

No. 22-

IN THE
Supreme Court of the United States

DANIEL L. COX,

Petitioner,

v.

MARYLAND STATE BOARD OF ELECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MARYLAND SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a question nearly identical to that of *Moore v. Harper*, 142 S. Ct. 2901, 213 L. Ed. 2d 1114, 90 U.S.L.W. 3403, 2022 WL 2347621 (2022): Whether the Maryland Circuit Court for Montgomery County violated the Elections Clause of the United States Constitution when it suspended the laws enacted by the Maryland General Assembly as to how elections for United States Representatives are conducted, namely the opening and tabulation of mail-in ballots more than a month prior to the date allowed by statute.

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PARTIES TO THE PROCEEDING

Petitioner Daniel L. Cox is a private citizen of the state of Maryland and was the Republican candidate for Governor. Respondent is the Maryland State Board of Elections, an agency of the State of Maryland.

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**RULE 29.6 CORPORATE DISCLOSURE
STATEMENT**

Neither party has any interest in a publicly traded company. Maryland Board of Elections is a state agency. Daniel L. Cox is a private citizen of Maryland who was the Republican candidate for Governor.

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RELATED PROCEEDINGS

In Re Maryland State Board of Elections, Supreme Court of Maryland, Case No. COA-REG-00210-2022; Judgment entered October 7, 2022.

In Re Maryland State Board of Elections, Appellate Court of Maryland, Case No. 1282-2022; no judgment entered (certiorari granted prior to briefing);

Circuit Court for Montgomery County, Case No. C-15-CV-22-003258; ruling on September 23, 2022; opinion and order docketed September 26, 2022.

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OPINIONS BELOW

Maryland Supreme Court (f/k/a Maryland Court of Appeals) Per Curiam Order, Case No. COA-REG-0021-2022, issued October 7, 2022; In Re Petition, 283 A. 3d 1214, 2022 WL 5403764 (2022). By this Order, the Maryland Court of Appeals affirmed the Opinion and Order issued by the Maryland Circuit Court for Montgomery County; the Court of Appeals Per Curiam Order is attached to the petition in the appendix (App. 1a-4a).

Maryland Circuit Court for Montgomery County, Opinion and Order, Case No. C-15-CV-22-003258, issued September 26, 2022; In Re Petition, 2022 Md. Lexis 390, 2022 WL 5030101 (Md., Sept 30, 2022). This Order granted the Board of Elections Petition for Emergency Remedy. It is attached to this petition in the appendix (App. 5a-20a).

JURISDICTION

The Maryland Supreme Court entered its Per Curiam Order on October 7, 2022. Pet. App. 1a-4a. This Court has jurisdiction under 28 U.S.C. 1257.

This petition is brought pursuant to United States Supreme Court Rule 10(c). On October 7, fewer than 90 days before the filing date of this petition, the Maryland Supreme Court (then known as the Maryland Court of Appeals) affirmed the ruling of the Maryland Circuit Court for Montgomery County that presents an important question of federal law that has not been, but should be, settled by this Court, while exercising judicial discretion in a way that conflicts with relevant decisions of this Court.

United States Constitution Article 1, Section 4, known as the Elections Clause, provides the basis for the United States Supreme Court to rule on this matter, as the issue at bar includes a change in the Time, Place and Manner of holding Elections for Representatives. That change was prescribed by a court and not the Legislature of Maryland. No rehearing was requested or has occurred.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Article 1, Section 4:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Maryland Code Annotated, Election Law Article, Section 8-103(b)(1):

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.

STATEMENT OF THE CASE

FACTS: The facts of this case are not in dispute. In 2020, Maryland Governor Hogan issued several Executive Orders, (which included elections for Congressional representatives), by which the procedure for requesting, obtaining, and filing mail-in ballots was changed during the COVID crisis. Approximately 1.5 million mail-in ballots were processed. The Maryland State Board of Elections had great difficulty meeting the deadlines imposed upon it by state and federal law counting those ballots.

Thereafter, during the 2021 Maryland General Session, the legislature passed, and Governor Hogan signed into law a bill that became Maryland Code Annotated Election Law Article 9-311.1, by which the procedure for obtaining a mail-in ballot was greatly liberalized.

