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Court of Special Appeals
Gregory Hilton
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	*	IN THE
	*	COURT OF SPECIAL APPEALS
IN THE MATTER OF THE STATE BOARD OF ELECTIONS	*	OF MARYLAND
	*	September Term, 2022
	*	No. 1282

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MARYLAND STATE BOARD OF ELECTIONS RESPONSE AND OPPOSITION TO EMERGENCY MOTION FOR STAY

On September 27, 2022, Delegate Daniel Cox, by counsel, noted an appeal of the circuit court's judgment in *In re: Petition for Emergency Relief by the Maryland State Board of Elections*, No. C-15-CV-22-003258 (Cir. Ct. for Montgomery County, Sept. 26, 2022). That same day, Delegate Cox filed in this Court two motions: (1) an emergency motion to stay the circuit court's judgment; and, (2) a motion to shorten the time for response to the emergency motion to stay. At day's end on September 27, 2022, this Court granted Delegate Cox's second motion, in part, ordering the State Board of Elections to file any response to Delegate Cox's emergency motion to stay by 3:00 p.m. on September 29, 2022. The State Board of Elections, by counsel, Brian Frosh, Attorney General, and Daniel Kobrin, Assistant Attorney General, hereby submit the following response and opposition to the motion to stay pursuant to this Court's September 27 order.

STATEMENT OF THE CASE

On August 15, 2022, the State Board voted unanimously at its monthly public meeting to seek an emergency remedy from a court to address the expected volume of

mail-in ballots incoming during the general election. At that meeting, the State Board noted that the inability to canvass and tabulate mail-in ballots before election day could leave races without certified results until late December 2022 or early January 2023. The Board also noted that Maryland is the only state to forbid the canvass of mail-in ballots until after election day.

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 7, 2022, the circuit court conducted a status hearing on the petition. The court issued a scheduling order for an adjudicatory hearing and ruling on the petition and requested of the State Board a supplemental memorandum of law. The court asked the State Board to address in its memorandum (1) the statutory interpretation of the "emergency circumstance" language in § 8-103(b)(1); (2) whether § 8-103(b)(1) complied with the principle of separation of powers; and, (3) whether the one-party petition and proceeding constituted a justiciable controversy.

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. Section 8-103(b)(1) delegated to a circuit court a "judicial function" as that term was understood by the common law. 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.

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. 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.

[1] Delegate Cox's intervention in the case mooted any concerns or controversies regarding the justiciability of the one-party proceeding.

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. 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.

Delegate Cox noted an appeal the next day and filed in this Court an emergency motion to stay the circuit court's order and request for a shortened briefing schedule. On the afternoon of September 27, 2022, this Court ordered the State Board to file any respond to Delegate Cox's motion to stay the circuit court's order by September 29, 2022, at 3:00 p.m.

ARGUMENT

Delegate Cox's attempt to obtain injunctive relief in this Court—a stay of the circuit court's order—fails on multiple fronts. In support of the emergency request, Delegate Cox has resubmitted before this Court the legal arguments he presented to the circuit court. He also justifies the request for an emergency stay solely on mootness grounds, stating that if injunctive relief is not granted then "[m]ail in ballots will be opened in violation of Maryland law and this case will become moot." Appellant's Memo at 9. He has failed, however, to address the full legal burden he carries in seeking injunctive relief in this Court under Maryland Rule 8-425.

As a threshold matter, Delegate Cox has failed to seek a stay from the circuit court and has not adequately presented why it was "not practicable" to do so. Md. Rule 8-425(b). As a substantive matter, Delegate Cox has failed to show how he as a party suffers "irreparable injury" without a stay, how he is likely to succeed on the merits of his claim, and how a stay would serve the public interest. *Ademiluyi v. Egbuonu*, 466 Md. 80, 114-15 (2019). The delegate's emergency request for an emergency stay must therefore be denied.

