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**IN THE  
COURT OF APPEALS OF MARYLAND**

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September Term, 2022

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No. 21

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

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On Appeal from the Circuit Court for Montgomery County  
(James A. Bonifant, Judge)  
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

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**BRIEF & APPENDIX OF APPELLEE**

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**BRIEF OF APPELLEE**

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**STATEMENT OF THE CASE**

Election workers around the State will canvass and tabulate hundreds of thousands, and possibly millions, of mail-in ballots during the upcoming 2022 gubernatorial general election. Yet, current law forbids them from opening a single mail-in ballot envelope for nearly 12 hours after the polls close on election day. Md. Code Ann., Elec. Law § 11-302(b)(1) (LexisNexis 2017). As during the primary election, weeks may pass before local boards can certify results to the Board of State Canvassers, who must then certify those results to the public; this delay will leave election results for many elective offices

unknown for an unforeseen period. The failure to ascertain election results in a timely manner may cause unintended and deleterious legal effects at the state and national level.

After the 2022 gubernatorial primary election, the Maryland State Board of Elections (the “State Board”) foresaw these clear obstacles to a timely certification of general election results due to the anticipated amount of incoming mail-in ballots for that election. To avoid violating statutory certification deadlines, the State Board voted, on August 15, 2022, to petition the Circuit Court for Montgomery County for an emergency remedy under § 8-103(b)(1) of the Election Law Article. That provision permits a circuit court, upon petition by the State Board, to remedy emergency circumstances that “interfere with the electoral process.” Elec. Law § 8-103(b)(1) (LexisNexis 2017).

The requested remedy is a temporary order, applicable only to the 2022 gubernatorial general election, that permits local boards of elections to begin canvassing mail-in ballots on October 1, 2022. To maintain uniformity and avoid influencing election results, the requested remedy seeks permission to count early but withhold mail-in canvass results until after polls close on general election day.

The State Board filed its petition in the Circuit Court for Montgomery County on September 2, 2022. On September 14, 2022, Delegate Daniel Cox moved to intervene in the matter as a party defendant to oppose the State Board’s petition. The circuit court granted permissive intervention on September 16, 2022.

After hearing arguments from the parties on September 20, 2022, the circuit court granted the State Board’s requested remedy on September 23, 2022. Delegate Cox noticed an appeal of the circuit court’s judgment and, on September 27, 2022, moved in the Court

of Special Appeals for a stay of the circuit court’s order. The Court of Special Appeals denied the request for a stay on September 29, 2022.

Before briefing in the intermediate appellate court, the State Board petitioned this Court for a writ of certiorari to review the circuit court’s judgment. This Court granted the petition and issued the writ on September 30, 2022.

### **QUESTIONS PRESENTED**

1. Did the circuit court correctly rule that the remedy sought under Election Law § 8-103(b)(1) comports with the principle of separation of powers because the remedy, an adjustment to the electoral calendar, is a function routinely entrusted to the judicial branch in election cases?

2. Did the circuit court correctly rule 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” as those terms are used in Election Law § 8-103(b)(1)?

### **STATEMENT OF FACTS**

#### **Factual Background**

##### **The 2022 Gubernatorial Primary Election**

For this year’s primary election, local boards of elections issued nearly 500,000 mail-in ballots to Maryland voters, and 345,230 (69%) of those ballots were returned (more than ten times the amount returned during the 2018 gubernatorial primary election). *See Mail-In Sent and Returned Report for the 2022 Gubernatorial Primary Election*, Md. State

Bd. of Elections (Aug. 8, 2022). (E. 31.) The overwhelming increase in the number of mail-in ballots, and the inability of election boards to process them until after election day, resulted in some jurisdictions canvassing, tabulating, and auditing mail-in ballots for weeks after the July 19, 2022, primary election day. (E. 251.) The canvass effort transgressed statutory deadlines because many post-canvass events—such as certification of local and statewide results, judicial challenges and recounts, and fulfillment of vacant nomination spots—could not take place until almost a month after election day. As drawn out as the mail-in ballot canvass was for the primary election, voters will request and return even more mail-in ballots during the general election. As of October 3, 2022, five weeks before election day, Maryland voters have requested 546,079 mail-in ballots; or, 37,241 more ballots than were requested for the entire primary election. *See Mail-In Ballot Requests by County for the 2022 Gubernatorial General Election*, Md. State Bd. of Elections (Sept. 27, 2022). (Apx. 1.)

### **Historical Background on the Use of Mail-In Ballots**

In the three gubernatorial general elections preceding the 2020 election cycle, Maryland voters requested and returned the following numbers of mail-in ballots:

<b>Election</b>	<b>Ballots Requested</b>	<b>Ballots Returned</b>
2010 Gubernatorial General Election	110,459	87,813
2014 Gubernatorial General Election	68,290	54,628
2018 Gubernatorial General Election	152,555	120,240

*See Absentees Sent and Returned by District: 2010 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 23, 2010) (E. 47); *see also Absentees Sent and Returned by County: 2014 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 14, 2014) (E. 56); *Absentees Sent and Returned by County: 2018 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 18, 2018) (E. 71).

Relative to statewide in-person vote totals, the 2010 through 2018 mail-in ballot totals constituted a small fraction of the voting electorate. In 2010, the State Board tabulated 1,747,435 in-person votes in the general election. *See Unofficial Polling Place Turnout (Statewide) in the 2010 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 2, 2010). (E. 86.) Mail-in votes accordingly accounted for 4.7% of the total votes in that primary election. In 2014, the State Board tabulated 1,655,375 in-person votes. *See 2014 Gubernatorial General Election Unofficial Early Voting and Election Day Turnout*, Md. State Bd. of Elections (Nov. 4, 2014). (E. 92.) Mail-in votes accounted for 3.2% of that vote total. And in 2018, the State Board tabulated 2,160,101 in-person votes. *See Official Turnout (by Party and County): 2018 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 6, 2018) (E. 94.) Mail-in ballots for the 2018 primary election likewise made up 5.3% of that vote total.

