IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2005

No. 143

LINDA H. LAMONE, *et al.,*

Petitioners,

v.

MARIROSE JOAN CAPOZZI, *et al.*,

Respondents.

On Appeal from the Circuit Court for Anne Arundel County
(Ronald A. Silkworth, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

During the 2006 legislative session, new laws were enacted to make voting more convenient for Maryland residents by allowing them to cast their votes at designated times and places during the week preceding an election. The first of these early voting provisions became law on February 16, 2006, one month after both houses of the General Assembly voted to override the Governor's veto of Senate Bill ("SB") 478, which had been adopted by the Legislature on April 2, 2005. Those provisions were then amended by the enactment of the Voter Bill of Rights, House Bill ("HB") 1368, which was adopted as emergency legislation as of March 29, 2006, and became effective immediately when both houses of the

General Assembly voted to override the Governor's veto as of April 10, 2006.

More than three months later, on July 17, 2006, the plaintiffs, Marirose Joan Capozzi and two others, filed in the Circuit Court for Queen Anne's County a suit for declaratory and injunctive relief seeking to prevent the State Board of Elections (the "Board") from implementing the early voting provisions in the 2006 primary and general elections. The complaint asserted that the early voting law violates election provisions set forth in the Maryland Constitution, including Article I, § 1 (entitling voters to vote in their wards or districts) and Article XV, § 7 (providing for general elections to be held on the Tuesday following the first Monday in November). Along with their complaint, the plaintiffs filed a motion for a temporary restraining order and preliminary injunction and a motion for summary judgment.

On August 4, 2006, after the case was transferred to the Circuit Court for Anne Arundel County, the Board filed an opposition to the motion for a temporary restraining order and preliminary injunction, along with a motion to dismiss the complaint for failure to state a claim.[1] The Board then supplemented its opposition by submitting a proffer of facts in lieu of live testimony, (E. 138-48); the plaintiffs did not oppose the proffer but reserved the opportunity to object to proffered facts on relevancy grounds. The plaintiffs filed a memorandum of law on August 7, 2006.

On August 8, 2006, the circuit court conducted a hearing at which no testimony was presented. The plaintiffs presented three maps as exhibits and the Board offered the affidavit

[1]The Board also requested additional time to respond to plaintiffs' motion for summary judgment and supported that request with an affidavit pursuant to Md. Rule 2-501(d) explaining why discovery was needed to address the motion for summary judgment. (E. 107-35.)

of a registered voter explaining how the early voting provisions would help to remove obstacles to her voting. Over the Board's objection, the court consolidated the hearing on the motion for preliminary relief with a trial on the merits, pursuant to Rule 15-505(b). During the course of the hearing, the court ruled from the bench that the plaintiffs' delay in bringing the suit would not preclude the court from addressing the merits. On August 11, 2006, the court issued a written opinion and final order declaring the early voting law unconstitutional and void, and enjoining its implementation or enforcement as to both the primary and the general election. The order also denied the defendants' motion to dismiss the complaint except as to one named defendant, the State of Maryland, and denied all other motions and requests for relief, thereby resolving all pending matters in the litigation.

The circuit court subsequently granted the Board's unopposed motion for stay pending appeal. The Board filed a timely notice of appeal on August 11, 2006. This Court granted the Board's petition for a writ of certiorari on August 14, 2006.

QUESTION PRESENTED

Did the circuit court err by permanently enjoining implementation of early voting legislation enacted to make voting more convenient, where the General Assembly determined that the legislation was necessary and appropriate to protect the right to vote as guaranteed by the Maryland Constitution, where the terms of the injunction extend to primary elections which are not covered by the constitutional provisions on which the circuit court relied, where plaintiffs made no showing of irreparable harm as required to warrant injunctive relief, and where an injunction would interfere with the ability of Maryland voters to cast their votes in the impending 2006 primary and general elections?

STATEMENT OF FACTS

A. Voting Provisions In The Maryland Constitution And Declaration Of Rights

Pertinent provisions of the Maryland Constitution establish the right to vote and authorize the General Assembly to adopt laws to regulate elections and safeguard the franchise. Article 7 of the Declaration of Rights provides:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The guarantee of suffrage declared in Article 7 is "even more protective of political participation than the provisions of the federal Constitution." *Maryland Green Party v. State Board of Elections*, 377 Md. 127, 150 (2003).