I. DELEGATE COX POSSESSED BOTH THE TIME AND OPPORTUNITY TO SEEK A STAY IN THE CIRCUIT COURT.

Maryland Rule 8-425(a) provides that this Court or the Court of Appeals may issue injunctive relief "[d]uring the pendency of an appeal," in the form of an injunction or stay, suspension, modification, or restoration of judgment entered by a lower court. Rule 8-425(b), however, requires the party seeking such relief to first request it in the circuit court "[u]nless it is not practicable to do so." Only upon the circuit court's denial of relief, or a showing of impracticality, may the party file for injunctive relief in this Court. Md. Rule 8-425(c).

Delegate Cox concedes that he did not seek a stay of the circuit court's judgment before the circuit court itself. Instead, he argues that seeking such relief was impractical because "time constraints" were "far too tight to allow for two attempts to get a stay of the order." Appellant's Supp. Memo at 2. He adds that it was "unlikely" that he would have obtained such relief from the circuit court, given that the presiding judge granted the State Board's petition. Neither reason constitutes a sufficient showing of impracticality.

As the delegate notes in his emergency motion, Judge Bonifant "read into the record his Opinion and Order granting [the State Board's] Petition for Remedy" on September 23, 2022 at 3:00 p.m. Appellant's Emergency Motion at 1. Delegate Cox's counsel was present at that Friday hearing to hear the opinion and order. And the opinion and order became publicly available immediately through the press information officer with the Administrative Office of the Courts. Delegate Cox therefore knew the judgment of the circuit court on Friday afternoon, September 23, 2022. That he and his counsel waited three days until September 26 to discuss the prospects of an appeal weighs against a finding of impracticality. Appellant's Supp. Memo at 1.

Moreover, the opinion and order of the circuit court were docketed at 8:04 a.m. on Monday, September 26. At that point, Delegate Cox enjoyed five full business days to file for emergency injunctive relief in the circuit court before seeking it from this Court. While the delegate argues that such a timeline was "far too tight," he has not shown why. His filing seeking an emergency stay does not introduce new legal research or facts into the case. And his dexterity noting the instant appeal with an emergency request for a stay and a secondary request for a shortened response period belie any argument that he could not have coordinated timing multiple filings between the circuit court and this Court.

Finally, the delegate's view that he was "unlikely" to receive his requested relief from the circuit court cannot support a showing of impracticality. In every case, a party will need to re-appear before the court before which they lost to seek injunctive relief. If the self-calculated prospects of obtaining that relief constituted *per se* impracticality, the Rule 8-425(b) requirement would be swallowed by the practicality exception.

Delegate Cox did not seek a stay of the circuit court's order and has not made a sufficient showing "why it [was] impracticable" to do so. Md. Rule 8-425(c). He emergency motion for a stay should therefore be denied.

II. DELEGATE COX FAILED AS A MATTER OF LAW TO SHOW ENTITLMENT TO AN INJUNCTIVE STAY OF THE CIRCUIT COURT'S ORDER.

Maryland Rule 8-425(g) requires this Court to consider "the same factors that are relevant to the granting of injunctive relief by circuit court" when considering a request like the one before it now. There are four such factors to consider: 1) the likelihood that the movant will succeed on the merits; (2) whether greater injury would be done to the non-moving party by granting the relief than by refusing it; (3) whether the moving party will suffer "irreparable injury" unless the injunction is granted; and, (4) the public interest. *Ademiluyi*, 466 Md. at 114.

Delegate Cox bore the burden of production to show that each factor weighs in his favor. *Schade v. Md. State Board of Elections*, 401 Md. 1, 36 (2007). The failure to prove even one of the four factors precludes relief. *Id*. And for the first factor—the likelihood of success on the merits—Delegate Cox was obliged to establish "a real *probability* of prevailing," rather than a remote "possibility" of success. *Ademiluyi*, 466 Md. at 115 (quoting *Ehrlich v. Perez*, 394 Md. 691, 708 (2006)).

The delegate failed to make the requisite showing in support of his request for a stay in this Court. Delegate Cox has claimed no injury that he, as a registered voter, will suffer without the grant of the stay. His claim is not likely to succeed. And considerations of the public interest militate in favor of denying the grant.

