
NO. _____

In The Court of Appeals of Maryland

MELISANDE C. FRITZSCHE, for herself and on behalf of Similarly Situated Voters,
MALCOLM G. VINZANT, JR., for himself and on behalf of Similarly Situated Voters,
Plaintiffs-Appellants,

v.

MARYLAND STATE BOARD OF ELECTIONS, LINDA H. LAMONE, State Administrator,
GILLES W. BURGER, Chairman, BOBBIE S. MACK, Vice Chairman, JOAN BECK,
Boardmember, ANDREW V. JEZIK, Boardmember, and SUSAN WIDERMAN, Boardmember,
in their official capacities as Administrators and Board Members of the Maryland State
Board of Elections,
Defendants-Appellees.

**ON APPEAL TO THE COURT OF APPEALS FROM
THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY**

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STATEMENT OF THE CASE

This is a direct interlocutory appeal to this Court from the decision of a Circuit Court in an election dispute under Maryland Code, Election Law § 12-203(a)(3). Appellants seek a temporary restraining order or preliminary injunction determining that the Maryland State Board of Elections must count ballots postmarked November 7, 2006. As provided by statute, appellants present the case directly to this Court for expeditious review and decision.

The action is in the Circuit Court for Anne Arundel County, *Melisande C. Fritzsche, et al. v. Maryland Board of Elections et al.*, Case No. 02-C06118140. The Circuit Court denied Appellants' requests for a temporary restraining order and a preliminary injunction in an order delivered orally on November 6, 2006. The Circuit Court has not issued a written order and mandate, and has not yet resolved Appellants' ultimate request for relief. This appeal concerns the Circuit Court's refusal to grant Appellants' request for a preliminary injunction. Adjudication of all claims is therefore not necessary for appeal. *See* Md. Code, Cts. & Jud. Procs. § 12-303(3)(iii).

The decision from which this appeal was taken was entered orally by the Circuit Court on November 6, 2006. The docket sheet for the case evidencing the entry of a decision in the Circuit Court is not available. The Circuit Court for Anne Arundel County was closed on Election Day, November 7, 2006. In lieu of a docket entry, an affidavit attached as Exhibit 1 to a Motion to Supplement the Record filed in support of this appeal attests to the entry of the decision at issue and describes the proceedings in the Circuit

Court. *See* Affidavit of Anthony T. Pierce attached as Exhibit 1 to Motion to Supplement the Record. Appellant will supply the court with the docket entry and transcript from the hearing at which the decision was announced at the earliest possible time following the opening of the Circuit Court on November 8, 2006. No opinion or written order has yet issued from the Circuit Court.

QUESTION PRESENTED FOR REVIEW

Are Appellants entitled to immediate injunctive relief directing Appellees to accept as valid all absentee ballots postmarked November 7, 2006 as provided by statute and as required by the state and federal constitutions?

PERTINENT STATUTES AND REGULATIONS

This case involves Maryland Code, Election Law §§ 9-102, 9-103, 9-303 & 9-304; Maryland Code, Election Law §§ 12-202 & 12-203; Maryland Code, Courts and Judicial Proceedings § 12-303(3); and Code of Maryland Regulations §§ 33.09.02.07 & 33.11.03.08.

JURISDICTIONAL STATEMENT

This is a direct appeal from a decision of a Maryland Circuit Court in an action “seek[ing] judicial relief from an[] act or omission relating to an election” under Maryland Code, Election Law § 12-202. Direct appeal to the Court of Appeals is authorized by Maryland Code, Election Law § 12-203(a)(3), which states that “an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the Circuit Court.” The Court of Appeals is directed by statute to “give priority to hear and decide an appeal brought under subsection (a)(3) of [Maryland Code, Election Law

§ 12-203] as expeditiously as the circumstances require.” This Court has authority to hear an appeal from a refusal to grant an injunction under Maryland Code, Courts and Judicial Proceedings § 12-303(3)(iii). Appellants have simultaneously filed a Motion to Expedite this appeal.

SUMMARY OF ARGUMENT

Appellants are Maryland voters who intended to vote by absentee ballot in the November 7 election. A state regulation (notably, not a statute) requires that absentee ballots submitted by mail must be postmarked by November 6. Appellants submitted timely requests for their ballots, but Appellees failed to send those ballots to Appellants in time for them to mail the ballots by the November 6 postmark deadline. Appellants filed a complaint in the Circuit Court for Anne Arundel County and sought a temporary restraining order (“TRO”) or preliminary injunction requiring the state to accept ballots postmarked on Election Day, November 7, 2006. The court denied the requests for a TRO or preliminary injunction.