Maryland voters overwhelmingly voted in person during the 2010, 2014, and 2018 gubernatorial general elections. Besides the absence of a public health emergency, Maryland law encouraged in-person voting during those elections. The statutory electoral framework provided flexibility for in-person polling by allowing for early voting at certain polling locations. *See 2009 Md. Laws ch. 445* (establishing the process by which a

Maryland voter could choose to vote early at a polling center up during a 10-day period two weeks before election day); *see also* Elec. Law § 10-301.1(a) (LexisNexis Supp. 2021). Meanwhile, voting by mail-in ballot required a voter to apply for and request a new absentee ballot for each election. Elec. Law. § 9-305. And Maryland did not yet utilize a drop box system for the easy deposit and collection of mail-in ballots.

Conditions changed drastically, however, during the 2020 presidential primary and general elections. Due to the COVID-19 public health emergency, Governor Hogan issued a series of emergency executive orders that, among other things, allowed the primary and general elections to be conducted principally by mail-in ballot. *See Proclamation: Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19*, Gov. Lawrence J. Hogan, Jr. (Apr. 10, 2020) (E. 100); *see also Proclamation: Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19*, Gov. Lawrence J. Hogan, Jr. (May 6, 2020) (E. 107); *Proclamation: Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19*, Gov. Lawrence J. Hogan, Jr. (Aug. 10, 2020) (E. 114).

To achieve that feat, the Governor, among several actions, issued an emergency order permitting each unit of State government to suspend “any legal or procedural deadline” pertinent to that unit’s administration. *See Order of the Governor of the State of Maryland: Amending and Restating the Order of March 12, 2020, Extending Certain Licenses, Permits, Registrations, and Other Governmental Authorizations, and Authorizing Suspension of Legal Time Requirements*, ¶ III(a), Gov. Lawrence J. Hogan, Jr.

(June 19, 2020). (E. 141.) The State Board used that delegated authority to suspend § 11-302(b)(1) of the Election Law Article as it applied to the general election, which forbade the opening of a mail-in ballot envelope before 8:00 a.m. on the Wednesday after election day. *See Public Notice: Dates and Times for the Canvassing and Opening of Mail-In Ballots and the Reporting of Unofficial Results of the Mail-In Ballot Vote Tabulation*, Md. State Bd. of Elections (Aug. 19, 2020). (E. 146.) Instead, election workers were permitted to open and canvass mail-in ballots on October 1, 2020, at 8:00 a.m., 25 days before the beginning of the early voting period. *Id.*

Given the large number of mail-in ballots returned, this additional time was warranted:

<b>Election</b>	<b>Mail-In Ballots Sent</b>	<b>Mail-In Ballots Returned</b>
2020 Presidential General Election	1,685,040	1,527,460

*See Mail in Ballot Sent and Returned by County: 2020 Presidential General Election*, Md. State Bd. of Elections (Dec. 1, 2020). (E. 118.) During that same election, voters cast 1,426,467 ballots in person. *See Official Turnout (by Party and County: 2020 Presidential General Election)*, Md. State Bd. of Elections (Nov. 3, 2020). (E. 134.) Mail-in ballots therefore accounted for 51.7% of all votes cast. Nonetheless, because of the emergency orders suspending the Election Law Article restriction and permitting extra time before election day to canvass mail-in ballots, most local boards of election certified the results of

the millions of mail-in ballots cast to the State Board within 11 days of election day.<sup>1</sup> *See Report on November 3, 2020 Election: Appendix 2 (Timeline of Key Dates)*, Md. State Bd. of Elections (Jan. 28, 2021). (E. 188.)

### **Expansion of Mail-in Voting During the 2021 Legislative Session**

During the 2021 legislative session, the General Assembly, among other measures, expanded the ease of, and access to, voting by mail-in ballot by providing for the creation of a permanent mail-in ballot list. 2021 Md. Laws ch. 56. Maryland voters could apply at any time to join the list and thereafter automatically receive a mail-in ballot in subsequent Maryland elections. Elec. Law § 9-311.1 (LexisNexis Supp. 2021). The General Assembly also provided the authority to use drop boxes in the collection of mail-in ballots, aiming to maximize voter participation by making mail-in participation as convenient as possible. 2021 Md. Laws ch. 56; *see also* Elec. Law §§ 2-304 – 2-305 (LexisNexis Supp. 2021).

Left in place without revision, however, was § 11-302(b)(1) of the Election Law Article prohibiting the counting of mail-in ballots until after Election Day.<sup>2</sup> With the

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<sup>1</sup> Montgomery County, tasked with canvassing and tabulating the lion's share of mail-in votes (348,293), required 29 days after election day 2020 to certify its results. But this certification time frame met all required code and statutory deadlines for local, state, and federal purposes. This certification time frame also included early canvassing of mail-in ballots that began on October 1, 2020.

<sup>2</sup> During the 2022 legislative session, the General Assembly passed two bills that would have repealed the restriction on canvassing absentee ballots until after election day. *See* S.B. 163, 2022 Reg. Legis. Sess.; H.B. 862, 2022 Reg. Legis. Sess. Both bills would have permitted poll workers to canvass and tabulates absentee ballots for the 2022 gubernatorial primary election eight business days before the beginning of the early voting



expiration of the declared public health emergency and its associated executive orders, Maryland law once again forbade election staff from opening or canvassing any mail-in ballot until after election day.

To this day, Maryland remains the *only* State with such a restriction. National Conference of State Legislatures, *Table 16: When Absentee Ballot Processing and Counting Can Begin*, Voting Outside the Polling Place Report (May 17, 2022), available at <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx>. Thirty-eight States permit the processing of mail-in ballots before election day; another nine permit such processing on election day itself, but before polls close. *Id.* Maryland stands alone in statutorily forbidding even the opening of a mail-in envelope until *after* election day.