A. Delegate Cox Has Not Shown The Only Injury Cognizable For A Registered Voter Seeking To Enjoin A Violation Of The Election Law Article—That The Outcome Of The Election May Change

To obtain his requested relief, Delegate Cox was obliged to show "irreparable injury" that he would suffer without the grant of a stay. *Ademiluyi*, 466 Md. at 114. To that end, Delegate Cox argues that without the stay, his case will become moot on October 1, 2022. Appellant's Memo at 9. He does not explain, however, how he is injured should his claim become moot. In other words, Delegate Cox has failed to explain how the early canvass of mail-in ballots beginning October 1, 2022, injures him as an aggrieved party.

As current a member of the House of Delegates, the suspension of a provision of the Maryland Code in to accomplish the early canvass of mail-in ballots does not injure Delegate Cox. As a member of the House of Delegates, Delegate Cox possesses no unique interest in the outcome of a judicial proceeding involving enacted legislation. *See Duckworth v. Deane*, 393 Md. 524, 538-542 (2006) (discussing how individual members of the state legislature possesses no greater interest in cases challenging legislative enactments than "other Maryland residents"). Delegate Cox cannot represent the interests of the legislative branch as a single legislator. He therefore cannot be injured in his role as a legislator.

As a current gubernatorial candidate, the early canvass of mail-in ballots likewise does not injure Delegate Cox. An early canvass does not tally votes in a manner different than that prescribed by law. And an early canvass does not count the votes in the gubernatorial general election differently from any other race. Delegate Cox has not

specified how he would be injured *as a candidate* by the grant of the State's petition and how that injury would differ from any other candidate, or any other registered voter, in the State. He therefore cannot claim any unique injury because of the office he seeks. *See Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179, 186 (2010) ("It is not enough for a person seeking intervention to base its motion on concern that some future action in the proceedings may affect its interests adversely. Seeking intervention on such a basis is merely speculative and affords no present basis upon which to become a party to the proceedings.") (Citations and quotation marks omitted).

As a registered voter, Delegate Cox *can* claim injury by asserting a violation of the Election Law Article; but, the injury he must prove as a registered voter is a change in the outcome of the election because of the violation. Md. Code Ann., Elec. Law Art. § 12-202(a) (LexisNexis 2017). In the context of a stay, the delegate needed to show how the grant of a stay would prevent an outcome-determinative change in election procedure. He has made no such showing, claiming only generalized injury to collective constitutional rights.

Delegate Cox has therefore failed to show how any cognizable injury would occur upon the denial of his requested stay. Because he bore the burden of showing irreparable injury in support of his request, his request must be denied.

B. There Is No Likelihood Of Success For The Delegate's Challenge To The State Board's Petition

To support a grant of injunctive relief, the moving party must prove "a real *probability* of prevailing on the merits, not a merely remote possibility of doing so." *Schade*, 401 Md. at 36 (emphasis in original) (quotation omitted). Delegate Cox's challenge to the State Board's petition failed in the court below and is not likely to succeed on appeal. The circuit court ruled correctly on both questions litigated before it. Section 8-103(b) of the Election Law Article is a constitutional delegation of authority from the legislative branch to judicial branch; and the current incoming volume of mail-in ballots and inadequate timeframe in which to count them constitute "emergency circumstances" under Election Law § 8-103(b).

1. The Circuit Court Correctly Ruled that Adjustment of the Election Law Calendar is a Judcial Function, Rendering Election Law § 8-103(b)(1) Constitutional Under the Separation of Powers Principle.

On the separation of powers question, Delegate Cox relies entirely on *Sugarloaf Citizens Assoc. v. Gudis*, 319 Md. 558 (1988) for the assertion that § 8-103(b) stands an in improper delegation of power from the legislature to the judiciary. Appellant's Memo at 5-7. The delegate, however, reads *Sugarloaf* far too broadly and fails to recognize the established function the judicial branch exercises in elections.

