

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.:
COA Pet. No. 243-2022

* * * * *

**RESPONSE TO THE STATE BOARD OF ELECTIONS’
PETITION FOR WRIT OF CERTIORARI
AND REQUEST FOR EXPEDITED REVIEW**

Daniel Cox (“Del. Cox”) respectfully responds to the Maryland State Board of Elections’ (the “State Board’s”) *Petition for 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. As stated in the *Petition*, 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).

Del. Cox agrees with the State Board that this Court’s immediate attention is desirable and in the public interest. As stated in the State Board’s *Petition*, 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.” Del. Cox asserts

that the statute violates the separation of powers provision of Md. Decl. of Rts. art. 8 because it delegates a legislative function to the judicial branch. Having never been litigated in any court, the constitutionality of this statute is a matter of first impression for this Court.

As the *Petition* further states, the nature of the emergency relief sought is time sensitive. However, Del. Cox reaches this conclusion using a different calculus. The separation of powers is a constitutional right; otherwise, if it were not, the Framers of the Maryland Constitution would have placed the separation of powers requirement in a different section of the Constitution than the Declaration of Rights. *A fortiori*, if Election Law § 8-103(b)(1) is found to be unconstitutional, then a critically important constitutional right (*i.e.*, the separation of powers) will be violated by the State Board as early as October 1, 2022 (App. 11).

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 incorrectly rule that the remedy sought under Election Law § 8-103(b)(1) comports with the separation of powers doctrine since the remedy requested had already been considered by the Legislative Department and had been

vetoed by the Executive Department months before the Judicial Department had been asked to formulate a remedy?

2. Did the circuit court incorrectly 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) given that these situations were contemplated by the Legislative Department during the 2022 session?

STATEMENT OF THE CASE

Factual Background

As stated in the *Petition*, 345,230 mail-in ballots were returned during the 2022 gubernatorial primary election. Although the State Board calls this number of mail-in ballots “overwhelming,” *Petition* at p.3, this sum is paltry when compared to the 1,527,460 mail-in ballots that were returned during the 2020 election. That year, due to the pandemic, mail-in ballots increased by nearly twelvefold as compared to the 120,240 mail-in ballots that had been cast during the 2018 election cycle. *Cf. id.*

Thus, the 345,230 mail-in ballots that were returned during the 2022 primary election would have been foreseeable to the General Assembly when they considered and passed Senate Bill 163 and House Bill 862 during the 2022 Regular Legislative Session. Both bills gave local boards authority to canvass and tabulate mail-in ballots eight days before the beginning of the early voting period. However, the Governor, exercising his prerogative under the Maryland Constitution, vetoed these bills.

Statutory Background

Statutory Election Deadlines

The State Board correctly articulates the current state of the statutory election deadlines in following paragraphs of the *Petition*:

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).

Petition, at pp. 5-6.

Emergent Circumstances

Although Del. Cox asserts that Election Law § 8-103 is unconstitutional as per Article 8 of the Maryland Declaration of Rights, he further contends that there are no

“emergency circumstances” to justify the exercise of this statute, even by the State Board’s own standards, as set forth below:

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.*

Petition, at p 7. Put simply, since the 345,230 mail-in ballots presented to the State Board and the local boards during the 2022 primary election were even less burdensome than the 1,527,460 mail-in ballots that had been cast two years earlier, the “deluge of ballot envelopes” could hardly have been “unforeseen” to General Assembly, to the Governor, or to the State Board.¹

¹ The term “deluge” comes straight from a footnote in the Petition for Emergency Remedy that the State Board filed in the lower court, as depicted below:

It is worth noting, however, that Governor Hogan supported the early canvassing provisions in the bills despite his veto. By veto statement transmitted to the President of the Senate and Speaker of the House, the Governor offered that early canvassing of ballots was a “positive change” because it “would allow hard working election officials to get a much needed head start on the deluge of ballot envelopes that, under current law, must wait until Election Day for processing.”

The State Board's Petition for an Emergency Remedy

In its *Petition*, the State Board correctly articulates the procedural history of the case, as set forth below:

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 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 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.

Petition, at pp. 7-10. However, the Court of Special Appeals denied Del. Cox’ motion to stay on September 29, 2022. ***Thus, to the extent that Del. Cox would otherwise need to file a petition for writ of certiorari in his own right, he requests that this response be treated as such.***

REASONS FOR GRANTING AND EXPEDITING

REVIEW

Del. Cox agrees with the State Board's assertion that 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.

As the State Board notes, Del. 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.

Del. Cox concurs with the State Board that time is of the essence. As the State Board contends, 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").

I. ADJUSTING THE ELECTORAL TIMELINE IN THE MANNER

REQUESTED BY THE STATE BOARD VIOLATES THE DOCTRINE OF SEPARATION OF POWERS.