### **Use of Mail-In Ballots During the 2022 Primary Election**

With Maryland voters having experienced widespread use of mail-in voting during the 2020 election season, the General Assembly having responded to that experience by

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period. S.B. 163 at 3, 8; H.B. 862 at 3, 8-9. Both bills were vetoed by the Governor on May 27, 2022.

It is worth noting, however, that Governor Hogan supported the early canvassing provisions in the bills despite his veto. By veto statement transmitted to the President of the Senate and Speaker of the House, the Governor offered that early canvassing of ballots was a “positive change” because it “would allow hard working election officials to get a much-needed head start on the deluge of ballot envelopes that, under current law, must wait until Election Day for processing.” *See Letter by the Governor to the President of the Maryland Senate and Speaker of the House of Delegates*, Gov. Lawrence J. Hogan, Jr. (May 27, 2022). (E. 208.) The Governor’s veto, therefore, was not a rejection of or disagreement with the remedy sought in this petition but stemmed from the bills’ overall failure to provide “basic security measures such as signature verification” and failure to “address ballot collecting.” *Id.*

easing structural access to mail-in ballots, and statutory restrictions on the ability to canvass and tabulate mail-in ballots returning to force, the 2022 primary election stood as a stress test of the State’s new electoral paradigm. Local boards would receive an unknown increase in mail-in ballots and would be prevented from canvassing or tabulating them until after election day. Election officials stood to learn whether Maryland’s electoral framework, as statutorily constituted, could handle a greater volume of mail-in votes.

The 2022 primary election showed that voters in many of the State’s largest jurisdictions had developed an overwhelming preference for mail-in voting. While many jurisdictions observed manageable increases in the number of mail-in ballots compared to primary elections past, seven jurisdictions saw increases in orders of magnitude greater than before:

<b>County</b>	<b>Mail-In Ballots Received (2010)</b>	<b>Mail-In Ballots Received (2014)</b>	<b>Mail-In Ballots Received (2018)</b>	<b>Mail-In Ballots Received (2022)</b>
Montgomery	5,729	4,010	10,612	74,914
Baltimore	3,344	2,689	3,482	49,768
Prince George’s	2,539	1,987	3,811	47,196
Baltimore City	2,270	2,119	2,642	34,486
Anne Arundel	1,962	1,558	1,976	32,369
Howard	1,009	631	1,119	20,561
Frederick	738	852	883	15,640

*See Absentee Statistics: 2010 Gubernatorial Primary Election*, Md. State Bd. of Elections (Sept. 14, 2010) (E. 210); *see also, Absentees Sent and Returned by County: 2014 Gubernatorial Primary Election*, Md. State Bd. of Elections (June 25, 2014) (E. 212); *2018 Gubernatorial Primary Election: Absentee Voting*, Md. State Bd. of Elections (June 26, 2018) (E. 228); *Mail-In Sent and Returned: 2022 Gubernatorial Primary Election*, Md. State Bd. of Elections (Aug. 1, 2022) (E. 230).

Statewide, Maryland voters returned 25,276 mail-in ballots in 2010, 18,984 ballots in 2014, and 30,122 ballots in 2018. (E. 210, 212, 228.) During the 2022 primary election, voters returned an unprecedented 345,081 mail-in ballots—ten to 18 times as many ballots as past gubernatorial primaries. (E. 230.) And while the emergency measures adopted in 2020 allowed local boards of elections to begin canvassing and tabulating mail-in ballots three weeks before a voter entered a polling booth, the applicable statute in 2022 forbade even the opening of a mail-in ballot envelope until 8:00 a.m. on the Wednesday after election day.

The sheer number of ballots caused cascading issues through the local and statewide canvass and certification process. In Montgomery County, a recount of the race for County Executive could not begin until August 19, 2022, or 31 days after election day. Montgomery County Bd. of Elec., *2022 Recount Information*, available at <https://www.montgomerycountymd.gov/Elections/2022PrimaryElection/primary-recount.html>. It was concluded, with final local certification of the results, on August 24, 2022, which was 36 days after election day. Karina Elwood, *Montgomery's Elrich Wins County Executive Recount; Poised for Second Term*, Wash. Post, Aug. 24, 2022,

<https://www.washingtonpost.com/dc-md-va/2022/08/24/elrich-wins-primary-recount>. In Frederick County, issues with the mail-in ballot canvass required the local board of elections to decertify its results on August 10, 2022, and re-scan all 15,640 mail-in ballots it received.<sup>3</sup> Karina Elwood, *Frederick Officials Re-Scan Ballots After Finding Error in Primary Results*, Wash. Post, Aug. 10, 2022, <https://www.washingtonpost.com/dc-md-va/2022/08/10/frederick-county-decertify-primary/>. Because of these issues, and others, Maryland’s voters did not know the results of their primary races, and the State Board did not identify conclusively who to place on the general election ballot, for more than a month after the polls closed.

Because of these cascading effects and the resultant delays that they caused, Maryland missed statutory deadlines for ascertaining and finalizing the nominees for the general election ballot. Section 9-207(a)(2) of the Election Law Article requires the State Board to “certify and publicly display” the general election ballot “64 days” before election day (Sept. 6, 2022).<sup>4</sup> To accomplish this, the State Board must know who the final nominees are to place on the ballot. Accordingly, Election Law § 5-801(b)(2)(i) requires

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<sup>3</sup> The Frederick County Board of Elections also re-scanned all the provisional ballots it had received from the early voting period and election day. *See* Elwood, Wash. Post, Aug. 10 2022.