Unlike its federal counterpart, the Maryland Constitution explicitly articulates the concept of a separation of powers between the executive, legislative, and judicial branches: "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. Decl.

of Rights art. 8. The purpose and intent of the provision are self-evident and have been so for over a century. Article 8 "parcel[s] out and separate[s] the powers" of Maryland's governance among three co-equal branches and "confides" certain powers to an "assigned" branch. *Wright v. Wright's Lessee*, 2 Md. 429, 452 (1852).

Nonetheless, the separation of governing powers among the three branches is not absolute. The Court of Appeals has "long acknowledged" that the executive, legislative, and judicial branches could not function as "wholly separate and unmixed" entities. *Murphy v. Liberty Mutual Ins. Co.*, 478 Md. 333, 370 (2022) (citing *Crane v. Meginnis*, 1 G. & J. 463, 476 (1829)). To that end, the legislative branch can, and has, regularly delegated discreet portions of its policy-setting authority to the other branches of government. *Murphy*, 478 Md. at 371-72; *Dep't of Nat. Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 218-20 (1975). Under the correct circumstances these legislative delegations are not only permissible, but necessary to the functioning of government in modern society. *Linchester*, 274 Md. at 219-20.

Between the legislative and judicial branches, specifically, the Court of Appeals has recognized two ways that the judiciary may exercise quasi-legislative power. *Murphy*, 478 Md. at 373-74.[2] The first is express delegation, where the Legislature assigns certain specific tasks to a court. *Id*. at 373. The second is inherent adoption, where a court seeks to undertake a quasi-legislative action incidental to its normal duties

[2] The Court of Appeals divided the power-sharing structure between legislative and judicial branches into *four* broad categories in *Murphy*. 478 Md. at 373-74. However, the latter two categories expressly involve the Court of Appeals' rulemaking authority granted to it by Article IV, § 18(a) of the Maryland Constitution. *Id.* at 374. They are wholly inapplicable to this context.

and in the absence of an express delegation. *Id*. at 373-74. Inherent adoption is generally judged under a "usurpation" standard, whereby the court's action must be declared unconstitutional as a violation of separation of powers when found to "usurp" or encroach upon the function of the legislative branch. *See Getty v. Carroll County Bd. of Elec.*, 399 Md. 710, 738 (holding that a circuit court usurped legislative authority by entering into a consent agreement to create new legislative districts because such redistricting was a legislative function and there existed no express legislation "to serve as the basis for the Consent Agreement").

In this case, the circuit court's order falls under an express delegation of authority found in Election Law § 8-103(b)(1). That provision grants a circuit court the authority 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." Elec. Law § 8-103(b)(1). There is therefore no question in this case of whether the requested remedy is a usurpation of legislative function

Instead, the constitutionality of an express delegation to the judicial branch depends on whether the delegation imposes a judicial or nonjudicial function on the court. *Sugarloaf*, 319 Md. at 569; *Duffy*, 295 Md. at 259-60; *Linchester*, 274 Md. at 226, *Cromwell v. Jackson*, 188 Md. 8, 18 (1947). There exists no "precise definition" of "judicial function." *Sugarloaf*, 319 Md. at 569. The Court of Appeals has refrained from "prescribe[ing] the precise limits to be observed by the legislative branch . . . in assigning duties to the judiciary" because of the impracticability of crafting such a rule for all possible future cases. *Cromwell*, 188 Md. at 18 (quoting *Bd. of Supervisors of Elec. for*

Wicomico County v. Todd, 97 Md. 247, 264 (1903)). Each delegation case has been judged on its own merits, with reference to past delegation decisions as illustrative guidance. *See Sugarloaf*, 319 Md. at 570-72; *see also Duffy*, 295 Md. at 260-61; *Linchester*, 274 Md. at 226.

