen to vote.

Article 1, Section 1 of the Constitution specifies those individuals who may vote in the state; it does not, as some have suggested, only address the rights of voters who are eighteen and older. This interpretation of Article 1, Section 1 dates back to *Southerland v. Norris*, 74 Md. 326, 22 A. 137 (1891), where the Court of Appeals stated that “the qualifications of a voter in this state are prescribed by the first section of article 1 of the constitution of Maryland.” 22 A. at 137. This interpretation was most recently affirmed by the Court of Appeals in *Capozzi*, where the Court stated that “Article 1, §1, for example, states simply who can vote. . . .” *Capozzi*, 396 Md. at 83.

June 19, 2007

Page 2

Article 1, Section 1 provides that “[e]very citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State.” This section sets forth three qualifications an individual must meet to be eligible to vote. First, the individual must be a citizen of the United States. Second, the individual must be 18 years old or older. Third, the individual must be a resident of the State as of the time for the closing of registration before the election.

From the plain reading of the section, if an individual is not 18 years old or older, then he or she is not qualified to vote. This interpretation stems from the placement of the commas, which sets off the age qualification from a connection to the phrase “as of the time for the closing of registration next preceding the election.” That phrase qualifies the residency requirement.

Even if, however, the phrase regarding the closing of registration before the election is connected to the age qualification, the result remains the same in light of *Capozzi*. Any prior interpretation that “election” only referred to general or special elections has been overruled. In *Capozzi*, the Court of Appeals adopted the view that the phrase “at all elections to be held in this State” includes primaries. The Court stated that all voter qualification requirements would be eliminated for primary elections if the phrase only referred to general or special elections. *Capozzi*, 364 Md. at 89. The phrase that was interpreted by the Court appears in the same sentence as the age qualification and the phrase regarding the close of registration before the election. Because the Court interpreted the word “election” in one part of the sentence as including primary elections, it must be interpreted that way throughout the rest of the sentence. Therefore, even if Article 1, Section 1 is read so that an individual must be eighteen or older by the end of registration preceding the election, a seventeen-year-old would still not be allowed to vote in a primary election because he or she would be required to be eighteen by the end of registration preceding the primary election.

Article 1, Section 2 of the Constitution charges the General Assembly with the responsibility of providing “by law for a uniform Registration of the names of all voters in this State, who possess the qualifications prescribed in this Article.” Election Law Article §3-102 provides who can register to vote. Those qualifications include an age requirement that allows an individual to register if he or she will be eighteen by the next general or special

June 19, 2007

Page 3

election. To interpret the provision to allow individuals to register and vote who do not meet the constitutional age requirement would violate Article 1, Section 1.<sup>1</sup>

In conclusion, an individual who is not eighteen on the date of the primary may not vote in the primary election without violating Article 1, Sections 1 and 2 of the Maryland Constitution and the Court of Appeals decision.<sup>2</sup>

cc: Ross Goldstein  
Donna Duncan  
Nikki Trella  
Mary Wagner

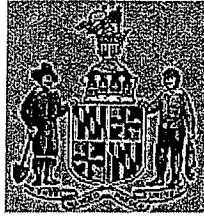
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<sup>1</sup> Objections have been made to this conclusion on the basis that if the Legislature cannot allow seventeen year olds to vote, then Article 1, Section 1 must guarantee the right of *all* people, including felons and those with mental disabilities who meet the qualifications in that section to vote. Election Law Article §3-102 excludes felons and those under guardianship for mental disability from being able to register. This provision is constitutional, however, because the General Assembly is given the power to regulate or prohibit the vote of those categories of people in Article 1, Section 4 of the Constitution. Also, Article 1, Section 2 states that those who meet the qualifications in Section 1 and are not disqualified under other sections may be registered.

<sup>2</sup> I wish to acknowledge the contributions of Jodie Chilson, a law clerk in the Office of the Attorney General to this memorandum.



DOUGLAS F. GANSLER  
Attorney General



KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

(410) 576-7036

(410) 576-6311

TELECOPIER No.

December 19, 2007

WRITER'S DIRECT DIAL No.

The Honorable Jamie Raskin  
Room 122  
James Senate Office Building  
Annapolis, Maryland 21401

Dear Senator Raskin:

You asked whether recent changes in the rules of the State's two principal political parties affect the advice of this Office to the State Board of Elections ("SBE") concerning the application of Annotated Code of Maryland, Election Law Article ("EL"), §3-102(a). That statute provides, among other things, that an individual may register to vote if the individual will be 18 or older on the date of the next general or special election. In the past, the election boards have allowed individuals who will be 18 by the time of a general election to vote in a primary election even if the individual was not 18 at the time of the primary. However, a recent Court of Appeals decision held that a State constitutional provision that, among other things, requires a voter to be 18 or older, applies to primary elections. This Office advised SBE of the implications of that decision and, following that advice, SBE required voters to be 18 to vote in a primary election.

Your letter raises two issues, one of which this Office has previously addressed in the advice letter to SBE and one of which has arisen in the past week as a result of the changes adopted by the State's two principal political parties. As explained below, this Office reaffirms the advice previously given to SBE that the Maryland Constitution, as construed in a recent Court of Appeals case, requires that voters be 18 to vote in primary elections. Nonetheless, because the political parties have, in recent days, asserted their *federal* constitutional rights to freedom of association, you have asked the Office to address the *different* question whether the Maryland Constitution as recently construed – at least with regard to the voter-age requirement – violates the parties' First Amendment associational rights to include in their primaries certain voters under the age of 18.

---

200 Saint Paul Place ♦ Baltimore, Maryland, 21202-2021  
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Telephone for Deaf: (410) 576-6372

For the reasons explained below, it is my view that the conflict between the Maryland constitutional provision and the First Amendment rights now asserted by the parties requires that SBE permit 17-year-olds who will be 18 by the next general election to vote in the parties' primary elections.

### ***Background***

Article I, §1 of the Maryland Constitution sets forth the basic qualifications for voting in Maryland. It provides:

Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State.

In the past it had been assumed that the qualifications set forth in Article I, §1 applied only to general elections and that, pursuant to EL §3-102(a), an individual who would be 18 by the general election could vote in a primary, even if not 18 by the date of the primary.

On December 11, 2006, the Court of Appeals issued its opinion in *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006). In that case, the Court held that an "early voting" system created by the Legislature was unconstitutional. In extending that holding to primary elections, the Court held that Article I, §1 applied to primary elections. It stated:

[P]rimary elections are included within the meaning of "at all elections to be held in this State" in Article I, § 1: if Article I, § 1 were read to exclude primary elections, "such a reading could lead to an absurd result, as it would eliminate *all* Constitutional qualifications for primary elections. Thus, a 12 year-old, non-U.S. citizen, residing in Virginia, would not be barred by the [Maryland] Constitution from voting in the Maryland primary election." Such a reading simply cannot be correct.

396 Md. at 89, 912 A.2d at 695 (quoting from circuit court opinion). Although the *Capozzi* case itself did not concern the age of primary voters, one ramification of its holding that the qualifications set forth in Article I, §1 apply to primary elections was that a voter must be 18 in order to vote in a primary election. This Office promptly advised SBE of the implications of the *Capozzi* decision and, following the advice of counsel, SBE instituted a policy stating

The Honorable Jamie Raskin  
December 19, 2007  
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that a voter must be 18 on or before the day of any election in which the individual wishes to vote. While that advice was correct, you have advised that the parties have recently changed their rules and have therefore introduced the second question raised by your inquiry.

### *Party Rule Changes*

Under the State election law, the two principal parties in the State, the Democratic and Republican parties, are required to select their candidates for most offices through primary elections. EL §8-202. Until recently, the two principal political parties simply adopted the primary system established by State law. However, we understand that the Democratic party has changed its rules to allow 17-year olds to vote in its primary election if they will be 18 at the time of the general election. You state in your letter that the Republican party is going to make a similar change. Both parties have requested that the SBE allow all individuals who meet the qualifications of EL § 3-102(a) be allowed to register and vote in all elections, including the primary election on February 12, 2008. Thus, both principal political parties have indicated that they wish to open their nomination processes to individuals who will be 18 by the time of the general election even if they are not 18 on the date of the primary.

### *Analysis*

Maryland law recognizes that the United States Constitution "shall be the Supreme Law of the State ... anything in the Constitution or Law of this State to the contrary notwithstanding." Maryland Declaration of Rights, Article 2. The federal constitution recognizes certain rights possessed by political parties, including First Amendment associational rights. Your request, together with the recent rule changes adopted by the Democratic and Republican parties, requires that we consider those rights in advising how SBE should implement EL §3-102(a).

The Supreme Court has held that political parties have a First Amendment right of association to determine who will participate in "the basic function of selecting the Party's candidates." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986); see also *Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)("[P]artisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments"). The Court has outlined the tests to be applied to state regulation of elections as follows:

Regulations that impose severe burdens on association rights must be narrowly tailored to serve a state government interest. ... [W]hen regulations impose lesser burdens, “a state’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”

*Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005) (citations omitted).

Here, the two principal parties, which are compelled by State law to use the State’s primary election apparatus to select their nominees, have indicated that they wish to ensure the participation in that selection process of certain members who will be eligible to vote in the general election – *i.e.*, individuals who will be 18 by the time of the general election but who have not attained that age by the time of the primary. The exclusion of those individuals from the primary undeniably burdens the associational rights of Maryland’s political parties. “[I]t is ‘[t]he moment of choosing the party’s nominee’ that matters ... for that is ‘the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’” *Id.* at 590 (citations omitted); *see also id.* at 599 (“It is here that the parties invite voters to join in selecting their standard bearers. The outcome is pivotal, of course, for it dictates the range of choices available at – and often the presumptive winner of – the general election”) (O’Connor, J., concurring).

Under the analysis established by the Supreme Court, a burden on associational rights is weighed against the State interest in the policy that affects those rights. Here, however, it is not necessary to determine whether application of an 18-year old age requirement to primary elections would impose a severe or lesser burden. Under either test, it is my view that no State interest is implicated that would override the parties’ rights of association under the First Amendment. Indeed, the General Assembly, in enacting EL § 3-102(a), expressed a legislative policy in favor of permitting such voters to exercise the franchise in the primary – a policy that coincides with the associational interests recently embraced by the parties. The Court of Appeals in *Capozzi* did not articulate a State interest in excluding these voters from the parties’ primary elections; rather, it simply applied Article I, §1, of the State Constitution to primary elections. To our knowledge, nothing in the history of Article I, §1, indicates a specific State interest in excluding from primary elections those 17-year olds who will be 18 by the time of the general election. Faced with this conflict between a long-standing legislative enactment, reinforced by the United States Constitution on one hand, and the Court of Appeals’ general holding with respect to Article I, §1 of the State Constitution on the other, the new party rules and legislative policy reflected in EL §3-102(a) should be given effect.

The Honorable Jamie Raskin

December 19, 2007

Page 5

*Conclusion*

In short, it is my view that, in light of the recent party rule changes that implicate the parties' associational rights under the federal constitution, SBE should implement EL §3-102(a) as it has in the past – by registering and allowing to vote those persons who are at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election.

Sincerely,

Douglas F. Gansler  
Attorney General

cc: State Board of Elections

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR. \*  
on behalf of \*  
Carl Philip Snyder, his son \* Civil Action Nos. C-08-128760  
PLAINTIFF \*  
v. \*

STATE BOARD OF ELECTIONS \*  
DEFENDANT \*

\* \* \*

RICHARD D. BOLTUCK \*  
on behalf of \*  
Sarah Elizabeth Boltuck, his daughter \*  
PLAINTIFF \*

v. \*

Civil Action No. C-08-128755

STATE BOARD OF ELECTIONS \*  
DEFENDANT \*

\*\*\*\*\*

**CONSENT MOTION FOR CONSOLIDATION**

Defendant State Board of Elections, by its undersigned counsel, moves pursuant to Maryland Rule 2-503, to consolidate the two above-captioned cases on the grounds that the complaints raise common questions of fact, law, and subject matter. Both complaints allege that the two 17-year old voters who will be 18 by the general election have been unlawfully denied the right to vote in the nonpartisan school board election and required to vote a provisional ballot for the February 12, 2008 primary. Defendant's counsel has obtained the consent of plaintiffs Clifford Snyder and Richard Boltuck to a consolidation of these actions.

WHEREFORE, Defendant requests that the Court grant its Motion. A proposed Order is attached.

Respectfully Submitted,

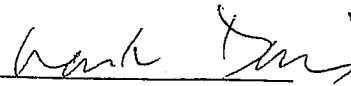
DOUGLAS F. GANSLER  
Attorney General of Maryland



Mark J. Davis  
Assistant Attorney General  
200 Saint Paul Place  
Baltimore MD 21202  
(410) 576-6356  
fax (410) 576-7036

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2008 a true and accurate copy of defendant's Consent Motion to Consolidate was mailed first-class postage prepaid and transmitted by email to: Clifford E. Snyder, Jr., Esquire, 4964 Flossie Avenue, Frederick MD 21703, plaintiff; and Jonathan S. Shurberg, Esq., 8720 Georgia Avenue, Suite 700, Silver Spring MD 20910, attorney for plaintiff Richard Boltuck.

  
Mark J. Davis

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR. \*  
on behalf of \*  
Carl Philip Snyder, his son \*  
PLAINTIFF \*

Civil Action Nos. C-08-128760

v. \*

STATE BOARD OF ELECTIONS \*  
DEFENDANT \*

\* \* \*

RICHARD D. BOLTUCK \*  
on behalf of \*  
Sarah Elizabeth Boltuck, his daughter \*  
PLAINTIFF \*

v. \*

Civil Action No. C-08-128755

STATE BOARD OF ELECTIONS \*  
DEFENDANT \*

\*\*\*\*\*

**ORDER**

Having considered defendant's Consent Motion for Consolidation, the parties having agreed to consolidation, it is this \_\_\_\_ day \_\_\_\_\_, 2008, **ORDERED** that the Motion is **GRANTED**, and the Clerk shall accept for filing all papers bearing the above captions in a single docket.

\_\_\_\_\_  
Circuit Court Judge



IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR. \*  
on behalf of \*  
Carl Philip Snyder, his son \*

PLAINTIFF \*

v. \* Civil Action No. C-08-128760

STATE BOARD OF ELECTIONS \*

DEFENDANT \*

RICHARD D. BOLTUCK \*  
on behalf of \*  
Sarah Elizabeth Boltuck, his daughter \*

PLAINTIFF \*

v. \*

Civil Action No. C-08-128755

STATE BOARD OF ELECTIONS \*

DEFENDANT \*

\*\*\*\*\*

**DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

Defendant State Board of Elections ("State Board"), by its undersigned counsel, moves pursuant to Md. Rule 2-322 to dismiss or for summary judgment. As grounds for the motion, defendant refers the Court to its attached memorandum in support, and states:

1. Plaintiffs Clifford E. Snyder, Jr., and Richard Boltuck on behalf of their 17-year old children Carl Philip Snyder ("Carl") and Sarah Elizabeth Boltuck ("Sarah") claim an

entitlement under state law to vote in their counties' nonpartisan school board primary elections on February 12, 2008, and to cast all their votes using a regular ballot rather than a provisional ballot.

2. Carl and Sarah are ineligible to vote in the nonpartisan primary and state no claim that voting on a provisional ballot denies them any rights under the Declaration of Rights of the Maryland Constitution or the Election Law Article.

3. In *Lamone v. Capozzi*, 396 Md. 53, 89 (2006), the Court of Appeals held that "primary elections are included within the meaning of 'at all elections to be held in the State' in Article I, §1 [of the Maryland Constitution]." Article I, §1 requires that a citizen be at least 18 in order to be eligible to vote.

4. On December 19, 2007, Attorney General Gansler reaffirmed advice from his Office the prior year that, in light of the *Capozzi* decision, voters be 18 to vote in primary elections and recommended that, in view of the two principal political parties' recent rule changes and assertion of their First Amendment associational rights, 17 year olds who will be 18 by the next general election ("17-year olds") be permitted to vote in the parties' primary elections on February 12, 2008.

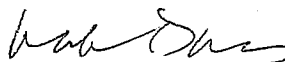
5. In an attempt to implement this advice, the State Board notified 17-year olds that they would be permitted to vote in the parties' primary elections, remained ineligible to vote in the nonpartisan primary elections, and would be required to cast provisional ballots. Should the Court wish to review the State Board's decision to require the use of provisional

ballots, and treat this motion as one for summary judgment, it may consider the two declarations of Donna Duncan, Director of the State Board's Election Management Division, which explain: 1) why using provisional ballots after the ballot styles were finalized is the only practical means of assuring that 17-year olds do not vote in contests in which they are ineligible; and 2) why it is impossible before the February 12, 2008 primary to reprogram electronic pollbooks to enable Carl and Sarah to vote on the electronic voting units.

WHEREFORE, defendant requests that the Court grant its Motion to Dismiss or for Summary Judgment. A proposed Order is attached.

Respectfully Submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

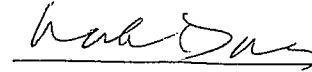


Mark J. Davis  
Assistant Attorney General  
200 Saint Paul Place  
Baltimore MD 21202  
(410) 576-6356  
fax (410) 576-7036

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2008 a true and accurate copy of defendant's Motion to Dismiss or for Summary Judgment, Memorandum in Support, Declaration of Donna Duncan, and Order was mailed first-class postage prepaid and

transmitted by email to: Clifford E. Snyder, Jr., Esquire, 4964 Flossie Avenue, Frederick MD 21703, plaintiff; and Jonathan S. Shurberg, Esq., 8720 Georgia Avenue, Suite 700, Silver Spring MD 20910, attorney for plaintiff Richard Boltuck.



Mark J. Davis

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR. \*  
on behalf of \*  
Carl Philip Snyder, his son \*

PLAINTIFF \*

v. \* Civil Action No. C-08-128760

STATE BOARD OF ELECTIONS \*

DEFENDANT \*

\* \* \*

RICHARD D. BOLTUCK \*  
on behalf of \*  
Sarah Elizabeth Boltuck, his daughter \*

PLAINTIFF \*

v. \* Civil Action No. C-08-128755

STATE BOARD OF ELECTIONS \*

DEFENDANT \*

\*\*\*\*\*

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Defendant State Board of Elections ("State Board"), by its undersigned counsel, files  
this memorandum in support of its motion to dismiss or for summary judgment.

Plaintiffs Clifford E. Snyder, Jr. and Richard Boltuck on behalf of their 17-year old children Carl Philip Snyder ("Carl") and Sarah Elizabeth Boltuck ("Sarah"), claim an entitlement under state law to vote in their counties' nonpartisan school board primary elections on February 12, 2008, and to cast all their votes using a regular ballot rather than a provisional ballot. The Court should dismiss the complaint because Carl and Sarah are ineligible to vote in the nonpartisan primary and their fathers state no claim that voting in partisan elections on a provisional ballot denies Carl and Sarah any right protected under the Declaration of Rights of the Maryland Constitution or the Election Law Article. Furthermore, if this Court reaches the merits of the State Board's decision to use provisional ballots, the declaration of Donna Duncan demonstrates that using provisional ballots is the only practical means of assuring that 17-year olds do not cast voters in the nonpartisan contests for which they are ineligible.<sup>1</sup> Under Maryland law as applied by the State Board, however, 17-year olds like Sarah and Carl, who will turn 18 by the time of the general election ("17-year olds"), may vote in their own party's partisan primary election.

#### STATEMENT OF FACTS

##### A. The State's Board's Initial Policy Concerning 17-Year Old Voters.

Article I, §1 of the Maryland Constitution sets forth the basic qualifications for voting in Maryland. It provides in part:

---

<sup>1</sup> See *Hrehorovich v. Harbor Hsp. Ctr.*, 93 Md. App. 772, 782 (1992), *cert. denied*, 330 Md. 319 (1993) ("If the court does not exclude the outside matters... [Rule 2-322(c)] mandates that 'the motion *shall* be treated as one for summary judgment.'" (emphasis in original).

Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State.

Before 2006, the State Board understood that the qualifications set forth in Article I, §1 applied only to general elections and that, pursuant to Election Law Article (“EL”) §3-102(a), an individual who would be 18 by the general election could vote in a primary, even if not 18 by the date of the primary. EL §3-102(a) provides that a qualified voter includes an individual who “is at least 18 years or will be 18 years old on or before the day of the next succeeding general or special election.”

On December 11, 2006, the Court of Appeals issued its opinion in *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006). In that case, the Court held that an “early voting” system created by the Legislature was unconstitutional. In extending that holding to primary elections, the Court held that Article I, §1 applied to primary elections. It stated:

[P]rimary elections are included within the meaning of “at all elections to be held in this State” in Article I, §1: if Article I, §1 were read to exclude primary elections, “such a reading could lead to an absurd result, as it would eliminate *all* Constitutional qualifications for primary elections. Thus, a 12 year-old, non-U.S. citizen, residing in Virginia, would not be barred by the [Maryland] Constitution from voting in the Maryland primary election.” Such a reading simply cannot be correct.

396 Md. at 89 (quoting from circuit court opinion). Although the *Capozzi* case itself did not concern the age of primary voters, its holding that the qualifications set forth in Article I, §1,

apply to primary elections means that a voter must be 18 in order to vote in a primary election.

On December 18, 2006, the Office of the Attorney General advised the State Board that the *Capozzi* decision only individuals who will turn 18 before the next primary election should be permitted to register. See Exhibit 1 at 4, attached hereto. The parties' associational rights were not a consideration in that advice because the parties did not then have rules that permitted 17-year olds to participate in their primaries.