The right to vote is further articulated in Article I, § 1 of the Maryland Constitution, which provides that "[a]ll elections shall be by ballot," and that "[e]very citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State."

The general authority to regulate elections is vested in the General Assembly, which "shall have power to regulate by Law, not inconsistent with this Constitution, all matters which relate to the Judges of election, time, place and manner of holding elections in this State, and of making returns thereof." Md. Const., Art. III, § 49. This legislative authority to regulate the time, place and manner of holding elections is subject to the requirement that "[a]ll general elections in this State shall be held on Tuesday next after the first Monday in the month of November, in the year in which they shall occur." Md. Const., Art. XV, § 7.

See also Md. Const., Art. XVII, § 2 (providing for a quadrennial general election of State and county officers on "the Tuesday next after the first Monday in November").

Notwithstanding the constitutionally determined date for holding general elections, the Constitution grants the Legislature authority to enact laws to provide for those voters who may not be able to cast their ballots on the date of an election. "The General Assembly of Maryland shall have 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 and for voting by other qualified voters who are unable to vote personally and for the manner in which and the time and place at which such absent voters may vote, and for the canvass and return of their votes." Md. Const., Art. I, § 3.

B. Early Voting Legislation And The Voter Bill Of Rights

The statute providing for early voting, § 10-301.1 of the Election Law ("EL") Article, contains provisions of Chapter 5, Laws of Maryland 2006, as amended by certain provisions of the Voter Bill of Rights, Chapter 61, Law of Maryland 2006. The statute recognizes that each qualified voter has available three lawful methods of exercising the right to vote in an election: (1) by casting a ballot in the voter's assigned precinct on election day, EL § 10-301.1(a)(1); (2) by casting a ballot in an early voting place during the hours between 7 a.m. and 8 p.m. from Tuesday through Saturday in the week preceding a primary or general election, §§ 10-301.1(a)(2); 10-301.1(b); or (3) by casting a ballot in accordance with the absentee voting provisions found in Title 9, Subtitle 3 of the Election Law Article, § 10-301.1(a).

The statute further requires that there be three early voting places in each of seven enumerated counties (Anne Arundel, Baltimore City, Baltimore County, Harford, Howard,

Montgomery and Prince George's) and one early voting place in the county seat of all other counties except Charles County, where the early voting place will be located in Waldorf. EL § 10-301.1(c).

To ensure that the voters understand how to exercise their right to participate in early voting, the statute mandates that "[b]eginning 30 days prior to each primary and general election, the State Board and each local board shall undertake steps to inform the public about early voting and the location of early voting polling places in each county, including a series of public service media announcements, mailings to all registered voters, and other efforts." EL § 10-301.1(c)(4).

These early voting provisions are intended to remove obstacles that prevent some voters from voting in primary and general elections on election day. In past elections, some voters who wished to exercise their right to vote found they were unable to cast their ballots on election day due to work or transportation difficulties that made it inconvenient for them to visit the polling places on the date of the election or during the hours when the polls were open. (E. 145 (PFN 38).) For example, Lisa Lucas, a healthcare worker who commutes to work in Towson from her home in northwest Baltimore City, has a work schedule that may vary from week to week, including unscheduled shifts to cover for absent co-workers. (E. 150.) She relies on public transportation, and her commuting time ranges from 40 to 90 minutes each way. (E. 151.) It takes an additional 20 minutes at the beginning and end of each work day for her to transport her four children to and from daycare. (E. 151.) Because of the variation in her work schedule, the length of her shifts, and the distance between her home and work, it can be difficult for her to attend her local polling place during the hours when the polls are open. (E. 151.) Due to the demands of her employment, she was unable

to cast her vote on election day in the 2002 gubernatorial election. (E. 151.) Early voting will make voting more convenient and practicable for such voters by allowing them to take advantage of a more flexible voting schedule. (E. 143 (PFN 21, 22).)