Over the past century-and-a-half, the Court of Appeals has held as unconstitutionally nonjudicial those functions exclusively reserved for another branch of government with no analogue to the normal judicial function of a court. *See e.g., Duffy*, 295 Md. at 261 (unconstitutional delegation requiring court to find facts in election law violation cases to be sent to other branches for final judgment); *Cromwell*, 188 Md. at 28 (unconstitutional delegation to issue liquor licenses); *Close v. S. Md. Agric. Ass'n*, 134 Md. 629 (1919) (unconstitutional delegation to issue gaming licenses for horse racing); *Todd*, 97 Md. at 264 (unconstitutional delegation to conduct popular referendum on issuance of liquor licenses); *Beasley v. Ridout*, 94 Md. 641 (1902) (unconstitutional delegation to appoint board of visitors to supervise county jail); *Baltimore v. Bonaparte*, 93 Md. 156 (1901) (unconstitutional delegation to review property assessment for property tax purposes); *Robey v. Prince George's County*, 92 Md. 150 (1900) (unconstitutional delegation to review and audit accounts of county officers before issuing payment on those accounts).

In *Sugarloaf Citizens Association, Inc. v. Gudis*, the Court of Appeals held as unconstitutional a Montgomery County Code ordinance that delegated a nonjudicial function to the circuit court. 319 Md. at 573. The delegated function in *Sugarloaf* permitted the circuit court to void a county council ordinance if the ordinance was voted

on by a councilmember with a conflict of interest (violating the county ethics law) and if voiding the ordinance was in the best interest of the public. *Id.* at 568. The *Sugarloaf* Court held that voiding legislation because it was "in the best interest of the public" constituted the type of "unguided discretion" that involved "questions of policy and expediency" reserved solely to the legislative branch. *Id*. at 572.

The Court in *Sugarloaf* took issue with the boundless discretion granted to a circuit court to *invalidate a law altogether*. *Id.* at 568-69. Where the judicial branch routinely voided legislation from all future applications on "grounds of unconstitutionality" or "failure to comply with enabling legislation requirements," there was no such analogue for nullifying a law solely because the court thought it in the public's best interest. *Id.* While a legislature could determine broadly applicable, future-facing policy "on the basis of public interest," a court could not likewise do so. *Id.*

The circuit court's order pursuant to § 8-103(b)(1) did not void legislation from all future application. It temporarily suspended a statute due to "emergency circumstances." The circuit court's order did not nullify legislation because a court believed generally it was in the public interest. The order adjusted the election calendar in light of a concrete and verifiable injury that the State Board and local boards determined would impair the integrity of the electoral process. The circuit court's order therefore did not perform a nonjudicial function like the one declared unconstitutional in *Sugarloaf.*

The circuit court's order engaged in a judicial function pursuant to Election Law § 8-103(b). That judicial function was a court order adjusting the timing of how an election proceeds in response to unforeseen obstacles. The Election Law Article

delegates such authority to the judicial branch in multiple contexts. Section 9-207 permits the Court of Appeals, on petition of the State Board, to postpone finalizing the ballot for an election. Elec. Law § 9-207(b). Section 12-204 permits a circuit court to "postpone and reschedule[]" an entire election where a violation of the Election Law Article "may change the outcome of a pending election." § 12-204(c)(2). If an election was already held under such circumstances, the circuit court is empowered to "declare void the election" and "order that the election be held again at a date set by the court." § 12-204(b)(1).

Finally, Election Law § 10-301(a) mandates that polling places "shall" remain open from 7:00 a.m. until 8:00 p.m. on election day. Section 9-404(c) of the Election Law Article, however, expressly provides that any person "who appears to vote during a period *covered by a court order* or other order *extending the time for closing the polls* shall cast a provisional ballot." (Emphasis added). And Election Law § 11-303(d)(4)(iii) contemplates how to canvass a provisional ballot "cast during a period *covered by a court order* or other order *extending the time for closing the polls*." (Emphasis added). The Legislature statutorily mandated the time for in-person voting, but expressly acknowledged the judicial function in adjusting that statutory mandate.

Adjustment of the timing of elections is thus a judicial function. Just as a court can conduct a single-party hearing to suspend Election Law § 10-301(a) and keep polls open past 8:00 p.m., the circuit court's order could suspend Election Law § 11-302(d) and permit mail-in ballot processing before November 9, 2022. The express delegation of authority to "provide a remedy that is in the public interest and protects the

integrity of the election process," Election Law § 8-103(b)(1), and the resultant circuit court order comport with Article 8 of the Maryland Declaration of Rights.

