

DANIEL COX,
Appellant

v.

MARYLAND STATE BOARD
OF ELECTIONS
Appellee

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

IN THE
COURT OF APPEALS

OF MARYLAND

COA-REG-0021-2022
September Term, 2022

(No. 1282, Sept. Term, 2022
Court of Special Appeals)

(No. C-15-CV-22-003258,
Circuit Court of Montgomery County
The Hon. James Bonifant, presiding)

* * * * *

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF CITATIONS..... 3

STATEMENT OF THE CASE..... 4

QUESTIONS PRESENTED..... 5

STATEMENT OF THE FACTS..... 5

SUMMARY OF ARGUMENT..... 7

ARGUMENT..... 7

CONCLUSION..... 14

CERTIFICATION OF WORD COUNT..... 15

CITATION AND VERBATIM TEXT OF ALL PERTINENT LAW..... 16

CERTIFICATE OF SERVICE..... 21

TABLE OF CITATIONS

Cases

<i>Sugarloaf Citizens Assoc., Inc. v. Gudis</i> , 319 Md. 558, 573 A.2d 1325 (1990)	9, 10, 11
--	-----------

STATUTES

Maryland Code, Election Law Article § 12-204	12
Maryland Code, Election Law Article § 10-301	12
Maryland Code, Election Law Article § 11-303	12
Maryland Code, Election Law Article § 8-103(b).....	passim
Maryland Code, Election Law Article § 9-404	12
Maryland Code, Election Law Article § 302(b)(1)	4, 5, 6
Maryland Code Election Law Article § 308 (a)	5
Maryland Code Election Law Article 503 (a)(1)(ii)	5, 15
Maryland Code Election Law Article 9-311.1	6, 7, 17
Maryland Senate Bill 163	6
Maryland House Bill 862	6
Montgomery County Code § 19A-22	9, 11

RULES

Maryland Rule 8-131(c).....	20
-----------------------------	----

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment XX § 2	5
Article 8 of the Maryland Declaration of Rights.....	10, 11, 16

STATEMENT OF THE CASE

Daniel Cox (“Delegate Cox” or “Appellant”) respectfully appeals the September 26, 2022, order of the Circuit Court for Montgomery County, Case No. C-15- CV-22-003258, granting the *Petition for Emergency Remedy by the State Board of Elections*. Pursuant to this order, the Maryland State Board of Elections (“State Board” or “Appellee”) may begin the canvassing of mail-in ballots beginning on October 1, 2022, at 8:00 a.m. instead of “8 a.m. on the Wednesday following election day,” as currently mandated by statute, Md. Code Ann., Elec. Law § 11-302(b)(1). (E 026, 027)

On September 27, 2022, Delegate Cox noted an appeal and filed in the Court of Special Appeals an emergency motion to stay the circuit court’s order. (E 357) The Court of Special Appeals ordered the State Board to respond to Delegate Cox’s motion by September 29, 2022, at 3:00 p.m. (E 363) The State Board filed a timely response. (E 363) The Court of Special Appeals denied Delegate Cox’s motion later that afternoon.

On September 28, 2022, the State Board filed a *Petition for Writ of Certiorari and Request for Expedited Review* with this Court. (E 005) On September 29, 2022, Delegate Cox was directed by this Court to file a response to the State Board’s *Petition* by September 30, 2022, at noon. Delegate Cox filed a timely response agreeing that certiorari should be granted for different reasons.

On September 30, 2022, this Court granted certiorari. This Court has directed each party to file their respective principal briefs by 5:00 p.m. on October 4, 2022.

QUESTIONS PRESENTED

- I. Whether Maryland Code Election Law § 8-103(b) is unconstitutional as an impermissible delegation of legislative discretion and authority.
- II. Whether an emergency existed at the time the Maryland State Board of Elections filed its Petition for Remedy.

STATEMENT OF THE FACTS

Current law imposes a specific timeline by which general election results must be ascertained and certified. Maryland Code, Election Law Article § 11-308(a) contemplates that each local board of elections will “verify the vote count” within ten days of election day. Also, the Board of State Canvassers must convene to determine and certify the outcome of every election and ballot question “within 35 days of the election.” Maryland Code, Election Law Article § 11-503(a)(1)(ii). Finally, the 118th Congress of the United States “shall assemble . . . at noon on the 3d day of January” in 2023. U.S. Const. amend. XX, § 2.