During the 2022 legislative session, in apparent anticipation of a repetition of the difficulty in meeting state and federal deadlines for presenting final results of federal, state, and county elections, the General Assembly passed HB 862 and SB 163, to allow mail-in ballots to be opened and counted eight business days prior to the beginning of the early voting period.

These bills would have changed Maryland Code Annotated Election Law Article Section 11-302, which requires each local board of elections to canvass mail-in ballots “following an election” and forbids the opening of any mail-in ballot envelope prior to 8:00 a.m. on the Wednesday after election day.

On or about May 27, 2022, Governor Hogan vetoed the bills HB 862 and SB 163. Accordingly, the state of the law throughout the summer and fall of 2022 as to mail-in ballots remained unchanged. The General Assembly had concluded its 2022 session; no further legislation could or would be passed. The BOE and the local boards of election were still precluded from opening or canvassing mail-in ballots until after election day.

2022 FEDERAL AND STATE ELECTIONS: On or about September 2, 2022, the Maryland State Board of Elections (hereinafter the “BOE”) filed in the Maryland Circuit Court for Montgomery County a Petition for Emergency Remedy, seeking a court order suspending three sections of the Election Law article of the Maryland Code, to allow the early opening and tabulation of mail-in ballots. The BOE asserted that the coming deluge of mail-in ballots would be impossible to tabulate by the statutory and constitutional deadlines if it could not open and canvass mail-in ballots prior to election day, prohibited by Maryland law. Daniel L. Cox, the Republican candidate for governor and the petitioner herein, moved to intervene and oppose the Petition for Emergency on Constitutional and other grounds. The Motion to Intervene was granted; the parties briefed the issues, and a hearing was held on September 20, 2022, at which the Petition was granted.

Thereafter, an appeal was noted as of right to the Court of Special Appeals (now renamed the Appellate Court of Maryland). Before any action was taken by the intermediate appellate court, the Court of Appeals (now the Supreme Court of Maryland) issued a Writ of Certiorari. After a speedy briefing and hearing schedule, the Circuit Court order was affirmed on October 7, 2022.

Although an opinion was promised, none has yet to be issued.

LEGAL POSITIONS OF BOE: The Petition for Emergency Remedy was brought by the BOE pursuant to Maryland Code Annotated, Election Law Article, Section 8-103(b)(1):

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.

At the hearing before Judge James A. Bonifant, the issues included the existence of an emergency, and whether the Circuit Court had authority to alter the laws of Maryland as to elections.

EMERGENCY. BOE argued that the pending deluge of mail-in ballots constituted an emergency, allowing the Circuit Court to take action under 8-103 of the Elections Article. Although the parties agreed that the definition of “emergency” was an unforeseen, sudden, unpredicted event, and that the BOE was aware of the coming deluge for at least a year, the Circuit Court found an emergency to have existed.

CONSTITUTIONAL ISSUES. More relevant to this petition, however, are the Constitutional issues that the petition filed by the BOE raises. These issues include the Elections Clause and the separation of powers.

The first is as discussed in the dissent in *Moore v. Harper*, 142 S. Ct. 1089, 212 L. Ed. 2d 247 (2022); the Elections Clause of the United States Constitution states:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U. S. Constitution Article I, Section 4.

Accordingly, the U. S. Constitution requires that the rules for holding an election be made only by the legislative body of the state holding those elections. It is indisputable in this case that the Maryland Circuit Court for Montgomery County prescribed the manner of holding elections in Maryland, in direct contradiction of the manner already set by the Maryland legislature. On September 23, 2022, the Circuit Court suspended Maryland Code Annotated Election Law Article Sections 11-302 (a), (b)(1), and (e), allowing mail-in ballots to be opened on October 1, 2022. This order was in direct conflict with the aforementioned laws passed by the Maryland legislature, as directed by the US and Maryland Constitutions.

Second, the action by the Circuit Court violated the separation of powers required by the state and federal Constitutions. Consistent with the Elections Clause, the Maryland Constitution provides that the General Assembly shall prescribe the rules for elections in Maryland, including those for federal and state office:

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

Md. Const. Art III, Section 49.