<sup>4</sup> This is an important deadline. The federal Uniformed and Overseas Citizens Absentee Voting Act, as amended by the Military and Overseas Voter Empowerment Act, requires a State to transmit a mail-in ballot to an overseas military or civilian voter upon timely request. 52 U.S.C § 20302 (a)(1) & (2). Transmission of such a ballot must take place “not later than 45 days before the election.” 52 U.S.C § 20302(a)(8)(A). Section 9-207(a)(2) exists to ensure that the general election ballot is certified, finalized, printed, and ready to mail before the federally imposed mailing deadline.

the winner of a primary election who wishes to decline the nomination do so “by the first Tuesday in August immediately preceding the general election” (this year, August 2, 2022); and, Election Law §§ 5-1002 through 5-1004 require the appropriate political body to fill that vacant nomination by the 88th day before the general election (this year, August 12, 2022). Moreover, if a nominee passes away or is disqualified,<sup>5</sup> that vacancy must be filled by the 81st day before the general election (this year, August 19, 2022). Elec. Law §§ 5-1002 (b)(1)(ii), 5-1003(5), & 5-1004(b)(2). Local boards of elections continued counting and re-counting ballots as these deadlines passed.

The State Board was therefore forced to exercise singular, emergency authority granted to it by an order of this Court to postpone the deadlines for declining a nomination and fulfilling a vacant nomination. *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 24, 25, 26 & 27, Sept. Term, 2021 (Apr. 13, 2022). By emergency vote at an open meeting on August 1, 2022, the State Board extended the deadline for declining a nomination to August 16, 2022 and extended the deadline for filling any vacancy (by declination, disqualification, or death) to August 19, 2022. *Maryland State Board of Elections Extends Multiple Deadlines in Response to Postponed Primary Election Date*, Md. State Bd. of Elections (Aug. 1, 2022) available at [https://www.elections.maryland.gov/press\\_room/documents/ThreeElectionsDeadlinesExtended.pdf](https://www.elections.maryland.gov/press_room/documents/ThreeElectionsDeadlinesExtended.pdf). The authority for the State Board to negate and extend such statutory deadlines

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<sup>5</sup> On August 12, 2022, by order of the Circuit Court for Frederick County, a victorious candidate in the Democratic primary for a Fredrick County Council seat was disqualified because she failed to meet residency requirements.

expired after the conclusion of the primary election. *See Order, In the Matter of 2022 Legislative Districting of the State* (Apr. 13, 2022). Nothing comparable exists for the deadlines associated with the general election.

Finally, a delay in counting ballots in one county caused ripple effects in other counties. This is because any delay in any single county necessarily delays statewide certification of results. *See* Elec. Law §§ 11-501(a)(1) & 11-503(a)(2) & (3) (LexisNexis 2017) (predicating statewide certification on receipt of results from local boards of election and requiring statewide certifying body to determine outcomes of all races). Statewide certification of results, however, is the sole launching point for a recount or for the filing of a petition for judicial review of an election. *See id.* §§ 12-101(d) & 12-202(b)(2). Therefore, a delay in one county necessarily affects other counties where a candidate chooses to challenge the outcome of an election.

This rippling delay occurred during the 2022 gubernatorial primary in Prince George's County. The Prince George's County Board of Elections finished canvassing all ballots and certified primary election results on August 1, 2022. But the Democratic primary election for the House of Delegates Seat in District 23 concluded with a margin of victory of .03% of the vote (19 votes), triggering a recount under § 12-107(b)(2)(iii)(1) of the Election Law Article. State Board of Elections, *Official Gubernatorial Primary Election Results for Prince George's County, 2022 Primary Results* (last updated Aug. 15, 2022, at 1:30 p.m.) [https://elections.maryland.gov/elections/2022/primary\\_results/gen\\_results\\_2022\\_by\\_county\\_17.html](https://elections.maryland.gov/elections/2022/primary_results/gen_results_2022_by_county_17.html). Because a seat in the House of Delegates is considered a statewide office, *see* Elec. Law § 5-302, the opportunity to request a recount

did not occur until the State Board certified statewide results on August 15, 2022. The District 23 recount therefore took place almost three weeks after Prince George’s County completed its canvass, from August 22 through August 24, 2022. William J. Ford, *Political Notes: Prince George’s Primary Results Final, New Dems Back Mizeur, Top Hogan Staffer Moves to Treasurer’s Office*, Md. Matters (Aug. 29, 2022) available at <https://www.marylandmatters.org/2022/08/29/political-notes-prince-georges-primary-results-final-new-dems-back-mizeur-top-hogan-staffer-defects-to-treasurer/>. Delays elsewhere in the State forced Prince George’s County to wait over a month to ascertain the result of its primary races.

It is reasonable to anticipate that the number of mail-in ballots will continue to grow during the upcoming general election. Historically, twice the number of voters participate in a Maryland general election overall than in a Maryland primary election. For mail-in ballots, however, the trend is a three-to-fourfold increase in returned ballots:

<b>Election Type</b>	<b>Mail-In Ballots Received (2010)</b>	<b>Mail-In Ballots Received (2014)</b>	<b>Mail-In Ballots Received (2018)</b>	<b>Mail-In Ballots Received (2022)</b>
Primary	25,276	18,984	30,122	345,081
General	87,813	54,628	120,240	?

Using that historical trend and recalling that 1,527,460 (or 51.7% of the voting electorate) returned mail-in ballots during the 2020 Presidential election, one could reasonably anticipate that local boards of elections will receive between 1,000,000 and 1,300,000 mail-in ballots during the upcoming general election.

## Statutory Election Canvass Deadlines

The law imposes a specific timeline by which general election results must be ascertained and certified. First, § 11-308(a) of the Election Law Article contemplates that each local board of elections will “verify the vote count” within 10 days of election day. That deadline falls on November 18, 2022, for the upcoming general election.

Next, county charters and codes around the State direct that the terms of high-level local offices begin on the first Monday in December. *See e.g.*, Montgomery County Code, Part I, art. I, § 105 & art. II, § 202 (mandating the term of office for Members of the Montgomery County Council and County Executive begin at noon on the first Monday in December); Charter for Prince George’s County, art. III, § 306 & art. IV, § 404 (mandating the same for Members of the Prince George’s County Council and County Executive); Charter of Baltimore County, art. II, § 203 & art. IV, § 402(a) (mandating the same for Members of the Baltimore County Council and County Executive); Frederick County Charter, art. II, § 206(a) & art. IV, § 404(a) (mandating the same for Members of the Frederick County Council and County Executive). This year, the first Monday in December falls on December 5, 2022.