By instituting early voting, Maryland joined at least 34 other states whose laws permit some form of early voting, which in some states is known as in-person absentee voting.[2] Of those states, at least nine of them have pertinent constitutional provisions similar to those provisions of the Maryland Constitution on which the circuit court below relied in declaring Maryland's statute unconstitutional.[3]

C. Implementation Of Early Voting

Early voting for the primary election is scheduled to take place beginning on September 5, 2006, and early voting for the general election will begin on October 31, 2006. Under the Board's Guidelines, ballots cast via early voting for the primary will not be tallied until the date of the primary, September 12, 2006. (E. 139 (PFN 8).) Similarly, ballots cast via early voting for the general election will not be tallied until the date of the general election, November 7, 2006. (*Id.*.) Electronic voting machines used in early voting will be programmed with the proper ballot styles and list the choices of candidates and ballot

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[2] According to http://electionline.org/Default.aspx?tabid=474 (website last visited August 17, 2006), the following states offer some form of early voting or in-person absentee voting: "early voting" -- Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Louisiana, Nevada, New Mexico, North Carolina, North Dakota, Tennessee, Texas, West Virginia; "in-person absentee voting" -- Alaska, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Montana, Missouri, Nebraska, Oklahoma, South Dakota, Utah, Vermont, Virginia, Wisconsin, Wyoming.

[3] *See* Florida Article VI, § 5; Hawaii Article II, § 8; Indiana Article II, § 14(a); Kansas Article IV, § 2; Maine Article II, § 4; Minnesota Article VII, § 7; Utah Article IV, § 9(1); Vermont Chapter II, § 43; Wyoming Article VI, § 17.

initiatives corresponding to the precinct of each early voter. (E. 146 (PFN 42).)

Statutorily mandated efforts to educate Maryland's 3.3 million registered voters about the availability of early voting have been under way since the Voter Bill of Rights became law in April, 2006. (E. 100.) The Board has posted early voting information on its website, spoken to various groups about early voting, and publicized early voting through interviews with print and broadcast media. (E. 139 (PFN 9).)

In addition to these voter outreach initiatives undertaken by the State Board, local boards of elections have taken steps to educate voters and prepare for early voting. For example, the Wicomico County Board of Elections has televised a public service announcement about early voting, entered a lease for its early voting place, hired election judges to serve at the early voting place, and prepared for a training session. (E. 140 (PFN 10).) Similarly, the Harford County Board of Elections has given early voting presentations at meetings of local organizations and informed persons requesting absentee ballots that the new early voting provisions offer another option. (*Id*.) The Washington County Board has publicized early voting and has been hiring election judges for early voting places. (*Id*.) The Montgomery County Board has conducted a mass mailing about early voting, leased early voting sites, and expended approximately $72,100 for costs associated with early voting. (*Id*.)

Information about early voting has also been disseminated by various organizations. For example, the availability of early voting in Maryland has been publicized on the websites of the League of Women Voters and the American College of Emergency Physicians. (E. 147 (PFN 46).)

SUMMARY OF ARGUMENT

Nothing in the Maryland Constitution requires that an election be inconvenient, and nothing prevents the State from creating procedures designed to make voting more convenient, as Maryland has done by enacting the Early Voting Law. The Early Voting Law does not impermissibly add to or curtail the qualifications for voting set forth in the Constitution. Not a single qualified voter becomes ineligible to vote as a result of early voting, and not a single ineligible voter becomes qualified. Instead, the Early Voting Law removes an obstacle to voting for qualified voters for whom it is impossible, difficult, or merely inconvenient to cast their ballot at their normal polling place during the hours when it is open on Election Day.

The plaintiffs do not object to early voting because it burdens or inconveniences them, and they have no basis for objecting to early voting because it relieves a burden or eases the inconvenience experienced by other voters. The plaintiffs do not allege that their vote is affected by the fact that others had an easier time getting to the polls. The plaintiffs also do not allege that fraud or vote dilution results from expanded opportunities for others to exercise their fundamental voting rights.

The plaintiffs' sole basis for objecting to early voting is their claim that it runs afoul of constitutional provisions prescribing Tuesday as the date on which general elections are to be held and entitling voters to cast their votes in their "ward or election district," an entitlement that historically provided convenience to voters and ensured that they would receive a ballot bearing the correct list of candidates. The plaintiffs' arguments are without merit. The plaintiffs' argument that voters can cast ballots only on Tuesday because that is when an election is held depends on a cramped definition of "election" – one that has been

rejected by every court that has considered it. Similarly, the plaintiffs must pervert the meaning of the word "entitled," equating it to "required," in order to transform a grant of voting rights into a restriction on such rights.