Appellants are entitled to the temporary relief requested. The Circuit Court misapprehended this Court’s decision in *Lamb v. Hammond*, 308 Md. 286, 518 A.2d 1057 (Md. 1987), concluding that Appellants had no statutory right to vote by absentee ballot in the face of errors by state employees and agents. In fact, the statutory regime has changed since the decision in *Lamb*: Maryland law now guarantees the right to vote by absentee ballot but no longer dictates a deadline for postmarking them. Contrary to the Circuit Court’s decision, *Lamb* strongly suggests that the state must accommodate Appellants and similarly situated voters by accepting ballots postmarked on November 7,

2006. Appellants meet all other requirements for a temporary restraining order or a preliminary injunction and are therefore entitled to relief.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Appellants are registered voters in the State of Maryland who timely applied for absentee ballots. Despite Appellants' diligence in meeting their obligation to timely request absentee ballots, Appellants were not able to vote in this election by virtue of Code of Maryland Regulations ("COMAR") 33.11.03.08(b), which requires that absentee ballots be postmarked by November 6, 2006.

Appellant Melisande C. Fritzsche is registered to vote in Baltimore County, Maryland. Ms. Fritzsche is a student at the Rochester Institute of Technology in Rochester, New York. She currently resides at 4046 Nathaniel Rochester Hall, Rochester, New York. In mid-August 2006, Ms. Fritzsche requested an absentee ballot for both the primary and general elections because she would be out of the state at school. She made this request by faxing and mailing an absentee ballot application to the County Board of Elections in Catonsville, Maryland. On Monday, November 6, 2006, she received her absentee ballot in the mail, with a postmark of November 1, 2006. However, on that day she was away from her residence from 10 a.m. until 8:45 p.m. As a result, she did not learn that she had received her absentee ballot in the mail until 8:50 p.m., well past the campus mail pick-up times of 11 a.m. and 1:30 p.m. In addition, Ms. Fritzsche did not have an open post office within her area of familiarity and, as a result, she was unable to submit a postmarked ballot at that late hour. Because Ms. Fritzsche lives out of state, she

will not be able to personally access her precinct polling station to vote. However, she will have submitted her absentee ballot by mail on November 7, in time to obtain a postmark for that date.

Appellee Maryland State Board of Elections (“MSBE”) is a public agency responsible for all aspects of general elections in Maryland and in specific counties, including the appointment of election judges and other officials and employees at each polling place. Appellees Lamone, Burger, Mack, Beck, Jezik, and Widerman are administrators or board members of the MSBE. Appellees are acting under color of State law and are sued in their official capacities. Under Maryland Code, Election Law § 9-303(a), Appellees have been delegated the authority to “establish guidelines for the administration of absentee voting by the local boards,” including “determining [the] timeliness of receipt of . . . ballots,” § 9-303(b)(4). Pursuant to this authority, Appellees have required that voters postmark absentee ballots by November 6, 2006, in order for those ballots to be counted. COMAR 33.11.03.08(b). No statute requires this deadline; rather, the rule represents the discretionary exercise of the Appellees’ regulatory powers.

On January 18, 2006, the Maryland Assembly enacted legislation that gave every Maryland voter the right to cast an absentee ballot as long as a timely request was submitted to the local board of elections. (R.E. Tab 5.)¹ Commencing on September 21, Maryland Governor Bob Ehrlich and other senior officials repeatedly urged Maryland voters to take advantage of their right to vote by absentee ballot as a “convenient and

¹ “R.E. Tab x” refers to the Record Extract at tab x.

reliable option to avoid long lines and malfunctioning technology at the polling places.” (R.E. Tab 6.)² As of Thursday, November 2, approximately 186,000 registered voters in Maryland had taken the State’s advice and had requested to vote by absentee ballot in the 2006 general election. This represents almost triple the number of absentee ballots submitted during the most recent mid-term election in 2002. (R.E. Tab 8 (“Whatever the cause, the number of ballots requested is well above the previous high of 137,953, recorded for the 2004 presidential election In the 2002 gubernatorial election, 65,284 voted absentee.”).)³

As a result of this onslaught of absentee ballot requests, local boards of election have been unable to timely fulfill absentee ballot orders, creating a statewide emergency. Many voters, like the Appellants here, did not receive absentee ballots in time to postmark them by November 6. According to the Maryland General Assembly’s Office of Legislative Audits, problems with the printing and delivery of absentee ballots to local boards were identified nearly three weeks ago, during the week of October 16, 2006.⁴ Despite the early identification of these problems, many counties simply were not supplied with absentee ballots by the Appellees’ vendor with any time left for them to timely fulfill the voters’ absentee ballot requests.

² Governor Ehrlich and Baltimore Mayor O’Malley were both sending out recorded messages urging voters to use absentee ballots. (R.E. Tab 7.)

³ The previous high was 137,953 absentee ballot requests in the 2004 presidential election; in the 2002 gubernatorial election, 65,824 people voted absentee. (R.E. Tabs 9-10.)

⁴ Letter from Bruce A. Meyers, CPA, Legis. Auditor, to Karl S. Aro, Exec. Dir., Dept. of Legis. Servs., MD Gen. Assembly, Oct. 16, 2006.

