

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MD

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

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

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

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

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.

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 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.

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

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.

⁴ §11–308 of the Election Law Article states:

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 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., Art. 8.

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).

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., Art. 9.

Article III, §49 states: “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.

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 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 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)).

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.

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

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.

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 Parris 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.

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.”* 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 ...”

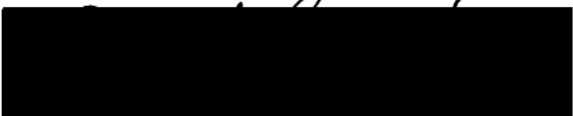
There is no doubt that the increased number of mail-in ballots will have an enormous affect on the process of this election. Mandatory deadlines will be missed if the Court takes no action. The General Assembly understood last session that action should be taken when it passed legislation which would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

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.


JAMES A. BONFANT
Administrative Judge
Circuit Court for
Montgomery County, MD

9/23/22

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MD

IN RE: PETITION FOR
EMERGENCY RELIEF BY THE
MARYLAND STATE BOARD OF
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Case No. C-15-CV-22-003258

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

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.



JAMES A. BONIFANT
Administrative Judge
Circuit Court for
Montgomery County, MD

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