

IN RE: PETITION FOR EMERGENCY
REMEDY BY THE MARYLAND
STATE BOARD OF ELECTIONS

* IN THE
* COURT OF APPEALS
* OF MARYLAND
* September Term, 2022
* Petition Docket No. **243**

* * * * *

**PETITION FOR WRIT OF CERTIORARI
AND REQUEST FOR EXPEDITED REVIEW**

The Maryland State Board of Elections (the “State Board”) respectfully petitions this Court for a writ of certiorari, before decision in the Court of Special Appeals, in *In re Petition for Emergency Remedy by the State Board of Elections*, No. 1282, Sept. Term, 2022, to review an order of the Circuit Court for Montgomery County, Case No. C-15-CV-22-003258. The circuit court granted the State Board’s petition for an order permitting the canvass of mail-in ballots beginning on October 1, 2022, at 8:00 a.m. (App. 11-12) instead of “8 a.m. on the Wednesday following election day,” as currently mandated by statute, Md. Code Ann., Elec. Law § 11-302(b)(1) (LexisNexis 2017). The circuit court premised its emergency remedy on the projected volume of mail-in ballots to be cast during the 2022 gubernatorial general election and the inadequate time after election day to canvass and tabulate them as required by law. (App. 10).

This Court’s immediate attention is desirable and in the public interest for two reasons. First, the circuit court issued its order granting an emergency remedy under Election Law § 8-103(b)(1), a provision of the election law that authorizes a court to

provide a remedy under “emergency circumstances” that “interfere with the electoral process”. That law has never before been litigated in any court and has been challenged on grounds that it violates the separation-of-powers provision of the Maryland Constitution. Second, the nature of the emergency relief sought is time-sensitive—sufficient time before election day for the local boards of elections to canvass and tabulate a massive volume of mail-in ballots. Every day between October 1, 2022, and election day that is dedicated to litigation is one less day to alleviate the impact of the volume of mail-in ballots that will be cast in the upcoming election and will thus diminish the relief provided by the emergency remedy.

PERTINENT PROVISIONS

U.S. Const. amend. XX, § 2

Md. Const. art. III, § 49

Md. Decl. of Rts. arts. 8, 9

Md. Code Ann., Elec. Law §§ 8-103, 11-302, 11-308, 11-503 (LexisNexis 2017)

QUESTIONS PRESENTED

1. Did the circuit court correctly rule that the remedy sought under Election Law § 8-103(b)(1) comports with the principle of separation of powers because the remedy, an adjustment to the electoral calendar, is a function routinely entrusted to the judicial branch?

2. Did the circuit court correctly rule that the incoming volume of mail-in ballots and inadequate timeframe in which to process them constitute “emergency

circumstances” that “interfere with the electoral process” as those terms are used in Election Law § 8-103(b)(1)?

STATEMENT OF THE CASE

Factual Background

During the 2022 gubernatorial primary election, local boards of election issued nearly 500,000 mail-in ballots to Maryland voters, and 345,230 (69%) of those ballots were returned. The returned mail-in ballots represented approximately 35% of the total vote during the primary election. This overwhelming number of mail-in ballots, and the inability of election boards to process them until after election day, resulted in some jurisdictions canvassing, tabulating, and auditing mail-in ballots for weeks after the July 19, 2022, primary election day. The canvass effort transgressed statutory deadlines because many post-canvass events—such as certification of local and statewide results, judicial challenges and recounts, and fulfillment of vacant nomination spots—could not take place until almost a month after election day.

The experience with mail-in ballots in the 2022 primary election broke sharply with Maryland’s past experiences with mail-in voting. During the 2010 general election, Maryland voters cast only 87,813 mail-in ballots; in 2014, voters cast 54,628 mail-in ballots; and in 2018, voters cast 120,240 mail-in ballots. During these three elections, mail-in ballots represented between 3% and 5% of the total number of votes cast.

The catalyst for the change between past general elections and the 2022 primary election was the electoral experience during the 2020 presidential election. Half of

Maryland's voters voted by mail-in ballot during the 2020 general election, with 1,527,460 mail-in votes cast. Local boards of election were able to canvass the 1.5 million mail-in ballots in a timely fashion, however, because of the state of emergency declared in the State at the time. By emergency declaration of the Governor and State Board, local boards began the 2020 mail-in canvass on October 1 at 8:00 a.m. The mail-in canvass was thus completed within 11 days of election day in most jurisdictions, with the last jurisdiction completing its canvass 29 days after election day.