In *Schisler v. State*, 394 Md. 519, 907 A.2d 175 (Md. App. 2006), this Court provides a thorough analysis of Article 8 and the Separation of Powers Doctrine. *Schisler* involves a dispute over Sections 12 and 22 of Senate Bill 1 from the 2006 legislative session. See 907 A.2d at 178. These sections “directly affect[ed] the terms of office of the current Commissioners [of the Public Service Commission] and the future appointment of interim Commissioners....” *Id.* This Court held that these sections were “repugnant to the Maryland Constitution ... and [are] otherwise in violation of Section 8 of the Declaration of Rights of Maryland.” 907 A.2d at 176.

Although the underlying dispute in *Schisler* deals with utility law, not election law, this Court’s analysis regarding the Separation of Powers doctrine is quite instructive to this discussion, *viz.*:

The Declaration of Rights expressly establishes (or continues the concept first created by the "Bill of Rights" of the 1776 Constitution and subsequent amendments and constitutions) the Separation of Powers concept, as an explicit Maryland Constitutional command (in contrast with the creation of such concept by implication in the Federal Constitution). ... Article 8 of the Declaration of Rights expressly established the Separation of Powers Doctrine as part of the "organic" law of Maryland.

907 A.2d at 203. Thus, the Separation of Power is not simply a notion to which Maryland law pays lip-service. Rather, it is an “*explicit Maryland Constitutional command.*” (Emphasis added.)

This Court in *Schisler* also reiterates its holding from 106 years earlier in *Robey v. Commissioners*, 92 Md. 150, 48 A. 48 (1900), which involved attempts by the Legislative Department to impose Executive Department accounting duties on certain of the Judges of Maryland:

The 8th Art. of the Declaration of Rights ordains: '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.' Can a Judge, who exercises the functions of the judicial department, be required to assume or discharge the duties which pertain to either of the other departments?

Schisler, 907 A.2d at 207 (quoting *Robey*, 92 Md. at 161-61, 48 A. at 50). Thus, we may infer that a Judge cannot be required to assume or discharge the duties which pertain to either the Legislative or Executive Departments. *Cf. id.*

The *Schisler* Court also quotes from *Board of Supervisors of Election v. Todd*, 97 Md. 247, 262-63, 54 A. 963 (1903), which also was a case involving a Legislative imposition of non-judicial duties on Judges:

In making this inquiry we are not dealing with any question of expediency or policy; nor can we have regard to the question whether, in the particular instance, the Legislature has prescribed a course of proceeding best adapted to the accomplishment of a laudable object. The public policy involved in the inquiry is determined and fixed in our Bill of Rights and the Constitution — the fundamental law; and we are limited to the question of constitutional power. As was said in the case of *Thomas v. Owens*, 4 Md. [189,] 225 [(1853)], "under our system of government its powers are wisely distributed to different departments; each and all are subordinate to the Constitution, which creates and defines their limits; whatever it commands is the supreme and uncontrollable law of the land."

Schisler, 907 A.2d at 207 (quoting *Todd*, 97 Md. at 262, 54 A. at 964.). Thus, it is immaterial whether the delegation of authority or duties from the General Assembly to the Judiciary is laudable or praiseworthy; instead, what matters is if the “uncontrollable law of the land” is being followed. *See id.*

The most recent case from the Maryland Court of Appeals regarding Article 8 is *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 274 A.3d 412 (Md. 2022). In holding that Article 8 did not limit the Chief Judge’s authority to suspend statutes of limitations during the COVID-19 pandemic, the *Murphy* Court describes “four broad categories” of cases addressing “the Judiciary’s place in Maryland’s system of government,” the first of which being, “those involving a legislative attempt to assign to the courts a task that had nothing to do with adjudicating cases....” 478 Md. at 373, 274 A.3d at 435. In describing this category of cases, this Court cites to the following cases favorably: *Beasley v. Ridout*, 94 Md. 641, 52 A. 61 (1902); *Duffy v. Conaway*, 295 Md. 242, 261, 455 A.2d 955 (1983); *Robey*, *supra*; and *Todd*, *supra*. *See Murphy*, 478 Md. at 374 n.44.

In *Beasley*, this Court recites the *Robey* Court:

The mere fact that a Judge is called on by statute to execute a certain function, does not make it a judicial function. Its character is dependent on its qualities, not on the mere accident as to the person designated to do it. * * * If the Act is judicial when conferred on a Judge, and non-judicial when not conferred on him, the same Act would be in one county judicial, whilst in an adjoining county it would not be.

Beasley, 94 Md. at 659 (quoting *Robey*, 92 Md. at 163). Therefore, if the Executive or Judicial Departments can perform a function, then such function is non-judicial. Thus, any statute requiring a Court to perform such function is unconstitutional:

Because courts cannot be required to exercise nonjudicial duties it has been held by this Court that it is beyond the power of the Legislature to require the judiciary to: . . . perform duties tantamount to a board of review in assessing property for tax purposes, *Baltimore City v. Bonaparte*, 93 Md. 156, 48 A. 735 (1901); appoint a board of visitors to supervise the county jail. [*Beasley, supra*]; provide for referendum concerning issuance of liquor licenses, [*Todd, supra*]; issue licenses permitting pari-mutuel betting on horse races, *Close v. Southern Md. Agr. Asso.*, 134 Md. 629, 108 A. 209 (1919); and issue liquor licenses, *Cromwell v. Jackson*, 188 Md. 8, 52 A.2d 79 (1947).