For example, the Board of Elections of Prince George's County completed its mailing on Saturday, November 4,⁵ allowing at most one business day for absentee ballots to be delivered to voters' mailboxes and for voters to complete, sign, and postmark the absentee ballots by November 6.⁶ For voters who did not receive their ballots until the afternoon of November 6, this time period may have been just a matter of hours, if there was any time at all. Assuming further that many voters had to work until 5:00 p.m. or later November 6, this deadline made postmarking an absentee ballot nearly, if not absolutely, impossible. Additionally, some voters who have maintained Maryland residency but who have requested that the absentee ballot be mailed to an address out of state did not receive ballots in time to postmark them by November 6.

Even more recent data confirm these fears. As of Monday, November 6, the MSBE reported that at least 900 absentee ballots were not sent out until Saturday, November 4, and approximately 2,350 were not sent out until Friday, November 3. As a result of these delays, many voters have not received or were not able to send out their absentee ballots by the postmark date. (R.E. Tab 11.)

On Monday, November 6, Appellants filed the petition for a TRO and motion for a preliminary injunction before the Circuit Court for Anne Arundel County, Judge Joseph P. Manck presiding. (R.E. Tabs 2-4.) Judge Manck denied the petition.

⁵ Telephone call by Ben Blustein, The Lawyers' Committee for Civil Rights Under Law, with Interim County Elections Administrator Robert J. Antonetti, Sr. on Wednesday, November 1, 2006.

⁶ See Jason Flanagan, *Nearly 3,000 Absentee Ballots Yet To Be Sent. Board Of Elections Scrambles To Prepare For General Election On Tuesday*, The Gazette, November 2, 2006, available at http://www.gazette.net/stories/110206/princou175322_31939.shtml.

ARGUMENT

A TRO or preliminary injunction is appropriate in this circumstance to prevent the irreparable harm of disenfranchising a substantial number of absentee voters for the November 2006 election. Such relief “may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.” Maryland Rule 15-504(a). Courts consider four factors to determine whether a TRO or preliminary injunction is appropriate:

- (1) the likelihood that the plaintiff will succeed on the merits;
- (2) the “balance of convenience” determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal;
- (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and
- (4) the public interest.

In re Application of Kimmer, 392 Md. 251, 260 n.13, 896 A.2d 1006, 1012 n.13 (Md. 2006) (quoting *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 300-01, 849 A.2d 451, 458-59 (Md. 2004)).

The Circuit Court held that Appellants were not entitled to the provisional relief requested because it determined that they were unlikely to succeed on the merits. The court erred in so holding. Appellants are likely to succeed on the merits. Furthermore, Appellants meet all three other requirements for a TRO or Preliminary Injunction, points on which the Circuit Court did not find against Appellants. Although the denial of a

preliminary injunction is reviewed for abuse of discretion, "even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards," *Alston v. Alston*, 331 Md. 496, 504 (1993), and this Court therefore reviews de novo the legal determinations upon which a grant or denial of a preliminary injunction is predicated.

I. The Circuit Court Erred in Finding that Appellants Are Not Likely to Succeed on the Merits

Appellants are likely to prevail on their claim that the Appellees have violated both State and Federal law in denying eligible voters the opportunity to vote or, at least, by imposing a severe burden on the right to vote.

A. The Circuit Court Erroneously Determined that Appellees' Actions did not Violate Appellants' Statutory Right to Submit an Absentee Ballot.

Under Maryland Code, Election Law § 9-304, registered voters have the right to vote by absentee ballot in this election. Since the enactment of this law, the Governor has signaled his official support for the legislation by publicly encouraging all Maryland voters to use absentee ballots as a preferred method to cast votes. The plain text of the new statute is clear. It provides that "[a] registered voter may vote by absentee ballot except to the extent preempted under an applicable federal law." The statute thus entitles voters to submit an absentee ballot and to have that ballot counted if they comply with the statute's requirements, as Appellants have here.

In its decision below, the Circuit Court mistakenly held that *Lamb v. Hammond*, 308 Md. 286, 518 A.2d 1057 (Md. 1987), required denying the Appellants' claims based on their statutory entitlement. In fact, *Lamb* supports the Appellants' requested relief.

Lamb's basic holding was that state election statutes should be strictly applied notwithstanding the negligence of state officials. In *Lamb*, absentee voters relied on misleading ballot instructions and submitted absentee ballots that were invalid under state law because they were postmarked one day late. The Court of Appeals held that the boards of election were required to follow the strict letter of state law. This was premised on two salient facts: First, the boards were granted no discretion in their role as vote counters. See *Lamb*, 308 Md. at 303, 518 A.2d at 1066 (“[T]he Legislature has created boards of canvassers, given them explicit directions how to collect and count votes, and carefully limited their authority to the performance of that function.”). Second, the court found that the Legislature had evinced a clear intent that those officials “remain within the bounds of their circumscribed authority.” *Id.* It further held that, “[g]iven the care that the Legislature has traditionally shown in crafting the State election laws, we cannot conceive that it intended those requirements to be other than mandatory.” *Id.* at 310, 518 A.2d at 1069. See also *id.* at 309, 518 A.2d at 1068 (rejecting “the notion that clear commands or conditions imposed by a legislative body may be disregarded on the theory that they are merely ‘directory’” (citation omitted)).