Delegate Cox's arguments to the contrary are not probable to succeed, warranting the denial of his request for a stay.

2. The Circuit Court Correctly Ruled 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."

On the statutory interpretation question, Delegate Cox argues that "emergency circumstances" must be defined as wholly unforeseen circumstances; and, that because an attempt at a legislative solution to this issue was undertaken during the 2022 session of the Maryland General Assembly, the current mail-in ballot situation was not unforeseen. Appellant's Brief 3-5. On this issue Delegate Cox looks at the situation too narrowly, conflating what was foreseeable and what was unknowable. While an increase in the number of returned mail-in ballots was foreseeable, the magnitude of that increase and its effect on the electoral system statewide was entirely unknown.

Section 8-103 of the Election Law Article stands as the sole provision for addressing electoral emergencies. Subsection (a) of the statute addresses the powers of the Governor when a "declared state of emergency" interferes with any part of an election. It permits the Governor, acting alone, to postpone an election, specify emergency polling locations, and even specify alternative methods for voting, after formally declaring a state of emergency in a specific jurisdiction or throughout the entire state. Elec. Law § 8-103(a).

Subsection (b) of the statute addresses emergencies falling outside of those covered by subsection (a). In cases where "emergency circumstances" threaten to interfere with an election but do not rise to the level of a gubernatorial-declared state of emergency, subsection (b) authorizes the State Board to 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." Elec. Law § 8-103(b). A local board of elections may likewise petition its local circuit court for the same relief, but must first "confer[]" with the State Board. *Id.*

The Election Law Article does not define "emergency circumstances." That phrase appears only 12 times in the Maryland Code, in a wide range of contexts covering varying degrees of "emergencies." *Compare e.g.*, Md. Code Ann., Envir. § 9-406(b) (LexisNexis 2014) (permitting the Secretary of the Environment to take any action necessary to provide safe drinking water when emergency circumstances relating to drinking water exist); *with* Md. Code Ann., Pub. Safety. § 12-808(c) (LexisNexis 2018) (allowing a building owner or lessee under emergency circumstances to register an elevator unit with the Commissioner of Labor and Industry less than 60 days before the elevator's first operation).

Construing the term "emergency circumstances," as it is used in the Election Law Article, therefore requires recourse to the oft-cited cannons of statutory interpretation. The cardinal rule of a court's interpretive task is to "ascertain and effectuate the General Assembly's purpose and intent when it enacted the statute." *Wheeling v. Selene Finance LP*, 473 Md. 356, 376 (2021). Interpretation begins with the plain meaning of the statute,

reading the statute as a whole "so that no word, clause sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Koste v. Town of Oxford*, 431 Md. 14, 25-26 (2013). Above all else, the statute must be read reasonably without granting it an interpretation that is "absurd, illogical, or incompatible with common sense." *Wheeling*, 473 Md. at 377 (quotation omitted).

In everyday parlance, an emergency is "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action." "Emergency," Dictionary.com (Sept. 13, 2022) available at https://www.dictionary.com/browse/emergency; *see also "*Emergency," Merriam-Webster.com (Sept. 13, 2022), available at https://www.merriam-webster.com/dictionary/emergency ("an unforeseen combination of circumstances or the resulting state that call for immediate action). An emergency need not involve physical harm or extreme danger. "Emergency," as that word is understood in its plainest meaning, involves only an absence of expectation, justifying a lack of preparation, and need for immediate remediation. *See* Md. Code Ann., Pub. Safety § 2-412(a)(2) (defining "emergency" in a first-responder context as "a sudden or unexpected happening or an unforeseen combination of circumstances that calls for immediate action to protect health, safety, welfare, or property from actual or threatened harm or from an unlawful act"). "Emergency circumstances" in Election Law § 8-103(b) can therefore be reasonably defined as unexpected and ongoing conditions that threaten the integrity of an election.