The law mandates a local board of elections to convene for the mail-in canvass “[f]ollowing an election.” Maryland Code, Election Law Article § 11-302(a). Local boards are prohibited from “open[ing] any envelope” containing a mail-in ballot “prior to 8 a.m. on the Wednesday following election day.” Maryland Code, Election Law Article § 11-302(b)(1). And at the end of each day of canvassing, the local board must “prepare and release” an unofficial report of that day’s mail-in ballot tabulation. Maryland Code, Election Law Article § 11-302(e)(1).

During the 2022 gubernatorial primary election, 345,230 mail-in ballots were returned. (E 007) Although the State Board calls this number “overwhelming,” this sum is paltry when compared to the 1,527,460 mail-in ballots that were returned during the 2020 election. (E 018) That year, mail-in ballots increased by nearly twelve-fold as compared to the 120,240 mail-in ballots that had been cast during the 2018 election cycle. (E 018)

Even though the number of mail-in ballots¹ had ballooned by more than 1.4 million from 2018 to 2020, the General Assembly made voting by mail even easier during the 2021 Regular Legislative Session by enacting Senate Bill 683. *See* 2021 Md. Laws, Ch. 514, Sec. 1; 2021 Md. Laws, Ch. 56, Sec. 1. Pursuant to this bill, which was signed by the Governor, all voters became eligible for permanent absentee ballot status. *See* Maryland Code, Election Law Article § 9-311.1.

Presumably mindful of the statutory and constitutional deadlines referenced above – and presumably mindful of how the Election Article had been changed in 2021 to make mail-in voting even easier than it had been in 2020 when the volume of mail-in ballots had increased by 1.4 million – the General Assembly contemplated amending Elec. Law § 11-302(b)(1) to give local election boards more time to count mail-in ballots. (E 012) Senate Bill 163 and House Bill 862 would have given local boards authority to canvass and tabulate mail-in ballots eight days before the beginning of the

¹ This Court should take judicial notice of Md. Code Ann., Elec. Law § 9-301(c), which makes the terms “mail-in ballots” and “absentee ballots” interchangeable.

early voting period. (E 012) The Governor, however, exercised his prerogative under the Maryland Constitution and vetoed these bills. (E 012)

Thus, after seeing a twelve-fold increase in mail in ballots in 2020 as compared to the previous election, the Legislative and Executive Departments made mail-in voting even easier in 2021 by creating a permanent absentee ballot list. *See* Elec. Law § 9-311.1. But then, in 2022, when posed with the question of giving election boards more time to count ballots, the Legislative and Executive Departments opted to do nothing. (E 012) Now the State Board wants this Court to perform an action the other two departments of government have contemplated, but nevertheless have refused to address.

SUMMARY OF ARGUMENT

Maryland Code Annotated Election Law Article § 8-103(b) is unconstitutional on its face as granting a nonjudicial function to the circuit court and by delegating legislative discretion to the judiciary; it is also unconstitutional in its application in this matter, as the lower court is effectively vetoing existing legislation on other than constitutional grounds.

The Appellee's Petition for Remedy is also invalid in that no emergency existed or was even alleged to exist.

ARGUMENT

I. APPELLEE PROVIDES NO AUTHORITY FOR ITS ASSERTION THAT 8-103 OF THE ELECTION ARTICLE IS NOT UNCONSTITUTIONAL.

Appellant Cox has firmly asserted that Maryland Election Law § 8-103(b) unconstitutionally delegates legislative discretion to the judiciary, in violation of the separation of powers. The essence of the State Board's argument in support of Maryland Code Election Law Article § 8-103(b) is that because other statutes have not been challenged as to their constitutionality, this one must pass muster. The State Board's position is without merit.

The first principle the State Board raises is that we must respect their view of this statute, because they are experts in elections. Admittedly, the majority of the State Board's brief discusses how many ballots they anticipate receiving; however, this fact is not disputed, as we have all seen this coming since 2020. The State Board of Elections possesses no expertise on the issue of the constitutionality of a statute based on whether the General Assembly has improperly delegated legislative discretion to the judiciary. Similarly, the State Board is not an expert on the definition of the word emergency.

Appellee next proceeds to discuss other instances in which it perceives the courts have say in matters pertaining to elections. The first example is the permission of the General Assembly to create the very agency that seeks the relief. It is axiomatic that the Maryland Legislature has the right to create agencies; this action is consistent with the discretion afforded the legislature by the Maryland constitution. In no way does the act of the legislature creating an agency that falls under the Executive branch support the notion that the judiciary is permitted to "take any action ... necessary to provide a remedy that is in the public interest."