Further, the standard imposed by the statute purportedly allowing the Circuit Court to change the rules of elections is not a judicial standard; rather, it is one for the legislature. Section 8-103(b)(1) allows the Circuit Court to make determinations that are “in the public interest” and that “protect the integrity of the electoral process.” *Sugarloaf Citizens Assoc., Inc. v. Gudis*, 319 Md. 558, 573 A. 2d 1325 (1990) states that allowing a court to determine what is in the public interest impermissibly vests in the court a non-judicial legislative power. *Id.*, at 568, 1331.

Such rulings from the Maryland Court of Appeals (recently renamed the Supreme Court of Maryland) are consistent with and in compliance with the Elections Clause and the separation of powers doctrine.

APPLICABILITY OF RULE 10: Section (c) of Rule 10 is applicable to this petition: A state court ... has decided an important question of federal law that has not been, but should be, settled by this Court. As set forth in the concurring opinion of Justice Kavanaugh and in the dissenting opinion of Justices Alito, Thomas, and Gorsuch in *Moore v. Harper*, 142 S. Ct. 1089, 212 L. Ed. 2d 247 (2022), “the underlying Elections Clause question raised in

the emergency application is important”, and it “presents an exceptionally important and recurring question of constitutional law, namely, the extent of a state court’s authority to reject rules adopted by a state legislature for use in conducting federal elections. There can be no doubt that this question is of great national importance. But we have not yet found an opportune occasion to address the issue.” *Id.*, at 247, 1089. The question raised in this petition is the exact same as in *Moore*, supra: the authority of a court to prescribe the manner in which elections are held.

The Maryland Supreme Court has affirmed a lower court ruling by which the Circuit Court for Montgomery County suspended rules for elections, which is expressly reserved for the legislature by the U.S. and Maryland Constitutions.

MOOTNESS: Although the 2022 election is over, the issue raised in the BOE’s Petition for Emergency Remedy will surface every election cycle. The General Assembly and Governor chose not to amend the law regarding mail-in ballots, both the ease of obtaining one and the prohibition on early canvassing. Accordingly, under the current state of the law, by Maryland Code Election Law Article, Section 8-103(b)(1), the Circuit Courts remain empowered to prescribe the rules as to how elections occur in Maryland in 2024, in ways that are directly contrary to the laws properly passed by the Maryland General Assembly and signed into law by the Governor of Maryland. Given the likelihood that mail-in ballots will continue to be popular, the BOE is likely to need and seek this relief every election cycle.

REASONS FOR GRANTING THE WRIT

The violation of the Elections Clause of the United States Constitution is an issue in need of resolution, as acknowledged by many of the Justices of this Court in *Moore v. Harper*, supra. The Maryland Supreme Court ran roughshod over the prescriptions of the U.S. and Maryland Constitutions, as well as the separation of powers critical to a fair and impartial government. This petition presents the opportunity for the United States Supreme Court to enforce the Elections Clause, vital to the continuation of our republic form of government. An important and relevant federal question is presented that requires resolution by this Court.

CONCLUSION

Maryland Code Annotated Election Law Article Section 8-103(b)(1), which allows the Circuit Courts of Maryland to prescribe the manner of federal and state elections, both as the statute is written and as it was applied by the Circuit Court for Montgomery County and the Maryland Supreme Court, is unconstitutional and must be stricken.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — ORDER OF THE COURT OF
APPEALS OF MARYLAND, FILED
OCTOBER 7, 2022**

IN THE COURT OF APPEALS OF MARYLAND

No. 21, September Term, 2022

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

Fader, C.J., Watts, Hotten, Booth, Biran, Eaves,
Adkins, Sally D. (Senior Judge, Specially Assigned) JJ.