This case presents a *fundamentally different circumstance* because the November 6 postmark deadline that the State seeks to enforce is purely a creature of administrative regulation issued pursuant to delegated authority, and is therefore subject to arbitrary and capricious review. *Baltimore Import Car Serv. & Storage, Inc. v. Md. Port Auth.*, 258 Md. 335, 342, 265 A.2d 866, 869 (Md. 1970). Maryland Code, Election Law § 9-303(a) delegates to Appellees the authority to “establish guidelines for the administration of

absentee voting by the local boards,” including “determining [the] timeliness of receipt of . . . ballots,” § 9-303(b)(4). Pursuant to this authority, Appellees have required that voters postmark absentee ballots by November 6, 2006, in order for those ballots to be counted. COMAR 33.11.03.08(b). This deadline thus represents the discretionary exercise of the Appellees’ regulatory powers, not the dictate of a state law.

As an administrative regulation, COMAR 33.11.03.08(b) can be overturned if it is “arbitrary, capricious or unreasonable.” *Baltimore Import Car Serv.*, 258 Md. at 342, 265 A.2d at 869. The November 6 deadline is both arbitrary and unreasonable. It is arbitrary insofar as Appellees have shown no reason why the November 6 deadline was chosen as opposed to a November 7 deadline. And it is unreasonable under these circumstances for the Appellees to strip Appellants and others similarly situated of their statutory right to submit an absentee ballot. Appellees cannot deny that Appellants are registered voters; that Appellants complied with every regulation in applying for an absentee ballot; and that the *only* reason Appellants may not be able to vote is that Appellees failed to send out absentee ballots in time for Appellants to meet the November 6 deadline. Appellees’ regulation cannot stand in light of § 9-304’s clear guarantee that registered voters such as Appellants may vote by absentee ballot.

In contrast to the November 6 deadline, set by regulation, the right to vote by absentee ballot *is* codified in state law, which *Lamb* dictates this Court must endeavor to strictly apply. Maryland Code, Election Law § 9-304 provides, in full, that “[a]n individual may vote by absentee ballot except to the extent preempted under an applicable federal law.” The older version of this statute required registered voters to

meet one of several criteria before they could qualify to vote absentee. The current version of the statute – which came into effect on February 17, 2006 – eliminated all of those criteria but one: By the plain terms of the statute, registered voters are entitled to vote by absentee ballot unless federal law provides otherwise.

Lamb held that state election laws, such as the right to an absentee vote under § 9-304, must be strictly applied. *Lamb*, 308 Md. at 310. In analogous circumstances, this Court, in *Munsell v. Hennegan*, 182 Md. 15, 27 (Md. 1943), refused to order the Supervisors of Election to depart from the provisions of an act of the Legislature concerning nomination procedures, stating that “[w]e are unable to hold that the Supervisors of Election can, in their discretion, determine not to obey [the provisions of the Act].” Similarly, in the present case, when enforcing a regulation would conflict with a statutory command, Appellees should not be able to use their discretion to depart from the instructions of § 9-304.

This conclusion is especially apt in light of the *Lamb* Court’s concern with enforcing laws “particularly designed to protect the integrity of the elective process.” *Lamb*, 308 Md. At 311, 518 A.2d at 1069. The September primaries in Maryland demonstrated that voters attending a polling place could easily be denied the opportunity to vote due to malfunctioning or confusing voting machines. As a result, candidates across the political spectrum, including Maryland’s current governor, have urged voters to take advantage of Maryland’s new no-excuse absentee voting provision, § 9-304, to

ensure that their votes will be counted.⁷ Thus, the right to vote by absentee ballot is not merely a procedural privilege afforded to certain voters. Rather, it helps underpin the integrity of Maryland's elections and ensures that registered voters may exercise their right to vote. Under *Lamb*, § 9-304 ought to receive the greatest solicitude from the courts.

This Court has the power to order election officials to do what Maryland election law tells them to do. See *Wilkinson v. McGill*, 192 Md. 387, 393, 64 A.2d 266, 270 (1949) (“The election officials are required to do what the law tells them to do and this can be enforced by appropriate court action[.]”); Maryland Code, Election Law § 12-202 (a) (“If no other timely and adequate remedy is provided by this article, a registered voter may seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission: (1) is inconsistent with this article or other law applicable to the elections process; and (2) may change or has changed the outcome of the election.”).

⁷ See, e.g., R.E. Tab 6 (Governor Bob Ehrlich: “In light of the long lines and malfunctioning technology encountered on Primary Day, please consider voting in November’s General Election by absentee ballot.”); R.E. Tab 7 (“Rep. Gov. Robert Ehrlich and Democratic Mayor Martin O’Malley are using recorded telephone messages to promote the use of absentee ballots in the general election, following a problems during this year’s primary and the governor’s doubts about the security of touchscreen voting machines.”).