The State Board follows with an explanation of the difference between “inherent adoption” and “express delegation”, the two ways that the courts may exercise authority over a statute, selecting the latter. The State Board acknowledges that the issue is whether the court is being asked to perform a nonjudicial function. Seemingly ignoring the inescapable conclusion from the undisputed fact that the General Assembly just addressed the very action it seeks this court to undertake, Appellee attempts to distinguish *Sugarloaf Citizens Association v. Gudis*, 319 Md. 558, 573 A. 2d 1325 (1989) on the remedy sought therein.

As *Sugarloaf* is directly on point as to the impermissible standard and broad discretion afforded the judiciary, a proper analysis is critical to the determination of § 8-103(b). Therein, the Montgomery County Council had to decide between two locations for an incinerator. A challenge was brought to the decision based on the allegation of a conflict of interest of one of the members of the council. The Montgomery County Code § 19A-22(b) provided in pertinent part that “the [circuit] court [for Montgomery County] ... can void an official action taken by an official or employee with a conflict of interest ...”. *Sugarloaf Citizens Association* filed a petition in the Montgomery County Circuit Court to “void an official action”, to wit: to disqualify the deciding vote of a council member alleged to have a conflict of interest. The above cited section of the Montgomery County Code authorized this action by the circuit court “if the court deems voiding the action to be in the best interest of the public.”

The Court of Appeals in *Sugarloaf* wasted no time immediately declaring that this provision “impermissibly attempts to vest in the court a nonjudicial power.” *Id.*, at 568, 1331. Further, contrary to the assertion of the State Board, the remedy sought by Sugarloaf Citizens Association was to invalidate the vote of the councilman with the alleged conflict of interest. This would cause the resolution of the council as to the location of the incinerator to be invalid. The petition did not seek to void legislation. The State Board’s attempts to distinguish *Sugarloaf* on this basis are without merit.

Nevertheless, had the remedy sought by Sugarloaf Citizens Association included voiding legislation, the principles espoused by *Sugarloaf* would remain applicable to Section 8-103(b). Repeatedly throughout *Sugarloaf*, the Court discussed the impermissible standard by which the circuit court was authorized under the Montgomery County Code to act:

That provision attempts to vest in the court a nonjudicial power.

[C]ourts cannot so act because a judge thinks that to void the legislation is in some fashion "in the best . . . interest of the public." To permit a court to act on that basis is to permit it to perform a nonjudicial function.

Article 8 [of the Maryland Constitution] prohibits the courts from performing nonjudicial functions.

A court has no jurisdiction to perform a nonjudicial function, and any enactment which attempts to confer such a function on a court is unconstitutional.

Section 19A-22(b) of the Montgomery County Code purports to allow a court to void legislation **(or other local governmental action)** because the court concludes that to do so would be in the best interest of the public. As our cases demonstrate, that sort of unguided discretion, involving, as it does, questions of policy and expediency, is legislative, not judicial, discretion. It is the sort of discretion that may not, consistent with Article 8 of the Declaration of Rights, be vested in a court. (emphasis added)

Nowhere in the opinion does the Court find or discuss that seeking to void legislation was the straw that broke the camel's back, causing the code section to be unconstitutional. Rather, as expressly stated above, the section authorized the court to void legislation or take other governmental action (such as voiding a vote) because to do so would be in the best interest of the public. It was this standard that caused the code section to fail. Accordingly, Appellee's efforts to distinguish *Sugarloaf* on the facts and the law are without merit.

Appellee next asserts that "adjustment of the election law calendar in response to a case is a judicial function." This statement is misleading in several ways.

First, § 8-103(b) does not authorize the court to "adjust the election law calendar"; rather, it attempts to allow the court to "take any action ... to provide a remedy that is in the public interest...". These are vastly different powers.

Second, the court herein was asked to suspend legislation that has been in place for many years, passed after appropriate debate at the General Assembly and signed into law

by the Governor. That remedy, because the State Board perceives it to be in the best interest of the public, is far beyond mere adjustment of the election calendar.

Third, Appellee provides no authority for its assertion that affecting the election calendar is a judicial function. It is undisputable that the jurisdiction for structuring elections lies in the General Assembly. While there is direct authority to intercede on issues of districting, no such issue exists in the case at bar. The analogy to court action in districting disputes is misleading.

Appellee goes on to cite other statutes that provide different authority under different circumstances, whose constitutionality has and is not being challenged. Sections 12-204, 10-301, and 11-303 bear no resemblance to 8-103 in circumstance, remedy, or discretion. The analogy is without merit.