October 7, 2022, Argued

October 7, 2022, Filed

PER CURIAM ORDER

Upon consideration of the filings by Daniel Cox, Appellant, and the Maryland State Board of Elections (the “State Board”), Appellee, and oral argument conducted in the above-captioned case on October 7, 2022,

WHEREAS, on September 2, 2022, the State Board filed in the Circuit Court for Montgomery County a Petition for Emergency Remedy by the Maryland State Board of Elections in which the State Board petitioned the circuit court pursuant to § 8-103(b)(1) of the Election Law Article of the Maryland Code for an emergency remedy permitting the early canvassing and tabulation of mail-in ballots for the 2022 Gubernatorial General Election; and

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WHEREAS, on September 14, 2022, Appellant filed in the Circuit Court for Montgomery County a motion to intervene and a response in opposition to the petition and a memorandum in support thereof, and on September 16, 2022, the Circuit Court for Montgomery County granted Appellant’s Motion to Intervene; and

WHEREAS, on September 26, 2022, after a hearing, the Circuit Court for Montgomery County entered an Opinion and Order, in which the court: (1) granted the Petition for Emergency Remedy by the State Board; and (2) ruled that it did “not find the provisions of § 8-103(b) (1) of the Election Law Article to be unconstitutional” and that “the undisputed facts of this case amount[ed] to emergency circumstances envisioned in the law”; and

WHEREAS, the Circuit Court for Montgomery County ordered the following:

that the restriction imposed by [Election Law Article (“EL”)] § 11-302(a), requiring each local board to meet “[f]ollowing an election” in order to canvass mail-in ballots was suspended from application to the 2022 Gubernatorial General Election,

that the restriction imposed by EL § 11-302(b)(1), forbidding a local board of canvassers from opening “any envelope of an absentee ballot prior to 8 a.m. on the Wednesday following election day” was suspended from application to the 2022 Gubernatorial General Election,

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that all local boards of canvassers may meet and open envelopes, canvass, and tabulate mail-in ballots no earlier than 8:00 a.m. on October 1, 2022,

that the requirement imposed by EL § 11-302(e), directing each local board to “prepare and release a report of the unofficial results of the absentee ballot vote tabulation” at the end of each day of canvassing was suspended from application to the 2022 Gubernatorial General Election, and

that all local boards of election may prepare and release an unofficial report of the mail-in ballot tabulation no earlier than the closing of the polls on election day, November 8, 2022, and thereafter at the end of each day of canvassing,

and

WHEREAS, on September 27, 2022, Appellant noted an appeal to the Court of Special Appeals and sought a stay of the circuit court’s order and an expedited schedule for resolving the appeal; and

WHEREAS, on September 28, 2022, the State Board filed in this Court a Petition for Writ of Certiorari and Request for Expedited Review; and

WHEREAS, on September 29, 2022, the Court of Special Appeals issued an order denying Appellant’s motion for stay; and

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WHEREAS, on September 30, 2022, Appellant filed in this Court a response to the State Board's petition for writ of certiorari in which he agreed that the petition should be granted; and

WHEREAS, on September 30, 2022, this Court granted the petition for writ of certiorari and ordered expedited briefing; and

WHEREAS, on October 7, 2022, this Court held oral argument,

For reasons to be stated later in an opinion to be filed, it is this 7th day of October, 2022,

ORDERED, by the Court of Appeals of Maryland, that the Opinion and Order entered on September 26, 2022 by the Circuit Court for Montgomery County are **AFFIRMED** in all respects; and it is further

ORDERED, that costs are to be paid by Appellant and the mandate is to issue forthwith.

/s/ Matthew J. Fader
Chief Judge

**APPENDIX B — OPINION OF THE CIRCUIT
COURT FOR MONTGOMERY COUNTY,
MARYLAND, FILED SEPTEMBER 26, 2022**

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MD

Case No. C-15-CV-22-003258

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

OPINION

The Parties

The parties to this matter are the State Board of Elections (hereinafter “the State Board”) and Daniel Cox (hereinafter “Respondent”). The State Board initiated the proceedings on September 2, 2022, after unanimous vote by the individual members of the Board on August 15, 2022. The Court granted Respondent’s Motion to Intervene pursuant to Rule 2-214(b) on September 16, 2022.¹

1. Respondent argued he had an unconditional right as a matter of law to intervene pursuant to Rule 2-214(a) as the Republican nominee for Governor in the upcoming 2022 Gubernatorial General Election and as a member of the House of Delegates. After consideration of his Motion to Intervene and the State Board’s Response, the Court granted Respondent’s request as a permissive intervenor. See Order entered 9/16/22.