Thereafter, state law requires the assembly of a special administrative body to certify the statewide results of the general election. The Secretary of State, Comptroller, State Treasurer, Clerk of the Court of Appeals, and Attorney General convene as the Board of State Canvassers to determine the outcome of every election and ballot question in the State. Elec. Law §§ 11-502(a) & 11-503(a) (LexisNexis 2017). The Board of State Canvassers must convene to accomplish this task “within 35 days of the election.” *Id.*



§ 11-503(a)(1)(ii). The 35th day after this year’s general election day is December 13, 2022.

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.

Election Law § 11-302 governs the canvass of mail-in ballots. The law mandates a local board of elections to convene for the mail-in canvass “[f]ollowing an election.” Elec. Law § 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.” *Id.* § 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. *Id.* § 11-302(e)(1).

### **Emergency Circumstances**

Election Law § 8-103 provides two legislative delegations of authority to address emergent circumstances that interfere with the process of an election. Section 8-103(a) 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 under authority of § 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.” *Id.*

§ 14-101(c) (LexisNexis 2018). Election Law § 8-103(a), therefore, is a narrow provision applying by its own terms to a certain range of emergencies that pose the greatest threat.

Election Law § 8-103(b) is a broader provision that applies to emergencies “not constituting a declared state of emergency.” Elec. Law § 8-103(b)(1). Put another way, while 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 unexpected 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 under subsection (a)). But the executive branch is authorized to seek permission from a court to address the interfering conditions. *Id.* In turn, the court may “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.” *Id.*

### **Request for Emergency Remedy and Circuit Court Ruling**

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 for 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 that forbids 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 8:00 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. These counties represent approximately 65% of the mail-in ballots that the State receives.

On September 7, 2022, the circuit court conducted a status hearing on the petition. The court issued a scheduling order for a merits 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 as a defendant in the circuit court proceeding. With the consent of the State Board, the circuit court granted permissive intervention to the under Rule 2-214(b).

The parties thereafter filed opposing memoranda of law on the statutory interpretation and separation-of-powers questions.<sup>6</sup> After hearing argument on September

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<sup>6</sup> Delegate Cox's intervention in the case mooted any concerns regarding the justiciability of the one-party proceeding.

20, 2022, the court took the matter under advisement until September 23, 2022. On that day, the court issued its ruling 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 III, § 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. Accordingly, the large volume of mail-in ballots coupled with inadequate time in which to count them constituted emergency circumstances.

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 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 general election and, instead, local boards were required to wait until the polls closed on election day to issue any tabulation reports.

### **SUMMARY OF ARGUMENT**

Section 8-103(b) of the Election Law Article exists to address circumstances such as this case presents. The provision permits a court to offer emergency relief when unexpected obstacles threaten the administration of an election. Here, that relief comports with the constitutional separation of powers because it requires a court to engage in a quintessentially judicial function—the temporary adjustment of the electoral timeline in the face of an electoral controversy. That relief is also available to the State Board in this case because the volume of incoming ballots and inadequacy of time in which to count them were unknown to election officials until after Maryland’s July 19, 2022, primary election. They are thus “emergency circumstances” that threaten to interfere with the general election process. Elec. Law § 8-103(b)(1).

The circuit court ruled correctly in issuing its emergency remedy in this case. This Court should affirm the judgment of the circuit court permitting the canvass of mail-in ballots for the 2022 gubernatorial general election to begin on October 1, 2022, at 8:00 a.m.

### **ARGUMENT**

#### **I. THIS COURT REVIEWS QUESTIONS OF CONSTITUTIONAL AND STATUTORY INTERPRETATION DE NOVO WITH DUE DEFERENCE TO THE AGENCY’S INTERPRETATION OF A STATUTE IT IS CHARGED WITH ADMINISTERING.**

As a purely legal question, this Court reviews de novo whether the circuit court’s order complies with the separation of powers principle enunciated by Article 8 of the

Maryland Declaration of Rights. *Ehrlich v. Perez*, 394 Md. 691, 708 (2006) (citing *Davis v. Slater*, 383 Md. 599, 604 (2004)). Likewise, this Court reviews questions of statutory interpretation de novo. *Wheeling v. Selene Fin. LP*, 473 Md. 356, 373 (2021). When faced with a statute administered by an executive agency, however, this Court affords “weight to an agency’s experience” in the interpretation of that statute. *Schwartz v. Maryland Dep’t of Nat. Res.*, 385 Md. 534, 554 (2005).

## **II. ADJUSTING THE ELECTORAL TIMELINE IS A JUDICIAL FUNCTION ROUTINELY ENTRUSTED TO THE COURTS BY THE LEGISLATIVE BRANCH AND COMPORTS WITH THE PRINCIPLE OF SEPARATION OF POWERS.**

The order of the circuit court permitting an early mail-in ballot canvass comports with Article 8 of the Maryland Declaration of Rights. Under that constitutional provision, the judicial branch may be delegated the authority to perform judicial functions, but a delegation to the judicial branch of a nonjudicial function is constitutionally prohibited. *Sugarloaf Citizens Ass’n, Inc. v. Gudis*, 319 Md. 558, 569 (1990). In numerous instances, the Election Law Article provides the judicial branch with the authority to adjust statutory deadlines and timing provisions that govern the conduct of an election. *See e.g.*, Md. Code Ann., Elec. Law § 12-204(c)(2) (LexisNexis 2017) (granting the circuit court plenary discretion to postpone or reschedule the date of an election to remedy an outcome-determinative violation of the Election Law Article). The trial court’s order therefore granted no more than what the judicial branch has been routinely assigned by the Legislature and no more than what this Court does in the context of legislative districting. Permitting mail-in ballots to be opened, canvassed, and tabulated beginning on October 1, 2022, comports with the constitutional principle of separation of powers.