Section 12-204 provides specific remedies in the event a registered voter brings an action based on an act or omission relating to an election that is inconsistent with the Election Law Article and may or has changed the outcome of the election. Those remedies include declaring or rescheduling the election. Nowhere in that statute is the discretion found to take any action that is in the best interest of the public. Further, no one has challenged the constitutionality of this section; accordingly, it is meaningless to claim that because this statute exists, therefore, § 8-103(b) must be constitutional.

Section 10-301 of the Election Law Article provides that voters who arrive at the polls during the hours of voting are permitted to vote. Section 9-404, also cited by Appellee, refers to the possibility of an applicable court order extending that time. Again, nowhere is

the court granted discretion to take any action that is in the public interest. The reference to these sections of the Maryland Code do not support Appellee's assertion that to suspend legislation because it is in the public interest is a constitutional delegation of authority.

Section 11-303 of the Election Law article also refers to the possibility of an order extending the time that a poll may remain open. Again, no broad grant of legislative discretion is provided; no analogy to section 8-103(b) can be found.

Appellee has failed to support its assertion that Maryland Code Election Law Article § 8-103(b) is constitutional. This statute must fail.

II. APPELLEE ATTEMPTS TO DELETE "EMERGENCY" FROM 8-103(B)

The State Board devotes many pages to the Statement of Facts, outlining the potential problems it expects in complying with the deadlines required by Maryland law. Nowhere in their brief, petition, or other filings or statements is an explanation of why they did not take action to increase their staff and improve technology to handle the deluge of ballots that everyone has known for years will be coming. The statements of Appellee doom its assertion of the existence of emergency circumstances:

The BOE foresaw clear obstacles to a timely certification.

It was reasonable to anticipate [the deluge of mail-in ballots]

Although the Appellee's brief does admit that an emergency requires circumstances that are "sudden, urgent, usually unexpected occurrence[s]", nowhere in Appellee's brief can there be found any factual basis for these circumstances. To the contrary, Appellee

admits in its brief and its prior filings that these circumstances began in 2020, when over 1.5 million mail-in ballots were processed. When the General Assembly thereafter changed the law to permit easy access to these ballots, it was “reasonable to anticipate” that the public would utilize this tool. That has proven to be true, according to Appellee. Therefore, no emergency exists. Nothing about the current circumstances is unforeseen, sudden, or unanticipated.

The trial court and Appellee’s arguments are effectively 1.) the legislature provided for a wide range of emergencies, and 2.) the current circumstances may interfere with the election; therefore, relief is appropriate. The requirement of an “emergency” has been deleted. Such an interpretation is inconsistent with the rules of statutory construction and cannot stand.

CONCLUSION

The judgment of the Circuit Court for Montgomery County must be reversed and the Maryland State Board’s Petition for Remedy must be denied.

RESPECTFULLY SUBMITTED on this the 6th day of October 2022,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112

1. This petition contains 2,738 words, excluding the parts exempted from the word count by Rule 8-503.
2. This petition complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ C. Edward Hartman, III
C. Edward Hartman, III

CITATION AND VERBATIM TEXT OF ALL PERTINENT LAW

Article 8, Maryland Declaration of Rights:

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. Code, Elec. Law § 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.

Md. Code, Elec. Law § 9-301(c):

The State Board and each local board shall: (c) notwithstanding the use of the term “absentee” in this article, refer to absentee ballots as “mail-in ballots” and absentee voting as “mail-in voting” in all communications with voters and the general public;

Md. Code, Elec. Law § 9-311.1:

(a) All voters are eligible for permanent absentee ballot status.

(b) To request permanent absentee ballot status a voter shall complete and submit:

(1) the State Board-approved absentee ballot application and indicate on the form that the voter wishes to have permanent absentee ballot status;

(2) a written request that includes the voter's name, residence address, and signature; or

(3) the online absentee ballot application provided by the State Board and indicate on the form that the voter wishes to have permanent absentee ballot status.

(c)

(1) A voter may apply for permanent absentee ballot status at any time.

(2) A voter who requests permanent absentee ballot status may not receive an absentee ballot for the next election if the request is made after the applicable deadline specified in § 9-305(c) of this subtitle.

(d) A voter shall specify in an absentee ballot application submitted in accordance with subsection (b) of this section:

(1) one of the following methods by which the voter chooses to receive an absentee ballot:

(i) mail;

(ii) facsimile transmission; or

(iii) the Internet; and

(2) one of the following methods by which the voter chooses to be contacted by the State Board under subsection (g) of this section before each election:

(i) nonforwardable mail;

(ii) e-mail; or

(iii) text message.