Local boards of election did not enjoy the same advantage during the 2022 primary election. The emergency orders permitting pre-election day canvassing of mail-in ballots expired with the declared state of emergency. Accordingly, the 2022 primary election was governed by Election Law § 11-302(b)(1)'s restriction against opening a mail-in ballot envelope before "the Wednesday following election day." The 2022 primary acted a stress test of the new voting paradigm, where local boards would receive post-pandemic volumes of mail-in ballots but would be prevented from canvassing or tabulating them until after election day. Election officials stood to learn whether Maryland's electoral framework, as statutorily constituted, could handle the greater volumes of mail-in ballots.

The lesson of the 2022 primary election was instructive, as the massive number of mail-in ballots caused cascading issues through the local and statewide canvassing and certification process. These issues, including a delayed recount over one month after election day in one jurisdiction and a decertification of results in another due to the inability to reconcile mail-in and provisional ballot totals, caused the State Board to miss

statutorily imposed deadlines for ascertaining and finalizing the general election ballot. The solution to these missed deadlines was the State Board’s exercise of singular, unique authority to “adjust any deadlines related to certifying, displaying and printing ballots,” granted to it by this Court’s order in *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 24, 25, 26 & 27, Sept. Term 2021 (Apr. 13, 2022). That singular delegated authority, however, expired with the conclusion of the primary election and certification of the general election ballot.

The State Board therefore began the preparations for the 2022 gubernatorial general election facing a stark mathematical reality. Faced with 345,081 mail-in ballots to count and beginning that count two days after election day, final ascertainment of the 2022 gubernatorial primary election results required 36 days. Maryland, however, does not have 36 days after the general election day to canvass mail-in ballots.

Statutory Background

Statutory Election Deadlines

The law imposes a specific timeline by which general election results must be ascertained and certified. First, § 11-308(a) of the Election Law Article contemplates that each local board of elections will “verify the vote count” within 10 days of election day. Next, county charters and codes around the State direct that the terms of high-level local offices begin on the first Monday in December. *See, e.g.*, Montgomery County Code, Part I, art. I, § 105 & art. II, § 202 (mandating the term of office for Members of the Montgomery County Council and County Executive begin at noon on the first Monday in December). After that, the Board of State Canvassers must convene to

determine and certify the outcome of every election and ballot question “within 35 days of the election.” Elec. Law § 11-503(a)(1)(ii). Finally, the 118th Congress of the United States “shall assemble . . . at noon on the 3d day of January” in 2023. U.S. Const. amend. XX, § 2.

Election Law § 11-302 governs the canvass of mail-in ballots. The law mandates a local board of elections to convene for the mail-in canvass “[f]ollowing an election.” Elec. Law § 11-302(a). Local boards are prohibited from “open[ing] any envelope” containing a mail-in ballot “prior to 8 a.m. on the Wednesday following election day.” *Id.* at § 11-302(b)(1). And at the end of each day of canvassing, the local board must “prepare and release” an unofficial report of that day’s mail-in ballot tabulation. § 11-302(e)(1).

Emergent Circumstances

Election Law § 8-103 provides two legislative delegations of authority to address emergent circumstances that interfere with the process of an election. Section 8-103(a) applies to elections affected by a “state of emergency, declared by the Governor in accordance with the provisions of law.” The Governor may declare such a state of emergency under authority of § 14-107(a) of the Public Safety Article when “an emergency has developed or is impending due to any cause.” In the context of a declared state of emergency, the Public Safety Article defines emergency narrower than its common meaning: “the imminent threat or occurrence of severe or widespread loss of life, injury, or other health impacts, property damage or destruction, social or economic disruption, or environmental degradation from natural, technological, or human-made

causes.” Pub. Safety § 14-101(c). Section 8-103(a), therefore, is a narrow provision applying by its own terms to a certain range of emergencies that pose the greatest threat.