The plaintiffs brought this lawsuit months after the early voting provisions they challenge became law, at a time when the relief they sought would cause substantial disruption to the elections process and prejudice to voters who will have difficulty voting without the early voting option. In these circumstances, and in light of the plain constitutionality of the Early Voting Law, the circuit court erred in enjoining implementation of the Early Voting Law. The history of voting in Maryland has been one of making exercise of the franchise more convenient and more widely available. The decision below does the opposite on the basis of a flawed legal analysis; it should be reversed.

ARGUMENT

I. THE EARLY VOTING LAW IS CONSTITUTIONAL.

Maryland's Early Voting Law facilitates the ability of qualified voters to exercise their franchise, a "fundamental political right, because preservative of all rights." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966). Similarly, the Maryland Declaration of Rights provides that "the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government," Md. Decl. Rights, Art. 7. "[F]or this purpose" of safeguarding the right to participate in our democratic system, "elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." *Id.* Given the longstanding recognition by this Court of the vital importance of the franchise, a view that is manifestly

supported by the design of the Constitution, it would be anomalous, to say the least, to interpret the same provisions that ensure the right to vote as imposing hitherto unseen restrictions on the right to vote. "'The elective franchise,' it is said in *Kemp v. Owens,* 76 Md. 235, 241 [(1892)], 'is the highest right of the citizen, and the spirit of our institutions requires that every opportunity should be afforded for its fair and free exercise.'" *Jackson v. Norris,* 173 Md. 579, 598 (1937).

The circuit court's cramped construction of the relevant constitutional provisions is also inconsistent with established principles of constitutional interpretation articulated by this Court. In *Norris v. Mayor & City Council of Baltimore,* 172 Md. 667 (1937), the issue was whether voting machines might lawfully be used in elections in this State. Article I, § 1 provides that "[a]ll elections shall be by ballot," and the opponents of voting machines argued that the term "ballot" could not possibly be intended to permit the use of voting machines, which did not exist in 1867. The Court rejected this view:

> The argument ignores the rule which above all others gives life to the written law and makes its use possible for the government and control of men in carrying on the actual business of life, and that is that, while the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not forsee.

172 Md. at 675-76; *see also Clauss v. Board of Educ.,* 181 Md. 513, 523 (1943) (in interpreting the meaning of the word "education," "[i]t is not to be supposed that the framers of the Constitution of 1867 did not expect the system of education then in force to be changed or improved;" because "[t]he meaning of the Constitution is not restricted to the meaning of

particular words employed as they were understood at the time of its adoption."); *Kindley v. Governor,* 289 Md. 620 (1981) ("[O]ur laws are addressed to the future. Where, as here, a statute is phrased in broad general terms, it suggests that the Legislature intended the provision to be capable of encompassing circumstances and situations which did not exist at the time of its enactment.").

Moreover, the circuit court failed to apply a basic tenet of judicial review, that a statute is presumed constitutional. *See Beasly v. Ridout,* 94 Md. 641, 649-50 (1902) ("There is a presumption . . . that every act of the legislature is within its power, and, before any act should be declared unconstitutional, its repugnancy to the provisions or necessary implications of the constitution should be manifest, and free from all reasonable doubt. If its character in this regard be questionable, then comity and a proper respect for a co-ordinate branch of the government should determine the matter in favor of the action of the latter."); *Brown v. State,* 177 Md. 321, 330-31 (1939) ("Every presumption is to be made in support of the theory that the General Assembly has validly and properly exercised its powers." (quoting *Shapiro v. State,* 131 Md. 168 (1918)); *Department of Natural Res. v. Linchester Sand & Gravel Corp.,* 274 Md. 211, 218 (1975) (enactments presumed constitutional "until it appears that the enactment under consideration is invalid or obnoxious to the expressed terms of the Constitution or to the necessary implication afforded by, or flowing from, such expressed provisions."); *Washington Suburban Sanitary Comm'n v. Utilities, Inc.*, 365 Md. 1, 24 (2001) (noting "presumption that enactments of the General Assembly are constitutional").

A. Maryland's Early Voting Law Was Validly Enacted Pursuant To The General Assembly's Constitutional Powers To Regulate Elections.

The General Assembly is Constitutionally directed to regulate the time, place, and

manner of elections. Art. III, § 49, provides:

> Power of legislature to regulate 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.

