	IN THE
DANIEL COX, Appellant	COURT OF APPEALS
v.	OF MARYLAND
MARYLAND STATE BOARD OF ELECTIONS Appellee	COA-REG-0021-2022 September Term, 2022
	(No. 1282, Sept. Term, 2022 Court of Special Appeals)
IN RE: PETITION FOR EMERGENCY REMEDY BY THE MARYLAND STATE BOARD OF ELECTIONS	(No. C-15-CV-22-003258, Circuit Court of Montgomery County The Hon. James Bonifant, presiding)

* * * * * * * * * * * * * * * *

APPELLANT'S BRIEF

C. EDWARD HARTMAN, III, L.L.M. J.D. B.S.E.E.
HARTMAN--ATTORNEYS AT LAW
116 DEFENSE HIGHWAY, SUITE 300,
ANNAPOLIS, MD 21401
AIS# 8501010262
410-266-3232 (phone) | 410-266-5561 (facsimile) |
ed@Hartman.law www.hartman.law
Attorneys for DANIEL COX

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

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.

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the circuit court incorrectly rule that the remedy sought under Maryland Code, Election Law Article § 8-103(b)(1) comports with the separation of powers doctrine since the remedy requested had already been considered by the Legislative Department and had been vetoed by the Executive Department months before the Judicial Department had been asked to formulate a remedy.
2. Did the application of election law § 8-103(b) create an unconstitutional effort by the circuit court to override Governor Hogan's veto?
3. Did the circuit court incorrectly rule that the incoming volume of mail-in ballots and timeframe in which to process them constitute "emergency circumstances" that "interfere with the electoral process" as those terms are used in Election Law §8-103(b)(1) given that these situations were contemplated by the Legislative Department during the 2022 session?

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 ballots[1] 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.

[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.

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 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.

STANDARD OF REVIEW

Maryland Rule 8-131(c) states:

> 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.

In the case at bar, the evidence was stipulated by the parties, as there was no testimony or exhibits presented other than those attached to the *Petition for Emergency Remedy by the State Board of Elections.*

Therefore, insomuch as the constitutionality of Elec. Law § 8-103(b)(1) is concerned, this is a pure question of law for which *de novo* review is warranted. *See Collins v. State*, 383 Md. 684, 688, 861 A.2d 727, 730 (Md. 2004). Likewise, with respect to whether "emergency circumstances" have arisen pursuant to Elec. Law § 8-103(b)(1), this, too, is a pure question of law requiring *de novo* review since the evidence is stipulated. *See Collins, supra.*

ARGUMENT

I. ELECTION LAW § 8-103(B)(1) VIOLATES THE SEPARATION OF POWERS DOCTRINE AND ARTICLE 8 OF THE MARYLAND DECLARATION OF RIGHTS.

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

> 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.

Delegate Cox respectfully submits that Elec. Law § 8-103(b)(1) is facially unconstitutional since it violates Article 8 of the Maryland Declaration of Rights[2], as well as Article III, Section 49 of the Maryland Constitution.[3] Therefore, because it is facially unconstitutional, the order of the lower court dated September 26, 2022, is void.

The case of *Sugarloaf Citizens Assoc., Inc. v. Gudis*, 319 Md. 558, 573 A.2d 1325 (1990) is on point. Therein, the Montgomery County Code contained language that allowed the Court to "void an official action taken by an official or employee with a conflict of interest…if the court deems voiding the action to be in the best interest of the public." This Court held that this provision "impermissibly attempts to vest in the court a nonjudicial power." *Id.*, at 568, 1331. "Absent some constitutional infirmity," the Sugarloaf Court held, "a court has no power to declare void an act of the General Assembly." *Id.*, at 569, 1331. "But courts 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

[2] Article 8 of the Maryland Declaration of Rights reads:

> 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.

[3] Article III, Section 49 of the Maryland Constitution reads:

> 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.

on that basis is to permit it to perform a nonjudicial function." *Id.*, at 569, 1331 (internal citations and ellipses omitted).