Based on this advice from the Office of the Attorney General, the State Board immediately notified 17-year old voters who would not be 18 years or older by the date of the 2008 primary that they were not eligible to vote in that election. See Exhibit 2.

**B. The State Board's Current Policy Concerning 17-Year Old Voters.**

On December 10, 2007, the Maryland Democratic Party adopted a resolution – now a Party rule – to allow 17-year olds to vote in its primary election. The Maryland Republican Party advised the Attorney General on December 18, 2007, that it was adopting the same policy. Both parties requested that the State Board allow all individuals who meet the qualifications of EL §3-102(a) be allowed to register and vote in all elections, including the primary election on February 12, 2008.

These developments prompted State Senator Jamie Raskin to ask whether the newly adopted rules of the State's two principal political parties affected the Office of Attorney General's prior advice that *Capozzi* had the effect of barring primary participation by



potential voters who were not yet 18 years old. On December 19, 2007, Attorney General Douglas Gansler issued an advice letter responding to that inquiry. See Exhibit 3. The Attorney General first reaffirmed the advice previously given to the State Board that the Maryland Constitution, as construed in *Capozzi*, generally requires that voters be 18 to vote in primary elections. He then noted, however, that the parties' recent rule changes constituted assertions by those parties of their federal rights of freedom of association under the First Amendment. Attorney General Gansler advised that no state interest was implicated that would override the parties' rights of association because, in enacting EL §3-102(a), the General Assembly expressed a policy in favor of *allowing* such voters to participate in the primary. Accordingly, he recommended that the State Board permit 17-year olds to vote in the primary.<sup>2</sup>

As noted, the basis for the Attorney General's conclusion that the statutory authorization of primary voting by certain 17-year olds, as set out in EL § 3-102(a), survives *Carpozzi*, was that the political parties had asserted a paramount, federally protected First Amendment right to associate with 17-year olds in their primaries. That conclusion does not

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<sup>2</sup> The Supreme Court has held that political parties have a First Amendment right of association to determine who will participate in "the 'basic function' of selecting the Party's candidates." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986); see also *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)("[P]artisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments"). In a case involving a primary election, the Court of Appeals has characterized the parties' First Amendment rights as "indisputable." *Suessman v. Lamone*, 383 Md. 697, 722 (2004).

apply to nonpartisan elections in which the political parties play no role.<sup>3</sup> Accordingly, the State Board adopted a resolution on December 20, 2007, allowing 17-year olds to vote in party primaries and decided on January 3, 2008 that:

A 17-year old who is a Democrat or Republican may vote in a primary election. However, if the voter lives in a county with nonpartisan contests on the ballot, the voter must vote by provisional ballot so that the local board of elections can ensure that the voter did not cast votes in the nonpartisan contests. If a vote was cast in a non-partisan contest, this vote will not be counted, and only votes that the 17-year-old casts in the party races will be counted.

See Exhibit 2.

### **C. Plaintiffs' Allegations**

#### **1. The Snyder Complaint**

Carl was born on October 11, 1990 in Frederick County and has resided there since birth. Complaint, ¶3. He applied for voter registration in early May 2007 and received a Voter Notification Card (VNC) issued on May 21, 2007, which indicated his association with the Democratic Party. *Id.*, ¶¶ 4-6.

In December 2007, Carl became aware from the State Board's web site that, under the State Board's policy at that time, a voter had to be at least 18 years old on the date of the election in which he wishes to vote, even if that election is a primary election. Complaint,

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<sup>3</sup> Allegany, Calvert, Carroll, Cecil, Frederick, Howard, Montgomery, Queen Anne's, Talbot and Washington Counties have non-partisan contests on all or some of the primary ballots. All of the contests are school board races, except that Allegany County also has municipal races.

¶ 8. Carl's father pursued administrative remedies with the Frederick County Board of Elections and the State Board. *Id.*, ¶¶ 10-14.

On December 21, a State Board hearing officer dismissed the complaint as moot, in light of the State Board's adoption of a resolution on December 20 allowing individuals in Carl's situation to vote in the February 12, 2008 party primary election. Complaint, ¶ 15. By letter dated January 8, 2008, the State Board informed Carl that he was eligible to vote for party offices in the primary. *Id.*, ¶ 16.

In Frederick County, there will be a nonpartisan primary election on February 12, 2008 to nominate candidates for the Frederick County Board of Education in which Carl wishes to vote. Complaint, ¶ 18. Carl's father sought a ruling that Carl could vote in the nonpartisan school board election, in addition to the Democratic Party primary. When the State Board refused to reconsider the complaint it dismissed as moot, Carl's father filed a complaint addressing this additional issue. *Id.*, ¶¶ 19-22. The State Board dismissed the second complaint because he did not allege any violations of the Election Law Article.

In this case, Carl's father requests an injunction requiring the State Board to allow Carl to vote by regular ballot and to have his votes counted "in the usual way, in all contests on the ballot in Frederick County on February 12, 2008." Complaint, ¶¶ 23, 26.

## **2. The Boltuck Complaint**

Sarah was born on July 21, 1990, and has resided in Montgomery County since 1998. Complaint, ¶ 3. She submitted an application to register to vote to the Montgomery County

Board of Elections in May or June 2007 and received a letter dated June 11, 2007 notifying her that her application had been rejected under the State Board's former policy that predated the Party rule changes. *Id.*, ¶¶ 4, 5. The rejection letter explained that "you do not qualify for registration and voting in this county because you will not have reached 18 years old by the date of the next election." *Id.*, ¶ 5.

After correspondence between Sarah's father and the Montgomery County Board of Elections, the State Board informed Sarah on January 11, 2008, that she is eligible to vote for party offices in the February 2008 primary. Complaint, ¶ 14. As in Frederick County, the primary election in Montgomery County will have nonpartisan school board contest in which Sarah allegedly wishes to vote. *Id.*, ¶¶ 15, 16. On January 18, 2008, Sarah's father filed a complaint with this Court that echoed and adopted the claims made by Carl's father. *Id.*, ¶ 18.

#### ARGUMENT

There is no dispute in this case that the State Board is correctly applying Maryland's election law, and the applicable federal and state constitutional provisions, to permit Carl and Sarah to participate in their own political party's partisan primary election. The only questions before the Court are whether (1) Carl and Sarah also have a right to participate in nonpartisan elections where their party's associational rights are not implicated and (2) Carl and Sarah have a protected right to use standard ballots rather than provisional ones. The answer to both questions is "no."

As a general matter, Article I, § 1 of the Maryland Constitution, as interpreted by the Court of Appeals in *Capozzi*, limits the right to vote in both primary and general elections to those who are 18 years old and otherwise qualified. As determined by the Attorney General and implemented by the State Board, there is an exception to this general rule that allows some 17-year olds to vote in the Democratic and Republican primary elections. That exception is necessary in order to respect the parties' First Amendment associational rights given the absence of any overriding state interest in excluding 17-year old party members from voting. Because the political parties have no associational interest with respect to nonpartisan primary races, however, the general rule applies to those races and, accordingly, Article I, § 1 and *Capozzi* together dictate that all voters in nonpartisan primaries must be at least 18 years old.

The State Board has adopted a provisional ballot process that allows eligible 17-year olds to vote in partisan primary elections consistent with First Amendment requirements, but not nonpartisan elections to which those First Amendment requirements do not apply. The State Board's use of provisional ballots fully respects Carl's and Sarah's constitutional and statutory rights. Carl's and Sarah's vote in their party's primary will be counted just as fully as if they were to cast their votes on the electronic voting units that most (but not all) older voters use. Using provisional ballots is the only practical means available to the State Board to assure that only eligible voters vote in the nonpartisan races, in which 17-year olds are not eligible to vote.

I. **CARL'S AND SARAH'S DERIVATIVE RIGHT TO VOTE  
IN THEIR PARTY'S PRIMARY DOES NOT ENTITLE  
THEM TO VOTE IN THE NONPARTISAN RACES.**

In *Capozzi* the Court of Appeals determined that Article I, §1 applies to all elections in the State, including primary elections. 396 Md. at 89. In general, in order to vote in a primary election, an individual must be 18 years old. While the Attorney General recently recognized an exception to this rule when a political party determines who may participate in its primaries and invites 17-year olds who are eligible to vote under EL §3-102(a), that exception does not apply to nonpartisan races in which the political parties have no interest. Accordingly, the State Board correctly decided that a voter must be 18 on primary day to vote in a nonpartisan race.

EL §8-802(a)(1)(i) provides that members of boards of education are elected on a nonpartisan basis. In a primary election to nominate board of education candidates, any registered voter of the county may vote in those contests for nomination regardless of party affiliation or lack of party affiliation. EL §8-802(a)(1)(ii). Thus, candidates for the school board are to file certificates of candidacy, be certified on and appear on the ballot, be voted on, nominated and elected without regard to party affiliation or lack thereof. EL §8-802(a)(2).

The Attorney General's December 19, 2007, advice letter correctly reaffirmed that, except for these associational rights, an individual must be 18 to vote in a primary election. Unless these associational rights apply, the right of a 17-year old to vote is controlled by the

*Capozzi* holding. Under *Capozzi*, unaffiliated voters must be at least 18 to participate in the nonpartisan primary. Plaintiffs' claim of an entitlement to vote in nonpartisan primaries is foreclosed by *Capozzi*.

## II. PLAINTIFFS' CHALLENGE TO THE USE OF PROVISIONAL BALLOTS FAILS TO STATE A CLAIM.

The State Board's use of provisional ballots in this situation is the only practical means of assuring that 17-year olds do not cast votes in the nonpartisan contests for which they are ineligible. Under Maryland law, a provisional ballot is available to a voter when an election judge asserts that an individual is not eligible to vote. EL §9-404. Far from depriving Carl and Sarah of their constitutional or statutory rights, using provisional ballots is consistent with law and assures that Carl's and Sarah's vote in their party's primary will be counted just as fully as if they were to cast their votes on the electronic voting units. See *Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 702 (2007) (acknowledging that when a voter is given a provisional ballot, that ballot "is counted, if the address, and thus the right to vote, is later verified").

No court has ever held that casting a provisional ballot—as opposed to voting on an electronic voting unit—deprives a voter of his or her constitutional rights.<sup>4</sup> Congress created a system of provisional balloting under which a ballot would be submitted on election day

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<sup>4</sup> So long as the ballot is counted, the form of the ballot is immaterial. See, e.g., *Hammond v. Hickel*, 588 P.2d 256, 270 (Alaska 1978) (rejecting argument that ballots should have been cast on paper rather than punch cards).

but counted only if the person was later determined to have been entitled to vote. *See, e.g., Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (explaining the Help American Vote Act (HAVA)).<sup>5</sup> This is the approach that the State Board has adopted to count Carl's and Sarah's votes.

Under Maryland law, an individual is eligible to cast a provisional ballot if:

(1) the individual declares in a written affirmation submitted with the provisional ballot that the individual is a registered voter in the State and is eligible to vote in the election; and ...

(2) (ii) an election official asserts that the individual is not eligible to vote.

EL §9-404. Provisional ballots are counted by the canvassing board of a local board of elections on the first Monday after an election. COMAR 33.16.04.03. While the local board may not reject a provisional ballot except by unanimous vote, the local board must reject the ballot if an individual is not eligible to cast it. EL §11-303(d)(1), (d)(2)(i).

The State Board has previously used provisional ballots in other situations, including when a voter has moved 21 days before an election and that change is not reflected in the voter registry, as well as when, during the 2006 gubernatorial primary, Montgomery County neglected to supply polling places with sufficient voter access cards. The State Board's interpretation of the statute it administers to permit the use of provisional ballots in these and

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<sup>5</sup> HAVA leaves it up to state and local officials to determine if the an individual is eligible "under State law to vote" and whether a provisional ballot "shall be counted in that election *in accordance with State law.*" 42 U.S.C. §15482(a)(4) (emphasis added).



the instant situation is entitled to deference and “considerable weight.” *See Fowler v. Motor Vehicle Admin.*, 394 Md. 331, 343 (2006).

Consistent with the Attorney General’s December 19, 2007 advice, SBE has directed election judges that 17-year olds are eligible to vote in their party’s primary and ineligible to vote in the nonpartisan contests. The ballot style for the electronic voting units combines these races on a single ballot. Duncan Declaration, ¶ 9. Because of the timing of the Attorney General’s advice, it was already too late to create new ballot styles for the electronic voting units which separate party and nonpartisan races without disrupting the election schedule and orderly election preparation.<sup>6</sup> *Id.*, ¶ 8. If a voter is eligible to vote a particular race, the provisional ballot is counted just as fully as a vote from an electronic voting unit. *Id.* However, because a ballot is sealed in the envelope of an identifiable voter, the canvassing board can determine if the voter is eligible to vote in the nonpartisan races and ensure that only those votes that the 17-year old voter is eligible to cast will be counted. *Id.* This ability to exclude votes in particular races does not exist if the 17-year old votes on the electronic voting units, where the ballot style combines the party and nonpartisan races. *Id.*

Because Carl’s and Sarah’s votes in their party’s primary will be counted, plaintiffs fail to state a claim for relief. Accordingly, the Court should dismiss their complaint.

Furthermore, it is simply too late for the 17-year olds to vote on the electronic voting units, even if plaintiffs were to prevail on their claims. The Court of Appeals has recognized

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<sup>6</sup> Ms. Duncan explains the sequence of events necessary to create 100 separate ballot styles and voter access cards for 17,000 voting units. Declaration, ¶¶ 3-8.

that injunctive relief “may be inappropriate in an elections case if the election is too close for the State, realistically, to implement the necessary pragmatic changes before the election.” *Liddy v. Lamone*, 398 Md. 233, 250 (2007). As explained in the accompanying Second Declaration of Donna Duncan, the reprogramming and database changes necessary to enable 17-year olds to vote on the electronic voting units cannot be accomplished before the primary election on February 12. Second Duncan Decl., ¶ 2.

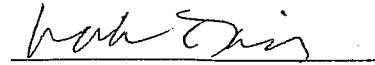
In order to vote on an electronic voting unit, a voter access card has to be encoded for the voter after he or she checks in to vote. Second Duncan Decl., ¶ 3. Voter access cards are encoded by the electronic pollbooks. *Id.* Programming and database for the electronic pollbooks was finalized on January 28, 2008, and sent to the local boards of elections for loading onto the pollbooks on February 1, 2008. *Id.* The pollbooks will be programmed so that the 17-year olds can only receive a provisional ballot, not a voter access card. *Id.* The only option that would allow 17-year olds to vote on the electronic voting units is to reprogram the pollbooks. *Id.* This option is administratively infeasible at this late date because it will require: reprogramming the pollbooks to allow the 17-year olds to vote on electronic voting unit; testing the programing changes, including detailed logic and accuracy testing; redistributing the database to the local boards of election; and reloading the database and programming changes on 1300 pollbooks. *Id.*

**CONCLUSION**

For the foregoing reasons, the Court should grant defendant's motion to dismiss or for summary judgment.

Respectfully Submitted,

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MEMORANDUM

December 18, 2006

TO: Linda Lamone

FROM: Mark J. Davis

SUBJECT: Analysis of Court of Appeals Decision in *Lamone v. Capozzi*

On December 11, 2006, the Court of Appeals issued its opinion explaining its order dated August 25, which affirmed a circuit court order that declared the early voting statute unconstitutional. As I explain below, the Court's opinion has ramifications for provisional voting, absentee balloting, and voter registration.

**I. The Opinion**

On April 9, 2005, the General Assembly passed Senate Bill 478, which authorized early voting in Maryland. The Governor vetoed the bill on May 20, 2005. On January 16, 2006, both houses of the General Assembly overrode the veto, enacting Senate Bill 478 as Chapter 5, Maryland Laws 2006, and adding a new §10-301.1 to the Election Law Article ("EL"). During the 2006 legislative session, HB 1368, another early voting bill, was passed as emergency legislation and vetoed by the Governor. That veto, too, was overridden and the bill became Chapter 61, Laws of Maryland 2006. The bill repealed and reenacted §10-301.1 with amendments, creating early voting as follows: a voting period for eleven hours each day for a five-day period beginning the Tuesday before a primary or general election through the Saturday before election day at designated sites.

On July 16, 2006, plaintiffs filed suit alleging that the early voting legislation violated various state constitutional provisions, claiming essentially that Article I only permitted in-person ballot voting and absentee voting. On August 8, 2006, the Circuit Court for Anne Arundel County declared §10-301.1 unconstitutional and void. On August 25, 2006, the

Exhibit 1

Court of Appeals heard argument and affirmed the circuit court in an order for reasons to be stated in an opinion to follow.

In the opinion that followed on December 11, the Court emphasized importance of the plain language principle of constitutional interpretation. Slip Op. at 18-20. Thus, the Court held that authorizing voters to cast ballots beginning the Tuesday through the Saturday before the election "is clearly inconsistent with the words of, and the plain meaning of Article XV, §7 and the other constitutional provisions that designate the "Tuesday next after the first Monday of November," as the date of the general election." *Id.* at 24-25. The Court read §7 to require that "the election shall be held *on* a specific day. . .[and] any statute that allows for a ballot to be cast before the prescribed day must be in derogation of the Constitution." *Id.* at 33.

The Court also literally interpreted Art. I, §1, which provides that a voter can only vote in the election district or ward in which he resides. Noting that EL §10-301.1 allows for early voting to occur outside of a person's district or ward, the Court held that the statute violated Art. I, §1, because "[w]e view the language in Article I, §1, as a mandatory requirement, not as a mere 'entitlement,' capable of being waived." *Id.* at 35-36.

Finally, the Court held that "primary elections are included within the meaning of 'at all elections to be held in this State' in Article I, §1," *id.* at 40; and that early voting is not a form of absentee voting, holding that "Article I, §3 clearly indicates that the inability to vote personally applies to 'absent' voters, not those who find the voting day to be inconvenient." *Id.* at 41.

## II. Ramifications of the Opinion.

### A. Provisional Voting.

The opinion makes clear that a provisional ballot cast outside the voter's district cannot be counted, even for candidates, such as statewide candidates, that the voter would be eligible to vote for in his or her district. As explained below, EL §§9-404(a) and 11-303(e) must be interpreted to apply to circumstances where a voter who is at the wrong polling place is in the same district as the correct polling place.<sup>1</sup>

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<sup>1</sup> A polling place is located within a district or ward which may consist of multiple precincts. A local board may combine or abolish precincts, *see* EL §2-303, but may not change a district or ward, which are established by local government.

Although provisional ballots are required by the federal Help American Vote Act (HAVA), "the individual's vote shall be counted as a vote . . . in accordance with state law." HAVA, §302(a)(4). Maryland law provides that an individual is eligible to cast a provisional ballot if the individual declares that he or she is a registered voter in the State and is eligible to vote in the election; and the individual's name does not appear on the precinct register, an election official asserts the individual is not eligible to vote, or the individual does not have the necessary identification. EL §9-404(b). An individual who is eligible may cast a provisional ballot at a polling place on election day; or at the local board office in the county where the individual resides. EL §9-404(a).

Under *Capozzi*, a ballot cast at other than the voter's correct district or ward may not be counted, which requires that the EL §11-303(e) be interpreted differently than it has been in recent elections. That provision states:

A local board shall count:

- (1) the entire provisional ballot if the address on the provisional ballot application is within the precinct where the provisional ballot was cast; or
- (2) only the votes cast by the voter for each candidate or question applicable to the precinct in which the voter resides, as determined by the address on the provisional ballot application of the voter.

SBE issued guidelines for the 2006 November elections that mirrored the language of the statute. *See* Guidelines for the Administration of Provisional Voting (June 21, 2006), §7.4D.<sup>2</sup> SBE instructed local boards to count ballots that the voter would have been eligible to vote for in his home precinct. For example, a vote cast by a Towson resident at a polling place in Essex would have been counted for the statewide races and for county executive, but not for any of the local races (e.g., House of Delegates, State Senate or County Council) that were not on the ballot at the voter's Towson precinct.

As a result of *Capozzi*, however, no votes cast by the Towson voter would be counted; his vote will count only if his out-of-precinct vote is cast in the same Towson district in which he resides. The election judges at the Essex polling place should be instructed to advise the Towson voter to go to his correct polling place or his vote will not be counted.

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<sup>2</sup> EL §11-303(a) provides that the canvass is to be conducted in accordance with the regulations and guidelines established by the State Board. SBE regulations relating to provisional ballots—found at COMAR 33.16—do not describe how provisional ballots are to be counted.

Although an individual who is eligible to vote a provisional ballot may do so at the local board office, *see* EL §9-404(a), that vote will not count if the board office is outside the voter's ward or district. An absentee ballot cast at the local board offices beginning on the Wednesday before the election until the closing of the polls on election day, *see* EL §9-305(c), is not subject to *Capozzi* and will be counted. Thus, local board staff should inform voters of their option to cast an absentee ballot to avoid the *Capozzi* problem and assure that their votes are counted.

### **B. Absentee Voting**

*Capozzi* did not involve the constitutionality of the new no-excuse absentee voting statute, EL §9-304, but the Court read Article I, §3 very strictly.<sup>3</sup> The Court held that early voting is not a form of absentee voting and that "the inability to vote personally applies to 'absent' voters, not those who find the voting day to be inconvenient." *Sip. Op.* at 41.