Subsection (b) is a broader provision that applies to emergencies “not constituting a declared state of emergency.” Elec. Law § 8-103(b)(1). Put another way, while subsection (a) applies to emergencies threatening “severe or widespread” injury on a catastrophic scale, subsection (b) applies to less dangerous emergencies. Subsection (b) applies to unforeseen and immediate conditions, natural or man-made, that do no more than “interfere with the electoral process.” *Id.* Under these lesser circumstances, the executive branch cannot act alone to suspend laws in administering an emergency election (as it can pursuant to subsection (a)). But, the executive branch is authorized to seek permission from a court to address the interfering conditions. *Id.* In turn, the court may “take any action the court considers necessary to provide a remedy that is in the public interest and protects the integrity of the electoral process.” *Id.*

The State Board’s Petition for an Emergency Remedy

On August 15, 2022, the State Board voted unanimously at its monthly public meeting to seek an emergency remedy from a court to address the expected volume of mail-in ballots incoming during the general election. At that meeting, the State Board noted that the inability to canvass and tabulate mail-in ballots before election day could leave races without certified results until late December 2022 or early January 2023. The Board also noted that Maryland is the only state to forbid the canvass of mail-in ballots until after election day.

On September 2, 2022, in the Circuit Court for Montgomery County, the State Board filed a petition, under Election Law § 8-103(b)(1), seeking a court order to permit canvassing of mail-in ballots to begin October 1, 2022 at 8 a.m. In support of the petition, the State Board filed five affidavits from election directors and local boards of elections in Montgomery, Prince Georgia's, Baltimore, and Frederick counties and Baltimore City, relating the need for an early canvass at the local level.

On September 7, 2022, the circuit court conducted a status hearing on the petition. The court issued a scheduling order for an adjudicatory hearing and ruling on the petition and requested of the State Board a supplemental memorandum of law. The court asked the State Board to address in its memorandum (1) the statutory interpretation of the “emergency circumstance” language in § 8-103(b)(1); (2) whether § 8-103(b)(1) complied with the principle of separation of powers; and, (3) whether the one-party petition and proceeding constituted a justiciable controversy.

On September 14, 2022, Delegate Daniel Cox moved to intervene in the circuit court proceeding as a matter of right, citing Maryland Rule 2-214(a)(2). The State Board consented to Delegate Cox's intervention, but noted that intervention was a matter of the court's discretion under Maryland Rule 2-214(b). On September 16, 2022, the circuit court discretionarily granted intervention to the state delegate under Rule 2-214(b).

The parties thereafter filed opposing memoranda of law on the statutory interpretation question and separation of powers question.¹ After hearing argument on

¹ Delegate Cox's intervention in the case mooted any concerns or controversies regarding the justiciability of the one-party proceeding.

September 20, 2022, the court took the matter under advisement until September 23, 2022. On that day, the court issued its written opinion and order from the bench; and, the court docketed its opinion and order on September 26, 2022.

The circuit court ruled that Election Law § 8-103(b)(1) stood as proper delegation of authority from the legislative branch to the judicial branch. (App. 8). Section 8-103(b)(1) delegated to a circuit court a “judicial function” as that term was understood by the common law. (App. 6-7). Accordingly, the delegation did not run afoul of Articles 8 or 9 of the Maryland Declaration of Rights, or Article II, § 49 of the Maryland Constitution. (App. 7-8).

Moreover, the circuit court ruled that any ambiguity in the statutory term “emergency circumstances” was clarified by reading it in the context of the whole statute and by the drafter’s note to the enacting legislation. (App. 9-10). Emergency circumstances, as that term was used in Election Law § 8-103(b)(1), was meant to apply to interfering circumstances, less dramatic than a declared state of emergency, that impacted the administration of an election and for which officials could not have been reasonably prepared. (App. 10).

Based on its rulings, the circuit court ordered an emergency remedy. The prohibition against canvassing mail-in ballots until after election day was temporarily suspended from application to the 2022 gubernatorial general election and, instead, the mail-in canvass could begin on October 1, 2022, at 8:00 a.m. (App. 11). Moreover, the requirement to report unofficial results of the day’s mail-in count after each day of canvassing was suspended temporarily from the 2022 gubernatorial general election and,

instead, local boards were required to wait until the polls closed on election day to issue any tabulation reports. (App. 11-12).

Delegate Cox noted an appeal the next day and filed in the Court of Special Appeals an emergency motion to stay the circuit court's order and request for a shortened briefing schedule. On the afternoon of September 27, 2022, the Court of Special Appeals ordered the State Board to respond to Delegate Cox's motion to stay the circuit court's order by September 29, 2022 at 3:00 p.m.

Before any further filings in the Court of Special Appeals, the State Board filed this petition for a writ of certiorari.