Although *Sugarloaf* involved a Montgomery County Code section, the fact pattern is otherwise identical. Elec Law § 8-103 (b) attempts to impart upon the courts the exact same power to act: "to provide a remedy that is in the public interest and protects the integrity of the electoral process." *Id.* The language of the statute at bar is virtually identical to that in *Sugarloaf*. The holding of unconstitutionality must likewise be identical.

The State Board and the trial court attempted to distinguish *Sugarloaf* on the basis that the plaintiff therein sought to invalidate rather than suspend legislation; however, nowhere in Sugarloaf is that distinction made as a basis for the ruling. The *Sugarloaf* court emphasized several times that it is the discretion afforded the court by the legislation, not the specific manner in which it is being applied, that renders the code section to be an unconstitutional delegation of legislative discretion. The Court held that to authorize a circuit court to act in the "best interest of the public" 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." *Id.*, at 568, 1331. The remedy was not the basis of holding in *Sugarloaf*; nor can it be in the case at bar.

In fact, the code section ruled unconstitutional in *Sugarloaf* did not authorize voiding legislation; rather, as stated above, it authorized a court to "void an official action taken by an official or employee with a conflict of interest…". The action was the deciding vote to approve a site for construction. The code section was voided because it was unconstitutional, which is the proper result in that case and in the case at bar.

In *Schisler v. State,* 394 Md. 519, 907 A.2d 175 (Md. 2006), this Court provides a thorough analysis of Md. Decl. of Rts. art. 8 and the Separation of Powers Doctrine. *Schisler* involves a dispute over sections of a bill from the 2006 Legislative Session. *See* 907 A.2d at 178. These sections "directly affect[ed] the terms of office of the current Commissioners [of the Public Service Commission] and the future appointment of interim Commissioners…." *Id.* This Court held that these sections were "repugnant to the Maryland Constitution … and [are] otherwise in violation of Section 8 of the Declaration of Rights of Maryland." 907 A.2d at 176.

Although the underlying dispute in *Schisler* deals with utility law, not election law, this Court's analysis is quite instructive to this discussion, *viz.*:

> The Declaration of Rights expressly establishes (or continues the concept first created by the "Bill of Rights" of the 1776 Constitution and subsequent amendments and constitutions) the Separation of Powers concept, as an explicit Maryland Constitutional command (in contrast with the creation of such concept by implication in the Federal Constitution). … Article 8 of the Declaration of Rights expressly established the Separation of Powers Doctrine as part of the "organic" law of Maryland.

907 A.2d at 203. Thus, the Separation of Power is not simply a notion to which Maryland law pays lip-service. Rather, it is an "*explicit Maryland Constitutional command*." (Emphasis added.)

This Court in *Schisler* also reiterates its holding from 106 years earlier in *Robey v. Commissioners*, 92 Md. 150, 48 A. 48 (1900), which involved attempts by the Legislative

Department to impose Executive Department accounting duties on certain of the Judges of Maryland:

> The 8th Art. of the Declaration of Rights ordains: `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.' Can a Judge, who exercises the functions of the judicial department, be required to assume or discharge the duties which pertain to either of the other departments?

Schisler, 907 A.2d at 207 (quoting *Robey*, 92 Md. at 161-61, 48 A. at 50). Thus, we may infer that a Judge cannot be required to assume or discharge the duties which pertain to either the Legislative or Executive Departments. *Cf. id.*

The *Schisler* Court also quotes from *Board of Supervisors of Election v. Todd*, 97 Md. 247, 262-63, 54 A. 963 (1903), which also was a case involving a Legislative imposition of non-judicial duties on Judges:

> In making this inquiry we are not dealing with any question of expediency or policy; nor can we have regard to the question whether, in the particular instance, the Legislature has prescribed a course of proceeding best adapted to the accomplishment of a laudable object. The public policy involved in the inquiry is determined and fixed in our Bill of Rights and the Constitution — the fundamental law; and we are limited to the question of constitutional power. As was said in the case of *Thomas v. Owens*, 4 Md. [189,] 225 [(1853)], "under our system of government its powers are wisely distributed to different departments; each and all are subordinate to the Constitution, which creates and defines their limits; whatever it commands is the supreme and uncontrollable law of the land."