⁸Alternatively, should this Court determine that the relevant time is when the Court of Appeals hears the case, and that § 12-202(a) does not, therefore, provide an avenue for relief, appellants submit that Article 19 of the Maryland Bill of Rights, acting in concert with § 9-304, operates to guarantee Appellants recourse to the courts. Under Article 19, a citizen is guaranteed a remedy under the Maryland Constitution “for every injury done to him in his person or property.” Md. Const., Dec. of Rights., Art. 19. This Court has stated that where, as here, the government has enacted a law granting rights but has not set up a means by which that law can be enforced, Article 19 affords persons whose rights are violated direct access to the courts for this purpose. *See Piselli v. 75th St. Med.*, 371 Md. 188, 206, 808 A.2d 508, 518 (Md. 2001) (“[W]here a person clearly has a right to money or property under a statute or common law principle, and no statute specifically provides for a remedy, Article 19 guarantees a common law remedy to enforce the right.”) (citing *Robinson v. Bunch*, 367 Md. 432, 444, 788 A.2d 636, 644 (Md. 2002) (“[If the General Assembly had not enacted a specific statutory remedy, state employees would certainly have a common law remedy in Maryland courts to enforce their rights to mandated overtime compensation under state or federal law.”])). *See also R.A. Ponte*

⁸ This Court has explained that, after an election has been held, “[t]o sustain a judicial challenge pursuant to § 12-202, the litigant must prove, by clear and convincing evidence, a substantial probability that the outcome would have been different but for the illegality.” *Suessmann v. Lamone*, 383 Md. 697, 720 (2004); *see also Dutton v. Tawes*, 225 Md. 484, 491 (Md. 1961) (“Election officials of course should do what the law tells them to do and, before election, a court will require that they do their duty. Yet if the election has been held before court action is sought and it is not shown that the failure of the officials to follow the law has interfered with the full and fair expression of the will of the voters, that expressed choice will not be disturbed by the Courts.”). Appellants’ challenge, including a motion for an emergency TRO, was filed with the Circuit Court on Monday, November 6th, prior to the election, and so should not be subject to the “substantial probability” bar enunciated in *Suessmann*.

Architects, LTD. v. InvestorsJAlert, Inc., 382 Md. 869, 696, 857 A.2d 1, 5 (Md. 2004) (“Circuit Courts do not require expressed statutory authorization to entertain a particular type of civil action; instead, they have jurisdiction over civil causes of action generally.”).

B. Appellees Have Violated Appellants’ Right to Vote Under the State Constitution.

Article 1, § 1 of the Maryland Constitution provides that “[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” (emphasis added). Similarly, Article 7 of the Maryland Declaration of Rights proclaims: “[E]very citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.” “Article 7 has been held to be even more protective of rights of political participation than the provisions of the federal Constitution.” *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 228 (Md. 2003).

These provisions of State law guarantee the right to vote despite any governmental interference, whether intentional or inadvertent. At their most lenient, these provisions may excuse “unimportant mistakes” or “misleading, erroneous, or ambiguous instructions” that merely affect – without wholly depriving eligible voters of – the right to vote. *See Lamb v. Hammond*, 518 A.2d 1057, 1069 (Md. 1987). However, they absolutely proscribe more serious errors, such as failing to fulfill election duties, that directly threaten the right to vote. Here, the Appellees’ errors are not “unimportant.” Rather, they fundamentally affect the electoral process. The Appellees’ failure to distribute absentee ballots in time and Appellees’ failure to ensure that polling places have sufficient provisional ballots threaten to *wholly disenfranchise* eligible voters who,

in reliance upon the Governor's declarations and provisions of State law, sought to exercise their right to vote by absentee ballot.

C. Appellees' Discriminatory Treatment of Appellants and Similarly Situated Absentee Voters Violates the Right to Equal Protection Under the State and Federal Constitutions.

The Appellees have also violated Appellants' right to vote under the equal protection guarantees contained in the Federal Constitution and in Article 24 of the Maryland Constitution. "[A]lthough Article 24 does not contain an express equal protection clause, the concept of equal protection nevertheless is embodied in the Article." *Renko v. McLean*, 697 A.2d 468, 477 (Md. 1977). The Court of Appeals of Maryland has held that "where all persons who are in like circumstances are treated the same under the laws, there is no deprivation of equal protection, but a law which operates upon some persons or corporations, and not upon others like situated or circumstanced or in the same class, is invalid." *Md. Green Party*, 832 A.2d at 234. Restrictions on the right to vote are "subject to some degree of special scrutiny." *O.C. Taxpayers for Equal Rights, Inc. v. Ocean City*, 375 A.2d 541, 547-48 (Md. 1977). Similarly, the Federal Constitution requires that election laws treat like voters equally. "[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens . . . Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Under both State and Federal law, there is no relevant distinction between the voting rights of Appellants and nonabsentee voters, especially after the Governor urged all Maryland voters to vote by absentee ballot. There is even less of a distinction between

the voting rights of Appellants – who either will not receive absentee ballots or who will receive them too late – and other absentee voters who are unaffected by Appellees’ delays because they happened to receive their ballots in time. Nevertheless, the Appellees’ actions impose a burden on the right to vote exclusively on Appellants and other absentee voters similarly situated. Furthermore, Appellees cannot articulate any public policy concern that would justify the imposition of this burden. Rather, this discrimination against Appellants is occurring solely as a result of the Appellees’ negligent failure to prevent a known problem: the high demand for absentee ballots and the unresponsiveness of the State’s vendor in fulfilling orders. Because the Appellees can offer no justification for their unequal imposition of a burden on the right to vote, their actions violate the equal protection guarantees of State and Federal Law.