*Appendix B**The Case*

In 1998 the Maryland General Assembly enacted what is presently codified as § 8-103(b)(1) of the Election Law Article. Acts 1998, c. 585, § 2. The Legislature included this provision of the law as part of a general revision of the Maryland Election Code. Three years earlier, the General Assembly had created the Commission to Revise the Election Code. Acts 1995, c. 514. Continuing legislation passed the following year clarified the stated purpose of the Commission: to produce a substantive revision of the Election Code “to make the law comport with the needs of the modern election administration ... [and] ... to make the law mesh with the realities of current and future technologies.” Acts 1996, c. 431.

Section 8-103(b)(1) was a new law when added to the State’s election laws in 1998. It provides:

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.

Md. Code Ann., Elec. Law § 8-103(b)(1).

The parties ask this Court to consider the constitutionality of § 8-103(b)(1) and, if found to be

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constitutional, to then determine whether the circumstances which currently exist regarding the canvassing of mail-in ballots in the upcoming 2022 Gubernatorial General Election amount to the type of emergency the General Assembly envisioned when it enacted § 8-103(b)(1).

There are no facts in dispute.² Citing the overwhelming increase in the popularity of mail-in ballots as shown by the number of mail-in ballots used in the recent 2022 Gubernatorial Primary Election, the State Board claims the requisite emergency exists for this Court to use the authority granted to it in § 8-103(b)(1) to suspend the provision of the law mandating when canvassing of mail-in ballots shall begin.

Section 11-302(b)(1) of the Election Law Article states: “A local board may not open any envelope of an absentee ballot prior to 8 a.m. on the Wednesday following election day.”³ § 11-302(b)(1). Election day for the 2022 Gubernatorial General Election is November 8, 2022. The State Board anticipates Maryland voters across the State will return between 1,000,000 and 1,300,000 mail-in ballots in the upcoming general election. *Board’s Petition*, p. 13-14. The State Board outlines in its Petition the tedious and careful process required by law to canvass and tabulate each mail-in ballot. *Id.*, p. 14-17.

2. During oral argument on September 20, 2022, counsel for Delegate Cox admitted all factual allegations appearing in the Board’s Petition.

3. Absentee ballot means a ballot not used in a polling place. See § 1-101(b) of the Election Law Article.

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With so many mail-in ballots, and the time needed to canvass and tabulate, the local boards of elections will not be able to verify the vote count within 10 days of the general election as required by § 11-308(a) of the Election Laws Article.⁴ This will place into jeopardy the seating of victorious candidates by the dates of the next term of office. The Board cites the new terms of office for the County Executive and County Council members in Baltimore County, Frederick County, Prince Georges County, and Montgomery County to be December 5, 2022, and the new term for the next Maryland representatives in Congress to be January 3, 2023. *Id.*, p. 19, and citations therein cited.

The State Board maintains it is in the public interest and necessary to protect the integrity of the electoral process for this Court: i) to suspend § 11-302(b)(1); ii) to permit the canvassing of mail-in ballots to begin on October 1, 2022; and iii) to suspend the daily reporting of

4. 11-308 of the Election Law Article states:

a) Within 10 days after any election, and before certifying the results of the election, each board of canvassers shall verify the vote count in accordance with the regulations prescribed by the State Board for the voting system used in that election.

(b) Upon completion of the verification process, the members of the board of canvassers shall:

(1) certify in writing that the election results are accurate and that the vote has been verified; and

(2) provide copies of the election results to the (Governor, State Board, and local clerk of the circuit court).

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unofficial mail-in tabulations until after Election Day. With such relief, the State Board argues the local boards will have sufficient time to canvass, verify and certify within the statutory deadlines. The Board brings this matter in its supervisory role of all elections held in Maryland. Thus, it asks that the requested relief be applied to all jurisdictions across the State of Maryland.

In opposition, Respondent argues suspending the provisions of § 11-302(b)(1) would be unconstitutional under the separation of powers provision of Article 8 of the Declaration of Rights of the Maryland Constitution, unconstitutional under the suspension of laws provision of Article 9 of the Declaration of Rights, and unconstitutional as an encroachment into the sole province over election policy given to the General Assembly in Article III, § 49 of the Maryland Constitution.

Article 8 provides: “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.” Md. Const., Decl. of Rts., Alt. 8.

Article 9 provides: “That no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.” Md. Const., Decl. of Rts., Alt. 9.