Such a definition comports with a reasonable reading of Election Law § 8-103 as a whole. *See United Bank v. Buckingham*, 472 Md. 407, 424-25 (2021) (looking to the

entirety Commercial Law § 15-201 to ascertain the meaning of "includes" in § 15-201(c)). Section 8-103(a) expressly applies to elections affected by a "state of emergency, declared by the Governor in accordance with the provisions of law." The Governor may declare such a state of emergency pursuant to § 14-107(a) of the Public Safety Article when "an emergency has developed or is impending due to any cause." In the context of a declared state of emergency, the Public Safety Article defines emergency narrower than its common meaning: "the imminent threat or occurrence of severe or widespread loss of life, injury, or other health impacts, property damage or destruction, social or economic disruption, or environmental degradation from natural, technological, or human-made causes." Pub. Safety § 14-101(c). Section 8-103(a), therefore, is a narrow provision applying by its own terms to a certain range of emergencies that pose the greatest threat.

Subsection (b), then, is a broader provision that applies to emergencies "not constituting a declared state of emergency." Elec. Law § 8-103(b)(1). Put another way, where 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*.

Nothing in the legislative history of Election Law § 8-103 contradicts this interpretation of the statute. In fact, nothing in the legislative history of Election Law § 8-103 provides any insight into the interpretation of "emergency circumstances." Section 8-103 was new language added to Article 33 by Senate Bill 118 of the 1998 legislative session. S.B. 118, 1998 Reg. Legis. Sess. The bill itself, totaling over 254 pages, reorganized and rewrote large portions of Article 33. *Id.* The effort was the product of four years' study by a task force and commission to revise the state election code in the wake of the 1994 gubernatorial election. Commission to Revise the Election Law Article, *Report of the Commission to Revise the Election Law Article* at 1 (Dec. 1997).

The commission report that gave rise to the bill referenced the provision that would become Election Law § 8-103(b) only once:

> 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 the Governor's emergency powers, which are found primarily in Article 16Aof the Code. Present Code: There is no provision addressing emergency situations.

Id. at 56.[3] No other commission materials make mention of the emergency circumstances provision or the manner in which it was intended to apply.

The legislative materials attendant to the senate bill are similarly unilluminating. No amendments were offered during the 1998 legislative session to revise or rewrite the portion of the bill creating Election Law § 8-103. The language of that provision

[3] The report refers to guidelines promulgated by the Attorney General for emergency situations. Undersigned counsel and his colleagues have not been able to locate any such documented guidelines from 1997.

remained consistent from first reading until the governor signed it into law. The bill itself included a drafter's note beneath the language of the new Election Law § 8-103. That drafter's note, however, was a word-for-word restatement of the note from the commission report, reproduced above. S.B. 118 at 117-18, 1998 Reg. Legis. Sess. And while the bill file for SB 118 contained a fiscal note, an advice letter from the Office of the Attorney General, and committee materials from two Senate committees, none of those materials mention § 8-103 and the emergencies to which it was meant to apply.

After its passage into law in 1998, 1998 Md. Laws ch. 585, the emergency provisions of Election Law § 8-103 have remain untouched for 25 years. In 2002, the statute was transferred from Article 33 to the newly created Election Law Article. 2002 Md. Laws, ch. 291. The Legislature, however, has not passed a law affecting Election Law § 8-103 since that time.

Election Law § 8-103(b)(1) must therefore be read according to its plain language and in the context of its counterpart, Election Law § 8-103(a). Upon the petition of the State Board, a court may fashion a remedy that is both in the public interest and protects the integrity of the electoral process against an unexpected circumstance, the continuance of which threatens immediate injury to the electoral framework of the State.

As applied in this case, the volume of mail-in ballots to be canvassed and tabulated during the 2022 gubernatorial general election combined with the inadequate time to complete those tasks constitutes "emergency circumstances" pursuant to Election Law § 8-103(b)(1).

After the electoral experience in 2020, election officials could hardly anticipate how Maryland voters would approach the polls in 2022. In the three gubernatorial general elections prior to 2020, mail-in ballots accounted for no more than 5.3% of the total vote. In the presidential general election held during the midst of the COVID-19 pandemic, mail-in ballots accounted for 51.7% of the total vote. Maryland conducted no statewide elections in 2021. Thus, it remained unclear whether Maryland voters in 2022 would return to in-person voting at levels similar to the 2010, 2014, and 2018 elections; or, whether voters would continue to cast mail-in ballots at levels similar to 2020.