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 Rts. 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).

One of those governmental powers is the authority to regulate elections. Article III, § 49 of the Maryland Constitution grants the General Assembly the power to legislate the conduct of the State’s elections. Article I, § 3 of the Constitution supplements that legislative authority by providing the General Assembly the power to legislate the conduct of mail-in and early voting.

Nonetheless, the separation of governing powers among the three branches is not absolute. This Court has “long acknowledged” that the executive, legislative, and judicial branches could not function as “wholly separate and unmixed” entities. *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 370 (2022) (citing *Crane v. Meginnis*, 1 G. & J. 463, 476 (1829)). To that end, the legislative branch can delegate, and has regularly delegated, discreet portions of its constitutional authority to the other branches of government. *Murphy*, 478 Md. at 371-72; *Department 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.

In the electoral context, the Legislature has delegated broadly some of its authority under Article III, § 49 and Article 1, § 3. The General Assembly created the State Board of Elections and empowered it to “supervise the conduct of elections in the State.” Elec. Law § 2-102(b)(1) (LexisNexis 2017). The State Board is authorized to “adopt regulations” to implement its supervisory power. *Id.* § 2-102(b)(4). For mail-in voting, the General Assembly delegated to the State Board the regulatory power to establish processes for, among other things, “determining timeliness of receipt of applications and ballots,” “the canvass process,” and “standards for disallowance of ballots during the canvass process.” *Id.* § 9-303(b)(4), (5) & (9).

Between the legislative and judicial branches, specifically, this Court has recognized two ways that the judiciary may exercise authority over a matter confided to the legislative branch. *Murphy*, 478 Md. at 373-74.<sup>7</sup> The first is inherent adoption, where a court seeks to undertake a quasi-legislative action incidental to its normal duties 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

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<sup>7</sup> This Court divided the power-sharing structure between legislative and judicial branches into *four* broad categories in *Murphy*. 478 Md. at 373-74. But the latter two categories expressly involve this Court’s rulemaking authority granted to it by Article IV, § 18(a) of the Maryland Constitution. *Id.* at 374.



upon the function of the legislative branch. *See Getty v. Carroll County Bd. of Elections*, 399 Md. 710, 738 (2007) (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 adjusting the time for canvassing mail-in ballots issued under an express delegation of authority found in Election Law § 8-103(b)(1).<sup>8</sup> That provision grants a circuit court the power 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.” *Id.* There is therefore no doubt in this case that the requested remedy is *not* a usurpation of legislative authority.<sup>9</sup>

The second way the judiciary exercises such authority is express delegation, where the Legislature assigns certain tasks to a court. *Id.* at 373. The constitutionality of an express delegation to the judicial branch depends on whether the delegation imposes a

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<sup>8</sup> Other express delegations to the judicial branch of the authority to regulate elections include Election Law § 3-602(c) & (d) (empowering the Circuit Court for Anne Arundel County and Court of Special Appeals to entertain appeals of certain voter registration determinations made by the applicable board); Election Law § 5-305(d) (authorizing a circuit court and this Court to hear petitions challenging the residency of a candidate); Election Law § 6-209(a) (granting the circuit court and this Court the authority to entertain petitions challenging a board of elections’ determination of a ballot petition); Election Law § 9-209 (permitting the Circuit Court for Anne Arundel County to review and revise the content and arrangement of a certified ballot).

<sup>9</sup> Nor does the circuit court’s order violate Article 9 of the Maryland Declaration of Rights. That constitutional provision prohibits the suspension of laws by any power other than that “derived from” the Legislature. Md. Decl. of Rts. art 9. The circuit court’s order suspending Election Law § 11-302(b)(1) from application to the 2022 general election derives from the express grant of authority in Election law § 8-103(b)(1).

judicial or nonjudicial function on the court. *Sugarloaf*, 319 Md. at 569; *Duffy v. Conaway*, 295 Md. 242, 259-60 (1983); *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. This Court has refrained from “prescrib[ing] the precise limits to be observed by the legislative branch . . . in assigning duties to the judiciary” because of the impracticality of crafting such a rule for all possible future cases. *Cromwell*, 188 Md. at 18 (quoting *Board of Supervisors of Elections for Wicomico County v. Todd*, 97 Md. 247, 264 (1903)). Each delegation case has therefore been judged on its own merits, with reference to past delegations 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, this Court held as unconstitutionally nonjudicial those functions exclusively reserved for another branch of government with no analogue to the normal judicial process 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. Southern 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*, this Court held 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. This 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. Although 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 under authority of Election Law § 8-103(b)(1) does not void legislation from all future application but merely requests a temporary suspension of a statute due to “emergency circumstances.” The court’s order does not nullify legislation based solely on the public interest. The order adjusts the election calendar to remedy a

concrete and verifiable injury that the State Board and local boards have determined will impair the integrity of the electoral process. The circuit court's order therefore does not perform a nonjudicial function like the one declared unconstitutional in *Sugarloaf*.