Schisler, 907 A.2d at 207 (quoting *Todd*, 97 Md. at 262, 54 A. at 964.). Thus, it is immaterial whether the delegation of authority or duties from the General Assembly to the Judiciary is laudable or praiseworthy; instead, what matters is if the "uncontrollable law of the land" is being followed. *See id.* The Court of Appeals held in *Schisler* that the General Assembly's action to "terminate, remove the incumbent members of the Public Service Commission is null and void as an unconstitutional usurpation of the removal power granted to the Governor under the provisions of Article II, section 15 of the Constitution of Maryland and is further null and void as being in violation of Article II, sections 1 and 9 of the Maryland Constitution and as being contrary to the provisions of Article 8 of the Maryland Declaration of Rights." *Id.*, at 602. The same holding in the case at bar is plainly evident.

The most recent case from the Maryland Court of Appeals regarding Article 8 is *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 274 A.3d 412 (Md. 2022). In holding that Article 8 did not limit the Chief Judge's authority to suspend statutes of limitations during the COVID-19 pandemic, the *Murphy* Court describes "four broad categories" of cases addressing "the Judiciary's place in Maryland's system of government," the first of which being, "those involving a legislative attempt to assign to the courts a task that had nothing to do with adjudicating cases…." 478 Md. at 373, 274 A.3d at 435. In describing this category of cases, this Court cites to the following cases favorably: *Beasley v. Ridout*, 94 Md. 641, 52 A. 61 (1902); *Duffy v. Conaway*, 295 Md. 242, 261, 455 A.2d 955 (1983); *Robey*, *supra*; and *Todd*, *supra*. *See Murphy*, 478 Md. at 374 n.44.

In *Beasley*, this Court recites the *Robey* Court:

> The mere fact that a Judge is called on by statute to execute a certain function, does not make it a judicial function. Its character is dependent on its qualities, not on the mere accident as to the person designated to do it. * * * If the Act is judicial when conferred on a Judge, and non-judicial when not conferred on him, the same Act would be in one county judicial, whilst in an adjoining county it would not be.

Beasley, 94 Md. at 659 (quoting *Robey*, 92 Md. at 163). Therefore, if the Executive or Judicial Departments can perform a function, then such function is non-judicial. Thus, any statute requiring a Court to perform such function is unconstitutional:

> Because courts cannot be required to exercise nonjudicial duties it has been held by this Court that it is beyond the power of the Legislature to require the judiciary to: . . . perform duties tantamount to a board of review in assessing property for tax purposes, *Baltimore City v. Bonaparte*, 93 Md. 156, 48 A. 735 (1901); appoint a board of visitors to supervise the county jail. [*Beasley*, *supra*]; provide for referendum concerning issuance of liquor licenses, [*Todd*, *supra*]; issue licenses permitting pari-mutuel betting on horse races, *Close v. Southern Md. Agr. Asso.*, 134 Md. 629, 108 A. 209 (1919); and issue liquor licenses, *Cromwell v. Jackson*, 188 Md. 8, 52 A.2d 79 (1947).

Duffy, 295 Md. at 260-61 (quoting *Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 226 (Md. 1975)).

The Maryland Constitution unambiguously gives the General Assembly the power to regulate elections. *See* Md. Const. art. III, § 49, *supra*. When this constitutional grant is read in conjunction with Article 8, as interpreted by the abovementioned cases, one must conclude that power to enact policy relating to elections is the sole province of the General

Assembly. Therefore, any statute giving any court the authority to make such a policy is unlawful and void.