(e) A voter who uses the online absentee ballot application to request permanent absentee ballot status or who uses any method to request to receive a blank absentee ballot through the Internet shall provide the information required under § 9-305(b) of this subtitle.

(f) A voter who submits a proper request for permanent absentee ballot status shall be placed on the permanent absentee ballot list.

(g)

(1) Not less than 75 days before the day on which a local board begins to send absentee ballots to voters, the State Board shall send a written communication to each voter who is on the permanent absentee ballot list as of a date that is at least 90 days before the upcoming election using the method chosen by the voter under subsection (d)(1) of this section.

(2) The communication required under paragraph (1) of this subsection shall include:

(i) confirmation that the voter is included on the permanent absentee ballot list;

(ii) the address of the voter;

(iii) the method by which the voter has chosen to receive an absentee ballot; and

(iv) a statement that the voter must notify the local board if any of the changes listed in subsection (j) of this section have occurred.

(3) If the State Board is unable to contact a voter using the method of communication chosen by the voter under subsection (d)(1) of this section, the State Board shall send the written communication using another method if the State Board has other contact information for the voter.

(4) If the communication required under this section is sent by mail, the envelope shall include a statement, prominently placed, requesting that the recipient return the communication to the State Board if the intended recipient no longer lives at that address.

(h) A local board shall send an absentee ballot to each voter on the permanent absentee ballot list each time there is an election.

(i) A voter who has permanent absentee ballot status shall be removed from the permanent absentee ballot list if:

(1) the voter requests to be removed from the list;

(2) the voter is removed from the statewide voter registration list under Title 3, Subtitle 5 of this article;

(3) the voter fails to return an absentee ballot for two consecutive statewide general elections; or

(4) any mail sent to the voter by the State Board or a local board is returned undeliverable.

(j) A voter shall notify the local board if any of the following changes occur while the voter has permanent absentee ballot status:

(1) the voter no longer wishes to have permanent absentee ballot status;

(2) the address to which the voter's absentee ballot should be sent has changed; or

(3) the voter wishes to receive an absentee ballot by a different method from the method previously indicated by the voter.

(k) If a voter who has permanent absentee ballot status gives notice of a change of address under § 3-304 of this article, the local board shall enclose with the confirmation notice sent to the voter under § 3-502(b) of this article a notification that:

(1) the voter remains included on the permanent absentee ballot list; and

(2) the voter's absentee ballot will be sent to the voter's new address.

Md. Code, Elec. Law § 11-302:

(a) Following an election, each local board shall meet at its designated counting center to canvass the absentee ballots cast in that election in accordance with the regulations and guidelines established by the State Board.

(b)(1) A local board may not open any envelope of an absentee ballot prior to 8 a.m. on the Wednesday following election day.

(2) A local board may not delay the commencement of the canvass to await the receipt of late-arriving, timely absentee ballots.

(c)(1) An absentee ballot shall be deemed timely received if it is received in accordance with the regulations and guidelines established by the State Board.

(2) An absentee ballot that is received after the deadline specified by the regulations and guidelines may not be counted.

(d)(1) The State Board shall adopt regulations that reflect the policy that the clarity of the intent of the voter is the overriding consideration in determining the validity of an absentee ballot or the vote cast in a particular contest.

(2) A local board may not reject an absentee ballot except by unanimous vote and in accordance with regulations of the State Board.

(3) The local board shall reject an absentee ballot if:

(i) the voter failed to sign the oath on the ballot envelope;

(ii) the local board received more than one ballot from the same individual for the same election in the same ballot envelope; or

(iii) the local board determines that an absentee ballot is intentionally marked with an identifying mark that is clearly evident and placed on the ballot for the purpose of identifying the ballot.

(4) If the local board receives more than one legally sufficient ballot, in separate envelopes, from the same individual, the local board shall:

(i) count only the ballot with the latest properly signed oath; and

(ii) reject any other ballot.

(5) If the intent of the voter is not clearly demonstrated, the local board shall reject only the vote for that office or question.

(6) If an absentee voter casts a vote for an individual who has ceased to be a candidate, the vote for that candidate may not be counted, but that vote does not invalidate the remainder of the ballot.

(e) At the end of each day of canvassing, a local board shall prepare and release a report of the unofficial results of the absentee ballot vote tabulation.

Maryland Rule 8-131(c):

When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

CERTIFICATE OF SERVICE

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

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This, the 6th day of October, 2022

/s/ C. Edward Hartman, III
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