Adjustment of the election law calendar in response to a case or controversy is a judicial function and one the judicial branch possesses some inherent authority to accomplish. Article III, § 5 of the Maryland Constitution empowers this Court with original jurisdiction to review disputes over the legislative districting of the State and grant “appropriate relief” if necessary. Nothing in the constitution, Maryland Code, or Maryland Rules provides procedures for *how* this review takes place. Moreover, nothing in the law provides how this Court is meant to reconcile the timing of redistricting challenges with the timing provisions of the statutory electoral framework. This Court exercises an inherent authority to suspend statutory mandates and postpone certain electoral timing provisions in order to give full effect to the Article III, § 5 grant. *See Murphy*, 478 Md. at 371-72 (“The separation of powers concept embodied in Article 8 accommodates the fact that, in addition to the specific powers and functions that the Constitution expressly grants the three branches of government, each branch must as a practical matter possess additional powers perforce implied from the right and obligation to perform its constitutional duties.”). And this Court did so during the past primary election, suspending § 8-201(a)(2)(i) of the Election Law Article and resetting the date for the primary election day, without constitutional question.<sup>10</sup>

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<sup>10</sup> Significantly, Delegate Cox has not challenged this Court's order extending the date for the primary election (in which he prevailed) to accommodate litigation over the

Moreover, in multiple instances the Election Law Article contemplates the judicial branch’s authority to remedy election cases or State Board requests with an adjustment to the election calendar.<sup>11</sup> Section 9-207 of the Election Law Article permits this Court, on petition of the State Board, to postpone finalizing the ballot for an election. Elec. Law § 9-207(b). Section 12-204 of the Election Law Article 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.” Elec. Law § 12-204(c)(2). If an election were 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.” Elec. Law § 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

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legislative districting legislation. *See Order, In the Matter of 2022 Legislative Districting of the State* (Mar. 15, 2022).

<sup>11</sup> The delegated judicial power over elections extends further than adjusting timing provisions. The Legislature has empowered the judicial branch to materially decide and revise the content and arrangement of ballots. *See* Elec. Law § 6-209 (governing judicial review of the petitioning process); *see also id.* §§ 9-209(b)(3) (governing judicial review of challenges to the content and arrangement of ballots after ballot certification); 5-305(d) (governing judicial review of challenges to a candidate’s residency). A court also may determine who is allowed to vote in an election. *Id.* § 3-602(c) (governing judicial challenges to voter registration).

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.

Hearing an electoral controversy and remedying the matter by adjusting the election calendar is thus a judicial function. Just as a court can suspend Election Law § 10-301(a) and keep polls open past 8:00 p.m., a court under “emergency circumstances” can suspend Election Law § 11-302(b) 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 actual remedy offered by the circuit court’s order comport with Article 8 of the Maryland Declaration of Rights. The circuit court should therefore be affirmed.

**III. 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.”**

The circuit court correctly interpreted the “emergency circumstances” provision of Election Law § 8-103(b)(1) to encompass interfering circumstances, less dramatic than a declared state of emergency, that impact the administration of an election and for which officials could not have been reasonably prepared. That interpretation accords with both the plain language of Election Law § 8-103 as a whole and the slight legislative history behind it. Election officials could not have reasonably anticipated the degree to which voters would continue to use mail-in ballots after the COVID-19 health emergency had

passed. While an increase in the number of returned mail-in ballots compared to pre-pandemic elections was more likely than not, the magnitude of that increase and its effect on the electoral system statewide was entirely unknown. The volume of mail-in ballots and resulting inadequate timeframe in which to canvass them for the general election are thus “emergency circumstances” that “interfere with the electoral process” under § 8-103(b)(1) of the Election Law Article.

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)(1). 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 canons 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*, 473 Md. at 376. 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).

A subsection of a statute is not read in isolation. *Lockshin v. Semsker*, 412 Md. 257, 275 (2010). Instead, the pertinent subsection must be read in the context of its great statutory scheme, “considering the purpose, aim, or policy of the Legislature in enacting the statute.” *Id.* at 276. This permits the subsection to be reconciled with the whole of the statute “consistent with the statute’s object and scope.” *Id.*



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 of 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 under authority of § 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; it defines it as “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). Election Law § 8-103(a), therefore, is a narrow provision applying by its own terms to a certain range of emergencies that pose the greatest threat.

In contrast, Election Law § 8-103(b), is a broader provision that applies to emergencies “not constituting a declared state of emergency,” and which therefore fall outside of gubernatorial authority. 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 unanticipated 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 under authority of 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 dispositive 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 a 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 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 16A of the Code.  
Present Code: There is no provision addressing emergency situations.

*Id.* at 56.<sup>12</sup> No other commission materials make mention of the emergency circumstances provision or the way 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 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 § 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 S.B. 118 contained a fiscal note, an advice letter from the Office of the Attorney General, and committee

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<sup>12</sup> 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.

materials from two Senate committees, none of those materials mention Election Law § 8-103 and the emergencies to which it was meant to apply.

Since its passage into law in 1998, 1998 Md. Laws ch. 585, the emergency provisions of § 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 in accordance with the provisions of the Election Law Article constitutes “emergency circumstances” within the meaning of Election Law § 8-103(b)(1).

Any argument that “emergency circumstances” must be defined as wholly or tortiously unforeseeable adds language to Election Law § 8-103(b)(1) and overextends its application. *Wheeling*, 473 Md. at 376-77. And any further argument that the current mail-in ballot situation was wholly foreseeable based on the 2020 electoral experience and the legislative efforts that followed conflates what was foreseeable with what was unknowable.

While an increase in the number of returned mail-in ballots was imaginable, the magnitude of that increase and its effect on the electoral system statewide was entirely unknown.

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.

The 2022 gubernatorial primary election clarified that unknown. Maryland voters chose overwhelmingly to continue voting by mail-in ballot at levels otherwise unseen outside of the pandemic crisis. Mail-in ballots during the 2022 primary election counted for approximately 35% of the total vote. Although participation by mail-in ballot *dropped* in comparison to the 2020 election, the electoral experience with mail-in ballots in 2020 fundamentally changed overall voting patterns in Maryland. The State Board, Governor, and Legislature, however, did not know that until July 19, 2022, when in-person polls closed at 8:00 p.m.

Moreover, election officials did not know how Maryland's electoral framework, as statutorily constituted, would process a greater volume of mail-in votes. Whether the statewide canvass could accommodate the increased volume depended on numerous practical factors, such as: the jurisdictions in which increased mail-in ballots were cast; the

type of mail-in ballots returned (web-delivery vs. form ballots);<sup>13</sup> how an increase in mail-in ballots affected an increase in provisional ballots; and how many legal challenges to the mail-in canvass arose, *see* Elec. Law § 11-304(a). The 2022 primary election provided a critical lesson in this regard, teaching officials that the statewide electoral framework stood ill-equipped for the precise way Maryland’s voters chose to cast mail-in ballots.