(Emphasis added); *accord* U.S. Const., Art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed *in each State by the Legislature thereof.* . . . (emphasis added)); *Gregory v. Ashcroft,* 501 U.S. 452, 461-62 (1991) (stating that the Framers of the Constitution intended the States to keep for themselves the power to regulate elections); *see also* Md. Const., Art. I, § 3 (General Assembly can regulate time, place, and manner for those unable to vote personally on election day). Through Article III, § 49, the Framers expressed their intent that the Legislature should regulate elections. *See County Council v. Montgomery Ass'n,* 274 Md. 52, 60 (1975). Thus, the General Assembly acts pursuant to an express grant of authority when it enacts legislation regarding the conduct of elections.[4]

The General Assembly has "pervasive control" over elections. *County Council,* 274

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[4]Article III, § 49 does not stand alone in this respect. Article III, § 42 provides: "The General Assembly shall pass Laws necessary for the preservation of the purity of Elections." These express grants of authority are in addition to the inherent plenary powers of the General Assembly, confined only by the existence of a direct constitutional limitation. *See First Continental Sav. & Loan Ass'n v. Director, State Dep't of Assessments & Taxation,* 229 Md. 293, 302 (1962) ("The powers of the Maryland Legislature are plenary except as restrained or confined by the Federal or State Constitutions."); *Maryland Committee for Fair Elections v. Tawes,* 228 Md. 412, 439 (1962); *Wyatt v. Beall,* 175 Md. 258 (1938); *Brawner v. Curran,* 141 Md. 586 (1922); *McMullen v. Shepherd,* 133 Md. 157 (1918); *Trustees Catholic Cathedral Church v. Manning,* 72 Md. 116 (1890); *Mayor & City Council of Baltimore v. State,* 15 Md. 376, 472 (1860) (LeGrand, C.J, concurring) ("[T]he people have the power to do as they may please," while "their delegates have the same scope of authority, save in so far as there be express or necessarily implied limitations on it.").

Md. at 62. The election code, enacted under these three powers, is a comprehensive statute dealing with the supervision of election procedures. *Id.* at 61. And, the General Assembly is, in the words of this Court, "obligated" to enact a comprehensive plan for the conduct of elections. *Id.* at 64. Plaintiffs have wholly failed to show that the General Assembly's constitutional *duty* to enact a comprehensive plan, and the subsequent exercise of this power is prohibited by the same Constitution that acknowledged it.

1. Because An "Election" Is More Than A Partial Casting Of Early Ballots, The "Elections" Will Be Held On Tuesday, And Early Voting Is Consistent With Articles XV And XVII Of The Maryland Constitution.

Two provisions of the Maryland Constitution direct that "elections" be held on Tuesday. Article XV, § 7 provides:

> Time for holding general elections. All general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur.

Accord Art. XVII, § 2.

While all parties and the lower court agree that there is no reported Maryland decision on this issue, there is persuasive authority that is on point and that squarely rejects the plaintiffs' position in this case. The plaintiffs contend that, because an early *vote* is not *cast* on Tuesday, the *election* is not *held* on Tuesday. That argument, however, is flawed because there is a difference between the act of casting a ballot, on the one hand, and holding an election, on the other. The lower court incorrectly ruled that the word "elections" had only

one common sense meaning.[5] The lower court defined the term "election" to mean "casting a ballot." (E. 292.). That conclusion is untenable and contrary to persuasive precedent. In fact, *the decision below should be reversed because an "election" is something more than the bare act of some of the voters casting a ballot.* It is not necessary to go any further than that proposition to defeat the plaintiffs' challenge to early voting based on the language of Article XV, § 7.

If, for example, 15% of the electorate voted on four days in the week preceding election day, but a natural disaster prevented voting on election day, no reasonable assertion could be made that an "election" had been held in those circumstances. However, because the plaintiffs contend, and the lower court agreed, that casting ballots in early voting is an "election" that is held on a day other than election day, the plaintiffs, if they are to be consistent, are committed to precisely that unreasonable position.