The current language of the absentee voter's oath does not contain a statement that the voter will be absent or will be unable to vote in person on election day.<sup>4</sup> We therefore recommend that the absentee voter's oath be changed to track the language of Article I, §3.

### **C. Voter Registration.**

Article I, §1 provides that an individual must be 18 in order to vote. *Capozzi* holds that "primary elections are included within the meaning of 'at all elections to be held in this State' in Article I, §1." *Slip Op.* at 40. EL §3-102(a) provides that a qualified voter includes an individual who "is at least 18 years or will be 18 years old on or before the day of the next succeeding general or special election."

The statute thus violates §1 because it permits an individual who has not yet turned 18 to vote in a primary election. The statute should be amended to add the word "primary" so that the pertinent phrase reads "next succeeding general, *primary*, or special election." In any event, only individuals who will turn 18 before the next election should be permitted to register.

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<sup>3</sup> Article I, §3 provides in part that the General Assembly may provides for voting by qualified voters "who are absent at the time of any election in which they are entitled to vote and for voting by other qualified voters who are unable to vote personally."

<sup>4</sup> COMAR 33.11.03.03 provides that the State Board prescribe the form and content of the instructions for marking and returning the absentee ballots.

December 18, 2006  
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Please let me know if you require clarification of these issues or require further assistance.

cc: Ross Goldstein  
Donna Duncan  
Nikki Trella  
Mary Wagner



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\* Robert L. Walker, Chairman \* Bobbie S. Mack, Vice Chairman \* Andrew V. Jezic \* David J. McManus, Jr. \* Charles E. Thomann

**State Administrator of Elections:** \* Linda H. Lamone

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**VOTER REGISTRATION****Introduction**[Restoration of Voting Rights in Maryland](#)[Students enrolled in a Maryland institution of higher education](#)[Voter Registration Application](#)[Voter Registration Statistics](#)**Voting Rights for 17 Year Olds****Overview**

An individual who is 17 years old may vote in the 2008 Presidential Primary Election, provided:

- The individual will be 18 years old on or before November 4, 2008 (the date of the Presidential General Election); and
- The individual is registered to vote and is affiliated with the Democratic or Republican Party.

As explained in detail below, 17 year olds are only permitted to cast votes for partisan races (i.e. President, Congress, Delegates to the National Conventions). They are not permitted to cast votes in non-partisan contests (i.e. school board races, ballot issues, and municipal elections). Since ballots contain both partisan and non-partisan contests, a 17 year old who resides in a county (or part of a county) that has a non-partisan contest on the ballot will be given a provisional ballot. That ballot will be counted after the local board of elections inspects the ballot to ensure that no votes are cast for non-partisan contests. If a vote is cast for a non-partisan contest, those votes will not be counted, but the rest of the ballot will be counted.

**Background and Explanation**

**December 11, 2006** - The Maryland Court of Appeals filed its formal written opinion in *Lamone v. Capozzi*, the lawsuit that challenged the constitutionality of early voting. One of the questions that the Court addressed was whether early voting, even if it was determined to be unconstitutional, could still be used in a primary election. The Court, in answering that question, concluded that "primary elections are included within the meaning of 'at all elections to be held in this State' in Article 1, §1." That section of the Constitution also provides that an individual must be 18 years of age or older to vote.

**December 18, 2006** - The Office of the Attorney General wrote an [analysis of the ramifications](#) of the Capozzi decision. That analysis concluded that, since the Court of Appeals determined that primary elections must comply with Article 1, §1 of the Maryland Constitution, it is unconstitutional to allow 17 year olds to vote in primary elections (as required under Election Law Article § 3-102(a) of the Annotated Code of Maryland). Based on this advice, the State Board of Elections began to administer the law accordingly and notified 17 year old voters who would not be 18 years old or older by the 2008 Presidential Primary Election that they were not eligible to vote in that election.

**December 19, 2007** - The Attorney General, in response to an inquiry by State Senator Jamie Raskin dated December 17, 2007, drafted a [second letter of advice](#) on the issue of allowing 17 year olds to vote in primary elections. In the opinion, the Attorney General reaffirmed the advice previously given that voters must be 18 years of age or older to vote in primary elections. However, because the Democratic and Republican Parties (on December 10, 2007) asserted their federal constitutional rights to freedom of association, the Attorney General concluded that prohibiting 17 year olds from registering and voting in a primary election violated the political parties' First Amendment associational rights to include in their primary elections certain voters under the age of 18. Based on this new interpretation, the members of the State Board of Elections convened on [December 20, 2007](#), and determined to follow the advice of the Attorney General and allow 17 year olds who will be 18 on or before the Presidential General Election to register and vote in the upcoming Presidential Primary Election.

**January 2, 2008** - In Attorney General Doug Gansler's letter to Senator Raskin, he concluded that, "SBE should implement § 3-102(a) as it has in the past - by registering and allowing to vote those persons who are at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election." In the past, all 17 year olds who would be 18 years old or older on or before the next general election were permitted to vote in a primary election. This included allowing 17 years olds who were unaffiliated with either the Democratic or Republican Parties to vote in a non-partisan (i.e., school board or municipal) election.

Since the basis for allowing 17 year olds to vote in a primary election is the associational rights of the principal political parties, staff members asked for clarification on whether a 17 year old voter who will be 18 on or before the next general election **and** who is unaffiliated with the Democratic or Republican Parties is permitted to vote in a primary election. Similarly, clarification was requested on whether a 17 year old who

will be 18 on or before the next general election **and** who is affiliated with either the Democratic or Republican Party can vote for any non-partisan primary contests on the ballot (i.e. school board or municipal contest).

**January 3, 2008** – The Office of the Attorney General advised that 17 year olds who will be 18 on or before a general election may vote in a primary election **only** if they are affiliated with either the Democratic or Republican Party and may only vote for partisan contests – not non-partisan contests. Following this advice:

1. A 17 year old who is not affiliated with either the Republican or Democratic Party is **not** registered and may **not** vote in a primary election; and
2. A 17 year old who is a Democrat or Republican may vote in a primary election. However, if the voter lives in Allegany, Calvert, Carroll, Cecil, Frederick, Howard, Montgomery, Queen Anne's, Talbot, or Washington Counties (counties with non-partisan contests on all or some of the Presidential Primary Election ballots), the voter must vote by provisional ballot so that the local board of elections can ensure that he or she did not cast any votes in the non-partisan contests. If a vote was cast in a non-partisan contest, this vote will not be counted, and only votes that the 17 year old is entitled to cast (i.e., partisan contests) will be counted.

The following table shows who can vote in the upcoming Presidential Primary Election and how the voter will vote.

Age	Party Affiliation	County	Method of Voting	Explanation
17 but will be 18 on or before 2008 Presidential General Election (Nov. 4, 2008)	Democrat or Republican	Montgomery or county with non-partisan contest – see list of counties above	Provisional Ballot	Since the voter will be 18 on or before the 2008 Presidential General Election and she is affiliated with either the Democratic or Republican Party, she can vote in the upcoming Primary Election. Since Montgomery County has a non-partisan school board contest on the primary election ballot, the voter must vote a provisional ballot.
	Democrat or Republican	Prince George's or county without a non-partisan contest	Regular ballot cast on touchscreen	Since the voter will be 18 on or before the 2008 Presidential General Election and he is affiliated with either the Democratic or Republican Party, he can vote in the upcoming Primary Election. Since there is no non-partisan contest in Prince George's County, he can vote a regular ballot on the touchscreen.
	Unaffiliated or Affiliated with Other Party	Any county	Not registered and cannot vote.	Since the voter is not affiliated with a party that nominates candidates at the primary election, he cannot register at this time and may not vote in the upcoming Primary Election.
17 but will be 18 after the Presidential General Election	Any party or unaffiliated	Any county	Not registered and cannot vote.	Since the voter will not be 18 by the 2008 Presidential General Election, she cannot vote in the upcoming Primary Election.

**Questions and Answers for Provisional Voters**

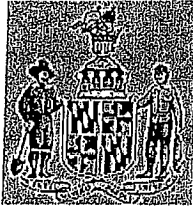
**How will you know whether your ballot is counted?**

You can go online 10 days after election day to the State Board of Elections' website ([www.elections.state.md.us](http://www.elections.state.md.us)) to find out whether your provisional ballot application was accepted and whether it was counted. Please note that Maryland always counts provisional and absentee ballots, regardless of whether or not they will make a difference in the outcome of the election.

**How will the privacy of your vote be protected?**

The local boards of elections take great care to open and remove provisional and absentee ballots in a manner that protects the secrecy of the voter's ballot. For example, the voted absentee or provisional ballot is separated from the absentee or provisional ballot envelope before any ballot review is conducted.

DOUGLAS F. GANSLER  
Attorney General



KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

(410) 576-7036

(410) 576-6311

TELECOPIER NO.

December 19, 2007

WRITER'S DIRECT DIAL NO.

The Honorable Jamie Raskin  
Room 122  
James Senate Office Building  
Annapolis, Maryland 21401

Dear Senator Raskin:

You asked whether recent changes in the rules of the State's two principal political parties affect the advice of this Office to the State Board of Elections ("SBE") concerning the application of Annotated Code of Maryland, Election Law Article ("EL"), §3-102(a). That statute provides, among other things, that an individual may register to vote if the individual will be 18 or older on the date of the next general or special election. In the past, the election boards have allowed individuals who will be 18 by the time of a general election to vote in a primary election even if the individual was not 18 at the time of the primary. However, a recent Court of Appeals decision held that a State constitutional provision that, among other things, requires a voter to be 18 or older, applies to primary elections. This Office advised SBE of the implications of that decision and, following that advice, SBE required voters to be 18 to vote in a primary election.

Your letter raises two issues, one of which this Office has previously addressed in the advice letter to SBE and one of which has arisen in the past week as a result of the changes adopted by the State's two principal political parties. As explained below, this Office reaffirms the advice previously given to SBE that the Maryland Constitution, as construed in a recent Court of Appeals case, requires that voters be 18 to vote in primary elections. Nonetheless, because the political parties have, in recent days, asserted their *federal* constitutional rights to freedom of association, you have asked the Office to address the *different* question whether the Maryland Constitution as recently construed – at least with regard to the voter-age requirement – violates the parties' First Amendment associational rights to include in their primaries certain voters under the age of 18.

---

200 Saint Paul Place ♦ Baltimore, Maryland, 21202-2021  
Telephone Numbers: (410) 576-6300 ♦ (888) 743-0023 ♦ D.C. Metro (301) 470-7534  
Telephone for Deaf: (410) 576-6372

Exhibit 3

The Honorable Jamie Raskin  
December 19, 2007  
Page 2

For the reasons explained below, it is my view that the conflict between the Maryland constitutional provision and the First Amendment rights now asserted by the parties requires that SBE permit 17-year-olds who will be 18 by the next general election to vote in the parties' primary elections.

### *Background*

Article I, §1 of the Maryland Constitution sets forth the basic qualifications for voting in Maryland. It provides:

Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State.

In the past it had been assumed that the qualifications set forth in Article I, §1 applied only to general elections and that, pursuant to EL §3-102(a), an individual who would be 18 by the general election could vote in a primary, even if not 18 by the date of the primary.

On December 11, 2006, the Court of Appeals issued its opinion in *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006). In that case, the Court held that an "early voting" system created by the Legislature was unconstitutional. In extending that holding to primary elections, the Court held that Article I, §1 applied to primary elections. It stated:

[P]rimary elections are included within the meaning of "at all elections to be held in this State" in Article I, § 1: if Article I, § 1 were read to exclude primary elections, "such a reading could lead to an absurd result, as it would eliminate *all* Constitutional qualifications for primary elections. Thus, a 12 year-old, non-U.S. citizen, residing in Virginia, would not be barred by the [Maryland] Constitution from voting in the Maryland primary election." Such a reading simply cannot be correct.

396 Md. at 89, 912 A.2d at 695 (quoting from circuit court opinion). Although the *Capozzi* case itself did not concern the age of primary voters, one ramification of its holding that the qualifications set forth in Article I, §1 apply to primary elections was that a voter must be 18 in order to vote in a primary election. This Office promptly advised SBE of the implications of the *Capozzi* decision and, following the advice of counsel, SBE instituted a policy stating

The Honorable Jamie Raskin  
December 19, 2007  
Page 3

that a voter must be 18 on or before the day of any election in which the individual wishes to vote. While that advice was correct, you have advised that the parties have recently changed their rules and have therefore introduced the second question raised by your inquiry.

#### *Party Rule Changes*

Under the State election law, the two principal parties in the State, the Democratic and Republican parties, are required to select their candidates for most offices through primary elections. EL §8-202. Until recently, the two principal political parties simply adopted the primary system established by State law. However, we understand that the Democratic party has changed its rules to allow 17-year olds to vote in its primary election if they will be 18 at the time of the general election. You state in your letter that the Republican party is going to make a similar change. Both parties have requested that the SBE allow all individuals who meet the qualifications of EL § 3-102(a) be allowed to register and vote in all elections, including the primary election on February 12, 2008. Thus, both principal political parties have indicated that they wish to open their nomination processes to individuals who will be 18 by the time of the general election even if they are not 18 on the date of the primary.

#### *Analysis*

Maryland law recognizes that the United States Constitution "shall be the Supreme Law of the State ... anything in the Constitution or Law of this State to the contrary notwithstanding." Maryland Declaration of Rights, Article 2. The federal constitution recognizes certain rights possessed by political parties, including First Amendment associational rights. Your request, together with the recent rule changes adopted by the Democratic and Republican parties, requires that we consider those rights in advising how SBE should implement EL §3-102(a).

The Supreme Court has held that political parties have a First Amendment right of association to determine who will participate in "the basic function of selecting the Party's candidates." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986); see also *Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)("[P]artisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments"). The Court has outlined the tests to be applied to state regulation of elections as follows:

The Honorable Jamie Raskin  
December 19, 2007  
Page 4

Regulations that impose severe burdens on association rights must be narrowly tailored to serve a state government interest. ... [W]hen regulations impose lesser burdens, "a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."

*Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005) (citations omitted).

Here, the two principal parties, which are compelled by State law to use the State's primary election apparatus to select their nominees, have indicated that they wish to ensure the participation in that selection process of certain members who will be eligible to vote in the general election — *i.e.*, individuals who will be 18 by the time of the general election but who have not attained that age by the time of the primary. The exclusion of those individuals from the primary undeniably burdens the associational rights of Maryland's political parties. "[I]t is '[t]he moment of choosing the party's nominee' that matters ... for that is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Id.* at 590 (citations omitted); *see also id.* at 599 ("It is here that the parties invite voters to join in selecting their standard bearers. The outcome is pivotal, of course, for it dictates the range of choices available at — and often the presumptive winner of — the general election") (O'Connor, J., concurring).

Under the analysis established by the Supreme Court, a burden on associational rights is weighed against the State interest in the policy that affects those rights. Here, however, it is not necessary to determine whether application of an 18-year old age requirement to primary elections would impose a severe or lesser burden. Under either test, it is my view that no State interest is implicated that would override the parties' rights of association under the First Amendment. Indeed, the General Assembly, in enacting EL § 3-102(a), expressed a legislative policy in favor of permitting such voters to exercise the franchise in the primary — a policy that coincides with the associational interests recently embraced by the parties. The Court of Appeals in *Capozzi* did not articulate a State interest in excluding these voters from the parties' primary elections; rather, it simply applied Article I, §1, of the State Constitution to primary elections. To our knowledge, nothing in the history of Article I, §1, indicates a specific State interest in excluding from primary elections those 17-year olds who will be 18 by the time of the general election. Faced with this conflict between a long-standing legislative enactment, reinforced by the United States Constitution on one hand, and the Court of Appeals' general holding with respect to Article I, §1 of the State Constitution on the other, the new party rules and legislative policy reflected in EL §3-102(a) should be given effect.

The Honorable Jamie Raskin  
December 19, 2007  
Page 5

*Conclusion*

In short, it is my view that, in light of the recent party rule changes that implicate the parties' associational rights under the federal constitution, SBE should implement EL §3-102(a) as it has in the past – by registering and allowing to vote those persons who are at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election.

Sincerely,

Douglas F. Gansler  
Attorney General

cc: State Board of Elections

## DECLARATION OF DONNA DUNCAN

I, Donna Duncan, state as follows:

1. I am over the age of 18 and am competent to be a witness.
2. I am the Director of the Election Management Division for the Maryland State Board of Elections ("State Board"). In that capacity, I am responsible for supervising the design of the ballots for the February 12, 2008 primary. In Maryland there are two methods of voting: the AccuVote Touchscreen Direct Recording Electronic (DRE) units for polling place voting; and paper Optical Scan (OS) ballots for absentee and provisional voting.
3. A ballot style is a unique set of candidates and/or ballot questions for a certain group of voters. Nearly 100 separate ballot styles in the State have been created for the February primary. Approximately 17,000 DRE units will be used in the upcoming primary statewide; voter access cards must be created for each unit to reflect each of the ballot styles used in the jurisdiction in which the unit will be deployed.
4. The process of ballot design follows a carefully planned schedule which cannot be disturbed without causing significant confusion and jeopardizing the integrity of the election. A specialized ballot programmer is contracted to come to Maryland for a scheduled period of time to design and produce each of the ballots. The programmer performs this function for many states and is only available for the scheduled period of



time. This schedule is established up to a year in advance. Outside of the existing contract, the 2008 rate of pay for this person is \$200.00 per hour.

5. On December 19, data was loaded into the election management system (GEMS) and ballots styles were generated assigning a unique number to each ballot style. Thus, on the same day that the Attorney General recommended that 17 year olds who would be 18 by the date of the general election ("17 year olds") and who are affiliated with a principal political party be permitted to vote in the primary, a crucial step in the schedule had already been completed. After these numbers were assigned, the numbers were exported from GEMS to other software applications such as MDVoters, the computerized voter registration system, and used throughout the election administration process to properly identify the correct ballot for a particular voter and to determine the number of printed ballots to order.

6. On December 20, the first set of ballot proofs were distributed to the local boards of election, and the same ballot data was transmitted to an audio recording studio for final preparation of the ballot data bases. The final ballot data base must include audio reading of all offices and candidates as well as operational instructions to allow blind and visually-impaired voters to vote on the DRE units. A Maryland primary ballot is designed to contain both party primary and the nonpartisan contests.

7. On December 28, the local boards of election received electronic copies of the touch screen ballots for printing the specimen ballot mailed out to voters or for other

printed notices of election and the OS ballots to be faxed to military and overseas voters. These ballots are also used in the program to assist nursing home residents to cast their absentee ballots or for voters that may require a ballot prior to the local boards of election receiving the printed OS ballots.

8. During the first two weeks of January, final ballot data bases for the DREs were distributed to the local boards to enable the boards to begin creating the voter access cards for each of the 17,000 units. During the first week of January, the company responsible for printing was given the ballot styles and directed to begin printing the OS ballots. On January 14, the local boards began testing the DREs loaded with these ballot styles for logic and accuracy.

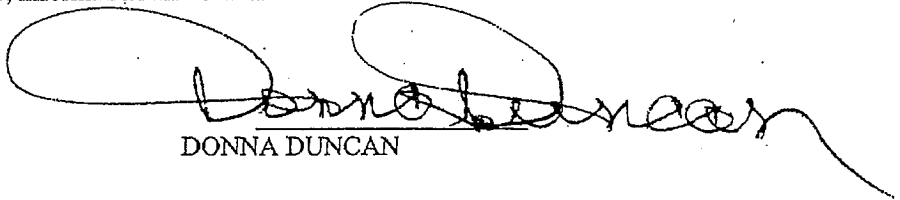
10. Because the ballot styles do not separate races in which a 17 year old voter is eligible to participate, new ballot styles which separate party and nonpartisan races would have to be created. Yet, by December 19, 2007, the date of the Attorney General's advice letter, it was already too late to create these new ballot styles without disrupting the schedule and orderly election preparation.

11. As a result of the Attorney General's December 19, 2007, advice letter and his Office's January 3, 2008, clarification of that advice as applied to nonpartisan races, the State Board decided to permit the 17 year olds to vote by provisional ballots using the printed OS paper ballots. If a voter is eligible to vote in a particular race, the ballot is counted just as fully as a vote from a DRE unit. However, because a ballot is sealed in

the envelope of an identifiable voter, the canvassing board can determine if the voter is eligible to vote in the nonpartisan races and ensure that only those votes that the 17 year old is eligible to cast will be counted. This ability to exclude votes in particular races does not exist if the 17 year old votes on the DRE, where the ballot style combines the party and nonpartisan races.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of knowledge, information and belief.

1/20/08  
Dated:

  
DONNA DUNCAN

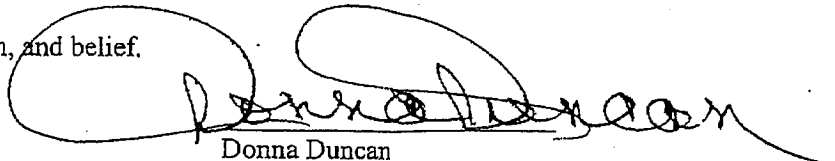
SECOND DECLARATION OF DONNA DUNCAN

I, Donna Duncan, state as follows:

1. I am over the age of 18 and am competent to be a witness.
2. I wish to make an additional declaration to discuss the feasibility of reprogramming the electronic pollbooks to permit 17-year olds who will be 18 by the general election to vote on the electronic voting units. As I explain in the next paragraph, it is simply impossible to do so before February 12, 2008.
3. In order to vote on an electronic voting unit, a voter access card has to be encoded for the voter after he checks in to vote. Currently, voter access cards are encoded by the electronic pollbooks. The programming and database for the electronic pollbooks was finalized on January 28, 2008, and sent to the local boards of elections for loading onto the pollbooks on February 1, 2008. The pollbooks will be programmed so that the 17-year olds can only receive a provisional ballot, not a voter access card. The only option that would allow 17-year olds to vote on the electronic voting units is to reprogram the pollbooks.
4. This option is administratively infeasible because it will require: reprogramming the pollbooks to allow the 17-year olds to vote on electronic voting unit; testing the programming changes, including detailed logic and accuracy testing; redistributing the database to the local boards of election; and reloading the database and programming changes on 1300 pollbooks.