By July 19, 2022, little could be done to prepare for this new voting pattern in the general election. With budgets for the year set and canvass spaces secured, locally funded boards of elections, *see* Elec. Law § 2-203 (LexisNexis 2017) (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.

Under these circumstances, the volume of mail-in ballots in the 2022 general election constitutes an “emergency circumstance,” and the circuit court properly ordered an early canvass of those ballots as a remedy.

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<sup>13</sup> Maryland law provides the opportunity for a voter to request and mark a mail-in ballot on the internet, then print it out at home and return it to the appropriate local board of elections. Elec. Law § 9-308.1 (LexisNexis 2017); COMAR 33.11.02.02(A)(1) & 33.11.03.05(A)(1). When a mail-in ballot is marked online and printed at home, however, it is returned to the local board on paper of a different size and weight than a form ballot printed by the board. The home-printed ballot cannot be properly scanned or read by Maryland’s ballot scanners. Accordingly, every mail-in ballot delivered via the internet and printed at home must be duplicated on to a readable ballot form before it can be scanned and tabulated by the State’s voting system.

## CONCLUSION

The judgment of the Circuit Court for Montgomery County should be affirmed.

Respectfully submitted,

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### **CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112**

1. This brief contains 10,289 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Daniel M. Kobrin

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Daniel M. Kobrin

**TEXT OF PERTINENT PROVISIONS**  
**(Rule 8-504(a)(10))**

**Annotated Code of Maryland, Constitutions Article**  
**(LexisNexis 2003)**

**Maryland Declaration of Rights Article 8. Separation of Powers.**

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.

**Maryland Declaration of Rights Article 9. Power of Suspension or Execution of Laws.**

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

**Maryland Constitution Article I, § 3. Absentee Voting.**

(a) The General Assembly shall have the power to provide by suitable enactment for voting by qualified voters of the State of Maryland who are absent at the time of any election in which they are entitled to vote, for voting by other qualified voters who are unable to vote personally, or for voting by qualified voters who might otherwise choose to vote by absentee ballot, and for the manner in which and the time and place at which such voters may vote, and for the canvass and return of their votes.

(b) The General Assembly shall have the power to provide by suitable enactment a process to allow qualified voters to vote at polling places in or outside their election districts or wards or, during the two weeks immediately preceding an election, on no more than 10 other days prior to the dates specified in this Constitution.

**Maryland Constitution Article III, § 49. Regulation of Elections.**

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.



**Annotated Code of Maryland, Election Law Article  
(LexisNexis 2017)**

**§ 8-103. State of emergency declared by the Governor.**

(a) *Contents of emergency proclamation.* – In the event of a state of emergency, declared by the Governor in accordance with the provisions of law, that interferes with the electoral process, the emergency proclamation may:

- (1) provide for the postponement, until a specific date, of the election in part or all of the State;
- (2) specify alternate voting locations; or
- (3) specify alternate voting systems.

(b)(1) *Other emergency circumstances.* – 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.

(2) The State Board shall develop guidelines concerning methods for addressing possible emergency situations.

**§ 11-302. Canvas of absentee ballots.**

(a) *In general.* – 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) *In general.* – 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) *Timely receipt of absentee ballots required.* – 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) *Rejection of absentee ballots.* – 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) *Daily report of unofficial results of absentee ballot vote tabulation.* – 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.

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

\* IN THE  
\* COURT OF APPEALS  
\* OF MARYLAND  
\* September Term, 2022  
\* No. 21

\* \* \* \* \*

**CERTIFICATE OF SERVICE MDEC**

I certify that, on this 4th day of October, 2022, the Brief of Appellee in the captioned case was filed electronically and served electronically by the MDEC system on all persons entitled to service, and that on the next business day two copies will be served by first class mail on all parties entitled to service:

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## **APPENDIX**

**Mail-in Ballot Requests by County**  
 Election: 2022 Gubernatorial General Election  
 As of: October 3, 2022

COUNTY	HOW THE BALLOTS WILL BE DELIVERED						TOTAL
	AGENT	FAXED	IN PERSON	MAILED	OTHERS	WEB DELIVERY	
Allegany	0	0	158	3,709	1	229	4,097
Anne Arundel	0	8	220	49,914	4	7,700	57,846
Baltimore City	3	6	0	44,308	0	5,735	50,052
Baltimore County	0	13	0	70,855	4	8,948	79,820
Calvert	2	0	30	7,991	0	949	8,972
Caroline	0	0	0	1,352	0	97	1,449
Carroll	1	2	8	13,130	1	1,491	14,633
Cecil	0	0	13	5,549	0	582	6,144
Charles	0	1	1	11,030	0	1,244	12,276
Dorchester	0	0	21	2,059	1	125	2,206
Frederick	2	4	28	21,782	0	2,793	24,609
Garrett	0	0	0	1,592	1	114	1,707
Harford	1	1	2	17,064	1	1,913	18,982
Howard	0	0	1	28,914	1	5,025	33,941
Kent	0	0	11	1,650	0	140	1,801
Montgomery	0	9	1,042	101,255	14	18,279	120,599
Prince George's	0	4	0	62,078	0	7,229	69,311
Queen Anne's	2	0	2	3,411	0	392	3,807
Saint Mary's	5	0	126	6,699	0	760	7,590
Somerset	1	0	0	1,096	0	48	1,145
Talbot	3	2	15	3,643	0	440	4,103
Washington	0	0	12	9,225	0	734	9,971
Wicomico	9	1	45	5,554	0	447	6,056
Worcester	0	1	17	4,542	0	402	4,962
<b>TOTAL</b>	<b>29</b>	<b>52</b>	<b>1,752</b>	<b>478,402</b>	<b>28</b>	<b>65,816</b>	<b>546,079</b>