Under the lower court's definition of "elections," *everything* except casting of ballots may be done on a date other than Tuesday. In short, if 100% of the ballots were cast on Tuesday, November 7, but were never counted, under the approach advanced by the plaintiffs and adopted by the lower court, an election would have occurred on that Tuesday. This analysis is inconsistent even with the plaintiffs' preferred dictionary definition of an election as "the act of choosing a person to fill an office . . ." because the act of choosing is never

[5] The lower court in part focused on the meaning of the word "held." The correct inquiry, as set forth in every case on point, however, is what the word "elections" means. Once that word is correctly defined to encompass more than the mere act of casting a ballot, there is no need to define "held."

consummated.[6] (R. 352-53 (Pls' Trial Mem. at 15-16); E. 292.) The absurd consequences that result from adoption of the plaintiffs' narrow understanding of the term "election" are easily and reasonably avoided, as every court to consider the issue has demonstrated in the context of similar challenges to early voting laws.

It is important to note that the Guidelines that have been promulgated by the Board to govern early voting provide that the early ballots for the general election will not be tallied until the day specified in the Constitution – this year, November 7.[7] When the early voting period is over, the election judges will turn off the voting machines in a way that does not produce a totals report. (E. 67 (Guidelines 7.4A).) The memory cards will then be transported to the local election office, where they are inventoried. (E. 67 (Guidelines 7.4B and C).) The votes may not be tabulated, however, until 8 p.m. on election day, which is when tabulation begins on the votes that were cast that day. (E. 67 (Guidelines 7.4D).) The early voting results are to be combined and reported with the election day results in the unofficial election day results. (E. 67 (Guidelines 8.1A).) After verification, they are to be

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[6] In the plaintiffs' legal memorandum filed on the eve of the hearing, they asserted that election procedures in place in the mid-nineteenth century supported their definition equating the casting of ballots with an election because ballots were not counted until ten days after election day. (R. 353-55 (Pls' Trial Mem. at 16-18).) While such a historical practice would not be inconsistent with the more reasonable definition of election discussed in the text below, historical research in fact refutes the plaintiffs' contention. Under the Public General Laws of 1860, Art. 25, § 262, when the polls closed, the ballot box was "immediately thereafter" opened by the election judges and the ballots were read aloud. Votes were tallied immediately, on the same day ballots were cast. Thus, there is no historical basis for viewing the casting of ballots as the only aspect of the elections process that was conducted on election day.

[7] Primary election ballots cast during early voting will similarly not be tallied until primary election day, September 12. However, Article XV, § 7, by its express terms refers only to general elections, and it would of course be impossible for that constitutional provision to apply to primary elections, requiring that they be held the same day as the general election.

reported both separately and as a combined result. (E. 67 (Guidelines 8.1B).)

The decision of the Fifth Circuit Court of Appeals in *Voting Integrity Project, Inc. v. Bomer,* 199 F.3d 773 (5th Cir.), *cert. denied,* 530 U.S. 1230 (2000), is on point. Much like Art. XV, §7 specifies that Maryland elections shall be held on Tuesday, Congress has specified that "Tuesday next after the 1st Monday in November. . . is established as the day for the election. . . ." *Id.* at 775; *see* 2 U.S.C. § 7; 3 U.S.C. § 1. The Texas legislature enacted an early voting law that permitted voting seventeen days before election day. *See id.* at 774. The Texas plaintiff asserted that early voting violates the provisions "which establish Tuesday after the first Monday in November as the day for the election"; that, when *"the* day for the election" was established, the statutes contemplated that "the entire election, including all voting, will occur on that day"; and "that 'election' is synonymous with voting." *Id.* at 774-75.

Relying on Supreme Court precedent, the Fifth Circuit rejected the Texas plaintiffs' arguments. The Fifth Circuit held that the plain language of the federal provisions calling for elections on Tuesday "does not require all *voting to occur* on federal election day. All the statute requires is that the *election be held* that day." *Id.* at 776 (emphasis added). Relying on *Foster v. Love,* 522 U.S. 67, 71 (1997), the Fifth Circuit held that the word "election" means "the combined actions of voters and officials meant to make a final selection of an office holder." 199 F.3d at 776. The Fifth Circuit and the Supreme Court both "recognized that some acts pertaining to the election . . . would be performed on days other than the federal election day. . . ." *Id.* The Fifth Circuit held that "some acts associated with the election may be conducted before the federal election day. . . ." *Id.* It therefore concluded and held that the Texas early voting statutes, which permitted voting seventeen days prior to the established

date, did not violate the federal mandate prescribing Tuesday as the day of elections.