I solemnly affirm under the penalties of perjury that the contents of this declaration are true to the best of my knowledge, information, and belief.

1/30/08  
Dated

  
Donna Duncan

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR.           \*  
on behalf of  
Carl Philip Snyder, his son       \*

PLAINTIFF                       \*

versus                           \*       Civil Action No. C-08-128760

STATE BOARD OF ELECTIONS       \*

DEFENDANT                     \*

\*\*\*\*\*

**ORDER**

Having considered Defendant's Motion to Dismiss or for Summary Judgment, and the opposition thereto it is **ORDERED** this \_\_\_ day of \_\_\_\_\_, 2008, that the Motion is **GRANTED** and:

1. The Complaint is **DISMISSED**; or
2. Summary Judgment is entered on behalf of Defendant State Board of Elections.

\_\_\_\_\_  
Circuit Court for Anne  
Arundel County

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR.  
on behalf of  
Carl Philip Snyder, his son  
PLAINTIFF

Versus

STATE BOARD OF ELECTIONS  
DEFENDANT

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

CIVIL  
ACTION

02-C-08-128760

\*\*\*\*\*

OPPOSITION TO DEFENDANT'S MOTION TO  
DISMISS OR FOR SUMMARY JUDGMENT

Plaintiff opposes Defendant's Motion to Dismiss or for  
Summary Judgment and cites in support of this Opposition a paper  
entitled "Brief to the Court" mailed on January 29, 2008 by Plaintiff  
to the Clerk for filing in this case.

Respectfully submitted,

---

Clifford E. Snyder, Jr.  
Plaintiff  
4964 Flossie Avenue  
Frederick, MD 21703  
(301) 473-5408

CERTIFICATE OF SERVICE

I hereby certify that on this day, January 30, 2008, I mailed, postage  
prepaid, a copy of the foregoing to Mark J. Davis, Esquire, Office of the Attorney  
General, 200 Saint Paul Place, Baltimore, MD 21202 and also transmitted a copy

to Mr. Davis by e-mail.

---

Clifford E. Snyder, Jr.

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

----- x	
CLIFFORD E. SNYDER, JR. and	:
RICHARD BOLTUCK,	:
	:
Plaintiffs;	: Civil Nos. C-08-128755
	: C-08-128760
	:
v.	:
	:
STATE BOARD OF ELECTIONS,	:
	:
Defendants.	: Annapolis, Maryland
	:
----- x	
	February 1, 2008

**HEARING**

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAUL A. HACKNER, Judge

APPEARANCES:

FOR THE PLAINTIFFS:

JONATHAN SHURBERG, Esq.  
8720 Georgia Avenue  
Suite 700  
Silver Spring, Maryland 20910

FOR THE DEFENDANTS:

MARK DAVIS, Esq.  
AUSTIN SCHLICK, Esq.  
Attorney General's Office  
200 St. Paul Street, 20<sup>th</sup> Floor  
Baltimore, Maryland 21202

*CompuScribe*  
(301) 577-5882



I N D E X

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Preliminary matters	4
<u>Arguments:</u>	
by Clifford E. Snyder, Jr., Plaintiff	11
by Jonathan Shurberg, Esq. On behalf of Plaintiff Richard Boltuck	17
by Mark Davis, Esq. On behalf of the Defendant	37
Ruling by Judge Paul A. Hackner	66

KEYNOTE: "----" Indicates inaudible in transcript.

P R O C E E D I N G S

1  
2 THE CLERK: All rise.

3 THE COURT: Good morning, please be seated. Court  
4 is going to call two cases that are set for a hearing this  
5 morning. Richard Boltuck, et al. versus the State Board of  
6 Elections, C-08-128755 and Clifford E. Snyder, Jr., et al.  
7 versus State Board of Elections, C-08-128760. Could I please  
8 ask counsel and the parties to identify yourselves and spell  
9 your last names for the record.

10 MR. SHURBERG: Good morning, Your Honor, Jonathan  
11 Shurberg and the last name is S-h-u-r-b-e-r-g on behalf of  
12 Richard Boltuck who is sitting to my right.

13 THE COURT: All right, good morning sir.

14 MR. BOLTUCK: Richard Boltuck, last name is spelled  
15 B-o-l-t-u-c-k.

16 THE COURT: All right, sir?

17 MR. SNYDER: Good morning, Your Honor, Clifford E.  
18 Snyder, Jr., S-n-y-d-e-r.

19 THE COURT: All right, very good sir. Thank you.  
20 Counsel, good morning.

21 MR. DAVIS: Good morning, Your Honor, Mark Davis,  
22 D-a-v-i-s, Assistant Attorney General on behalf of Defendant,  
23 State Board of Elections, with me is Luna Lamone, the  
24 administrator on the State Board.

25 THE COURT: All right, good morning.

1 MS. LAMONE: Good morning.

2 THE COURT: I guess we can address a couple --

3 MR. DAVIS: And --

4 THE COURT: Oh, I am sorry, I am sorry. I thought  
5 he was just going to ignore you.

6 MR. SCHLICK: Austin A-u-s-t-i-n Schlick  
7 S-c-h-l-i-c-k, Office of Attorney General on behalf of the  
8 Defendant State Board.

9 THE COURT: All right, thank you very much sir. I  
10 guess as a preliminary matter, we have two cases and I gather  
11 there is no objection to consolidating them, is that correct?  
12 Both parties are in agreement with that?

13 MR. SNYDER: That is correct, Your Honor.

14 MR. SHURBERG: Yes, Your Honor.

15 THE COURT: That is agreeable to the State Board as  
16 well?

17 MR. DAVIS: Correct.

18 THE COURT: So, the Court has, I think there is an  
19 order in the file and I will assign it consolidating the  
20 matter and I am not sure whether there is likely to be any  
21 additional pleadings filed from this point on. I suppose we  
22 should indicate a main case, exactly. I am just trying to  
23 figure out whether -- how do you all refer to this? What is  
24 your preference, it doesn't matter to me. Do you want to  
25 call it the Snyder case or the Boltuck case?

1 MR. SHURBERG: We have no preference Your Honor. I  
2 think Snyder appears on the top of the caption.

3 THE COURT: For that reason and no other reason, we  
4 will call that the main case. So, any pleadings that get  
5 filed should be filed in that Court file, okay? I apologize,  
6 I am sorry, I am fighting something that is going to keep me  
7 coughing here while we are at it. Mr. Shurberg, are you  
8 going to be representing both of the parties or just one, or  
9 how does that work?

10 MR. SHURBERG: I am not, Your Honor. I am  
11 representing Mr. Boltuck. I have met Mr. Snyder before,  
12 however, he has elected to represent himself before Your  
13 Honor here this morning. Your Honor, if I may, just so I am  
14 complete, if I may approach the Clerk I have a line entering  
15 my appearance and a hard copy of the memorandum that was sent  
16 by email to the Court administrator and if I may just  
17 approach?

18 THE COURT: Yes, sure.

19 MR. SHURBERG: Those have been served on the State  
20 Board of Elections.

21 MR. DAVIS: Your Honor, I would like to follow him  
22 and give the Court opposition to the Defendant's motion to  
23 dismiss or for summary judgment.

24 THE COURT: All right, you are welcome to give it  
25 up to the Clerk.

1 MR. DAVIS: As well as the brief to the Court.  
2 Both of these, at least the brief to the Court was sent  
3 earlier but may not have reached the Clerk in time for  
4 filing.

5 THE COURT: Okay, well, I am going to tell you in a  
6 minute what I have received and we will see what we have.  
7 What I have received as of yesterday was the opposition to  
8 the Defendant's motion to dismiss or for summary judgment  
9 filed by Mr. Snyder and his brief. I have received the  
10 Defendant's motion to dismiss or motion for summary judgment,  
11 the alternative filed on behalf of the Board in both of the  
12 cases. Did you file a pleading today other than your entry  
13 of appearance?

14 MR. SHURBERG: I did, Your Honor and that was sent  
15 by email to Mr. Sheridan, I believe, the night before last  
16 which was a memorandum in support of Plaintiff's complaint  
17 under section 12-202 of the Election Articles, the captioned  
18 title.

19 THE COURT: Well, I got this case assigned to me  
20 yesterday and as of 4:30 yesterday I asked my Clerk to call  
21 and make sure there wasn't another pleading floating around  
22 the building and I was assured that I had everything there  
23 was supposed to be. So, I have not seen your pleading and I  
24 don't want to put you at a disadvantage but, I am happy to do  
25 whatever you would like. If you want to make your argument

1 before or after I take a look at it. I am happy to just take  
2 a break and look at it. I don't want to put you in a  
3 position where I don't have the benefit of your --

4 MR. SHURBERG: Your Honor, I am not suggesting  
5 anything, I just want to make the record clear. I don't have  
6 a copy of the email with me but I did send it to Tim Sheridan  
7 to Mr. Snyder and to Mr. Davis. My recollection is it was  
8 about five after six on Wednesday evening, January 30, 2008  
9 and I am saying that for the record, not suggesting --

10 THE COURT: I don't doubt for a minute that you did  
11 it, I am just telling you --

12 MR. SHURBERG: And I did not receive any indication  
13 via my email that it had bounced back, that it had not been  
14 delivered. So, Your Honor, what I would respectfully request  
15 is that I would like you to take the opportunity to read my  
16 memorandum because I think it adds --  
17 well, to say I think it takes a little bit of a different  
18 approach than does either of the other pleadings.

19 THE COURT: Well, I would like to do that and I  
20 will take the liberty of turning page 10 upside down.

21 MR. SHURBERG: Yes, Your Honor, I noticed that this  
22 morning and I didn't have a staple remover. I noticed that  
23 in the car as I was reading it and I apologize. On all my  
24 copies it was right, there is a long story behind it and I  
25 won't bore the Court with it, but I apologize for that.

1 THE COURT: Let me take a brief recess then because  
2 I do want to have the benefit of the memorandum before I hear  
3 argument and I am sorry that I did not get it earlier but,  
4 like I said, I had the forethought of asking around the  
5 building but I was told I had everything there was. So, I  
6 will excuse myself.

7 THE CLERK: All rise.

8 (Whereupon, a brief recess was taken.)

9 THE CLERK: All rise.

10 THE COURT: Thank you, be seated please. I am  
11 going to recall the matter of Clifford Snyder, et al. versus  
12 State Board of Elections, C-08-128760, which has been  
13 consolidated with Richard Boltuck, et al. versus State Board  
14 of Elections, C-08-128755. Would you identify yourselves  
15 again please? I am sorry to make you do that again.

16 MR. SHURBERG: Good morning, Your Honor, Jonathan  
17 Shurberg on behalf of Plaintiff Richard Boltuck.

18 MR. BOLTUCK: Plaintiff Richard Boltuck.

19 MR. SNYDER: Plaintiff Clifford E. Snyder, Jr.,  
20 here on behalf of Carl Phillip Snyder, my son.

21 MR. DAVIS: Mark Davis, Assistant Attorney General  
22 on behalf of the State Board of Elections.

23 MR. SCHLICK: Austin Schlick, Office of the  
24 Attorney General on behalf of the State Board.

25 THE COURT: All right. Now, I have had the

1 opportunity to read the memorandum that was submitted on  
2 behalf of the Plaintiff Boltuck and I appreciate you giving  
3 me the time to do that. I am happy to hear the argument.  
4 Let me just make a couple other housekeeping observations.  
5 Am I correct in assuming that everyone is in agreement that  
6 there are no disputes of fact material to this case? That  
7 all the facts are agreed upon and that this case is in the  
8 posture where the Court could grant a conclusive decision one  
9 way or the other. Are we in agreement on the Plaintiff's  
10 side?

11 MR. SHURBERG: Certainly, on behalf of Plaintiff  
12 Boltuck. I don't want to speak for anyone else.

13 MR. SNYDER: Yes, Your Honor.

14 MR. DAVIS: Yes, Your Honor.

15 THE COURT: Okay, fine. I just want to make sure  
16 that no one felt there was a factual dispute that needed to  
17 be resolved in this case.

18 MR. SHURBERG: Your Honor, if I may just  
19 procedurally, in the event that this matter goes further  
20 which I have a feeling it probably will.

21 THE COURT: I suspect, yes.

22 MR. SHURBERG: I would ask Your Honor, and just for  
23 the record, since we all submitted sort of simultaneously and  
24 sort of -- it was not a case where a motion was filed and an  
25 opposition was filed, I would ask Your Honor to treat the



1 memorandum that you have now had the opportunity to read as  
2 two things, even though it is not captioned as such.

3 I would ask you to treat it as an opposition to the  
4 State Board's motion to dismiss or in the alternative for  
5 motion for summary judgment. Secondly, I would ask you to  
6 treat it as a cross motion for summary judgment on behalf of  
7 the Plaintiff for the reasons, Your Honor, as just stated  
8 that there really are no disputes. But, I just want the  
9 record to be clear that we are proceeding it essentially on  
10 cross motions for either to dismiss or for summary judgment  
11 filed by both sides.

12 THE COURT: Fine. Any objections from State on  
13 that?

14 MR. DAVIS: No objections.

15 THE COURT: All right, very good. Well, then let's  
16 begin with Plaintiff's arguments and I am happy to begin with  
17 either side. If you would like to start with Mr. Shurberg?

18 MR. SHURBERG: Your Honor, I will defer to  
19 Mr. Snyder initially.

20 THE COURT: All right, Mr. Snyder if you would like  
21 to address the Court first, you are welcome to. You can do  
22 it from there or from the podium, wherever you are more  
23 comfortable is fine.

24 MR. SNYDER: Well, thank you, Your Honor.

25 THE COURT: But, the one thing I want you to do is

1 not walk around here because otherwise the microphone will  
2 not pick up your voice. So, just pick a spot anywhere in the  
3 building and just go at it. Thank you, sir.

4 MR. SNYDER: All right, Your Honor. Good morning,  
5 my name is Clifford Snyder, Jr. I am the father of Carl  
6 Phillip Snyder. He suffers the disability of infancy and  
7 that is why I am here as the Plaintiff.

8 I would like to start out by thanking Richard  
9 Boltuck for his attention to voting rights and, of course,  
10 his attorney Jonathan Shurberg. I would also like to thank  
11 Mark Davis from the State Board of Elections council for  
12 helping us get a hearing this morning. He did help advance  
13 this case. He has been more than fair so, I really  
14 appreciate that.

15 Your Honor, what I have this morning is a little  
16 bit of a statement about the posture and then I have what I  
17 have counted as seven points I would like to make. Of  
18 course, I submitted the brief to the Clerk. It will take me  
19 10 to 15 minutes, I believe to go through this.

20 THE COURT: That is fine.

21 MR. SNYDER: All right, thank you. Now, Your Honor  
22 I am here defending my son's right to vote from attack by the  
23 State Board of Elections and its counsel, the Attorney  
24 General of Maryland. I am also here defending provisions of  
25 the election law article from attack by the Attorney General,

1 quite an interesting posture.

2 Now, what is the Attorney General using to attack  
3 my son's right to vote? Is it the election law article,  
4 positive, enacted, statutory law? No, Your Honor, it is not.  
5 Is it a Court decision that involved a dispute over voting by  
6 persons under the age of 18 years? No, Your Honor, it is  
7 not. This appears to be a case of first impression where  
8 what is at issue, clearly at issue, is the right of persons  
9 under the age of 18 to vote.

10 Now, what the State Board of Elections and counsel  
11 are using against my son's right to vote is an interpretation  
12 of article 1 section 1 of the Maryland constitution. It's  
13 not my interpretation. I submit it's not a correct  
14 interpretation and I hope that it doesn't turn out to be the  
15 Court's interpretation.

16 Now, I will proceed to the major points. You  
17 cannot view, one cannot properly view, article 1 section 1 of  
18 the constitution in isolation. It doesn't say everything  
19 there is to say about election law or the relevant  
20 constitutional provisions. In particular, one must take a  
21 look at article 1 section 2 which empowers the General  
22 Assembly to provide for the registration of qualified voters.

23 So, when you look at article 1 section 1, look at  
24 what follows, article 1 section 2. Also, take a look at the  
25 26<sup>th</sup> Amendment to the United States Constitution which says

1 that 18 year olds must be allowed to vote.

2 Now, it is an interesting feature of Maryland's  
3 election system that Maryland uses a registration procedure  
4 followed by an election. It is a matter of pure logic, as I  
5 see it, that if 18 year olds are to be allowed to vote  
6 guaranteed by the U.S. Constitution persons younger than 18  
7 must be registered. Unless there is some sort of  
8 instantaneous registration, which apparently is not possible  
9 and certainly isn't a feature of Maryland's election system.

10 So, I submit that Maryland has to allow persons  
11 under 18 to register to vote because Maryland has chosen to  
12 use a registration system. Article 2 section 2 of the  
13 Maryland constitution says that a registered voter is allowed  
14 to vote in all succeeding elections. Carl Snyder, my son,  
15 was a registered voter, is a registered voter, and he is  
16 allowed to vote in the primary both in the Democratic party  
17 primary and in the non-partisan election, which is at issue  
18 here in Frederick County at the Board of Education.

19 I would like the Court to take a careful look at  
20 the language of article 1 section 1. It does not say to me  
21 that persons under 18 cannot vote. It does not have  
22 prohibitory language. When I was reading the U.S.  
23 Constitution, and I was looking for something that was  
24 relevant, I looked at article 2 section 1 clause 5 of the  
25 U.S. Constitution which specifies that the President must be

1 35 years old. Now, that is the kind of language I expect to  
2 see -- the U.S. Constitution, the prohibitory language,  
3 therein is the kind of language that I look for if Maryland's  
4 constitution intends to prohibit my son from voting, and it's  
5 not there. A Court or someone else would have to read a  
6 prohibitory intent or prohibitory meaning in the absence of  
7 prohibitory words.

8 I do want to be clear, and I think I have already  
9 made this point, I will repeat. Carl met the registration  
10 requirements of the election law article section 3-102. He  
11 met them in May 2007, he was registered to vote and he has  
12 not been in any way disqualified from voting.

13 Let's also be clear that section 8-802 of the  
14 election law article, it deals specifically with the Board of  
15 Education contests. It says very explicitly that any  
16 registered voter, any registered voter, now Carl is a  
17 registered voter, regardless of party affiliation, regardless  
18 of party affiliation, or lack of party affiliation is  
19 eligible to vote in the primary election. Again, there is  
20 really no dispute that everything that Carl has sought by  
21 registration and is seeking in Court, he is entitled to under  
22 the positive enacted statutory law of Maryland.

23 Which brings us to the question, given Carl's  
24 status how can the State of Maryland keep him from voting?  
25 This is the first time that Carl has really had a hearing,

1 particularly on this issue and I have to ask this question,  
2 is the right to vote in Maryland so uncertain that it can  
3 properly be changed as to Carl's status twice since May 2007  
4 without any change in statutory law and without any judicial  
5 determination of a dispute involving voting age? Recall,  
6 Carl was registered in May 2007 and eligible to vote under  
7 article 2 section 2 of the Maryland constitution and, at any  
8 election thereafter held.

9           The first change in his status was one that Carl  
10 found out and I found out by reading in the Washington Post  
11 an article written by Mr. Boltuck. December 2<sup>nd</sup> is when I  
12 first learned that my son's right to vote in the primary had  
13 been stripped from him. No communications from the State  
14 Board of Elections prior to that point.

15           The second change was that following the State  
16 Board of Elections change in policy on or about December 20<sup>th</sup>  
17 a couple of weeks thereafter following staff inquiry at the  
18 State Board of Elections, the policy says, now says, that  
19 Carl can vote in the Democratic party primary but he cannot  
20 vote in a non-partisan election.

21           So, he started out as a registered voter, his  
22 status was changed to deny him a vote in the primary at all,  
23 either partisan or non-partisan, then it changed to allow  
24 him to vote in the partisan but not in the non-partisan  
25 primary. There have been two changes in his status without

1 any change in law and without any case directly on point.

2 I would like to conclude by saying that Carl's  
3 right to vote in the primary, on February the 12<sup>th</sup>, has never,  
4 I repeat, never depended on the associational rights of the  
5 Democratic party. When the Court looks at article 1  
6 section 1 of the Maryland constitution, article 1 section 2  
7 of the Maryland constitution and at the 26<sup>th</sup> Amendment to the  
8 United States Constitution, Carl is entitled to vote. One  
9 need not invoke the theory of associational rights to vote in  
10 the Democratic party. He had that right independently of  
11 associational rights. Because of that, it does not matter  
12 one wit that what is at issue here is a non-partisan primary.