II. Appellants Meet the Other Requirements for a TRO or Preliminary Injunction Because They Will Suffer Irreparable Injury if Relief Is Not Granted, the Balance of Convenience Favors Granting Temporary Relief, and the Public Interest Would Be Served by Granting that Relief.

A. Appellants Will Suffer Irreparable Injury if Relief Is Not Granted.

As outlined in the factual background, Appellees have failed to distribute absentee ballots in time for those ballots to be mailed on the day before Election Day. These actions have irreparably injured Maryland voters in a number of ways. Many voters will have their statutory and constitutional right to vote stripped entirely. These burdens and restrictions on the right to vote are immediate, substantial, and irreparable without this Court’s intervention. The deadline for submitting an absentee ballot was November 6; November 7 was Election Day. The right to vote is a fundamental right protected by the

Maryland and United States Constitutions. Under extant regulations, eligible voters who received an absentee ballot too late will not have their votes counted.

B. The “Balance of Convenience” Strongly Favors Granting the TRO or Preliminary Injunction

In comparison to the substantial harms that Appellants face, Appellees will suffer little to no harm if the requested relief is granted. First, Appellees could easily comply with the relief requested using existing procedures. Extending the deadline for postmarking absentee ballots until Election Day, November 7, will not burden the Appellees because they can count such ballots during either the first canvass on November 9 or the second canvass of absentee ballots on November 17. COMAR 33.11.04.05(A)(2). Furthermore, COMAR 33.11.03.07 requires all absentee ballots to be gathered in one centralized location for the counting process, minimizing any logistical issues with counting such ballots.

Second, the requested relief is consistent with Maryland law. The Maryland Code already contemplates the issuance of court orders that extend the time for voting activities. For example, Maryland Code, Election Law § 9-404(c) (entitled “Under court order”) specifically mentions court orders that keep polling places open: “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.” Furthermore, the rule at issue here – the postmark deadline for absentee ballots – derives from regulation, not state law. In granting relief, this Court would not be flouting the legislature’s intent. Rather, it would be merely be modifying a regulation that, given current circumstances, is

unreasonable if applied. Thus, the requested relief represents no sharp break from existing Maryland law.

Third, courts outside of Maryland have extended the deadline for receipt of absentee ballots in analogous circumstances. *See Reitz v. Rendell*, 2004 U.S. Dist. LEXIS 21813 (M.D. Pa. Oct. 29, 2004) (extending deadline for receipt of absentee ballots from overseas military voters where U.S. “did not mail . . . ballots in time for their votes to be counted”). This precedent demonstrates that the requested relief does not place an onerous burden on the Appellees in comparison to the risk that eligible voters will be disenfranchised.

Fourth, the proposed relief is narrowly tailored to the specific anticipated harm. As noted above, some Boards of Election did not complete their mailings of absentee ballots until only two or three days ago. Nevertheless, to minimize the burden on Appellees, Appellants seek only to extend the postmark deadline to November 7, Election Day, even though such a remedy will not give voters the fullest measure of relief.

C. The Public’s Interest in Preventing the Disenfranchisement of Eligible Voters Is of the Highest Order

The importance of the right to vote cannot be gainsaid. “[V]oting is of the most fundamental significance under our constitutional structure.” *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Suffrage is “a fundamental political right, because [it is] preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Maryland Declaration of Rights similarly affirms the importance of the right to vote: “[E]very citizen having the qualifications prescribed by the Constitution, ought to

have the right of suffrage.” Md. Declaration of Rights, Article 7. There can be no question that the imminent loss of or burden on the right to vote represents the kind of threat to the public interest for which a TRO or Preliminary Injunction is appropriate.

CONCLUSION

In this case, the trial court abused its discretion in applying *Lamb v. Hammond*, 308 Md. 286, 518 A.2d 1057 (1987), to conclude that the Appellants were unlikely to succeed on the merits of their challenge to COMAR 33.11.03.08(b)'s requirement that absentee ballots be postmarked by November 6, 2006. The record before the trial court and before this Court evinces a conclusion that *Lamb* supports the Appellants' request. Moreover, the record also supports a conclusion that: (1) the Appellees unjustified enforcement of COMAR 33.11.03.08(b) imposes a present and ongoing injury to the Appellants; (2) the Appellants will suffer irreparable harm if the requested relief is not granted; and (3) the balance of convenience, as well as the public interest, warrant the award of an injunction to ensure that the Appellants are afforded the opportunity to exercise their right to vote as guaranteed by the laws of Maryland, the constitution of Maryland, and the Constitution of the United States.