The rationale supporting that holding is significant. The Fifth Circuit wrote that it "cannot conceive that Congress intended" the Tuesday voting requirement "to have the effect of impeding citizens in exercising their right to vote." *Id.* at 777. Provisions setting Tuesday as the date for holding elections were designed to avoid having one state's voting influence another, and to avoid requiring citizens to turn out for multiple elections. *See id.* The Fifth Circuit held that early voting presented neither of these problems and, in fact: "The challenged Texas [early voting] statutes encourage voting by providing Texas voters with more opportunities to vote." *Id.* In short, the Fifth Circuit's holding and analysis provide a compelling precedent for concluding that the Early Voting Law furthers, and does not frustrate or violate, the provisions of Art. XV, § 7 of the Maryland Constitution.

The Fifth Circuit is not alone. In *Millsaps v. Thompson,* 259 F.3d 535 (6th Cir. 2001), the Sixth Circuit rejected a challenge to Tennessee's early voting law. Tennessee's constitution provided that the date for elections was the Tuesday following the first Monday in November. 259 F.3d at 537. The Tennessee legislature enacted an early voting law that permitted voting five days before the day of the election. *Id*. The Sixth Circuit noted that: "Early voting has proved to be a popular method for casting ballots." *Id.* It then considered each of the purposes for specifying that elections be held on Tuesday. *Id.* at 541. And, like the Fifth Circuit, the Sixth Circuit framed the question as: "What is an election?" *Id.* at 543.

The State of Tennessee argued that there is a "fundamental distinction between the physical act of casting a ballot and the election of a federal official, which requires ministerial actions of state and local election officials to transform the voters' preference for a candidate into the final act of selection." *Id.* The Sixth Circuit agreed, stating: "When the federal

statutes speak of 'the election'. . . they plainly refer to *the combined actions of voters and officials meant to make a final selection of an officeholder*. . . ." *Id.* at 543 (emphasis in original). The court referred to the definition in N. Webster, An American Dictionary of the English Language, 433 (C. Goodrich & N. Porter eds. 1869), defining "election" as "the act of choosing a person to fill an office." *Cf.* EL § 1-101(v) ("'Election'" means the process by which voters cast votes on one or more contests under the laws of this State or the United States.").[8]

Both the Fifth and Sixth Circuits relied on the Supreme Court's *Foster* decision. The Supreme Court stated that an election is "the combined actions of voters and officials meant to make a final selection of an officeholder. . . ." *Foster,* 522 U.S. at 71. Additionally, the Sixth Circuit noted that the Ninth Circuit had held that an "election is the entire process by which both voters and officials make a final selection of an officeholder," and that this process "encompasses more than merely casting ballots." *Id.* at 544. In short, a "candidate is not 'selected for office' at the time a voter deposits a completed ballot in the ballot box. . . . Providing various options for the time and place of depositing a completed ballot does not change 'the day for the election.'" *Id.* at 545 (citation omitted).

"An 'election' under the federal statutes [setting Tuesday as election day] requires more than just voting, and the Early Voting statues do not create a regime of combined action meant to make a final selection on any day other than federal election day." *Id.* at 547. That

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[8] The *Millsaps* court's conclusion is supported by an examination of actions in other states. Nine other states, with constitutional provisions similar to Maryland, have enacted early voting legislation. *See* Florida Article VI, § 5; Hawaii Article II, § 8; Indiana Article II, § 14(a); Kansas Article IV, § 2; Maine Article II, § 4; Minnesota Article VII, § 7; Utah Article IV, § 9(1); Vermont Chapter II, § 43; Wyoming Article VI, § 17.

is precisely what happens under Maryland's Early Voting Law and the Board's Guidelines. Early votes are not tabulated until all of the votes are tabulated.[9]

If the lower court is correct, the Supreme Court, and the Fifth, Sixth, and Ninth Circuits, in addition to the General Assembly, have erred.[10] The presumption of constitutionality gains added force when the ostensible conflict between the statute and the Constitution depends on a strained interpretation of the pertinent constitutional provision that has been rejected by other courts considering analogous claims. The lower court's construction of Article XV, § 7, which disregards the sound reasoning of those other courts,

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[9]Similarly, the term "vote" encompasses much more than casting a ballot. *Cf.* EL § 1-101(uu) ("Vote" means to "cast a ballot that is counted."). For example, under 42 U.S.C. § 1973 l (c)(1), the Voting Rights Act provides:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

No one would contend that they had "voted" if their ballot had not been counted. Thus, electors may cast a ballot early and still "vote" on Tuesday. Similarly, one has not participated in an "election" until one's vote has been counted and, therefore, an election has not been held if votes are not canvassed.