13 Your Honor, I request that you deny the Defendant's  
14 motion to dismiss. I request that you grant my motion for  
15 summary judgment. I ask that you enter judgment on my behalf  
16 and order the State Board to permit Carl to vote for the  
17 Board of Education candidates and since it appears to be  
18 impossible to reprogram the voting machines at this step,  
19 it's okay if Carl has to use a provisional ballot.

20 So, the relief I am asking is an injunction  
21 ordering the State Board of Elections to allow Carl to vote  
22 on all issues on the ballot in Frederick County including the  
23 Board of Education primary. Thank you.

24 THE COURT: Thank you, sir. Do you want to hear  
25 argument from both Plaintiffs and then address them both or

1 do you want --

2 MR. SHURBERG: That would be acceptable, Your  
3 Honor.

4 THE COURT: All right, Mr. Shurberg.

5 MR. SHURBERG: Your Honor, I will try very hard not  
6 to repeat things that Mr. Snyder said because I agree with  
7 him in total so, I will try not to and if you find me doing  
8 that, please do not hesitate to tell me.

9 This interpretation of the statute that Mr. Snyder  
10 has set forth, and that I agree with, is, in fact, one that  
11 has stood for more than 40 years. As far as I can tell, it's  
12 a little bit hard to tell exactly when this statute was  
13 enacted because things are enacted and re-enacted but it has  
14 been going on for a long time and nobody in any of that time  
15 has ever said, hey, wait a minute, this doesn't work. In  
16 fact, nobody with the authority to come before Your Honor is  
17 even making it today.

18 What has happened is, is that, and I mentioned in  
19 my brief Your Honor, the case of the Burning Tree case which  
20 is that the Attorney General does not have the power to come  
21 before Your Honor or any other Judge and say, we think this  
22 statute is unconstitutional, please declare it so and we will  
23 go on with our business. The Court of Appeals said, you  
24 don't have the power to do that in 1984, that is some 23, 24  
25 years ago.



1 I submit that what has been done in this case is a  
2 step more egregious than coming before Your Honor and saying,  
3 please declare the statute unconstitutional. They did it  
4 themselves. They just said, we are not going to enforce this  
5 statute anymore, we are not going to apply this statute  
6 anymore and if you look at Exhibit 1, Your Honor, which is  
7 the original memorandum from Mr. Davis and it is the next to  
8 last page, excuse me, where it says "voter registration."

9 Not only are they refusing to enforce the statute,  
10 they are amending it. The memorandum reads, "The statute  
11 should be amended." What in the world is the Attorney  
12 General of Maryland doing, a) not doing what it was told to  
13 do in Burning Tree, which is, an order to promote and protect  
14 the State's policies, determinations and rights.

15 Among those policies, determinations, and rights is  
16 the election law code and it says that a person who will be  
17 18 by the next general election, shall be entitled to  
18 register and there is a separate section of the code that  
19 says once you are registered you get to vote. That is pretty  
20 clear.

21 It is the State's Attorney General's office's job  
22 to defend that. Respectfully, we are standing here,  
23 Mr. Snyder and I, doing the job that the Court of Appeals has  
24 told the Attorney General they ought to be doing. What they  
25 have done here, Your Honor, I submit and I don't want to be

1 flippanant in any way is, they have created a solution for  
2 which there is no problem. This is not, I submit Lamone  
3 versus Capozzi where a voter, Capozzi, came forward and went  
4 before a Court and said, I believe that early voting is  
5 unconstitutional. That is the quintessential situation when  
6 it comes before a Court.

7           Who is the voter here who is saying, I believe  
8 allowing 17 year olds, who will be 18 by the general  
9 election, but not by the primary to still vote in the  
10 primary? Who is saying that? Nobody is saying that.  
11 Attorney General is simply saying, well, we are going to be a  
12 roving truth squad and we are going to look through the  
13 statutes and see that there might be a statute that is  
14 unconstitutional and we are going to rewrite it and we are  
15 going to tell the State Board of Elections not to enforce it.  
16 That is not their job, Your Honor.

17           The job of determining whether a statute is  
18 constitutional or not and whether it ought to be applied, is  
19 not the Executive Branch and the Attorney General, it is your  
20 job, Your Honor. It is the Court of Appeals and the Court of  
21 Special Appeals and all the Judges of the state. I feel a  
22 little foolish standing here, I mean, that is one of the  
23 first things we learn in constitutional law is the executive  
24 applies to law, the legislature passes the law and the  
25 judiciary interprets and applies the law.

1 Well, the Attorney General here has sought to say,  
2 well, we are going to take the law that the legislature  
3 passed, we are going to rewrite it and we are going to not  
4 apply it as it is written.

5 When this first came to me my thought was, wait a  
6 minute. Marbury versus Madison, all the cases, if not the  
7 exclusive it is the primary function of the judiciary to  
8 determine what is the law and if the Attorney General cannot  
9 come before Your Honor and ask Your Honor to say that a law  
10 is unconstitutional certainly they cannot just unilaterally  
11 say it's unconstitutional and refuse to apply it. So, I  
12 think that is something we need to keep in mind here, Your  
13 Honor, is --

14 THE COURT: Well, it is not the Attorney General  
15 that is refusing to allow your client's --

16 MR. SHURBERG: It is the State Board of Elections,  
17 excuse me, Your Honor.

18 THE COURT: They have a client.

19 MR. SHURBERG: On the advice of the Attorney  
20 General.

21 THE COURT: Isn't that what the AG is supposed to  
22 do, is advise their client whether depending it is right or  
23 wrong is a different issue. I am not sure that I necessarily  
24 would elevate their advice to their client to be some ultra  
25 virus act on their part.

1 MR. SHURBERG: Well, Your Honor, they have to give  
2 advice but their purpose is to defend the policy's rights and  
3 determinations of the State of Maryland. One of those groups  
4 that does that is the General Assembly. The General Assembly  
5 passes laws. The General Assembly passed a law here, this is  
6 not a question simply of constitutional interpretation, for  
7 example, me saying, we have a right, they say, no, you don't.  
8 That is a different question. This is a situation where they  
9 unilaterally undertook to, in their own words, amend the  
10 statute to put in a word that is not there.

11 THE COURT: Well, they didn't amend the statute,  
12 they wrote a letter to their client saying, now that we have  
13 read Capozzi, Lamone versus Capozzi, we are of the opinion  
14 that the Court of Appeals means the article 1 section 1  
15 strictures on voting to apply to primaries as well as  
16 generals, primary elections as well as general elections, and  
17 therefore it is our opinion that the statute is inconsistent  
18 with it and therefore, the statute ought to be fixed. Isn't  
19 that what every lawyer would tell every client if that is  
20 what they believe?

21 MR. SHURBERG: Then go to the General Assembly and  
22 ask them to fix the statute.

23 THE COURT: That is what they were recommending.

24 MR. SHURBERG: Well, what they have done Your  
25 Honor, is not go to the General Assembly and say, fix the

1 statute, they told the State Board of Elections, their  
2 client, to interpret the statute as if it had words in it  
3 that it doesn't have.

4 THE COURT: Okay, we may be a little bit off on a  
5 tangent but I just --

6 MR. SHURBERG: And I was thinking the same thing,  
7 Your Honor. I raise the point because I think it is rather  
8 extraordinary for the Attorney General to not be making the  
9 argument that, quite frankly, I am making.

10 THE COURT: I don't know if it is extraordinary but  
11 it is unusual.

12 MR. SHURBERG: And it is the Plaintiffs, private  
13 citizens, who are defending the prerogative of the General  
14 Assembly as against the state. Another state agency was  
15 essentially saying, they weren't supposed to do that and at  
16 that point, Your Honor, I will move to the merits.

17 THE COURT: I appreciate the irony of your being in  
18 that position.

19 MR. SHURBERG: Your Honor, let me talk about  
20 Capozzi for a minute. Capozzi was a decision that dealt with  
21 the time, the place, the manner of voting. It did not deal  
22 with who may vote, it dealt with how those who are entitled  
23 to vote may vote. It is not a situation where one group of  
24 voters was eligible to vote and they tried to make a new  
25 group of people eligible to vote. I think that is an

1 important distinction, Your Honor because speaking the  
2 language of Capozzi which said, "You must strictly follow the  
3 constitution as to how voting is held," where, when, in what  
4 wards, in what election districts is a far different issue  
5 constitutionally from them saying based on that decision,  
6 which did not address age or who may vote in any way, shape,  
7 or fashion, to them saying, we are now going to exclude an  
8 entire class of people.

9 Your Honor, originally we were talking about 50,000  
10 voters in the State of Maryland before the Attorney General  
11 modified his advice in December to allow voters to vote in  
12 the partisan primary. We were talking about 50,000 voters  
13 being excluded from voting. That is a significant  
14 constitutional issue.

15 Your Honor has had a chance to look at the brief,  
16 see what justice Blackman wrote in it and that is one of  
17 probably thousands of similar sentiments. Voting is  
18 fundamental.

19 The right to vote is one that is -- everything else  
20 comes out of that. If you can't vote, if your vote is  
21 hobbled, if your vote is restricted improperly then you  
22 basically are upsetting the entire foundation of the society  
23 we like to think we live in. Capozzi doesn't deal with any  
24 of those issues. The Court of Appeals wasn't faced with any  
25 of those issues.

1           So, I think you have to keep that in mind in terms  
2 of simply looking at the language. It was dealing with one  
3 set of issues that were facing it and it decided those  
4 issues.

5           So, I would submit that the statute, as we have  
6 argued in the brief Your Honor, is, in fact, not inconsistent  
7 with the constitution because the constitution simply says  
8 that those who will be the age of 18 and upwards shall be  
9 entitled to vote. It does not say when that determination is  
10 to be made. It does not say how that determination is to be  
11 made and particularly for the issues that we are dealing  
12 within this case, Your Honor, we are dealing with a situation  
13 where we are not dealing with parties, we are dealing with  
14 simply taking a certain number of candidates and winnowing  
15 them down from a certain number to a smaller number.

16           If there is one Board of Education seat available,  
17 you are going to take the top two vote getters and in the  
18 primary you are going to move them forward to the general.  
19 If you have three seats available you are going to take the  
20 top six people and you are going to move them into the  
21 general election.

22           So, this is different. I submit as we have said in  
23 the brief, from a party primary which is who is going to be  
24 the standard bearer of that party. I submit that the  
25 determination by the General Assembly was a proper one, a

1 reasonable one. It was not inconsistent with article 1  
2 section 1. It is one that is expansive of voting rights and,  
3 Your Honor, let me just note parenthetically that after I  
4 wrote this I looked to see if there were other states that  
5 had similar constitutional language and a similar statute to  
6 this. I was told there were a number of them.

7 I was able to find one and the state that I found,  
8 Your Honor, was the State of Mississippi that uses the  
9 upwards of 18, 18 and upwards, uses the same age  
10 qualification and has a statute that allows for voting in a  
11 primary even though one is not 18 but will be 18 before the  
12 general election. It is a little more detailed than  
13 Maryland's, it goes into a little more specifics than  
14 Maryland's.

15 That statute has been on the books as far as I can  
16 tell for over 50 years in the State of Mississippi. It has  
17 never been challenged. With all due respect to anyone who  
18 might be from the State of Mississippi, it is not a state  
19 exactly noted for people not being willing to challenge  
20 voting rights for any number of different reasons over the  
21 last 50 years.

22 Election litigation in the deep South, as we know,  
23 is something that comes up all the time. If people believed  
24 that that statute was unconstitutional and wanted to  
25 disenfranchise people, they have had a long time to do it and



1 there has never been a case. At least, certainly not a case  
2 at the appellate level that I could find that was reported.  
3 If Your Honor would like to look at the statute, I did bring  
4 a copy of it.

5 I think materially speaking, identical language in  
6 the constitution and a statute that accomplishes precisely  
7 the same purpose is Maryland's and it has never been  
8 challenged. I submit as I did earlier that we are not even  
9 being challenged here today.

10 Now, I want to agree and I want to sort of stress  
11 my agreement with Mr. Snyder on one point. The language of  
12 the constitution does not say, as some state constitutions  
13 do, you must be 18 to vote. The language of our constitution  
14 says, "Citizens of the age of 18 or upwards," and I am  
15 striking out some of the words here, "Shall be entitled to  
16 vote." It does not say, you must be 18 to vote. It says,  
17 "Citizens who are 18 shall be entitled to vote."

18 So, there is the suggestion that not necessarily as  
19 the Court of Appeals said in Capozzi, a 12 year old Virginia  
20 non-citizen can come in and vote in a primary but certainly  
21 that the legislature can within reason, without doing  
22 violence, if you will, to the constitutional language say  
23 that if we are going to use 18 and we are going to use the  
24 general election date, which I submitted as I said in the  
25 brief, is eminently reasonable, is eminently consistent with

1 the statute to say, well, we are going to let those people  
2 also vote in the primary because the primary is the process  
3 by which we get to the general.

4 In order to get to the general election as a  
5 candidate, whether as a party or in a non-partisan election,  
6 you have to go through the primary and you have to prevail.  
7 So, the question is why, therefore, as a matter of  
8 legislative determination, not inconsistent with the language  
9 of the constitution, should the legislature not be allowed to  
10 say, we are going to let that class of people vote in both  
11 the general and the immediately proceeding primary. Not at  
12 age 12 but at age 17 and, well I think in this case, you are  
13 going to have to be at least 17 and 3 months, or there about,  
14 3 or 4 months.

15 THE COURT: Isn't that just by administrative  
16 happenstance that the registration process is what it is?  
17 What if the registration process were that you have to  
18 register 18 months before the next election, then would you  
19 argue that you could be 16½ and vote at the primaries?

20 MR. SHURBERG: No, because that is not what the  
21 statute says. The statute says, you have to be 18 by the  
22 next election.

23 THE COURT: But the question is whether the statute  
24 and the constitution are at odds with each other. I am  
25 saying under the constitution, under article 1 section 1,

1 would you say that the legislature would have been within its  
2 rights to require, let's say, registration much farther in  
3 advance than they do now and say you could be 16? I am  
4 picking numbers out of thin air obviously, but you could be  
5 16 when you register as long as you are 18 before the general  
6 election.

7 MR. SHURBERG: To register?

8 THE COURT: Yes.

9 MR. SHURBERG: Yes, there is nothing in this  
10 constitution that says anything about a prohibition about  
11 when you can register.

12 In fact, there was a statute that was proposed by  
13 Senator Raskin last legislative session to call for the  
14 allowance of people to register at age 16 so that they would  
15 be registered for whatever election they will then be  
16 eligible for. If you register at 16 but the next election is  
17 when you are 16½, I submit, I don't want to speak for him but  
18 certainly my interpretation would be even though you are  
19 registered, you cannot vote until you are eligible under the  
20 statute which is the general election when you will be 18.

21 THE COURT: Set aside the statute, I am supposing  
22 an instance where the statute says something different  
23 because I am challenging you as to the interpretation of the  
24 constitutional interpretation. You started off by saying  
25 that you agreed with Mr. Snyder's argument and Mr. Snyder's

1 argument, in part, was that if you are properly registered  
2 then ergo you have the right to vote whether it is the  
3 primary or whether it is the general election.

4 MR. SHURBERG: As the statute is currently written.

5 THE COURT: Okay, and I say to you, what if the  
6 statute -- do you feel that the constitution would permit the  
7 legislature to permit registration sooner than 17 and 3  
8 months and then would you follow that with the argument that  
9 therefore, somebody who is 16 should be able to vote or 15,  
10 or 14, or 13?

11 MR. SHURBERG: No, I would not, Your Honor. With  
12 all due respect to Mr. Snyder to the extent that that is his  
13 argument, I would submit that at some point you would do  
14 violence to the constitutional language if you allowed people  
15 to vote in primaries further and further back. You get to  
16 the point, at some point, I think the Court of Appeals  
17 analogies was one of extremist where you go to 12 years old  
18 non-resident --

19 THE COURT: Well, obviously they were picking a  
20 dramatic example but the point is, is it any worse to say  
21 that somebody who is 17½ cannot vote then somebody who is 17  
22 and a third. Isn't there necessarily an arbitrariness about  
23 imposing a birth date requirement?

24 MR. SHURBERG: Not when the person will be eligible  
25 to vote in part of the process, Your Honor, but not the other

1 part. In other words, this legislature I submit has the  
2 power, it has the power to regulate elections, it has the  
3 power to pass laws, to determine how elections will be had.  
4 Capozzi makes it absolutely clear you still have to pay  
5 attention to the constitution, you can't just ignore that  
6 language.

7           However, when you have a primary process -- now  
8 normally, Your Honor, in state elections in 2006 and in 2010,  
9 the primary will not be in February. The primary is in  
10 February this year because of the exigencies of the  
11 presidential primary. Maryland, like every other state  
12 wanted to move it up. It used to be in March, I think in the  
13 past it has been even later than that. In a gubernatorial  
14 election, in the off years, 2006, 2010, 2014, the primaries  
15 are in September, difference between September and November  
16 is relatively minimal.

17           THE COURT: That just happens to be that way.

18           MR. SHURBERG: That just happens to be. Now, at  
19 some point -- let's put it this way, I think we are about as  
20 far back as we can go, I mean, some states are --

21           THE COURT: Well, let's say Maryland wanted to beat  
22 Iowa and New Hampshire to the punch and be the first one on  
23 CNN to predict who the president is going to be. So, then  
24 they would say, well, you know what, we are going to have our  
25 primaries before anybody even thinks about it and then those

1 17 year olds would be that much younger, right?

2 MR. SHURBERG: They will still be 17, Your Honor.

3 THE COURT: Well, I guess you are right.

4 MR. SHURBERG: And they will still be eligible to  
5 vote in the general election. There is only a certain amount  
6 of elasticity that this can have. We cannot go back beyond  
7 the prior election. We cannot hold the 2008 primary in 2005.

8 THE COURT: Okay, I will grant you that.

9 MR. SHURBERG: At some point after the November  
10 2006 election that would have been the earliest possible  
11 time. So, in other words, there is not an infinite  
12 elasticity to we cannot vote today for 2020 fortunately  
13 because otherwise somebody would probably think of it and  
14 decide to go ahead and do it. But, we have to wait for the  
15 one election to be over before we get to the next one.

16 THE COURT: If you set aside for a minute, if you  
17 can compartmentalize the argument a little bit like I would  
18 like to, if you set aside the statute for a minute and you  
19 look strictly at article 1 section 1, I gather you would not  
20 read this to say that a person must be 18 to vote at all  
21 elections.

22 MR. SHURBERG: I would not, Your Honor, for two  
23 reasons. One is the one, very well put forward, by Mr.  
24 Snyder and as I touch on which is that, those who are 18  
25 years or upwards shall be entitled. There are constitutions,

1 it is saying, and I am paraphrasing, they probably don't say  
2 it as bluntly as this, you must be "X" years old to vote.  
3 That would be prohibitory, Your Honor, and I would be  
4 standing here making a different argument if I would be  
5 making any argument at all. But, that is not what the  
6 constitution says, it says, "Those who are 18 shall be  
7 entitled." So, number one, it's not prohibitory.

8 THE COURT: That implies that those who are not 18  
9 may possibly be able to vote? Is that the way you would read  
10 the constitution?

11 MR. SHURBERG: And the second point, Your Honor,  
12 is, let me add on to it because I think they go together, is  
13 it does not say when over the age of 18, when? It doesn't  
14 say.

15 When Mr. Boltuck first came to me I read it four or  
16 five times and I said, this is not a model of perfect  
17 draftsmanship, it was written, I think, originally in 1876, I  
18 think it has been modified a few times so I don't want to  
19 speak ill of the 148 some year old drafters but it does not  
20 say when is the trigger. It could say, and some do, you have  
21 to be 18 by some point slightly before the election, in other  
22 words, for purposes of registration. Some states that have  
23 same day registration or don't have same day registration,  
24 some say you have to be 18 by a date prior to the election.  
25 They spell it out in their constitution. Some say, you must

1 be 18 as of the date of the election to vote. This doesn't  
2 say that.

3 Now, the question is, okay the legislature now has  
4 to apply this because the General Assembly is charged with,  
5 okay we are going to implement this. You can't just leave  
6 this and say, we are done. We need to now pass laws and we  
7 have passed -- the General Assembly has passed an election  
8 law code to implement elections consistent with this.

9 So, as long as one does not do violence to the  
10 constitutional language, the legislature is free within  
11 constitutional bounds. You can't say, as some states did  
12 many years ago, only certain people of a race can vote and  
13 things like that. You can't do that.

14 But, other than constitutional principles the  
15 legislature is free to apply this consistent with the  
16 constitutional language. I submit, as I have written, that  
17 the legislature chose, the General Assembly chose, to use the  
18 date of the general election as the trigger date. I think  
19 that is the most reasonable reading. I think that is the one  
20 that puts things most in harmony.

21 But, what they did Your Honor, is they did it with  
22 a little bit of a twist and I have mentioned it and I will  
23 just touch on it briefly again which is that, that is the  
24 date but we know that there is a primary and that primary is  
25 going to be some amount of time prior to the general



1 election. We don't have instant run off voting. If we did,  
2 quite frankly, we would solve this whole problem and we would  
3 be talking about something else. But, we don't and nobody  
4 does, quite frankly, in terms of primaries.

5 So, we know that there is going to be a period of  
6 time prior to the general election when we are going to have  
7 a primary. Maybe it's September, maybe it's April or May or  
8 March as it used to be, and now it is February. We know  
9 there is some period of time and the legislature, the General  
10 Assembly has said, okay, we are going to use this 18 as the  
11 election date, the general election date as the cutoff but we  
12 are going to also allow those who are eligible at that date,  
13 not some other date, not earlier, to vote in that primary  
14 because we, I submit their rationale was, that we treat these  
15 elections as one process.