REASONS FOR GRANTING AND EXPEDITING REVIEW

This Court should grant review because this appeal presents a novel interpretation of an election law statute never litigated before in Maryland's courts and a novel question of state constitutional law as it applies the separation of powers principle explicit in Article 8 of the Maryland Declaration of Rights. Delegate Cox challenged in the circuit court below, as he does now in the Court of Special Appeals, whether the present situation for canvassing the large volume of incoming mail-in ballots constitutes "emergency circumstances" under Election Law § 8-103(b)(1). He further challenges the constitutionality of Election Law § 8-103(b)(1), charging it as an improper delegation of authority to a circuit court. Both questions bear critically on the State's ability to duly administer the 2022 gubernatorial general election.

This Court should expedite review of this appeal because time is of the essence. Election law matters are generally required to be heard expeditiously and without unreasonable delay. *Liddy v. Lamone*, 398 Md. 233, 245 (2007) (holding that “in the context of election matters, ‘any claim against a state electoral procedure must be expressed expeditiously,’ . . . without unreasonable delay, so as to not cause prejudice to the defendant”); Elec. Law §§ 5-305, 6-209, 6-210, 9-209, 12-203, 16-1004 (each requiring a certain aspect of an election to be heard and decided by the circuit court and, if appealed, the Court of Appeals, “as expeditiously as the circumstances require”). This matter in particular requires expeditious resolution, as local boards of election must prepare now to canvass ballots (or not) in the coming days.

I. ADJUSTING THE ELECTORAL TIMELINE IS A JUDICIAL FUNCTION ROUTINELY ENTRUSTED TO THE JUDICIARY BY THE LEGISLATIVE BRANCH AND COMPORTS WITH THE PRINCIPLE OF SEPARATION OF POWERS.

The constitutionality of an express delegation to the judicial branch depends on whether the delegation imposes a judicial or nonjudicial function on the court. *Sugarloaf Citizens Ass’n, Inc. v. Gudis*, 319 Md. 558, 569 (1990); *Cromwell v. Jackson*, 188 Md. 8, 18 (1947). There exists no “precise definition” of “judicial function.” *Sugarloaf*, 319 Md. at 569. This Court has refrained from “prescribe[ing] the precise limits to be observed by the legislative branch . . . in assigning duties to the judiciary” because of the impracticability of crafting such a rule for all possible future cases. *Cromwell*, 188 Md. at 18 (quoting *Board of Supervisors of Elections for Wicomico County v. Todd*, 97 Md. 247, 264 (1903)).

Over the past century-and-a-half, this Court has held as unconstitutionally nonjudicial those functions exclusively reserved for another branch of government with no analogue to the normal judicial function of a court. *See e.g., Duffy v. Conaway*, 295 Md. 242, 261 (1983) (unconstitutional delegation requiring court to find facts in election law violation cases to be sent to other branches for final judgment); *Cromwell*, 188 Md. at 28 (unconstitutional delegation to issue liquor licenses); *Close v. Southern Md. Agric. Ass'n*, 134 Md. 629 (1919) (unconstitutional delegation to issue gaming licenses for horse racing); *Todd*, 97 Md. at 264 (unconstitutional delegation to conduct popular referendum on issuance of liquor licenses); *Beasley v. Ridout*, 94 Md. 641 (1902) (unconstitutional delegation to appoint board of visitors to supervise county jail); *Baltimore v. Bonaparte*, 93 Md. 156 (1901) (unconstitutional delegation to review property assessment for property tax purposes); *Robey v. Prince George's County*, 92 Md. 150 (1900) (unconstitutional delegation to review and audit accounts of county officers before issuing payment on those accounts).

The State Board petitioned the trial court to engage in a judicial function granted under Election Law § 8-103(b). That judicial function was a court order adjusting the timing of how an election proceeds in response to unforeseen obstacles. The Election Law Article delegates such authority to the judicial branch in multiple contexts. *See* Elec. Law §§ 9-207(b), 9-404(c), 10-301(a), 11-303(d)(4)(iii), 12-204(b)(1) & 12-204(c)(2).

Adjustment of the timing of elections is thus a judicial function. Just as a court can conduct a hearing to suspend Election Law § 10-301(a) and keep polls open past 8:00

p.m., a circuit court may permit mail-in ballot processing before November 9, 2022. The express delegation of authority to “provide a remedy that is in the public interest and protects the integrity of the election process,” Election Law § 8-103(b)(1), and the actual remedy requested by the State Board’s petition comport with Article 8 of the Maryland Declaration of Rights.

