
**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2022

No. 21

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

On Appeal from the Circuit Court for Montgomery County
(James A. Bonifant, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

RESPONSE BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

ARGUMENT..... 1

I. IN GRANTING AN EMERGENCY REMEDY, THE CIRCUIT COURT PERFORMED A QUINTESSENTIAL JUDICIAL FUNCTION AND DID NOT USURP A CORE LEGISLATIVE POWER. 2

 A. This Court’s Precedents Establish That Adjusting Statutory Deadlines to Deal with Emergency Circumstances Is Within the Judicial Power. 2

 B. The Circuit Court’s Order Is Consistent with Legislative Intent and Furthers Legislative Policy..... 3

II. IF PRESERVED FOR REVIEW, THE CIRCUIT COURT’S ORDER DID NOT OVERRIDE THE GOVERNOR’S VETO OF SENATE BILL 163 AND HOUSE BILL 862 OF THE 2022 REGULAR LEGISLATIVE SESSION. 5

 A. Because this Issue Was Neither Raised in, nor Decided by the Circuit Court, It Is Not Preserved for Appellate Review. 5

 B. The Circuit Court’s Order Had No Effect on the Governor’s Veto of Either Senate Bill 163 or House Bill 862. 5

CONCLUSION 6

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112 6

TEXT OF PERTINENT PROVISIONS 7

TABLE OF AUTHORITIES

Page

Cases

<i>In the Matter of 2022 Legislative Districting of the State</i> , 478 Md. 236 (Apr. 13, 2022)	3
<i>Murphy v. Liberty Mutual Ins. Co.</i> , 478 Md. 333 (2022).....	2, 3
<i>Whitley v. Maryland State Bd. of Elections</i> , 429 Md. 132 (2012).....	4

Constitutional Provision

Md. Const. art. III, § 49	3
---------------------------------	---

Statutes

2021 Md. Laws ch. 514, § 1	2
2021 Md. Laws ch. 56, § 1	2
Md. Code Ann., Elec. Law § 1-201(5) (LexisNexis 2017)	3
Md. Code Ann., Elec. Law § 1-201(6) (LexisNexis 2017)	4, 5
Md. Code Ann., Elec. Law § 8-103 (LexisNexis 2017).....	4
Md. Code Ann., Elec. Law § 8-103(b) (LexisNexis 2017)	2, 4
Md. Code Ann., Elec. Law § 8-103(b)(1) (LexisNexis 2017)	4, 5
Md. Code Ann., Elec. Law § 9-311.1 (LexisNexis Supp. 2021)	4

Rule

Md. Rule 8-131(a)	5
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ARGUMENT

Delegate Cox concedes that voters cast nearly 12 times the number of mail-in ballots in the 2020 general election than in the 2018 general election. Appellant’s Br. 7. He further admits that, during the following legislative session, the General Assembly took action to make mail-in voting “even easier”:

Even though the number of mail-in ballots had ballooned by more than 1.4 million from 2018 to 2020, the General Assembly made voting by mail even easier during the 2021 Regular Legislative Session by enacting Senate Bill 683 . . . , [under which] all voters became eligible for permanent absentee status.

Appellant’s Br. 7 (citing 2021 Md. Laws ch. 514, § 1; 2021 Md. Laws ch. 56, § 1) (footnote omitted). Despite these admissions, Delegate Cox challenges the circuit court’s order granting the State Board’s petition for emergency remedy to permit elections officials to timely process the 1,000,000 to 1,300,000 mail-in ballots expected to be cast in the 2022 general election. *See* Appellee’s Br. 14-15.

In the circuit court, Delegate Cox limited his arguments regarding separation-of-powers to his contention that Election Law § 8-103(b) unconstitutionally delegates a legislative function to the judicial branch. (E. 293-94, 301-05.) On appeal, Delegate Cox adds a new issue: that the circuit court’s order amounted to a “veto” of Senate Bill 163 and House Bill 862 of the 2022 Regular Legislative Session. Appellant’s Br. 6. Even if preserved for review, this new argument fails because the circuit court’s order providing a temporary remedy permitting the timely counting of ballots and certifying of election results has no effect on any legislation passed by the General Assembly.

I. IN GRANTING AN EMERGENCY REMEDY, THE CIRCUIT COURT PERFORMED A QUINTESSENTIAL JUDICIAL FUNCTION AND DID NOT USURP A CORE LEGISLATIVE POWER.

A. This Court’s Precedents Establish That Adjusting Statutory Deadlines to Deal with Emergency Circumstances Is Within the Judicial Power.

Delegate Cox has not identified a single case holding that a court exercises a non-judicial function when it alters a statutory deadline. In *Murphy v. Liberty Mutual Insurance Co.*, 478 Md. 333, 372-79 (2022), this Court rejected an argument that the Chief Judge’s pandemic-emergency administrative order tolling the statute of limitations violated separation of powers because, among other things, judicially ordered tolling usurped a core

legislative power. Despite that holding, Delegate Cox incorrectly asserts that *Murphy* establishes a bright-line rule that any function that can be performed by the legislature or the executive branches is a non-judicial function. This is plainly wrong, because, as the Court explained in *Murphy*, the respective spheres of the branches often overlap, as they do with establishing tolling exceptions for statutes of limitations, *id.* at 377, or adjusting statutory deadlines affecting all Maryland state and federal candidacies and elections, which were necessary as the result of pending challenges to the State’s legislative districting plan, *In the Matter of 2022 Legislative Districting of the State*, 478 Md. 236 (Order Apr. 13, 2022) . Delegate Cox’s arguments are without merit.