16 We go through a primary, we go through a general  
17 and we get a winner. Only one person gets the Board of  
18 Education seat. Only one person gets the House of Delegates  
19 or the State Senate or the Governorship or any other race, or  
20 the Congressional race. Only one person wins. It is one  
21 process that we go through.

22 THE COURT: Do you think the Court of Appeals would  
23 agree with you though given that in Lamone versus Capozzi,  
24 they made it pretty clear that an election is when you go and  
25 you pull the lever, it's not a process. I understand that in

1 a different context but that was the argument made in that  
2 case, was that the whole early voting process was something  
3 that had a beginning and an end that was not necessarily on  
4 the same day.

5 MR. SHURBERG: Well, Your Honor, I think the Court  
6 of Appeals, as I mentioned at the outset, was dealing with  
7 questions of --- manner. How are we going to hold elections?  
8 Now, we are dealing with an issue of who may vote and I think  
9 the Court of Appeals, well, I hope the Court of Appeals, will  
10 look at this in a fundamentally different fashion. Because,  
11 given what has transpired through Exhibit 1 to my brief,  
12 Exhibit 2, Exhibit 3, we now have a class of voters,  
13 approximately 50,000, that every two years, and it may grow  
14 or it may shrink, is going to be introduced to the voting  
15 system by being told, you know what, you get to vote for some  
16 things but not for other things, welcome to the voting  
17 system. I don't think that is what the constitution  
18 intended. I don't think that is what the legislature  
19 intended in 3-102 in the rest of the election law code. I  
20 don't think that is what the Court of Appeals intended in  
21 Capozzi because I don't think the Court of Appeals was faced  
22 with that issue in Capozzi.

23 So, we are going to tell these voters, that is  
24 really not -- I would say by telling the voters that, it is  
25 not exactly making them enthusiastic first time voters. I

1 don't think that is appropriate, number one. Number two, I  
2 don't think it is constitutional.

3 I would submit, Your Honor, that I would defy  
4 anyone -- I looked to find a voting system anywhere in this  
5 country, I am sure we could probably find one somewhere else,  
6 in this country, with our constitution and our laws for the  
7 last 200 years, that says to people for reasons other than  
8 where they live, you live in Anne Arundel County, you get to  
9 vote for the state Senator in your district in Anne Arundel  
10 County. I live in Montgomery County, I vote for my state  
11 Senator and mine, that is obviously different, we vote for  
12 different races based on where we live.

13 But, this is telling people, you get to not vote  
14 for races, not based on where you live, or by district or  
15 ward, as the constitution says, but by age. You only get to  
16 vote for these things but not the other things and your  
17 neighbor and your parent and your friend, who just by  
18 fortuity, happened to be born in January of 1990 as opposed  
19 to July of 1990. He or she gets to vote but you don't. That  
20 is not a system, Your Honor, that the constitution either  
21 intended, that ought to be done or, quite frankly, that is  
22 constitutional because that is so arbitrary, supports no  
23 state interest whatsoever other than reading the words of a  
24 constitutional provision that with all due respect to the  
25 1867 drafters, is now 141 years old and many states, Your

1 Honor, have recognized these constitutions were written at a  
2 time when there was no such thing as a primary. People  
3 didn't have primaries.

4 Parties put forward their candidates and people  
5 voted in November. That was it. They didn't have primaries.  
6 If this is the result that we are going to have, if the Court  
7 of Appeals says so, then we obviously will move on but what  
8 will happen honestly is that we are going to go through a  
9 legislative process of amending this.

10 This cannot be what anybody intended. It is not  
11 what the constitution intended. It is not appropriate. It  
12 sends the wrong message to voters and, quite frankly, I think  
13 it is unconstitutional under both the federal constitution  
14 and the state constitution to tell a first time voter, you  
15 can't vote for this on an arbitrary classification. I defy  
16 anyone to find a state system anywhere in this country,  
17 federal or state, that calls for voting under those kinds of  
18 circumstances.

19 With that, Your Honor, I will conclude.

20 THE COURT: Thank you very much, Mr. Shurberg. All  
21 right, Mr. Davis.

22 MR. DAVIS: Your Honor, may I please the Court. We  
23 are here today a little over a year after the Court of  
24 Appeals set in motion the chain of events that has led to  
25 this litigation in less than two weeks before the election.

1 From the State Board of Elections, the issue is whether the  
2 Court of Appeals meant what it said. Ultimately, we have  
3 come full circle because only the Court of Appeals can  
4 finally decide that question and in the best of all possible  
5 worlds, we would receive guidance from the Court of Appeals  
6 more than 11 days before th election.

7 This case really turns on the meaning of the second  
8 sentence of article 1 section 1 of the Maryland constitution.  
9 The very same sentence that was interpreted by the Court of  
10 Appeals decision in Lamone versus Capozzi in December of  
11 2006. Now, the relevant language is the same sentence that  
12 the Court of Appeals decided and it is important to focus  
13 very clearly on that language because I think this Court's  
14 decision and ultimately the Court of Appeals review of this  
15 decision, will turn on that language.

16 The language reads, "Of every citizen of the United  
17 States of the age of 18 years or upwards, who is a resident  
18 of the state, as of the time of the closing of registration  
19 next proceeding the election shall be entitled to vote in the  
20 ward or election district in which he resides at all  
21 elections to be held in this state."

22 Now, counsel for Plaintiffs have focused on the  
23 "shall be entitled" language and have argued that that  
24 language is not a prohibition and, in fact, that the General  
25 Assembly may expand that language by permitting 17 year olds

1 to vote. However, we made that same argument in Capozzi, we  
2 argued that the "shall be entitled" language did not restrict  
3 elections to simply the ward or election district and the  
4 Court of Appeals rejected that argument. They held that the  
5 "shall be entitled" language, the very same language from the  
6 same sentence, which is at issue here today did constitute a  
7 restriction and the Court of Appeals held quite clearly that  
8 the "shall be entitled" language did limit voting to the ward  
9 or election district in which a voter resides.

10 Now, when we explain how we came full circle we can  
11 see that there are, in fact, five milestones each supported  
12 by a very reasonable decision of the State Board of Elections  
13 and, of course, the State Board of Elections is required, its  
14 members are required, to take an oath to support the  
15 constitution of Maryland that is found in election article  
16 2-101D.

17 Now, the first milestone is the historic practice  
18 of the Board. In the past, the State Board had assumed that  
19 the statute which Plaintiff's counsel has discussed at great  
20 length of election article 3-102A, did permit 17 year olds to  
21 vote in the primary and had assumed that article 1 section 1  
22 referred only to general elections and, in fact, the language  
23 of election article 3-102A provides that a qualified voter  
24 includes an individual who is at least 18 years old or who  
25 will be 18 years old on or before the day of the next

1 succeeding general or special election. Of course, it had  
2 been historic practice that and historic understanding of the  
3 State Board that that did not exclude 17 year olds from  
4 voting.

5 The second milestone in this case, of course, was  
6 the 2006 decision of the Court of Appeals when the Court  
7 decided Lamone versus Capozzi. The Court, of course, did  
8 strike down early voting as a violation of various provisions  
9 of the Maryland Constitution including the one at issue here  
10 today, article 1 section 1. The Court in holding that early  
11 voting was unconstitutional also considered the question of  
12 whether even if early voting was unconstitutional whether it  
13 can still be used in a primary election and our office, of  
14 course, argued contrary to the position of the Plaintiffs,  
15 that primaries had historically been treated differently from  
16 the general elections.

17 But, of course, in Capozzi the Court rejected that  
18 argument just as we argued -- we made the same argument that  
19 counsel for Mr. Boltuck made today that the elections were a  
20 continuous process but as the Court correctly recognized in  
21 Capozzi the Court of Appeals rejected that argument as well.

22 So, the Court's precise language in Capozzi, I  
23 think here is worth focusing on and quoting because we think  
24 it really leads only to one conclusion and on page 89 of the  
25 Court's opinion, the Court states that primary elections are

1 included within the meaning of, "At all elections to be held  
2 in the state," in article 1 section 1. If article 1  
3 section 1 were read to exclude primary elections, "Such a  
4 reading," and here the Court is quoting from the Circuit  
5 Court, "Could lead to an absurd result as it would eliminate  
6 all," all emphasized, "all constitutional qualifications for  
7 primary elections," and then the Court refers to the case of  
8 the 12 year old, "thus, a 12 year old non U.S. citizen  
9 residing in Virginia would not be barred by the Maryland  
10 Constitution from voting in Maryland primary elections."  
11 Such a result simply cannot be correct."

12 Of course, article 1 section 1 is the very same  
13 constitutional provision and, in fact, the very same sentence  
14 of the provision that requires that an individual be 18 years  
15 of age to vote.

16 The Court of Appeals, of course, held that article  
17 1 section 1 applies, "to all elections to be held in the  
18 state."

19 Now, to our office the inclusion was inescapable  
20 that a person must be 18 to vote, "in all elections to be  
21 held in the state." That is what the constitution says. So,  
22 we gave that advice to the State Board of Elections. Now, I  
23 heard counsel for the Plaintiffs argue certain policy  
24 considerations that we need to welcome 17 year olds into the  
25 political process and indeed neither the Attorney General nor



1 the State Board of Elections has any policy objections to 17  
2 year olds voting in primaries.

3 In fact, the State Board of Elections aggressively  
4 have contacts and recruits high school students and  
5 encourages them to register. Of course, that registration,  
6 as the Court pointed out, is an administrative mechanism to  
7 have somebody be part of the computerized voting list does  
8 not mean that the 16 year olds can vote.

9 But, this case is really not about policy, it is  
10 about the meaning of the Maryland Constitution and as much as  
11 we tried to reconcile Capozzi with the Maryland statute, the  
12 conclusion was inescapable. It is clear that the Court of  
13 Appeals met the requirement of, "age of 18 years and upward,"  
14 it didn't say 18 years downward, it uses the word upward, to  
15 apply, "to all elections to be held in the state," and that  
16 any election included a primary election.

17 Now, if the Court of Appeals didn't mean that, we  
18 hope it will tell us and do it so properly so that we can  
19 clear all of this up. If the Court of Appeals did mean it  
20 then the remedy is certainly a constitutional amendment.

21 There was some discussion during last session when  
22 this advice and this decision of the State Board of Elections  
23 became known about whether there would be a constitutional  
24 amendment and it didn't happen so that is why we are here  
25 before you today.

1           The third milestone, the third part of the story,  
2 is that as a result of the Capozzi decision, the State Board  
3 did inform 17 year olds that they were not eligible to vote  
4 in the February 2008 primary. This was well known to the 17  
5 year old community. I don't know why Mr. Snyder's son did  
6 not get notice. We know that Frederick County, pursuant to  
7 the directors of the State Board, did send out notices to all  
8 of the 17 year olds and indeed Mr. Boltuck in his complaint  
9 alleges in paragraph 11 that Sarah did learn on June 14, 2007  
10 of the State Board's action, long before Mr. Boltuck filed  
11 suit on January 18<sup>th</sup> so close to the election. Now, the  
12 history of SB's implementation of the statute is set forth in  
13 Exhibit 2 to our motion to summary judgment.

14           Now, the fourth milestone in this case happened in  
15 December of 2007 when it was not until that date that the  
16 political parties actually came forward and asserted their  
17 rights under the First Amendment to associate with 17 year  
18 old members. The Attorney General received a request from  
19 Senator Raskin who is actually one of the counsel to  
20 Mr. Boltuck, to allow 17 year olds to vote in their political  
21 party's primary. Now, as a result of that the Attorney  
22 General recognized that the Democrats and the Republicans  
23 constitutionally are entitled to establish their own rules as  
24 to who may participate in their primaries. Basically, in  
25 this advice letter the Attorney General made two points and

1 this is Exhibit 3 to our memorandum in support of summary  
2 judgment.

3 First, Your Honor, he reaffirmed that the 2006  
4 advice that under Capozzi an individual must be 18 years old  
5 to vote in a primary and that is why we are here today.  
6 Second, the Attorney General considered a question that had  
7 not been asserted before by the political parties and that is  
8 the First Amendment right of those parties to associate with  
9 17 year olds.

10 Now, I don't believe that exploring -- the  
11 reasoning behind that is really at issue here. I think  
12 everyone agrees that 17 year olds should be permitted to vote  
13 in their political party's primary. I think we come at that  
14 objective from different places. I heard Mr. Snyder take  
15 issue with the necessity for the Attorney General's analysis  
16 but the bottom line is that we will be allowing 17 year olds  
17 to participate in the primary.

18 One clarification I heard Mr. Shurberg say that the  
19 number was 50,000. In fact, the number is considerably less  
20 than that, it is 15,000. But, what happened after the  
21 Attorney General carved out an exception to the Capozzi  
22 decision is that we came to milestone number five and that is  
23 based on this advice and further clarification the State  
24 Board, less than two months before the election had to shift  
25 gears and adopt a policy by resolution, and I have got the

1 minutes from that State Board meeting, at its December 20,  
2 2007 meeting and sent out thousands and thousands of letters.

3 When I was at the State Board two weeks ago for the  
4 State Board of Election there were people in the back room  
5 that were still stuffing the envelopes, still stuffing the  
6 thousands and thousands of letters notifying the 17 year old  
7 political party members that they could vote in their party  
8 primary.

9 But, of course, because of Capozzi because of  
10 article 1 section 1, because of that very clear language,  
11 because of the way the Court of Appeals decided the "shall be  
12 entitled" issue in the context of early voting, it was the  
13 State Board's position, based on the advice from our office,  
14 that the 17 year olds remained ineligible to vote in races in  
15 which there is no political party interest at stake, such as  
16 the non-partisan school board races.

17 So, we think the State Board correctly applied the  
18 law as interpreted by the Court of Appeals. If the Court of  
19 Appeals does not believe that our interpretation was correct,  
20 they need to tell the State Board so the political party's  
21 First Amendment association rights only issued in a political  
22 party primary. They are not at issue in a  
23 non-partisan race and, of course, the political parties who  
24 have benefitted most from the Attorney General's 2007 advice  
25 letter are not parties to this litigation here today and are

1 not involved in this law suit.

2 Now, the second point that I want to make and I  
3 just want to clarify my understanding that Mr. Snyder has  
4 argued that he is not seeking the right of the 17 year olds  
5 to vote on the electronic ballots and I did not hear  
6 Mr. Boltuck's attorney make a similar representation. But,  
7 that really does create a nightmare scenario for the State  
8 Board if, less than two weeks before the election this Court  
9 were to order that the 17 year olds are permitted to vote on  
10 regular electronic ballots because there simply is not enough  
11 time to do that.

12 As the Court of Appeals recognized in the Liddy  
13 case, it may be inappropriate to grant an injunction in an  
14 election case if the election is so close that the state  
15 cannot realistically or pragmatically institute the necessary  
16 changes before the election. That is clearly the case here.

17 We have established by affidavit evidence the two  
18 declarations of Donna Duncan, the Director of Election  
19 Management, that it is simply too late first, to reprogram  
20 the ballot styles and the reason why 17 year olds have to  
21 vote provisionally is that the ballot styles were basically  
22 put to bed in mid December at the time the Attorney General  
23 rendered the advice letter and by then it was already too  
24 late to redesign and to shift gears and to separate the  
25 ballots for the political party races and the non-partisan

1 races.

2 Now, the second problem we had was this case, once  
3 it was filed on January 18<sup>th</sup>, proceeded in a rather leisurely  
4 manner even though we were less than a month before the  
5 primary and we really did want to expedite the case because  
6 as Ms. Duncan's second declaration points out, on January  
7 28<sup>th</sup>, the State Board, pursuant to its normal processes had to  
8 send the computerized electronic data base to the local  
9 Boards of Election and it is today, as a matter of fact, that  
10 the local Boards received the data base and load into their  
11 epoll books.

12 What that means is, there is no physical way, this  
13 close to the election for the 17 year olds to vote on the  
14 electronic machines if this Court were to disagree with our  
15 view of the merits of this case. Now, that Duncan  
16 declaration is essentially undisputed and I didn't hear  
17 Mr. Boltuck's attorney disagree with Mr. Snyder as far as  
18 expressing no objection to having the 17 year olds vote on  
19 provisional ballots if the Court were to find against us on  
20 the merits. Thank you very much, Your Honor.

21 THE COURT: Before you sit down, I always worry  
22 when I think of something that I didn't hear you folks argue  
23 that I am off on a wild goose chase so I want to make sure  
24 that I do not go off on a wild goose chase. But, in my  
25 reading of article 1 section 1, the annotation refers to an

1 old case, the case of Hannah versus Young which is an 1896  
2 Court of Appeals case and that case in a much different era  
3 and a much different context holds that only those elections  
4 which are subject of the Maryland Constitution are governed  
5 by section 1, article 1.

6 So, my question to you is, what effect, if any,  
7 does article 1 section 1 have on the  
8 non-partisan Board of Education elections which I presume are  
9 not constitutionally mandated. Those are set up by a  
10 creature of the Board of Elections. Why does the  
11 Constitution even matter in that context?

12 MR. DAVIS: Your Honor, I do not have my  
13 Constitution with me but it is my understanding that members  
14 of the Boards of Education are constitutional officers as  
15 created by the Constitution.

16 THE COURT: I do want to give you time to explore  
17 that because again I am not trying to stir things up.

18 MR. DAVIS: Right, it is an interesting question.  
19 I do not know off hand the answer to it.

20 THE COURT: I have had all of half a day to think  
21 about this case and you have thought about it longer but in  
22 my first review, each county elects members to the Board of  
23 Education. In some cases actually elected and some cases  
24 they are appointed, and I thought that was completely a  
25 creature of statute.

1           Let me give you a few minutes to address that  
2           because I would really like to explore that because I may  
3           come to this from a completely different perspective than you  
4           all and just have you reach a conclusion that perhaps may be  
5           the same result as they want for different reasons. I might  
6           end up doing the same thing. So, let me take a recess and  
7           you folks holler at me and I will give you all a chance to  
8           address the argument some more.

9           MR. SHURBERG: Your Honor, do you have the site for  
10          that case because I would like to go take a look at it?

11          THE COURT: I don't claim any great research here,  
12          I just looked at the annotations, it is Hannah v. Young, 84  
13          Maryland 179. What it says, it is listed here for the  
14          proposition that this section, meaning article 1 section 1,  
15          relates only to elections which the Constitution itself  
16          requires to be held and hence, it has not application to  
17          municipal corporations other than Baltimore City.

18          The Hannah case dealt with an election for the  
19          commissioners, or whatever they were called of the City of  
20          Bel Air. In that case, there was an issue as to whether you  
21          could vote or not without being a property owner and so the  
22          world was backwards and upside down at that time but the  
23          point made was that -- the question raised, I should say, in  
24          the Hannah case was whether or not article 1 section 1  
25          applied and whether the election could require criteria of



1 the electorate that were beyond what the Constitution  
2 required.

3           So, the argument was made, well, if the  
4 Constitution doesn't say you have to be a property owner, or  
5 doesn't say you have to be a male, or doesn't say some other  
6 criteria that perhaps might have been required in the local  
7 election. But, the argument there was, well, this  
8 Constitution doesn't apply to an election for something other  
9 than a Constitutional officer. So, my question, quite  
10 simply, is whether or not the Constitution applies to the  
11 Board of Education and if it doesn't then the next step is  
12 the statute says you can vote and why are we here?

13           MR.. SHURBERG: Your Honor, just so the record is  
14 clear, in my brief I refer consistently to Board of Education  
15 elections and I realized afterwards that, at least, in  
16 Montgomery County where Mr. Boltuck lives, there are also  
17 local ballot questions that are on primary elections that I  
18 think would also fall within the rubric you are talking  
19 about. I want to be clear about that.

20           THE COURT: Well, again, I guess I am trying to  
21 figure out whether all of the various things that appear on a  
22 ballot, or let me rephrase that, how many of those things  
23 that appear on a ballot are Constitutional entitlements  
24 versus they just happen to be on a ballot for convenience  
25 sake.

1 MR. DAVIS: Your Honor raises an extraordinary  
2 possibility and that is that in primaries, we are not  
3 electing anybody to a position. All we are doing is  
4 selecting people who will move forward in the process. So,  
5 it is, at least, arguable under the Court's observation that  
6 it would not apply to primaries, partisan, or non-partisan  
7 because they are not elections to office. They are merely  
8 part of a process.

9 THE COURT: But, for the fact that the Court of  
10 Appeals has made it pretty clear in my mind that the  
11 primaries are among the elections that article 1  
12 contemplates, that would be the appealing argument. But, on  
13 that point I think the folks down the street have made it  
14 pretty clear to me that primaries do count. So, do you need  
15 more time? I don't mind, I am not trying to pressure you  
16 into a quick response. I would be happy to step down just  
17 like you gave me time.

18 MR. DAVIS: Well, maybe it does make sense to  
19 review this with a little more care rather than jumping the  
20 gun.

21 THE COURT: Okay, that is fine. I am going to take  
22 a recess and let me know when you are ready to resume, okay?

23 THE CLERK: All rise.

24 (Whereupon, a brief recess was taken.)