Article III, § 49 states: “The General Assembly shall have power to regulate by Law, not inconsistent with this

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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.

Alternatively, Respondent claims the increased number of mail-in ballots and the time needed to canvass them is not an unforeseen, recent development. As such, these circumstances do not amount to an emergency circumstance which have suddenly occurred. Without being an emergency circumstance, the Court cannot invoke the authority granted to it in § 8-103(b) to award the relief requested by the State Board.

Constitutionality of § 8-103(b)

With regard to the Article 8 challenge, this Court finds direction from the Maryland Court of Appeals’s recent decision in *Murphy v. Liberty Mutual Insurance Co., Inc.* 478 Md. 333, 274 A.3d 412 (2022). In that case, the United States District Court for the District of Maryland certified a question to the Court of Appeals asking whether an administrative order issued by the then-Chief of the Court of Appeals which tolled the statutes of limitations in civil cases exceeded the powers of the Chief under the Maryland Constitution. The Court of Appeals answered that the Chief did not exceed her authority.

In its opinion, the Court reviewed Article 8 and the powers of the three branches of government and noted that each branch had separate, designated powers. It then stated that a literal reading of Article 8 would conclude that “each branch can, and must, carry out its functions

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without performing any of the functions assigned to another branch.” *Murphy*, 478 Md. at 370, 274 A.3d at 434. However, the Court cited the 1829 case of *Crane v. Meginnis*, 1 G & J, 463, 476, for a proposition long held by the Court that the powers of the three branches of government are not “wholly separate and unmixed.” *Id.* Stating that the “principle of separation of powers does not isolate each branch in its own silo,” the Court of Appeals cited Justice Robert Jackson:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring).

Murphy, 478 Md. at 370-71, 274 A.3d at 434.

The Court of Appeals went on to state that when addressing questions concerning the separation of powers and the judiciary, prior caselaw can be sorted into four broad categories, two of which are pertinent here. The first category includes legislative attempts to assign to the courts a task having nothing to do with adjudicating a case between two competing parties, the core function

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of the Judiciary. The other category includes when the requested relief from the judiciary encroaches upon a clear legislative or executive function. *Murphy*, 478 Md. at 373-74.⁵

Respondent contends § 8-103(b)(1) attempts to delegate to the Courts a nonjudicial function because there is nothing to adjudicate. As counsel stated during oral argument, the proper province of the Judiciary is “to call balls and strikes.” Examples of legislative delegation to the Judiciary which have been found to be non-adjudicative tasks and thus unconstitutional include a statute requiring circuit court judges to approve the accounts of certain officers before payment (*Robey v. Commissioners of Prince George’s Cnty*, 92 Md. 150 (1900)); a statute requiring a court to appoint members of a board of visitors to Anne Arundel county jail (*Beasley v. Ridout*, 94 Md. 641 (1902)); and a statute requiring the circuit court to receive petitions on whether to permit county-wide liquor sales and order an election if petitions met the required threshold (*Bd. of Sup’rs. of Election for Wicomico Cnty. v. Todd*, 97 Md. 247 (1903)).

However, this Court believes it is a judicial function for it to address a situation where circumstances make

5. The two other categories, though instructive in *Murphy*, are not relevant here: the Court’s “authority under Article IV, § 18(a) to adopt rules and regulations concerning ‘the practice and procedure’ in the courts, and those [under the same section) involving whether a particular rule or other action by the Judiciary exceeded the rulemaking authority concerning ‘the administration’ of the courts.” *Murphy*, 478 Md. 333 at 374.

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compliance with two statutes unachievable and there are competing parties arguing to the Court which statute should be followed. Under the facts of this case, two statutes conflict. The State Board, following the provisions of § 11-302(b)(1), cannot begin canvassing until the day after election day; yet, because of the volume of mail-in ballots, the results cannot be timely verified and certified by the statutory deadline imposed by § 11-308. This Court believes: “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” *Marbury v Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). The provisions of § 8-103(b)(1) do not violate Article 8.