In the case at bar, the General Assembly exercised its Legislative function by passing not one, but two bills during the 2022 Regular Legislative Session that would have allowed the State Board and local election boards to canvass and tabulate mail-in ballots days before the election. (E 012) That was after the General Assembly had made voting-by-mail easier by creating a permanent absentee ballot list. *See* Elec. Law § 9-311.1. In other words, the General Assembly – clearly mindful of the twelve-fold increase in mail-in ballots from 2018 to 2020 and its own liberalization of mail-in ballot laws in 2021– enacted legislation in 2022 that anticipated the very problems referenced by the State Board in the case at bar.

However, the General Assembly selected not to place this legislation into a stand-alone bill. Instead, the General Assembly presented this legislation to the Governor along with other items late in the session, knowing that there might not be time to override a potential veto. The Governor vetoed both bills.

Thus, the General Assembly treated the decision to expand the dates for counting ballots as if it were a legislative question. Then, when it was presented to the Governor for review, he vetoed it. Ergo, the decision to set (or to reset) the dates for counting ballots – as codified by state law – is a legislative question, not a judicial question. In this instance, the actions of the legislative branch prove this point; it is not merely hypothetical. The very same remedy sought by the State Board was granted by the legislature earlier this year. The judiciary does not have the right to override Governor Hogan's veto.

Delegate Cox's position accords with the holding in *Cromwell v. Jackson,* 188 Md. 8, 52 A.2d 79 (1947). *Cromwell* describes whether Chapter 5(V) of the Special Session of 1933 imposed non-judicial duties upon the judiciary. 188 Md. at 13, 52 A.2d at 82. The Act referenced in *Cromwell* required Clerks of Court to issue saloon licenses to applicants pursuant to ten questions. 188 Md. at 25-26, 52 A.2d at 87-88. The Court deemed the first six of these as being "questions of fact and law upon which the Judge is required to exercise his judgment after hearing the evidence." 188 Md. at 25, 52 A.2d at 87. However, the Court had constitutional concerns about the last four questions:

> The remaining four questions follow: 7. Whether the applicant is a fit person to have a license to sell alcoholic beverages? 8. Whether the place for which the license is applied is a proper one with reference to the public peace and general welfare of the neighborhood or to the character of the inhabitants? 9. Proper allocation of licenses so as not to exceed one to every fifteen hundred persons. 10. What is a bona-fide entertainment held by any club, society, or association, for a special license?

Cromwell, 188 Md. at 25-26, 52 A.2d at 87-88.

This Court in *Cromwell* held, "Whether a person is a fit person to have a license to sell alcoholic beverages is a question of public policy or expediency depending upon many matters. It is not a judicial question." *Id.*, at 188 Md. at 26, 52 A.2d at 88 (*citing Beasley v. Ridout*, 94 Md. at 649, 52 A. at 62). Then, this Court distinguished the non-judicial question of whether a person is fit to have a saloon license with the judicial question of whether a person is fit to have custody of an infant in a child custody case:

> The argument has been advanced that as the Court decides as a judicial question whether a person is fit to have custody of an infant, it is likewise a judicial question as to whether a person is fit to have a license to sell alcoholic beverages. In the case

> of an infant the principle of law is firmly established and a definite guide given that in all cases involving the custody of infants, the welfare of the infant is the primary consideration in determining whether a person is fit to have custody of the infant. In determining whether a person is fit to have a license to sell alcoholic beverages, is the primary consideration the welfare of the purchaser, the welfare of the seller or manufacturer, the welfare of the seller's or purchaser's family, or the welfare of the public in general? If the last, what is the guide? It is purely a question of expediency and policy and not judicial.

Cromwell, at 188 Md. at 26-27, 52 A.2d at 88.

Similarly, the *Cromwell* Court held that the remaining questions were non-judicial because they failed to offer any sort of guide to the Courts, to-wit:

> For the same reasons question eight, whether a place is a proper one for a license with reference to the public peace and general welfare of the neighborhood or to the character of the inhabitants, is not a judicial question but one of policy and expediency. No standard is set by the Act to guide the Court.
>
> ***
>
> For the same reasons as hereinbefore given, no guide is given the Court to answer question ten. What is a bona fide entertainment? What is meant by club, society or association? As was said in *Beasley v. Ridout, supra*, no argument is needed to show that such questions are nonjudicial.