Duffy, 295 Md. at 260-61 (Md. 1982) (quoting *Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 226 (Md. 1975)).

The Maryland Constitution unambiguously gives the General Assembly the power to regulate elections:

The General Assembly shall have power to regulate by Law, not inconsistent with this Constitution, all matters which relate to the Judges of election, time, place and manner of holding elections in this State, and of making returns thereof.

Md. Const. art. III, § 49 (emphasis added). When constitutional grant is read in conjunction with Article 8 as interpreted by the abovementioned cases, one must conclude that power to enact policy relating to elections is the sole province of the General Assembly – not the State Board or even the Courts. Therefore, any statute giving any court the authority to make such a policy is unlawful and void.

In the case at bar, the General Assembly exercised its Legislative function by passing not one, but two bills during the 2022 Regular Legislative Session that would have allowed the State Board and local election boards to canvass and tabulate mail-in ballots days before the election. In other words, the General Assembly – clearly mindful of the

twelfefold increase in mail-in ballots from 2018 to 2020 – enacted legislation that not only anticipated the problems referenced by the State Board but would have given the State Board the very relief it now seeks. The General Assembly, however, selected not to place this legislation into a stand-alone bill. Instead, the General Assembly presented this legislation to the Governor along with other items late in the session, knowing that there might not be time to override a potential veto. The Governor vetoed both bills.

Thus, the General Assembly treated the decision to expand the dates for counting ballots as if it were a legislative question. Then, when it was presented to the Governor for review, he vetoed it, exercising his Executive prerogative to veto legislation. Ergo, the decision to set (or to reset) the dates for counting ballots – as codified by state law – is a legislative question, not a judicial question.

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

Election Law § 8-103 (b)(1) states as follows.:

If emergency circumstances, not constituting a declared state of emergency, interfere with the electoral process, the State Board or a local board, after conferring with the State Board, may petition a circuit court to 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.

According to the State Board, this subsection applies to “unforeseen and immediate conditions, natural or man-made, that do no more than interfere with the electoral process.”

Petition at p. 7 (emphasis added and internal quotations omitted). Restated, the State Board may seek this relief only when there are unforeseen circumstances.

Nevertheless, the State Board claims that “[a]fter the electoral experience in 2020, election officials could hardly anticipate how Maryland voters would approach the polls in 2022.” *Petition*, at p. 14. With due respect to the State Board, this representation is mind boggling. As mentioned, the number of mail-in ballots that were returned increased by nearly twelvefold from 2018 to 2020. Thus, the General Assembly, the Governor, and the State Board all knew that a “deluge of ballot envelopes” was, at least, possible.

As the Court is aware, foreseeability is not only central to the determination of whether Election Law § 8-103 (b)(1) is triggered, but it is also central to every case of common law negligence. Therefore, by analogue, Del. Cox would invite this Court to examine the “Hand Analysis” that is commonly used to ascertain whether a defendant is negligent for his failure to act:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B > PL$.

United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

In the case at bar, the probability of having a deluge of mail-in ballots (which is analogous to “the probability that [a vessel] will break away” from its moorings, *id.*) was high. Admittedly, 2020 was an unusual year, with a pandemic that had caused people to stay locked in. However, the General Assembly, the Governor, and the State Board all

should have recognized that human nature takes the path of least resistance. In 2020, a million new voters had just tasted how easy mail-in voting could be. For the State Board to even think that the genie might return to her bottle seems a bit of a stretch. At the very least, the possibility of having a deluge of mail-in ballots was by no means impossible.

As for “the gravity of the resulting injury,” *id.*, the General Assembly, the Governor, and the State Board understood how many manhours would be required to count approximately 1,500,000 mail-in ballots. After all, they had performed this task in 2020. Thus, the General Assembly, the Governor, and the State Board all understood the backlog that would occur if insufficient manhours were appropriated to the counting of mail-in ballots during the 2022 general election.

Finally, as for “the burden of adequate precautions,” *id.*, that would have been relatively low. All the General Assembly had to do was enact a piece of standalone legislation that would have changed the deadlines for counting ballots – which is, essentially, the relief the State Board now requests.

Thus, in view of the Hand Analysis, *supra*, the tests for foreseeability have been met. The probability of having a deluge of ballots was high, the gravity of the harm would have been computable, and the means to rectify the problem by legislative means would have been simple. Thus, this is not an emergency circumstance, because it was by no means unforeseeable. Ergo, the State Board lacks even the statutory authority to act.

CONCLUSION

The petition for writ of certiorari should be granted and the appeal decided expeditiously to prevent the Separation of Powers from being violated and/or to prevent the State Board from exercising emergency powers for which it is not allowed to exercise.

This the 30th day of September, 2022

/s/ C. EDWARD HARTMAN

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**CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112**

1. This petition contains 4,528 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/ C. EDWARD HARTMAN

C. EDWARD HARTMAN, III

CERTIFICATE OF SERVICE

I, C. Edward Hartman, III, hereby certify that the preceding pleading was served upon the following persons via first class US mail and email.

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