B. The Circuit Court’s Order Is Consistent with Legislative Intent and Furthers Legislative Policy.

The Constitution grants the General Assembly the power to regulate by Law, . . . , elections, including the time, place and manner of holding elections in this State, and of making returns thereof.” Md. Const. art. III, § 49. Among these enactments are the laws permitting no-excuse mail-in balloting, laws governing the counting and canvassing of mail-in ballots, and laws governing the certifying of election results. *See* Appellee’s Br. 12-13, 15-16. Among the factors that this Court considers in evaluating whether there has been a usurpation of a core legislative function is whether the challenged judicial action is consistent with legislative intent and legislative policy. *Murphy*, 478 Md. at 345-46.

Here, the circuit court’s order furthers both legislative intent and legislative policy. The General Assembly has mandated that “citizen convenience” be “emphasized in all aspects of the election process.” Md. Code Ann., Elec. Law § 1-201(5) (LexisNexis 2017)

cited in Whitley v. Maryland State Bd. of Elections, 429 Md. 132, 155 (2012). Furthering that policy, the General Assembly enacted laws that make mail-in balloting the norm, rather than the exception. Elec. Law § 9-311.1 (LexisNexis Supp. 2021) (permitting Maryland voters to apply at any time to automatically receive a mail-in ballot in subsequent Maryland elections). And the General Assembly enacted Senate Bill 163 and House Bill 862 during the 2022 Regular Legislative Session to, among other things, accommodate the potential massive increase in mail-in balloting. Although the Governor vetoed those bills because he found other provisions objectionable, he concurred that early counting should be permitted. Thus, the circuit court’s order permitting early counting is consistent with legislative intent and furthers legislative and gubernatorial policy.

The General Assembly also established legislative policy and declared its intent that “the conduct of elections should inspire public confidence and trust by assuring that . . . security and integrity are maintained in the casting of ballots, canvass of votes, and reporting of election results.” Elec. Law § 1-201(6). To implement that policy, the legislature enacted Election Law § 8-103, which enables the executive and judicial branches to provide a remedy when emergency circumstances threaten to interfere with the electoral process. Subparagraph (b)(1), at issue here, authorizes a court to take any necessary action “to provide a remedy that is in the public interest and protects the integrity of the electoral process.” Elec. Law § 8-301(b)(1) (Lexis Nexis 2017). In granting an emergency remedy, in accordance with Election Law § 8-103(b), that makes possible the timely canvassing of mail-in ballots and the timely certifying of election results, the circuit court’s order furthers the legislative intent and policy that “security and integrity are

maintained in the casting of ballot, canvass of votes, and reporting of election results.”
Elec. Law § 1-201(6).

II. IF PRESERVED FOR REVIEW, THE CIRCUIT COURT’S ORDER DID NOT OVERRIDE THE GOVERNOR’S VETO OF SENATE BILL 163 AND HOUSE BILL 862 OF THE 2022 REGULAR LEGISLATIVE SESSION.

A. Because this Issue Was Neither Raised in, nor Decided by the Circuit Court, It Is Not Preserved for Appellate Review.

For the first time in this litigation, Delegate Cox argues in his principal brief that the circuit court’s order violates separation of powers because it amounts to an overriding of the Governor’s veto of Senate Bill 163 and House Bill 862 of the 2022 Regular Legislative Session. Because this issue was not “raised in or decided by the trial court,” it is not preserved for review on appeal. Md. Rule 8-131(a).

B. The Circuit Court’s Order Had No Effect on the Governor’s Veto of Either Senate Bill 163 or House Bill 862.

Even if Delegate Cox’s new objection were preserved for appeal, it fails. The circuit court’s order left intact the Governor’s veto of Senate Bill 163 and House Bill 862 of the 2022 Regular Legislative Session. The court ordered a temporary remedy, applicable only to the 2022 gubernatorial general election. That temporary remedy deals with an expected volume of mail-in ballots that cannot otherwise be counted, canvassed, and reported in time for the election to be certified in compliance with statutory deadlines. The circuit court’s order under authority of Election Law § 8-103(b)(1) has no effect on the Governor’s veto, and in no way restores the vetoed legislation. Instead, the order “provide[s] a remedy that is in the public interest and protects the integrity of the electoral process.” Elec. Law § 8-301(b)(1).

CONCLUSION

The judgment of the Circuit Court for Montgomery County should be affirmed.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 1,248 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Daniel M. Kobrin

Daniel M. Kobrin

TEXT OF PERTINENT PROVISIONS
(Rule 8-504(a)(10))

Annotated Code of Maryland, Election Law Article (LexisNexis 2017)

§ 1-201. Statement of Purpose.

The intention of this article is that the conduct of elections should inspire public confidence and trust by assuring that:

(1) all persons served by the election system are treated fairly and equitably;

(2) all qualified persons may register and vote and that those who are not qualified do not vote;

(3) those who administer elections are well-trained, that they serve both those who vote and those who seek votes, and that they put the public interest ahead of partisan interests;

(4) full information on elections is provided to the public, including disclosure of campaign receipts and expenditures;

(5) citizen convenience is emphasized in all aspects of the election process;

(6) security and integrity are maintained in the casting of ballots, canvass of votes, and reporting of election results;

(7) the prevention of fraud and corruption is diligently pursued;
and

(8) any offenses that occur are prosecuted.

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REMEDY BY THE MARYLAND
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* OF MARYLAND
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* * * * *

CERTIFICATE OF SERVICE MDEC

I certify that, on this 6th day of October, 2022, the
Response Brief of Appellee in the captioned case was filed electronically and served
electronically by the MDEC system on all persons entitled to service:

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