Cromwell, at 188 Md. at 27-28, 52 A.2d at 88-89.

Finally, the *Cromwell* Court held that "quasi-legislative" functions are "non-judicial" by their very nature:

> In the light of the prior decisions of this court we hold that some of the duties imposed on the judges of the Circuit Court for Allegany County by section 305 are quasi-legislative and hence non-judicial, and that the Act as a whole is unconstitutional and invalid, despite the severability clause.

Cromwell, 188 Md. at 28, A.2d at 89.

Returning to the case at bar, the Elec. Law § 8-103(b)(1) permits 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***" (emphasis added). Upon close examination of this text, the quasi-legislative nature of the remedy becomes clear. *Cf. Cromwell*, 188 Md. at 28, A.2d at 89.

First, the term "any action" involves the universal set. In other words, the General Assembly is declaring that the Judicial Department may do anything it wants, just so long as it is "in the public interest and protects the integrity of the electoral process." Elec. Law § 8-103(b)(1). Naturally, purely judicial acts would fall into this universal set. However, so would non-judicial acts. This is because the universal nature of "any action" necessarily includes judicial acts as well as quasi-legislative/non-judicial acts.

Beyond this, "[b]ecause the concept of the 'public interest' is amorphous, it is difficult to apply." *Wolf v. Ford*, 644 A.2d 522, 532, 335 Md. 525, 526 (Md. 1993). "Courts, … have struggled to refine and narrow the definition in an attempt to make the concept more concrete." *Id.* Therefore, the concept of "public interest" as set forth in Elec. Law § 8-103(b)(1) is no more a guide to the Courts than was whether the licensure of a saloon is in the "public peace" or "general welfare of the neighborhood." *See Cromwell*, at 188 Md. at 27-28, 52 A.2d at 88-89 ("… whether a place is a proper one for a license with reference to the public peace and general welfare of the neighborhood … is not a judicial question… .") In fact, the determination of what is in the public interest is invariably a legislative function. *See Sugarloaf*, 319 Md. at 572, 573 A.2d at 1332:

> 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.

Therefore, the only possible guide to limit the function of the Courts is that any such remedy must "protect[] the integrity of the electoral process." Elec. Law § 8-103(b)(1). However, that limitation is in addition to "public interest" limitation. *See id.* ("…a remedy that is in the public interest ***and*** protects the integrity of the electoral process" (emphasis added)). In other words, if the concept of "public interest" is too nebulous to be constitutional, then whether the remedy "protects the integrity of the electoral process" becomes a moot question because the two restrictions are concurrent.

Nevertheless, even if the integrity limitation could be read in a vacuum, at the very least it would show that, as applied to this case, Elec. Law § 8-103(b)(1) and/or the circuit court's order would be unconstitutional. The "electoral process," *id.*, is codified into the Maryland Code as the entire Election Law Article. In other words, Md. Code, Elec. Law § 11-302 (b) – being part of the Election Law Article – is part of the "electoral process." Therefore, any suspension of Elec. Law § 11-302 (b), or any other section of the Election Law, would not protect the integrity of the electoral process; instead, it would undermine the process.

Restated, because any suspension of Elec. Law § 11-302(b) would go against the express limitation of Elec. Law § 8-103(b)(1) regarding "the integrity of the electoral

process," the circuit court's order would be void since it runs afoul of the anti-suspension provision of Article 9 of the Maryland Declaration of Rights[4]. That is because any power to suspend Elec. Law § 11-302(b) could not be derived from Elec. Law § 8-103(b)(1) since that power would undermine the integrity of the electoral process in contravention of the express language of Elec. Law § 8-103(b)(1).