Accordingly, the Appellants are entitled to immediate injunctive relief directing Appellees to accept as valid all absentee ballots postmarked on November 7, 2006, in order to ensure that the Maryland vote in the 2006 elections is fully and fairly counted. Appellants respectfully request that this Court reverse the decision of the Circuit Court and order the entry of a TRO or Preliminary Injunction granting the relief requested above.

Respectfully submitted,

This 7th day of November, 2006

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APPENDIX

Document 1 of 2**Source:**

Maryland Code/ELECTION LAW /TITLE 9. VOTING/SUBTITLE 1. VOTING SYSTEMS /§ 9-102. Certification of voting systems.

§ 9-102. Certification of voting systems.

(a) *Adoption of regulations.*- The State Board shall adopt regulations for the review, certification, and decertification of voting systems.

(b) *Periodic review.*- The State Board shall periodically review and evaluate alternative voting systems.

(c) *Standards for certification.*- The State Board may not certify a voting system unless the State Board determines that:

(1) the voting system will:

(i) protect the secrecy of the ballot;

(ii) protect the security of the voting process;

(iii) count and record all votes accurately;

(iv) accommodate any ballot used under this article;

(v) protect all other rights of voters and candidates; and

(vi) be capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount;

(2) the voting system has been:

(i) examined by an independent testing laboratory that is approved by the National Association of State Election Directors; and

(ii) shown by the testing laboratory to meet the performance and test standards for electronic voting systems established by the Federal Election Commission; and

(3) the public interest will be served by the certification of the voting system.

(d) *Considerations for certification.*- In determining whether a voting system meets the required standards, the State Board shall consider:

(1) the commercial availability of the system and its replacement parts and components;

(2) the availability of continuing service for the system;

(3) the cost of implementing the system;

- (4) the efficiency of the system;
- (5) the likelihood that the system will malfunction;
- (6) the system's ease of understanding for the voter;
- (7) the convenience of voting afforded by the system;
- (8) the timeliness of the tabulation and reporting of election returns;
- (9) the potential for an alternative means of verifying the tabulation;
- (10) accessibility for all voters with disabilities recognized by the Americans with Disabilities Act; and
- (11) any other factor that the State Board considers relevant.

(e) *Regulations for each voting system.-*

- (1) The State Board shall adopt regulations relating to requirements for each voting system selected and certified under § 9-101 of this subtitle.
- (2) The regulations shall specify the procedures necessary to assure that the standards of this title are maintained, including:
 - (i) a description of the voting system;
 - (ii) a public information program by the local board, at the time of introduction of a new voting system, to be directed to all voters, candidates, campaign groups, schools, and news media in the county;
 - (iii) local election officials' responsibility for management of the system;
 - (iv) the actions required to assure the security of the voting system;
 - (v) the supplies and equipment required;
 - (vi) the storage, delivery, and return of the supplies and equipment necessary for the operation of the voting system;
 - (vii) standards for training election officials in the operation and use of the voting system;
 - (viii) before each election and for all ballot styles to be used, testing by the members of the local board to ensure the accuracy of tallying, tabulation, and reporting of the vote, and observing of that testing by representatives of political parties and of candidates who are not affiliated with political parties;
 - (ix) the number of voting stations or voting booths required in each polling place, in relation to the number of registered voters assigned to the polling place;
 - (x) the practices and procedures in each polling place appropriate to the operation of the voting system;

- (xi) assuring ballot accountability in systems using a document ballot;
 - (xii) the actions required to tabulate votes; and
 - (xiii) postelection review and audit of the system's output.
- (3) Certification of a voting system is not effective until the regulations applicable to the voting system have been adopted.

[An. Code 1957, art. 33, § 9-102; 2002, ch. 291, §§ 2, 4.]

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Document 2 of 2

Source:

Maryland Code/ELECTION LAW /TITLE 9. VOTING/SUBTITLE 1. VOTING SYSTEMS /§ 9-103.
Decertification.

§ 9-103. Decertification.

(a) *Decertification - In general.*- The State Board:

- (1) may decertify a voting system previously certified if the State Board determines that the system no longer merits certification; and
- (2) shall decertify a previously certified voting system if the voting system no longer meets one or more of the standards in § 9-102(c)(1)(i) through (iii) of this subtitle.

(b) *Time and conditions of decertification.*- The State Board shall determine the effective date and conditions of the decertification.

[An. Code 1957, art. 33, § 9-103; 2002, ch. 291, §§ 2, 4.]

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Source:

Maryland Code/ELECTION LAW /TITLE 9. VOTING/SUBTITLE 3. ABSENTEE VOTING /§ 9-304. Permissible unless federal preemption.

§ 9-304. Permissible unless federal preemption.

An individual may vote by absentee ballot except to the extent preempted under an applicable federal law.