25 THE CLERK: All rise.

1 THE COURT: Thank you, be seated please. All  
2 right, the Court is resuming the cases of Clifford Snyder, et  
3 al. versus State Board of Elections, C-08-128760 consolidated  
4 with Richard Boltuck, et al. versus State Board of Elections,  
5 C-08-128755. Could I ask you to please identify yourselves  
6 again for the record?

7 MR. SHURBERG: Good morning, Your Honor. Jonathan  
8 Shurberg on behalf of Plaintiff Richard Boltuck.

9 MR. BOLTUCK: Your Honor, Richard Boltuck,  
10 Plaintiff.

11 MR. SNYDER: Clifford E. Snyder, Jr., Plaintiff.

12 MR. DAVIS: Mark Davis on behalf of the State Board  
13 of Elections.

14 MR. SCHLICK: Austin Schlick, State Board of  
15 Elections.

16 THE COURT: Thank you. So, when we last parted  
17 company, I had imposed on Mr. Davis to address a case of  
18 Hannah versus Young and I would be happy to hear your  
19 research Mr. Schlick?

20 MR. SCHLICK: Thank you, Your Honor and we do  
21 appreciate the opportunity to follow up on that question and  
22 to inspect our own assumptions. We did come to the  
23 conclusion that article 1 section 1 does apply under Hannah  
24 against Young. Page 183 of that case in the Maryland reports  
25 provides that article 1 section 1 applies to elections which

1 the Constitution itself requires to be held or which the  
2 legislature under the mandate of the Constitution makes  
3 provision for.

4 Your Honor we believe these actions certainly fall  
5 within that second category of elections which the  
6 legislature under the mandate of the Constitution has made  
7 provision for. Article 8 section 1 requires the General  
8 Assembly to establish by law throughout the state a thorough  
9 and efficient system of free public schools. Under that  
10 authority the General Assembly has provided in education  
11 article section 3-114, that members of the county board shall  
12 be elected in counties including the counties at issue here,  
13 Frederick and Montgomery counties.

14 Furthermore, under the election law article section  
15 8-802, members of the Board of Election shall be elected on a  
16 non-partisan basis. So, our position, Your Honor, is these  
17 elections are being conducted pursuant to the General  
18 Assembly's instruction under the mandate of the Constitution  
19 and accordingly section 1 of article 1 does apply and we note  
20 that that historically has been the position of the State  
21 Board.

22 THE COURT: Can I just ask you to rewind, just to  
23 make sure I catch up with you. Under what Constitutional  
24 mandate did the legislature create the Board of Elections?

25 MR. SCHLICK: That would be article 8 section 1,

1 page 451 in my volume. "The General Assembly shall by law  
2 establish a system of free public schools," essentially  
3 public education.

4 THE COURT: All right, okay, thank you.

5 MR. SCHLICK: Thank you.

6 THE COURT: Would anyone on the Plaintiff's side  
7 care to address that point?

8 MR. SHURBERG: I would Your Honor, if I may help  
9 Mr. Boltuck. Constitutionally, mandate is to establish a  
10 system of free public schools. It doesn't say anything about  
11 elections. It doesn't say anything about establishing for  
12 elections. In fact, in some counties, still to this day in  
13 Maryland Boards of Education are appointed and not elected.  
14 There is no requirement that there actually be an election.  
15 The fact of having free public schools, under article 8  
16 section 1, in no way implies or directs that there, in fact,  
17 be an election at all or how it ought to be held, number one.

18 So, it is not a mandate, Your Honor. The mandate  
19 to create free public schools is not a mandate to hold  
20 elections because if it were, there are counties in the state  
21 today that would be in violation of that implied mandate  
22 because there are counties that still have appointed school  
23 boards.

24 Your Honor, if I may, in looking at the -- I can't  
25 even remember the name of the case now, I did look at it

1        though --

2                    THE COURT:  The one I mentioned Hannah versus  
3        Young?

4                    MR. SHURBERG:  Yes, Hannah versus Young, I found  
5        two other cases, Your Honor, and I am always chagrined when I  
6        find them because the Judge suggested it because I always  
7        like to think that I am pretty good at finding cases.  But,  
8        there are two cases I would like to bring to Your Honor's  
9        attention that relates to this, about primaries generally  
10       because I looked at that question because basically the Court  
11       of Appeals was suggesting in that case that primaries and  
12       that certain kinds of elections are simply not within the  
13       Constitution in the Hannah case.

14                   The two other cases, one is called Kenneweg  
15        K-e-n-n-e-w-e-g versus County Commissioners of Alleghany  
16        County, which is a 1905 case of the Court of Appeals reported  
17        at 102 Maryland reports 119.  It says that the legislature of  
18        Maryland, unlike the Federal Congress, has all the  
19        legislative power that there is unless there are restrictions  
20        as opposed to the Federal Congress which has only the powers  
21        that the Federal Constitution gives it.

22                   One of the things they said in the Kenneweg case,  
23        the Court of Appeals did, is that the power to enact a  
24        primary election law, and they used somewhat antiquated  
25        language, lies back of and beyond this provision.  They are

1 talking about what is now article 1 section 7 of the  
2 Constitution which talks about the purity of elections.

3 I think in a general sense, that is kind of what we  
4 are fighting about here is are we doing this right? Are we  
5 doing this as the Constitution has mandated? The Court said  
6 in the Kenneweg case, that the power to enact a primary  
7 election law lies back of and beyond this provision. It was  
8 a different provision, I think it was article 42 or  
9 something. They reorganized the Constitution. It is not  
10 derived from it at all, i.e. a primary election is something  
11 different. It lies back beyond the Constitution. They did  
12 not cite article 1 section 1 and they did not suggest that  
13 there was any limitation in article 1 section 1.

14 Subsequently, in this case, Your Honor,  
15 interestingly enough, dealt with the question of who may  
16 vote. You Honor will recall that in my initial argument I  
17 talked about difference between time, place, and manner of  
18 restrictions. How one may vote. You can't vote here but you  
19 can down the street and you can vote there, is a different  
20 thing than you may or you may not vote.

21 The second is a much more fundamental question.  
22 The Kenneweg case dealt with who may vote and this  
23 essentially said that the legislature has plenary power in a  
24 primary election to decide that question. Both Kenneweg and  
25 the other case I will get to, the Court of Appeals was

1 dealing with situations where the legislature had imposed  
2 greater requirements than the Constitutional requirement.

3 Property requirements, being enrolled with a party  
4 and declaring certain things about their party preference in  
5 a party primary. In both cases the Court said the  
6 legislature has the power to do this and that the  
7 Constitution doesn't bar it.

8 The second case to get to it is Hennegan  
9 H-e-n-n-e-g-a-n versus, I am sure I am pronouncing this  
10 wrong, Geartner G-e-a-r-t-n-e-r, which is a 1946 case  
11 reported at 186 Maryland 551. "The legislature has the power  
12 to create and regulate primary elections subject only to such  
13 prohibitions that may be found in the state Constitution."  
14 Now, I know you can argue article 1 section 1 is that  
15 prohibition but we come back to that prohibition versus  
16 non-prohibition argument, number one. But, number two, once  
17 again, the Court of Appeals was upholding in the Hennegan  
18 case a requirement that was not in the Constitution. In both  
19 Hennegan and in Kenneweg they said, additional requirements  
20 above and beyond the Constitution are okay in primaries, and  
21 Hennegan cited to Kenneweg.

22 Now, Your Honor, we go back to Capozzi, which said,  
23 election is election is election. Well, when you look at  
24 Capozzi and you look at when they cite to, when the Court of  
25 Appeals cites to article 1 section 1 which is, bear with me I



1 want to get you the right page site where they actually  
2 reference it which I believe is -- pardon me, Your Honor.

3 THE COURT: Sure.

4 MR. SHURBERG: It looks like page 59, actually it  
5 is 59 and 60 and it cites to it, it highlights and emphasizes  
6 the language shall be entitled to vote in the ward or  
7 election district in which he resides at all elections to be  
8 held in this state. That is what the Court was focusing on  
9 in Capozzi. They emphasize it. That is not my emphasis,  
10 that is their emphasis as to what they were interested in.  
11 They weren't interested in that case, in the remainder of it.

12 So, Your Honor, now that we are dealing with a  
13 situation not like Capozzi, time, place, manner, where you  
14 may vote, how you may vote, what day you may vote, but who  
15 may vote. You have two cases of the Court of Appeals,  
16 Kenneweg and Hennegan that say that, in fact, the legislature  
17 has authority to regulate primaries. So, somebody, and maybe  
18 it is only the Court of Appeals, but I think Your Honor that  
19 until the Court of Appeals says these cases are no longer  
20 good law that they are good law. They have not been  
21 overruled. They have not been superseded by statute.

22 They are, in fact, the law of the State of Maryland  
23 which is that at least as to who may vote, and both cases  
24 dealt with that, primaries are different. If the legislature  
25 can impose greater requirements than the Constitution,

1 property requirement, fees to be paid, poll taxes, in the old  
2 days. Now, there may be federal limits to those now but as  
3 to the general principle that in primaries more requirements  
4 that don't run afoul perhaps with the Federal Constitution.

5 For example, residency requirements are not in the  
6 Constitution but, those cases are still good law as a general  
7 principle. The particulars of some of them may no longer be  
8 good law. The Hennegan case dealt with, again party  
9 primaries but the general principle is primaries, as to who  
10 may vote, are different and those cases remain good law and I  
11 think --

12 THE COURT: Why do you say residency requirements  
13 are not in the Constitution? I mean, in article 1 in talks  
14 about residency right in the middle of it.

15 MR. SHURBERG: Right, it says, "Who is a resident  
16 as of the time for closing of registration." The legislature  
17 may impose requirements as to how long they have lived there.

18 THE COURT: Oh, I see in that regard.

19 MR. SHURBERG: Almost every state does. In the  
20 Federal Constitution, the U.S. Supreme Court has said that is  
21 okay. That does not run afoul of the right to vote. In  
22 fact, Maryland at one point there was a case back in the  
23 '60's that I ran across, not specifically germane where  
24 there was actually a two year residency requirement. I think  
25 it might have been in the Constitution at one point. It was

1 taken out and a lesser residency requirement was imposed  
2 pursuant to statute as opposed to by Constitution. Federal  
3 Court basically said, we may not like this but it is the law  
4 and there is nothing unconstitutional about a pretty lengthy  
5 residency requirement.

6 So, there are still some things that the  
7 legislature can do that are more. So, the question then  
8 simply is under Kenneweg and Hennegan, can they grant more  
9 rights in a primary election because we are not granting any  
10 more rights in the general election, 3-102 grants nothing  
11 inconsistent with the Constitution in the general election.  
12 I think we can all agree on that. Because it says only those  
13 who will be 18 by the date of the general election. So, the  
14 only question is the granting of rights in a primary  
15 election.

16 I would ask Your Honor respectfully to take a look  
17 at those cases because I think they strengthen the argument I  
18 made earlier more than abstraction that time, place, and  
19 manner is different than the actual right to vote, yes or no  
20 you may vote or you may not vote. But, I think these cases  
21 make it clear that the legislature may do that and for  
22 whatever reason, the Court of Appeals in Capozzi did not  
23 address it perhaps did not address Kenneweg and did not  
24 address Hennegan because they were not dealing with who may  
25 vote, they were dealing only with the express language in the

1 Constitution which was you have to vote in your ward, you  
2 have to vote in your district. You can only vote on certain  
3 days, you have to have the first Tuesday in November, those  
4 are all in the Constitution.

5 They weren't dealing with the question of primary  
6 versus general, certainly, time, place, manner. An election  
7 is an election. But, as to who may vote, the legislature has  
8 in time imposed more requirements.

9 I submit that the right to impose greater  
10 requirements also implies the right to allow more voting  
11 rights. If you can go one way, you certainly can go the  
12 other way without going afoul of the expressed language of  
13 the Constitution which the legislature in 3-102 has not.

14 So, I would also say, Your Honor, that the  
15 Constitution, as far as mandates go, and I think Kenneweg and  
16 Hennegan go to this point, is that elections are only  
17 mandated by the Constitution if they are literally in the  
18 Constitution. I think the State Board of Elections has said,  
19 well, you have to have an educational system so, therefore,  
20 the election requirement is implied. I would submit that  
21 that is not the case. It is where it is mandated because  
22 Kenneweg says, this purity of elections, the General  
23 Assembly, shall take care to make sure that purity of  
24 elections is preserved. It is simply how the execute it.

25 It is not directing them to do anything, it is

1 simply telling them, you are going to execute the right you  
2 already have. This is in the Kenneweg case. You are going  
3 to imply the right you already have in a certain fashion. It  
4 is not mandating any particular thing, it is simply saying,  
5 you need to keep this in mind as you go about your duties to  
6 regulate elections, at least as to primaries.

7 So, Your Honor, I would submit that the Board of  
8 Education and any other non-partisan primaries that may exist  
9 in any particular county are not, in fact, pursuant to the, I  
10 keep wanting to say Harris --

11 THE COURT: Hannah?

12 MR. SHURBERG: Hannah, I don't know why I keep  
13 wanting to say Harris but I do, the Hannah case that, in  
14 fact, the Constitution applies to Constitutional elections.  
15 That case has not been overruled.

16 I think the State agrees with that. They have not  
17 proffered any suggestion that that case has been overruled in  
18 any way and that, therefore, Your Honor the other point I  
19 would note is that with respect to elections generally, the  
20 Constitution does provide an article, I think it is 17,  
21 section 2, that certain elections are to be held every four  
22 years for state and local officials.

23 In theory, we could read state and local officials  
24 to include Board of Education. However, section 7 of article  
25 17 specifically excludes elected Boards of Education from

1 section 2 of that same article. It says it is not  
2 applicable. So, to the extent that they are mentioned at all  
3 in the Constitution, they are then five sections later,  
4 excluded the Board of Education specifically from that  
5 possible reading so state and local officials could  
6 conceivably include Boards of Education.

7 So, Your Honor, I submit without in any way  
8 withdrawing any of my earlier arguments that the point, Your  
9 Honor, has raised for the reasons I have just stated now  
10 compel the conclusion that, in fact, both my client,  
11 Mr. Boltuck and Mr. Snyder, not to speak for him, his son  
12 should be allowed to vote without restriction. Your Honor,  
13 let me address a point that the State raised about a  
14 question of provisional ballots.

15 It was my understanding that, in fact, it would be  
16 easier for people to vote without restriction because then  
17 you don't have to tell them you can't vote for this, and  
18 this, and this. You can vote for everything. But, the  
19 State, I think, raises a good point given the timing of where  
20 we are right now, that because of the electronic poll books  
21 and that only certain people are going to be in that and that  
22 the 17 year olds who were, at least at the time the poll  
23 books were finalized were basically not in the electronic  
24 poll books but we are presumably on a list to be allowed to  
25 vote by provisional ballot.

1           It does seem reasonable to say that it is not  
2 feasible for purposes of the February 12<sup>th</sup> election for 17  
3 year olds to be allowed to vote electronically for the  
4 reasons I just stated. But, certainly in terms of any future  
5 elections it will be easier. The result we want in this case  
6 is actually simpler for the Boards of Election. Everybody  
7 gets to vote for everything as opposed to these people only  
8 get to vote for certain things.

9           But, certainly for this election, it does seem  
10 reasonable to say that it would not be feasible so, I can't  
11 really take issue with that and I will not.

12           THE COURT: All right, thank you. Mr. Snyder, did  
13 you want to add anything?

14           MR. SNYDER: Your Honor, were you looking for  
15 argument just on the point whether the Constitution covers  
16 Board of Education or general argument?

17           THE COURT: Well, I am looking for any argument you  
18 would like to make without repeating something that has  
19 already been said.

20           MR. SNYDER: Okay.

21           THE COURT: Since you are the Petitioners I am  
22 giving you the last word essentially.

23           MR. SNYDER: It is really unfair to use the  
24 hypothetical in Capozzi, the non-resident of Maryland age 12  
25 or 14 or whatever, really unfair, fundamentally unfair to use

1 a hypothetical in an unrelated case. The case did not center  
2 on voting age against a real live citizen of Maryland, my  
3 son, 17 years old been a resident of Maryland since birth and  
4 a registered voter since May 2007.

5 I am asking the Court to decide this case, not to  
6 do some sort of comprehensive analysis of all possible  
7 ramifications, I am asking the Court to grant relief to Carl  
8 Phillip Snyder. An observation, as far as I can tell the  
9 United States Constitution, the supreme law of the land,  
10 contains no prohibition against voting by persons under 18.  
11 Is it not curious that a Maryland Court, I submit that it is  
12 not really appropriate for a Maryland Court to concern itself  
13 over much with a similar lack of prohibition in the Maryland  
14 Constitution.

15 The people who ratified the United States  
16 Constitution, and the 26<sup>th</sup> Amendment, did not see fit to  
17 impose a minimum voting age. It is unseemly that a Maryland  
18 Court would find the absence of a prohibition in the Maryland  
19 Constitution.

20 I would remind everyone that there are other  
21 aspects of the complaint. The violations of article 8 and  
22 article 24, which I think are clear, the separation of powers  
23 violation. The fact that the State Board of Elections has  
24 rewritten election law or rewritten the Constitution to its  
25 own satisfaction. I would emphasize again article 24, the



1 lack of due process, Carl Phillip Snyder was registered as a  
2 voter. He is entitled under article 1 section 2 to vote in  
3 all subsequent elections in Maryland and that right has not  
4 yet been stripped from him in a way that we recognize in  
5 Maryland as due process.

6 Now, I am asking the Court if Your Honor finds this  
7 to be a close case, I respectfully request that you give the  
8 benefit of the doubt to my son who took the trouble, excuse  
9 me, at the urging of the State Board of Elections when he  
10 sought his drivers license, he took advantage of a procedure  
11 established by the State Board of Elections. He went to the  
12 trouble to register to vote.

13 I am asking you, if you find this a close case put  
14 the burden of appeal on the State. These people are on the  
15 state payroll, let them worry about the next step in this  
16 litigation. I have already had to go to Court. I have  
17 already had to file an administrative complaint. Thank you.

18 THE COURT: Thank you. All right, anything else?

19 MR. DAVIS: Your Honor, we do have two very quick  
20 points on the Hannah question.

21 THE COURT: Go ahead.

22 MR. DAVIS: Thank you sir. First, Your Honor, on  
23 the argument that the Hannah language applies only to  
24 elections that are specifically mandated upon the  
25 Constitution, that cannot be correct because what the

1 language of the case says is, elections which the  
2 Constitution itself requires to be held or which the  
3 legislature under the mandate of the Constitution makes  
4 provision for. So, that second category is elections which,  
5 although, not mandated by the Constitution are required by  
6 the General Assembly pursuant to some other mandate of the  
7 Constitution.

8           Second, Your Honor, with respect to Mr. Shurberg's  
9 rather nuanced argument about the plenary powers of the  
10 legislature about the primary elections, we think it is a  
11 good argument. We thought it was a good argument in Capozzi.  
12 It was made by the State Board in Capozzi at page 88 the  
13 Court of Appeals recognized, "The appellants argue that  
14 article 1 section 1 of the Maryland Constitution does not  
15 apply to primary elections," and then it quoted the State  
16 Board arguing that, "The legislature has plenary powers which  
17 are not restricted by the provisions of article 1 of the  
18 Constitution with regard to both primary and municipal  
19 elections." So, that argument was made, it was then  
20 rejected by the Court.

21           THE COURT: How do you address Mr. Shurberg's  
22 argument though that the Boards of Educations are not elected  
23 in every county, they are just in some and some not. So, how  
24 would you derive a mandate that there must be some sort of an  
25 election from the Constitution?

1           MR. DAVIS: Because the General Assembly in its  
2 wisdom, has seen fit to mandate elections in some counties  
3 but not others. That is a legitimate implementation of the  
4 Constitutional mandate to establish a system of public  
5 education. The Hannah case, again, is clearly contemplating  
6 a category of elections that are not required by the  
7 Constitution, and therefore, presumably the General Assembly  
8 would have some discretion to require them, or not, it is in  
9 this category where the General Assembly is implementing a  
10 Constitutional mandate to carry out some public purpose and  
11 determine through that public purpose if that is defectuated  
12 through a system of elections that that second part of the  
13 sentence in Hannah would apply.

14           THE COURT: All right, thank you very much. I have  
15 said this before in the context of another election case and  
16 I will say it again, and I don't mean to be flip about it  
17 because I know this is a serious matter to all involved but,  
18 what I am about to say, I hope, is not misinterpreted.

19           It is my sincere belief that I am not going to be  
20 the last word on the subject and that it is in everybody's  
21 best interest that I give you a decision sooner rather than  
22 later and whether I turn out to be right or wrong is  
23 ultimately going to be somewhat academic because the Court of  
24 Appeals is going to be the one who is going to determine what  
25 the law of the land is in connection with this election.

1           So, for that reason given that we are really coming  
2 up on the heels of the primary elections very quickly, I am  
3 going to give you a verbal decision rather than taking the  
4 time to write something which I would like to think might be  
5 more articulate than what I am about to say. But, I hope  
6 that both you and my colleagues on Rowe Boulevard will  
7 understand the circumstances under which I render this  
8 decision.

9           I guess first things first. What is not before me  
10 is the question of whether the 17 year olds who will become  
11 18 by the date of the next general election should be allowed  
12 to vote in the primary elections for the partisan portions of  
13 the ballot. Quite candidly, and this is a complete aside, I  
14 am not sure that if I were faced with that question I would  
15 necessarily conclude the way that the Attorney General has  
16 that Capozzi does not preclude those young people from  
17 voting. But, I say that as an aside and because it is not an  
18 issue that is the subject of the dispute. I am not rendering  
19 a decision on that point.