Returning to the general discussion of the facial unconstitutionality of Elec. Law § 8-103(b)(1), Delegate Cox invites the Court to examine the holding of *Getty v. Board of Elections*, 399 Md. 710, 926 A.2d 216 (Md. 2007). In *Getty*, a private party and a local board of elections had entered a consent order modifying the method of election for Carroll County commissioners. *Id.*, 926 A.2d at 218. The local election board claimed that the consent order was necessary because, "the General Assembly's inaction, in essence, compelled the Circuit Court to act, and effectively, if inadvertently, conferred on that court some semblance of authority to do so." *Id.* at 233. Nevertheless, this Court found that the consent order violated Article 8 of the Declaration of Rights:

> Because we conclude that, as ordained by the Constitution, the power and authority to designate the method of election ultimately, and exclusively, lies with the Legislature, we shall hold that the Circuit Court's approval of the Consent Order authorizing a change in the method of election of county commissioners was a clear violation of Article VII, §§ 1 and 2 of the Maryland Constitution.
>
> ***

[4] Article 9 of the Maryland Declaration of Rights reads:

> That no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.

> This Court has held that "Article 8 [of the Declaration of Rights] prohibits the courts from performing non-judicial functions," *Consolidated Const. Servs., Inc. v. Simpson*, 372 Md. 434, 449, 813 A.2d 260, 269 (2002), quoting *Shell Oil Co. v. Supervisor of Assessments of Prince George's County*, 276 Md. 36, 46, 343 A.2d 521, 527 (1975); *Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 319 Md. 558, 569, 573 A.2d 1325, 1331 (1990). *See also Duffy v. Conaway*, 295 Md. 242, 254, 455 A.2d 955, 961 (1983) ("[A] court has no jurisdiction to perform a nonjudicial function...."). More specifically, we have stated that the "[t]he judicial department ha[s] no jurisdiction or right to interfere with the legislative process which was committed by the constitution ... to the Legislature itself." *Maryland-Nat'l Capital Park & Planning Comm'n v. Randall*, 209 Md. 18, 25, 120 A.2d 195, 199 (1956). It is clear that the provisions of the Consent Order … go beyond the functions of the judiciary, and, indeed interfere with the Legislature's authority to redistrict. In issuing its Order, the Circuit Court assumed a role that, in fact, constitutionally belongs to the legislative and executive departments of our government.

Getty, 926 A.2d at 218, 233.

Now if the what the *Getty* opinion says is not persuasive enough, then what the opinion does not mention may be even more persuasive.

This Court should take judicial notice from the opinion that it was entered during the 2005 term of court. Naturally, this means that the subject matter in *Getty* happened after 1998, when Elec. Law § 8-103(b)(1) was enacted. *See* 1998 Laws of Maryland, Ch. 585. Assuming, *arguendo*, that the State Board's contentions in case at bar are valid, the Carroll County Election Board "after conferring with the State Board," could have easily petitioned "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." *See* Elec. Law § 8-103(b)(1). After all, if the General Assembly's present failure to give ballot

workers more time to count mail-in ballots is considered an "emergency circumstance" by the State Board, then the General Assembly's failure to perform redistricting in Carroll County likewise should have been deemed an emergency. Ergo, the State Board and the Carroll County local board could have used the same arguments in this present case to address the *Getty* matter in 2005. Curiously, they did not.

Given the constraints of time and the urgency of the present matter, Delegate Cox has no feasible way of discovering whether this issue was raised in *Getty*. Nevertheless, Delegate Cox believes that in this post-1998 paradigm it is instructive to find a Court of Appeals' election case that describes how boards of election and circuit courts cannot infringe upon the Legislative process, even when the General Assembly fails to act.

The State Board would attempt to relegate this simply to a matter of calendaring. It is not. It is an attempt by the State Board to invalidate a state law – without going through the legislative process set forth in the Maryland Constitution.

Delegate Cox believes that if we do not protect the process, then one day, we will not have a process left to protect. Then when that process is all but gone, it will not be there to protect us (or our children, if we are not still around).