[An. Code 1957, art. 33, § 9-304; 2002, ch. 291, §§ 2, 4; 2006, ch. 6.]

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Maryland Code/ELECTION LAW /TITLE 12. CONTESTED ELECTIONS/SUBTITLE 2. JUDICIAL REVIEW OF ELECTIONS /§ 12-202. Judicial challenges.

§ 12-202. Judicial challenges.

(a) *In general.*- If no other timely and adequate remedy is provided by this article, a registered voter may seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission:

(1) is inconsistent with this article or other law applicable to the elections process; and

(2) may change or has changed the outcome of the election.

(b) *Place and time of filing.*- A registered voter may seek judicial relief under this section in the appropriate circuit court within the earlier of:

(1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or

(2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.

[An. Code 1957, art. 33, § 12-202; 2002, ch. 291, §§ 2, 4.]

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Maryland Code/ELECTION LAW /TITLE 12. CONTESTED ELECTIONS/SUBTITLE 2. JUDICIAL REVIEW OF ELECTIONS /§ 12-203. Procedure.

§ 12-203. Procedure.

(a) *In general.*- A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:

(1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;

(2) on the request of a party or sua sponte, the chief administrative judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and

(3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.

(b) *Expedited appeal.*- The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a) (3) of this section as expeditiously as the circumstances require.

[An. Code 1957, art. 33, § 12-203; 2002, ch. 291, §§ 2, 4.]

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Maryland Rules/MARYLAND RULES /Title 15. Other Special Proceedings /Chapter 500. Injunctions /Rule 15-504. Temporary restraining order.

Rule 15-504. Temporary restraining order.

(a) *Standard for granting.*- A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

(b) *Without notice.*- A temporary restraining order may be granted without written or oral notice only if the applicant or the applicant's attorney certifies to the court in writing, and the court finds, that specified efforts commensurate with the circumstances have been made to give notice. Before ruling, the judge may communicate informally with other parties and any other person against whom the order is sought or their attorneys.

(c) *Contents and duration.*- In addition to complying with Rule 15-502 (e), the order shall (1) contain the date and hour of issuance; (2) define the harm that the court finds will result if the temporary restraining order does not issue; (3) state the basis for the court's finding that the harm will be irreparable; (4) state that a party or any person affected by the order may apply for a modification or dissolution of the order on two days' notice, or such shorter notice as the court may prescribe, to the party who obtained the order; and (5) set forth an expiration date, which shall be not later than ten days after issuance for a resident and not later than 35 days after issuance for a nonresident. The order shall be promptly filed with the clerk. On motion filed pursuant to Rule 1-204, the court by order may extend the expiration date for no more than one additional like period, unless the person against whom the order is directed consents to an extension for a longer period. The order shall state the reasons for the extension.

(d) *Service; binding effect.*- A temporary restraining order shall be served promptly on the person to whom it is directed, but it shall be binding on that person upon receipt of actual notice of it by any means.

(e) *Denial.*- If the court denies a temporary restraining order, the clerk shall note the denial by docket entry in accordance with Rule 2-601 (b).

(f) *Modification or dissolution.*- A party or person affected by the order may apply for modification or dissolution of the order on two days' notice to the party who obtained the temporary restraining order, or on such shorter notice as the court may prescribe. The court shall proceed to hear and determine the application at the earliest possible time. The party who obtained the temporary restraining order has the burden of showing that it should be continued.

[Amended Nov. 12, 2003, effective Jan. 1, 2004.]

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33.09.02.07

.07 Audit Trail Required.

The voting system shall be capable of providing an audit trail of all ballots cast so that, in a recount, the election can be reconstructed, starting with the individual votes of all eligible voters.

33.11.03.08

.08 When Ballots Are Timely.

A. United States.

(1) "United States" means the several states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) "United States" does not include American Samoa, the Canal Zone, Guam, the Trust Territory of the Pacific Islands, any other territory or possession of the United States, an Army Post Office address, or a Fleet Post Office address.

B. In General. An absentee ballot is considered to have been timely received only if:

(1) The ballot is received by the local board office before the polls close on election day; or

(2) The ballot:

(a) Is received by the local board office from the United States Postal Service or a private mail carrier:

(i) On or before 10 a.m. on the second Wednesday after a primary election preceding a gubernatorial election; or

(ii) On or before 10 a.m. on the second Friday after a general or special election or in a primary election preceding a presidential election; and

(b) Was mailed before election day, as verified:

(i) By a postmark of the United States Postal Service, an Army Post Office, a Fleet Post Office, or the postal service of any other country; or

(ii) By the voter's affidavit that the ballot was completed and mailed before election day, if the return envelope does not contain a postmark or the postmark is illegible.

C. Untimely Ballots. A ballot that is not timely received as provided in this regulation may not be counted.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by electronic mail and by first-class mail, postage pre-paid, 2 copies of the foregoing Brief for Appellants upon opposing counsel designated below.

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Dated at Washington, D.C., this 7th day of November, 2006.



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