Additionally, the Court does not view the provisions of § 8-103(b)(1) to be a violation of Article 9. There are few cases from our appellate courts interpreting Article 9, but in the recent *Murphy* opinion, the Court of Appeals stated Article 9 must be read in harmony with other provisions of the State Constitution. *Murphy*, 478 Md. at 383, 274 A.3d at 431. As noted above, the powers conferred upon the three branches of government cannot be interpreted as within separate silos, wholly separate and unmixed. The Court believes § 8-103(b)(1) to be a product of that appropriately shared authority. Alternatively, giving the plain meaning to the words used in Article 9, § 8-103(b)(1) was enacted by the General Assembly; as such, this grant of authority to the Judiciary falls within the “unless by, or derived from” exclusionary language in the Article.

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Respondent also argues § 8-103(b)(1) is unconstitutional because it authorizes judicial encroachment into a core legislative function of determining what is in the public interest. He cites *Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 319 Md. 558 (1990). In that case petitioners asked the court to void legislation passed by the Montgomery County Council, relying on a provision of the county code which authorized a court to void official action taken by an official with a conflict of interest if such action was deemed in the public interest. The Court of Appeals struck down the code provision because it impermissibly gave to the court a nonjudicial power: the power to void legislation because the court believed it to be in the public interest to do so. *Sugarloaf*, 319 Md. at 573.

This Court finds the present case distinguishable from *Sugarloaf*. The State Board is not asking the Court to employ § 8-103(b)(1) to void the provisions of § 11-302(b)(1) from all future elections. It requests a one-time suspension of § 11-302(b)(1) due to “emergency circumstances.” It does not ask this Court to permanently nullify the legislation simply because this Court believes it is in the public interest. The petition asks this Court to adjust the date canvassing can begin in this one election to avoid certain failure to meet the verification deadlines for this one election. Respondent argues that it is not known what the Board may seek in the future if there is no amendment to the Election laws. That situation is not before the Court. The Court is only addressing the State Board’s requests as they pertain to this one election, and its ruling is limited to the facts presented in this matter.

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Respondent argues the sole province over election policy is given to the General Assembly in Article III, § 49 of the Maryland Constitution. The Court agrees that § 49 gives the Legislature the power to set policy. However, what is being asked of this Court in this matter is not setting public policy. The Court views what it is being asked to do as similar to what the Court of Appeals of Maryland did by Order filed March 15, 2022, *In the Matter of 2022 Legislative Districting of the State, In the Court of Appeals of Maryland, Misc. Nos. 21, 24, 25, 26, 27 September Term 2021*. After referencing the time constraints associated with challenges to the 2022 legislative districting plan, the Court of Appeals amended deadlines for filing certificates of candidacy, for withdrawing a certificate of candidacy, for filling a vacancy in candidacy, and for challenging a candidate's residency. The Court also authorized the State Board to adjust deadlines for certifying, displaying, and printing ballots. All these deadlines are set by statutory law. See Md. Code Ann., Elec. Law §§ 5-503, 5-502(a), 5-901, 5-303, and 9-207. The Court of Appeals did not set policy when modifying them.

For these reasons, the Court does not find the provisions of § 8-103(b)(1) of the Election Laws Article to be unconstitutional.⁶

6. There is evidence that the bill was reviewed and approved by the Attorney General, at the behest of Governor Panis Glendening, for “constitutionality and legal sufficiency.” *Atty. Gen. J. Joseph Curran, Jr., Letter to Gov. Parris N. Glendening, May 4, 1998*. However, the letter is not accompanied with any memorandum or research.

*Appendix B**Emergency*

Both parties agree that the authority granted to this Court under § 8-103(b)(1) can only be exercised in the event of “emergency circumstances.” But they disagree on the interpretation this Court should give to that phrase. The Court notes there is no case law interpreting the language.

Respondent argues that an objective reading of “emergency” is appropriate, arguing there is no ambiguity in the statutory language. He cites the common usage definition of “emergency” to encompass “sudden, unexpected, unanticipated” events, carrying with it a notion of “unforeseeability.” Given that the same or similar events occurred in the 2020 primary and general election, and that the State Board was on notice of a deluge of incoming ballots for the upcoming general election, at least since May 2022, the State Board’s situation, while unfortunate, is not sudden, unexpected, or unanticipated. Respondent argues the State Board admitted as much in its Petition which stated: “[i]t is reasonable to anticipate that the number of mail-in ballots will continue to grow during the upcoming general election.” *Pet. 13*. Thus, it cannot be an emergency since this situation was anticipated.