II. THE APPLICATION OF ELECTION LAW § 8-103(b) CREATES AN UNCONSTITUTIONAL EFFORT BY THE CIRCUIT COURT TO OVERRIDE GOVERNOR HOGAN'S VETO.

The remedy sought by the State Board is identified as the suspension of two statutes that have and continue to require that mail-in ballots be left unopened until after election

day. This very remedy was the subject of two bills passed early this year by the General Assembly. It is alleged by the State Board that the veto of these bills placed it in the position that requires court intervention; accordingly, the impact of the remedy sought by the State Board and granted by the Montgomery County Circuit Court is to undo that veto to allow the General Assembly's bills to become law.

Accordingly, in addition to being unconstitutional on its face due to the legislature's delegation of legislative discretion in the form of doing whatever "is in the public interest", Election Law § 8-103(b) as applied in this case seeks direct legislative action by voiding, whether temporary or permanent, two statutes legitimately passed and signed into law. The attack on these statutes is not constitutional; rather, this Petition was filed because the State Board is not satisfied with the current state of applicable law.

In the case of *Mistretta v. United States*, 488 U.S. 361, 109, S. Ct. 647, 102 L. Ed. 2d 714 (1989), the Supreme Court discussed the issue of courts exercising legislative non-judicial power. *Mistretta* involved an attack on the new Sentencing Commission. The Court, at 380, discussed the importance and history of the Separation of Powers.

> This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, into three coordinate Branches is essential to the preservation of liberty.

Madison, in writing about the principle of separated powers, said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324.

In *Bowshar v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 583 (1986), the Supreme Court continued this discussion:

When this Court is asked to invalidate a statutory provision that has been approved by both houses of Congress and signed by the President, …it should only do so for the most compelling Constitutional reasons.

Id., at 736.

In *Mistretta,* supra, the Supreme Court cites Montesquieu for the proposition that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." *Id.*, at 394.

The remedy of overriding the Governor's veto and suspending legitimately passed laws is a blatant blurring of the lines between the branches of government about which we were warned centuries ago.

Nevertheless, the State Board asserts that the three branches of government are not completely separate. *Getty,* supra, acknowledges this. Notwithstanding [the mingling of the three branches] the "constitutional elasticity cannot be stretched to

a point where, in effect, there no longer exists a separation of governmental power, as the Maryland Constitution does not permit a merger of those branches." *Id.*

Accordingly, the remedy sought by the State Board in this action violates the separate branches of the government, which, while implied in the U.S. Constitution, is expressly set forth in the Maryland Constitution as set forth above. The Circuit Court's complicity in invalidating Maryland statutes on grounds other than constitutional must not stand.

III. THE VOLUME OF MAIL-IN BALLOTS WAS FORESEEABLE; THEREFORE, NO EMERGENCY CIRCUMSTANCES EXIST TO TRIGGER ELECTION LAW § 8-103 (B)(1) .

As mentioned, Election Law § 8-103 (b)(1) states:

> 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.

According to the State Board, this subsection applies to "unforeseen and immediate conditions, natural or man-made, that do no more than interfere with the electoral process." (E 311) (emphasis added and internal quotations omitted). Restated, the State Board may seek this relief only when there are unforeseen circumstances.

Nevertheless, the State Board claims that "[a]fter the electoral experience in 2020, election officials could hardly anticipate how Maryland voters would approach the polls in

2022." (E 384) With due respect to the State Board, this representation is mind boggling. As mentioned, the number of mail-in ballots that were returned increased by nearly twelvefold from 2018 to 2020. Thus, the General Assembly, the Governor, and the State Board all knew that a "deluge of ballot envelopes" was, at least, possible. In fact, the General Assembly encouraged this deluge when it enacted legislation in 2021 to create a permanent absentee ballot list. *See* 2021 Md. Laws, Ch. 514, Sec. 1; 2021 Md. Laws, Ch. 56, Sec. 1.