II. THE CIRCUIT COURT CORRECTLY RULED THAT THE INCOMING VOLUME OF MAIL-IN BALLOTS AND INADEQUATE TIMEFRAME IN WHICH TO PROCESS THEM CONSTITUTE “EMERGENCY CIRCUMSTANCES” THAT “INTERFERE WITH THE ELECTORAL PROCESS.”

Construing the term “emergency circumstances,” as it is used in the Election Law Article requires recourse to the oft-cited canons of statutory interpretation. The cardinal rule of a court’s interpretive task is to “ascertain and effectuate the General Assembly’s purpose and intent when it enacted the statute.” *Wheeling v. Selene Finance LP*, 473 Md. 356, 376 (2021). Interpretation begins with the plain meaning of the statute, reading the statute as a whole “so that no word, clause sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.” *Koste v. Town of Oxford*, 431 Md. 14, 25-26 (2013). Above all else, the statute must be read reasonably without granting it an interpretation that is “absurd, illogical, or incompatible with common sense.” *Wheeling*, 473 Md. at 377 (quotation omitted).

In everyday parlance, an “emergency” is “an unforeseen combination of circumstances or the resulting state that call for immediate action.” “Emergency,” Merriam-Webster.com (Sept. 13, 2022), available at <https://www.merriam-webster.com/dictionary/emergency>. An emergency need not involve physical harm or

extreme danger. “Emergency circumstances” in Election Law § 8-103(b) can therefore be reasonably defined as unforeseen and ongoing conditions that threaten the electoral process or the integrity of an election.

Nothing in the legislative history of Election Law § 8-103 contradicts this interpretation of the statute. In fact, nothing in the legislative history of Election Law § 8-103 provides any insight into the interpretation of “emergency circumstances.”

As applied in this case, the volume of mail-in ballots to be canvassed and tabulated during the 2022 gubernatorial general election combined with the inadequate time to complete those tasks constitutes “emergency circumstances” under Election Law § 8-103(b)(1).

After the electoral experience in 2020, election officials could hardly anticipate how Maryland voters would approach the polls in 2022. In the three gubernatorial general elections prior to 2020, mail-in ballots accounted for no more than 5.3% of the total vote. In the presidential general election held during the midst of the COVID-19 pandemic, mail-in ballots accounted for 51.7% of the total vote. Maryland conducted no statewide elections in 2021. Thus, it remained unclear whether Maryland voters in 2022 would return to in-person voting at levels similar to the 2010, 2014, and 2018 elections; or, whether voters would continue to cast mail-in ballots at levels similar to 2020.

The 2022 gubernatorial primary election clarified that unknown. But by July 19, 2022, however, little could be done to prepare for this new voting paradigm in the general election. With budgets for the year set and canvass spaces secured, locally funded boards of elections, *see* Elec. Law § 2-203, could not feasibly raise more manpower *and* obtain

the larger canvass spaces needed to accommodate the increase in mail-in ballots. Without more help to count ballots, and without more space in which to count ballots, the only option was to seek more time in which to count ballots.

That is why the volume of ballots in the 2022 general election constitutes an “emergency circumstance” and why the State Board sought the remedy it has specified.

CONCLUSION

The petition for writ of certiorari should be granted and the appeal decided expeditiously to accommodate the conduct of the 2022 gubernatorial general election.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Daniel M. Kobrin

DANIEL M. KOBRIN
Attorney No. 112140138
Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
dkobrin@oag.state.md.us
(410) 576-6472
(410) 576-6955 (facsimile)

September 28, 2022

Attorneys for Petitioner

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This petition contains 3,705 words, excluding the parts exempted from the word count by Rule 8-503.
2. This petition complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Daniel M. Kobrin

Daniel M. Kobrin

CERTIFICATE OF SERVICE

I certify that, on this 28th day of September, 2022, the foregoing was emailed to counsel for Delegate Cox at the email address below and on September 29th it was mailed by registered, first-class mail to counsel at:

C. Edward Hartman, III, Esquire
116 Defense Highway, Suite 300
Annapolis, Maryland 21401-7047
ed@hartmand.law

/s/ Daniel M. Kobrin

Daniel M. Kobrin