The Court believes there is some ambiguity in the use of the phrase: “emergency circumstance.” The Election Code provides no definition. But the Drafter’s Note to the Senate Bill which eventually became § 8-103(b)(1) states:

Provision is made to address the potential problem of *a wide range of “emergencies.”*

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It is consistent with the Attorney General's guidelines for emergency situations and with provisions relating to the Governor's emergency powers, which are found primarily in 16A of the Code.

Maryland Senate Economic and Environmental Affairs Committee, Bill Analysis – Senate Bill 118, 4 (H. Title 8: Elections) (1998) (emphasis added). From this the court concludes the Legislature intended a broad interpretation be given to what is meant by “emergency circumstances.”

It is clear that a situation as drastic as a declared state of emergency is not needed for the Court to act since such events are reserved for the Governor to act pursuant to § 8-103(a). See Md. Code Ann., Elec. Law § 8-103(a).

The Court also takes guidance from the language used in the statute that further elaborates on the phrase “emergency circumstances.” Removing the language referencing a declared state of emergency, subsection (b) reads: “If emergency circumstances ... interfere with the electoral process ...”

There is no doubt that the increased number of mail-in ballots will have an enormous affect on the process of this election. Mandatory deadlines will be missed if the Court takes no action. The General Assembly understood last session that action should be taken when it passed legislation which would have advanced the date the mail-in ballots could be canvassed, but the legislation was vetoed by the Governor on other grounds.

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Nevertheless, the full extent of the difficult situation caused by so many mail-in ballots did not materialize until the primary election occurred this past summer. The razor-close elections which occurred around the State, including races in Montgomery County and in Frederick County, exacerbated the situation. This is the reason the members of the Board of Elections met on August 15, 2022 and voted to ask this Court to exercise the authority granted to it by § 8-103(b)(1). The Court is satisfied the undisputed facts of this case amount to emergency circumstances envisioned in the law.

Conclusion

This Court does not believe it is violating the State Constitution by granting the State Board's requested relief. To the contrary, the Court believes it is exercising the powers granted to it under the Constitution to decide a case between competing parties who have different views on the interpretation of the law. The Court reaches its decision by following the language appearing in § 8-103(b)(1).

An Order in furtherance of this Opinion shall issue.

/s/ James A. Bonifant
James A. Bonifant
Administrative Judge
Circuit Court for
Montgomery County, MD

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IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MD

Case No. C-15-CV-22-003258

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

ORDER

UPON CONSIDERATION of the Petition for Emergency Remedy by the Maryland State Board of Elections, Respondent's Opposition, the oral argument, and for the reasons stated in the accompanying Opinion and intending this to be a final judgment, it is this 23rd day of September, 2022,

ORDERED, that the Petition is GRANTED; and, it is further

ORDERED, that the restriction imposed by Election Law Article § 11-302(a), requiring each local board to meet “[f]ollowing an election” in order to canvass mail-in ballots is hereby suspended from application to the 2022 Gubernatorial General Election; and, it is further

ORDERED, that the restriction imposed by Election Law Article § 11-302(b)(1), forbidding a local board of canvassers from opening “any envelope of an absentee ballot prior to 8 a.m. on the Wednesday following election day” is hereby suspended from application to the 2022 Gubernatorial General Election; and, it is further

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ORDERED, that all local boards of canvassers may meet and open envelopes, canvass, and tabulate mail-in ballots no earlier than 8:00 a.m. on October 1, 2022; and, it is further

ORDERED, that the requirement imposed by Election Law Article § 11-302(e), directing each local board to “prepare and release a report of the unofficial results of the absentee ballot vote tabulation” at the end of each day of canvassing is hereby suspended from application to the 2022 Gubernatorial General Election; and, it is further

ORDERED, that all local boards of election may prepare and release an unofficial report of the mail-in ballot tabulation no earlier than the closing of the polls on election day, November 8, 2022, and thereafter at the end of each day of canvassing.

/s/ James A. Bonifant
James A. Bonifant
Administrative Judge
Circuit Court for
Montgomery County, MD