20           So, I am dealing with the issue that is before me,  
21 which has clearly been limited by the pleadings, to the  
22 question of whether the 17 year olds that are in this  
23 category will be permitted to vote on the non-partisan items  
24 on the ballot.

25           As we have discussed, there are different ways that

1 both of the parties reach some of the conclusions in this  
2 case. Mr. Snyder argues that the right to vote is across the  
3 board as a result of the statute, the election statute, and  
4 is not impaired in any way by a reading of the Capozzi case.

5 Now, to some degree that is an academic discussion  
6 because as the Board has interpreted Capozzi, I am sorry, as  
7 the Board has concluded for other reasons, for First  
8 Amendment reasons, those young people have a right to vote in  
9 the primaries on the partisan issues so, it is an interesting  
10 issue but not one that I necessarily have to address. So, it  
11 leaves sort of carved out of the equation the question of, do  
12 they vote for the Board of Education members at the  
13 primaries? I think Mr. Shurberg also mentioned there might  
14 be some other items on the ballot in Montgomery County which  
15 I am candidly not familiar with.

16 My view is as follows: Starting with Capozzi, and  
17 some of the points that the Court of Appeals makes which have  
18 to do with sort of general rules of interpretation. As you  
19 look at the statute and you look at the language of the  
20 statute and you interpret it in difference to the plain  
21 meaning of the words and a Constitutional provision is  
22 interpreted no differently than a statute when it comes to  
23 that analysis.

24 Capozzi was clearly a case that involved a  
25 different set of facts and it involved a question of not who

1 could vote as Mr. Shurberg described, where and how and so  
2 forth the vote could be taken but there is a question that  
3 Capozzi asked and I believe answered and that is stated in  
4 part 4 of the Capozzi decision where the Court of Appeals  
5 says, "The appellants argue that article 1 section 1 of the  
6 Maryland Constitution does not apply to the primary elections  
7 in Maryland." That statement was made -- well, a question  
8 was raised by the Court of Appeals not in a limited fashion  
9 although obviously they were doing it in the context of the  
10 case before it. But, they posed that question and then they  
11 answered it by stating that we adopt the analysis offered by  
12 the Circuit Court in holding that primary elections are  
13 included within the meaning of "at all elections to be held  
14 in this state," which is the language that we are focusing on  
15 in article 1 section 1.

16 So, it would be my view that notwithstanding the  
17 election article 3-102, a person would have to be the age of  
18 18 at any election including a primary election. As again, I  
19 have said this is somewhat of an aside but I just want you to  
20 understand the flow of whatever logic I apply to this.

21 We then go to the second phase of the analysis  
22 which the Attorney General proposes which is that because of  
23 a supremacy clause issue that the First Amendment of the  
24 United States Constitution would say that even if the  
25 Maryland Constitution would preclude people under the age of

1 18 from voting at the primary, there is the right of  
2 association called for by the First Amendment which it is the  
3 State's position carves out an exception to Capozzi which  
4 therefore, permits the 17 year olds to vote at the primary  
5 and whether I agree or disagree with that is somewhat  
6 academic. Whether I would consider the age restriction to be  
7 an undue burden on the voting rights of any citizen is an  
8 academic exercise.

9           Then we come to the point where that issue is no  
10 longer on the table. In other words, everyone agrees for  
11 different reasons perhaps, that 17 year olds can vote at the  
12 primary on the partisan issues. The question then becomes,  
13 is there any limitation on their right to vote on the  
14 non-partisan issues?

15           That brings me to the question that I posed  
16 earlier, which is whether or not the Maryland Constitution  
17 applies to those issues at all. Although, I certainly am  
18 appreciative of the arguments made on behalf of the State, I  
19 am not convinced that article 8 of the Maryland Constitution  
20 mandates the Board of Education elections that are being held  
21 in those counties in which Board of Educations are elected.

22           The Constitution mandates the establishment of  
23 schools and certainly there are lots of things that come and  
24 go from that mandate including the most mundane to the most  
25 lofty in terms of decisions that have to be made. But, as I

1 read in Hannah, I am not convinced that when Hannah says, "It  
2 is only at elections which the Constitution itself requires  
3 to be held or which the legislature, under the mandate of the  
4 Constitution makes provisions for."

5 I am not clear, and I am not convinced, I should  
6 say, that that necessarily means that Boards of Education  
7 must be elected or that the extent to which they are elected  
8 is as a mandate created by the Constitution.

9 The requirements of the Board of Education  
10 elections are set out in the educational article of the  
11 Maryland code and I certainly don't think there is anything  
12 unlawful about those requirements but I don't think they are  
13 Constitutionally mandated and for that reason, I believe that  
14 article 1 section 1 does not apply to the non-partisan  
15 matters that are going to be on the primary ballot and ergo,  
16 I believe, that the 17 year olds who are entitled to vote at  
17 the primary on the partisan matters for reasons that we have  
18 already discussed are equally entitled to vote on the non-  
19 partisan matters. Because, they are not prohibited by the  
20 Constitution from doing so and are, in fact, permitted by the  
21 election law article 3-102 to do so.

22 So, I don't know and I hope for the sake of all of  
23 us that there isn't some other item on those election ballots  
24 in some county that falls between the cracks between the  
25 non-partisan and the partisan. I can't envision how they



1 would, but, to the extent that I am aware of these items they  
2 are either, in other words, if it is something that could be  
3 a non-partisan item that yet would be mandated by the  
4 Constitution, that would fit in a category that doesn't  
5 squarely meet with my opinion on the subject.

6 Now, with respect to the question of the  
7 provisional ballots, I think the parties have graciously  
8 conceded that point but I would make the finding in any event  
9 that under the circumstances established by the uncontested  
10 affidavit in this case, that the practical limitations and  
11 the time limitations that we are all facing would prohibit  
12 changing that method and the Court would not enjoin a method  
13 that is really the only practical method of accomplishing the  
14 election at this point. So, I would declare that the  
15 provisional balloting would be permitted.

16 I do not take any issue with the fact that the  
17 Attorney General's office has taken whatever positions it has  
18 in this matter, I think that is incumbent upon the Attorney  
19 General to advise its client, which in this case is the Board  
20 of Elections, as to how to interpret not only statutory and  
21 Constitutional law, but also the decisional law from the  
22 Court of Appeals.

23 So, I do not find in any way that the procedural  
24 posture of this case is any way suspect and so, unless there  
25 is something I have overlooked, it would be my intention to

1 declare verbally and I will sign any order that you care to  
2 propose, that number one, provisional ballots can be used in  
3 the election coming up. The primary election for members of  
4 the voting public who are 17 but will reach the age of 18 by  
5 the date of the general election and that those members of  
6 the voting public who are 17 but will reach the age of 18 by  
7 the general election are permitted to vote at the primary  
8 elections on both the partisan and the  
9 non-partisan issues.

10           Aside from being wrong, is there anything that I  
11 have overlooked?

12           MS. LAMONE: Your Honor, may I have a minute  
13 please?

14           THE COURT: Sure, I want to give you an order to  
15 let you go down the street as well.

16           MS. LAMONE: Your Honor, just a second.

17           THE COURT: Go ahead.

18           (Pause.)

19           MR. DAVIS: Your Honor, there is an issue that is  
20 not raised by any of the pleadings in this case. However,  
21 given the Court's order I would be remiss if I didn't at  
22 least raise it and that is that there are unaffiliated 17  
23 year olds who, of course, who are not voting in the party  
24 primary that have never had --

25           THE COURT: Good point. Yes, I am sorry, not to

1 cut you off but I am glad you brought it up. I believe that  
2 the law on the subject is still intact, which is that only  
3 affiliated persons can vote at the primary.

4 MR. DAVIS: Correct.

5 THE COURT: I don't think there is anything that  
6 has been argued or that would be changed.

7 MS. LAMONE: No, that's not --

8 MR. DAVIS: I think the point Your Honor is that  
9 there are 17 year olds who are unaffiliated with either party  
10 but if I understand the Court's order, you are ordering they  
11 be permitted to vote in the school board elections.

12 THE COURT: In the non-partisan stuff.

13 MS. LAMONE: People that are unaffiliated or the  
14 non-principle party may vote for the school board races if  
15 they, under your ruling, if they are 18 years of age or  
16 older. We now have this class of voters, however many of  
17 them --

18 THE COURT: Unless you all mind, I don't mind  
19 Ms. Lamone just speaking out loud instead of --

20 MS. LAMONE: Your Honor, in the school board races,  
21 in the jurisdictions where they are held, unaffiliated or  
22 other voters, as we call them, may if they are eligible to  
23 vote, may vote for the school board races. We now have a  
24 class that has not been addressed here of the unaffiliated or  
25 other 17 year old registered voters who we have said and

1 advised may not vote for anything.

2 THE COURT: Well, those are those unintended  
3 consequence that we sometimes get. I guess one, perhaps  
4 facile way to address it is that is not before me. I am not  
5 here to give advisory opinions, I am here to judicate the  
6 issue before me.

7 MR. DAVIS: Very well, Your Honor.

8 THE COURT: So, good luck and godspeed.

9 MS. LAMONE: Thank you, Your Honor.

10 MR. SHURBERG: Your Honor, I just want to go over  
11 it so we can at least agree, I know I want to make sure I got  
12 it right, I was trying to write down what Your Honor wrote so  
13 that we can then turn that into an order and get Your Honor  
14 to sign hopefully today since we are heading into a weekend.  
15 What I have written down is, 17 year olds who will be 18 by  
16 the general election may vote in both the partisan and  
17 non-partisan primary elections on February 12<sup>th</sup>. I am  
18 certainly happy to discuss other language but, at least, that  
19 is the fundamentals.

20 THE COURT: I guess I would have to modify that by  
21 saying, and I don't know whether you said it or not,  
22 affiliated voters because the action in this case has been  
23 brought on behalf of affiliated voters. No? Am I wrong?

24 MR. SNYDER: Sir, I hesitate to say you may be  
25 going beyond the Plaintiffs here and treating this as a class

1 action.

2 THE COURT: No, I had no intentions of doing that.  
3 It is my understanding that the parties that brought the suit  
4 are affiliated and are asking to vote in the primary.

5 MR. SNYDER: Yes.

6 THE COURT: So, I am limiting my decision to those,  
7 that universe.

8 MR. SNYDER: To the parties before the Court, or  
9 are you reaching out to all those other people's similar  
10 situations?

11 THE COURT: I see what you are saying.

12 MR. SNYDER: Because I have an order crafted that I  
13 believe reflects your judgment or reflects your stated  
14 judgment for my son Carl.

15 THE COURT: I see your point and I guess that is a  
16 good point. It is not a class action but do I say that Carl  
17 gets to vote, is that the decision you want?

18 MR. SNYDER: Well, that is why I came to this  
19 Court. If the State Board of Elections chooses not to apply  
20 that example, shall we say, that is their choice.

21 MR. SHURBERG: Your Honor, let me say on behalf of  
22 Mr. Boltuck we take a different approach and that is one of  
23 the reasons why I am representing one party here and not two  
24 and that is absolutely fine.

25 Mr. Boltuck on the other hand is requesting, and I

1 am now requesting on his behalf, that others, and again it is  
2 not a class action but it ought to be generally applicable.  
3 If Sarah Boltuck can vote then others who are in her  
4 situation ought to similarly be able to vote and that  
5 otherwise this Court, or some other Court, conceivably to the  
6 extent of being reported in the media, which I have a feeling  
7 it probably will, will then be flooded with potentially, who  
8 knows how many, individual people saying, well, let me do it  
9 too, let me do it.

10 THE COURT: Well, 15,000 by his estimate and 50,000  
11 by yours.

12 MR. SHURBERG: Your Honor, let me be clear, 50,000  
13 was the class of people who were eligible but some of them  
14 didn't register.

15 THE COURT: I understand.

16 MR. SHURBERG: Of course, the question might be why  
17 they didn't, but you are right. The State is correct.

18 THE COURT: Let me hear from the State in terms of  
19 how to cast this net as maybe appropriate. I don't want to  
20 overstep my bounds but by the same token it would be folly to  
21 issue a decision that applies only to two individuals in the  
22 State of Maryland.

23 MR. DAVIS: Your Honor, as I understand it, neither  
24 of the complaints has a request for declaratory judgment  
25 here.

1 THE COURT: No, I thought they did actually. I  
2 hope I didn't dream that up.

3 MR. DAVIS: There is a pray for an injunction --

4 THE COURT: Maybe I was dreaming but I thought it  
5 was a declaratory judgment action.

6 MR. DAVIS: I think the State would have no  
7 objection if Plaintiffs were orally to move for a declaratory  
8 judgment that would solve the problem. I mean, it is not in  
9 the complaint.

10 THE COURT: All right, I will take your word for  
11 it. For some reason, I just derived that notion when I read  
12 these yesterday and as I told you earlier I didn't see these  
13 papers until about 3:00 yesterday afternoon.

14 MR. SNYDER: Your Honor, I was in no way suggesting  
15 that other people not benefit from this. It was simply that  
16 I didn't want an additional issue to be raised on appeal.

17 THE COURT: No, that's fine. I suspect that that  
18 is going to be the least of the Court of Appeals issues on  
19 this matter.

20 MR. SHURBERG: Your Honor, at the suggestion of the  
21 State and I think Your Honor would agree, I would orally  
22 request that you issue a declaratory judgment consistent with  
23 the ruling that you just made that would be generally  
24 applicable to those who get knowledge of this and then  
25 present themselves on February 12<sup>th</sup>.

1 MR. SNYDER: I would join that.

2 THE COURT: I will accept the oral amendment and  
3 that is why, quite candidly, I see now as I look at it more  
4 closely that it was not drafted in that way but, I guess, it  
5 was in my assumption all along that it was a declaratory  
6 judgment that you are seeking. So, I will declare as I  
7 stated and I don't know if you want to -- I am going to be  
8 around at least part of the afternoon until my health gives  
9 out to the point I go home. But, if you want to spend the  
10 next hour or so during your lunch break and hash out an order  
11 and I will be happy to take a look at it and if you all can  
12 work out a mutually agreeable order that says what you think  
13 I said, I will stand by it.

14 MR. SHURBERG: Your Honor, given the oral request  
15 for the declaratory judgment, I think we should be clear  
16 before we break so we don't end up coming back and having to  
17 debate the point. My client requests that I make this  
18 request not only on behalf of himself and affiliated voters  
19 but on behalf of unaffiliated voters as well. He feels very  
20 strongly about it and he has asked me to make that request  
21 to the extent they are registered. Now, some of them may not  
22 be because they were discouraged by things, there is nothing  
23 we can do about those. We are not asking the Board to  
24 register anybody but those that are registered and do come  
25 forward to vote in the non-partisan primaries be allowed to



1 do so and I would ask just that you include that in your  
2 ruling and we are going to have a debate about that, I guess,  
3 I would say let's perhaps do that now rather than later.

4 THE COURT: Well, let's have the debate now.

5 MR. DAVIS: We object Your Honor, it is certainly  
6 beyond the scope of the pleadings. It is 11 days before the  
7 election. These people are not in the poll books. It would  
8 create an administrative nightmare to do it. Let me have a  
9 minute here to confirm my understanding.

10 THE COURT: I realize I am throwing a lot of monkey  
11 wrenches at you, it is all right.

12 MR. DAVIS: Can we have a minute to just confirm  
13 this fact?

14 THE COURT: Sure. All right, let's take a minute.

15 THE CLERK: All rise.

16 (Whereupon, a brief recess was taken.)

17 THE CLERK: All rise.

18 THE COURT: Thank you. Be seated please. I need  
19 to call the case again, it is Clifford Snyder, et al. versus  
20 State Board of Elections, C-08-128760 and Richard Boltuck,  
21 et al. versus State Board of Elections, C-08-128755 and the  
22 same parties and counsel are still present in the Courtroom.  
23 Mr. Davis, I think you made a phone call to find out what the  
24 problems would be.

25 MR. DAVIS: Apparently it is not as I thought that

1 these individuals are in the poll book so we would have no  
2 objection to expanding the scope of the order to include the  
3 unaffiliated individuals.

4 THE COURT: Okay, so the unaffiliated 17½ year  
5 olds, so to speak, could vote in the non-partisan portions of  
6 the election, correct?

7 MR. DAVIS: Right, by provisional ballot.

8 THE COURT: Okay, by provisional ballot.

9 MR. DAVIS: Yes.

10 MR. SHURBERG: Just to clarify, when we say  
11 unaffiliated we mean, I don't know how many 17 year olds  
12 might be Libertarian or Green Party members that registered  
13 as not just unaffiliated but as some other party other than  
14 Democrat or Republican.

15 THE COURT: Right, other than the Democrats or  
16 Republicans.

17 MR. DAVIS: Correct.

18 MR. SHURBERG: That was easy.

19 THE COURT: Sure, nothing to it. Now, if you have  
20 the where with all to go down to the law library and crank  
21 out an order or however you want to do it or get back to me.  
22 I don't know whose office is around the corner, I would be  
23 happy to sign it as soon as somebody gives me an order and I  
24 think it would be behoove of all of you to make sure that you  
25 work on it together so that it says what you think I said,

1     okay? I am going to have lunch in my office and I will be  
2     here until at least the mid afternoon.

3             MR. SHURBERG: Thank you, Your Honor.

4             MR. SNYDER: Thank You, Your Honor.

5             MR. DAVIS: Thank you, Your Honor.

6             THE CLERK: All rise.

7             (Whereupon, the hearing was concluded.)

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C E R T I F I C A T E

CompuScribe, hereby certifies that the attached pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings heard on February 1, 2008, in the Circuit Court for Anne Arundel County in the matter of:

Civil Nos. C-08-128755 and C-08-128760

CLIFFORD E. SNYDER, JR., and  
RICHARD BOLTUCK,

v.

STATE BOARD OF ELECTIONS

By:

\_\_\_\_\_  
Michelle L. Smiroldo, Transcriber

\_\_\_\_\_  
Date

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR.  
on behalf of Carl Philip Snyder, his son,  
*et al.*,

Plaintiffs,

\*  
\*  
Civil Action No. C-08-128760  
\*

v.

STATE BOARD OF ELECTIONS,  
Defendant.

\*  
\*

\*\*\*\*\*

ORDER

UPON CONSIDERATION of Plaintiff RICHARD BOLTUCK's Complaint, Plaintiff CLIFFORD E. SNYDER, JR.'s Complaint, the Motion to Dismiss/Motion for Summary Judgment filed by Defendant STATE BOARD OF ELECTIONS, the oppositions/cross-motions filed by both Plaintiffs, and the oral Motion for Declaratory Judgment filed by both Plaintiffs, it is this 15<sup>th</sup> day of February, 2008,

DECLARED that the voter eligibility requirements of Article I, § 1 of the Maryland Constitution do not apply to non-partisan elections for Boards of Education, municipal elections, and local ballot questions that are not mandated by the Constitution and, accordingly, it is further

ORDERED, that Defendant's Motion to Dismiss/Motion for Summary Judgment be, and the same hereby is, DENIED; and it is further

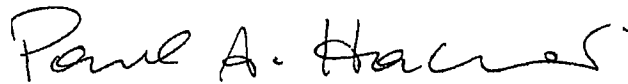
ORDERED, that the Motions for Summary Judgment filed by Plaintiffs be, and the same hereby are, GRANTED IN PART; and it is further

ORDERED, that the oral Motions for Declaratory Judgment be, and the same hereby are, GRANTED; and it is further

ORDERED, that this Court declares that all 17-year old voters, whether or not affiliated with any political party, who will be 18 on or before the November 4, 2008 general election, shall be entitled to vote in both the partisan and non-partisan primary elections on February 12, 2008, and it is further

FILED  
2008 FEB -1 P 2:57

ORDERED, that Defendant State Board of Elections may use provisional ballots in the February 12, 2008 primary elections for all 17-year old voters, whether or not affiliated with any political party, who will be 18 on or before the November 4, 2008 general election.



Paul A. Hackner  
Paul A. Hackner  
Circuit Court Judge

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY, MARYLAND

CLIFFORD E. SNYDER, JR. \*  
on behalf of \*  
Carl Philip Snyder, his son \*  
PLAINTIFF \*  
v. \*

Civil Action Nos. C-08-128760

STATE BOARD OF ELECTIONS \*  
DEFENDANT \*

\* \* \*  
RICHARD D. BOLTUCK \*  
on behalf of \*  
Sarah Elizabeth Boltuck, his daughter \*  
PLAINTIFF \*  
v. \*

Civil Action No. C-08-128755

STATE BOARD OF ELECTIONS \*  
DEFENDANT \*


\*\*\*\*\*

NOTICE OF APPEAL

Defendant State Board of Elections hereby notes an appeal of the Order of the Circuit Court for Anne Arundel County pursuant to Election Law Article §12-203.

Respectfully Submitted,

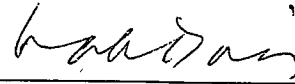
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this day of February, 2008 a true and accurate copy of defendant's Notice of Appeal was mailed first-class postage prepaid and transmitted by email to: Clifford E. Snyder, Jr., Esquire, 4964 Flossie Avenue, Frederick MD 21703, plaintiff; and Jonathan S. Shurberg, Esq., 8720 Georgia Avenue, Suite 700, Silver Spring MD 20910, attorney for plaintiff Richard Boltuck.



Mark J. Davis