As the Court is aware, foreseeability is not only central to the determination of whether Elec. Law § 8-103 (b)(1) is triggered, but it is also central to every case of common law negligence. Therefore, by analogue, Del. Cox would invite this Court to examine the "Hand Analysis" that is commonly used to ascertain whether a defendant is negligent for his failure to act:

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B > PL.

United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

In the case at bar, the probability of having a deluge of mail-in ballots (which is analogous to "the probability that [a vessel] will break away" from its moorings, *id.*, was high. Admittedly, 2020 was an unusual year, with a pandemic that had caused people to

stay locked in. However, the General Assembly, the Governor, and the State Board all should have recognized that human nature takes the path of least resistance. In 2020, a million new voters had just tasted how easy mail-in voting could be. For the State Board to even think that the genie might return to her bottle seems a bit of a stretch. This is especially true since they encouraged mail-in voting by creating a permanent absentee ballot registry after the 2020 election cycle. So, at the very least, the possibility of having a deluge of mail-in ballots was apparent.

As for "the gravity of the resulting injury," *id.*, the General Assembly, the Governor, and the State Board understood how many manhours would be required to count approximately 1,500,000 mail-in ballots. After all, they had performed this task in 2020. Thus, the General Assembly, the Governor, and the State Board all understood the backlog that would occur if insufficient manhours were appropriated to the counting of mail-in ballots during the 2022 general election.

Finally, as for "the burden of adequate precautions," *id.*, that would have been relatively low. All the General Assembly had to do was enact a piece of standalone legislation that would have changed the deadlines for counting ballots – which is, essentially, the relief the State Board now requests.

Thus, in view of the Hand Analysis, *supra*, the tests for foreseeability have been met. The probably of having a deluge of ballots was high, the gravity of the harm would have been computable, and the means to rectify the problem by legislative means would have been simple. Thus, this is not an emergency circumstance, because it was by no means unforeseeable. Ergo, the State Board lacks even the statutory authority to act.

The lower court justified its finding of emergency circumstances by determining essentially that the current conditions interfere with the electoral process, a requirement of the statute in question. The court ignored the State Board's own admission in its petition that these circumstances were reasonably anticipated.

The trial court effectively deleted the term "emergency" from its analysis, by finding that a set of circumstances close to the election date that could interfere with the electoral process constitute emergency circumstances, even though those circumstances were foreseen years in advance.

It is axiomatic that every word in a statute has meaning. The trial court erred in ignoring the legislature's requirement that such circumstances that could interfere with the electoral process must constitute an emergency: unforeseeable, sudden, and unexpected.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Appellant, Delegate Daniel Cox, prays for this Court to do the following:

1. Reverse the order of the Circuit Court of Montgomery County that was rendered on September 23, 2022, and entered on September 26, 2022,

2. Declare that Maryland Code, Election Law Article § 8-103(b) is unconstitutional, both facially and/or as applied to the facts of this case, pursuant to Articles 8 and 9 of the Maryland Declaration of Rights, and Article III, Section 49 of the Maryland Constitution;

3. Order the Maryland State Board of Elections to cease and desist from any canvassing or tabulation of mail-in ballots until the Wednesday following Election Day;

4. And to grant any further relief that this Court may deem meet and proper in the premises.

RESPECTFULLY SUBMITTED on this the 4th day of October 2022,

HARTMAN, Attorneys at Law

By: /s/ C. Edward Hartman, III
C. Edward Hartman, III
AIS# 8501010262
116 Defense Highway, Suite 300
Annapolis, Maryland 21401-7047
Telephone: (410) 266-3232
Facsimile: (410) 266-5561
Email: ed@hartman.law
Attorneys for Daniel Cox

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This petition contains 7,137 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

US Constitution, Amendment XX, Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

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.

Article 9, 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.

Article III, Section 49 of the Maryland Constitution:

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. 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.

ROBERT A. SCOTT and DANIEL M. KOBRIN
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
dkobrin@oag.state.md.us
(410) 576-6472
(410) 576-6955 (facsimile)

This, the 4th of October, 2022

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