That was, in part, why the State Board chose not to seek an emergency remedy to canvass mail-in ballots early for the primary election.

The 2022 gubernatorial primary election clarified the unknown. Maryland voters chose overwhelmingly to continue voting by mail-in ballot at levels otherwise unseen outside of the pandemic crisis. The electoral experience with mail-in ballots in 2020 fundamentally changed voting patterns in Maryland. The State Board, however, in addition to the Governor and Legislature, did not know that until July 19, 2022, when in-person polls closed at 8:00 p.m.

By July 19, 2022, little could be done to prepare for this new voting paradigm in the general election. With budgets for the year set and canvass spaces secured, locally funded boards of election, *see* Elec. Law § 2-203 (mandating "[e]ach county" pay the expenses for its local board of elections, including expenses for the operation of polling places, supplies, and equipment), could not feasibly raise more manpower *and* obtain the larger canvass spaces needed to accommodate the increase in mail-in ballots. Without

more help to count ballots, and without more space in which to count ballots, the only option was to seek more time in which to count ballots. That is why the volume of ballots in the 2022 general election constitutes an "emergency circumstance."

Delegate Cox's argument otherwise fail to show a probable likelihood of success on this issue. His request for a stay must therefore be denied.

C. It Is In The Public Interest To Deny The Delegates Request For A Stay Where Local Boards Of Election Require Clear Instruction For When To Begin The Mail-In Canvass.

On this last factor, Delegate Cox argues only a that the grant of a stay supports "the public policy of not allowing the judiciary to exercise non-judicial legislative functions." Appellant's Memo at 9. This generalized claim fails to identify a public policy outside of Article 8 of the Maryland Declaration of Rights. And on this factor, the State Board's status as a public agency tips the balance in its favor.

"In litigation between governmental and private parties, or in cases in which injunctive relief directly impacts governmental interests, the court is not bound by the strict requirements of traditional equity as developed in private litigation." *Md. Commission on Human Relations v. Downey Communications, Inc.*, 110 Md. App. 493, 517 (1996) (quotation omitted). Instead, courts "go much further" to withhold relief in the name of the public interest than when only private parties are involved in a suit. *Id.*; *see also Schade*, 401 Md. at 37, 40 (repeating this principle in support of the notion that injunctive relief is inappropriate in an elections case when the election is too soon for the State to implement the requested relief).

The public possesses an interest in a well-administered election. As of today, September 29, 2022, mail-in ballots have been mailed to overseas voters. Drop-boxes are being delivered statewide to receive mail-in ballots. And domestic mail-in ballots are being mailed in a weeklong effort across the state. Local boards of elections need to be able to plan when and how they will canvass mail-in ballots. This requires the management of human resources, scheduling times for paid election workers to come to canvass spaces in order to canvass ballots. It also affects how the local boards will allocate their resources to deploying early voting sites; and, how those sites will be staffed.

Right now, the local boards are relying on a circuit court order permitting them to begin canvassing on October 1st. That reliance allows the local boards to plan through October the activities necessary for conducting the 2022 gubernatorial election. It provides clarity in the face of the enormous and complex undertaking to conduct an election.

A stay pending this appeal removes that clarity, leaving every local board of elections in a liminal state between preparation and reaction. Election workers will not know when to do their job until the last moment. And voters will not know when to expect confirmation that their ballot has been counted. This last concern is no small issue—voters who cast a mail-in ballot and then arrive at a polling place during early voting or on election day will be instructed to cast a provisional ballot. Adding more provisional ballots to the election would serve only to lengthen the amount of time required to canvass and certify the election.

The public interest factor favors a denial of Delegate Cox's request for a stay. For that reason, and for all the aforementioned reasons, his request should thus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 29th day of September, 2022, the foregoing was filed and served electronically by the MDEC system on all persons entitled to service:

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