[10] The circuit court's reasoning would lead to untenable results. For example, the election date may be postponed due to emergency, EL § 8-103(a)(1). That provision is unconstitutional, if the lower court's decision is correct. In fact, *even in the greatest emergency - - a hurricane, tornado, terrorist attack - - under the holding below, not even a court could alter the election day or provide for balloting on a day other than Tuesday*, because the word "elections" in Art. I, §1 has been deemed a precise and unchangeable rubric. Rather than a statutory, administrative or judicial postponement due to an emergency, it would be necessary to amend the Constitution to postpone an election during a disaster. In fact, if there were an unforeseen flood in a ward, the trial court's reasoning would forbid an emergency relocation outside of the ward.

should be rejected.

This conclusion is bolstered by the legislative history surrounding adoption of the Constitutional provision. That history betrays no indication of any concern that voting must be accomplished within any specific twenty-four hour period. Instead, a variety of concerns have driven the selection of an election day, with the dominant one being that there not be an excess of elections, and that the elections for the major State offices not be affected by Presidential politics.

The 1776 Constitution, in §§ 2, 4 and 5, called for the election of Delegates on the first Monday of October 1777 and on the same day in every year thereafter. The voting was *viva voce,* which (because it was by voice) meant, as a practical matter, that everyone (or a rather selective portion of "everyone") had to be there not only on the same day, but at the same moment. The only other elected officials were the electors for the Senate, chosen, also *viva voce,* on the first Monday of September in 1781 and every fifth year thereafter, and Sheriffs, who were elected by ballot every three years at an unspecified time. This arrangement was apparently undesirable, as all parts of the Constitution relating to the judges, time, place and manner of elections were "abrogated, repealed and annulled" in 1799, and replaced with a provision stating that "the same shall hereafter by regulated by Law." Chapter 115 of 1798. In short, since Colonial times, one goal of the Constitution was to make voting convenient for voters.

The 1837 amendments providing for an elected Governor and Senate, set the election for the first Wednesday in October in 1838, and on the same day every third year thereafter, on a staggered basis for the Senate, and yearly for the Delegates. Those amendments also provided: "The General Assembly shall have power to regulate by law, all matters which

relate to the Judges, time, place and manner of holding elections for Governor and of making returns thereof not affecting the tenure and term of office thereby." Chapter 197 of 1836.

The 1851 Constitution retained the single day for most offices, but set the terms in such a way as to effectively require elections every year. In addition, the General Assembly was given the authority to "to regulate by law all matters which relate to the judges, time, place and manner of holding elections in this State, and of making returns thereof, provided that the tenure and term of office, and the day of election shall not be affected thereby."

The 1850 Convention contains much discussion about when elections should be held. One of the major issues was whether elections for judicial officers and State's Attorneys should be held on the same days as those for other offices, with some arguing that they would be less tainted by politics if they were separate. Other considerations mentioned in the timing of elections included: the convenience of those in agricultural areas, where farmers not only could not leave early in the fall, but could not make their horses and carts available for the transportation of others; a concern that state elections not be held with the federal, or at least the Presidential elections; and that elections not be held on Monday, as that had in the past led to unseemly electioneering on the Sabbath. *See* 1851 Debates Volume I at 293-294, 296, 455, 457, and 1851 Debates Volume II at 10-13, 201-14, 236-28, 254-26, and 840. There is not the slightest historical indication that the Framers intended for the provision setting the date for elections to deny voters the option of a more convenient voting experience.

The 1864 Constitution retained the practice of having the elections on the same day, the "Tuesday next after the first Monday in the month of November" in each year. This was set both in the specific provisions relating to the offices, and in Article XII, § 7. The provision was originally drafted to set all elections on the first Wednesday of November and

the language was changed to coincide with the language used for Presidential elections.[11] Most of the debate centered on whether the convention could set the date of the election for Congressional elections where that was delegated to the State legislatures. *See* 1864 Debates Volume 1, pages 752-60 and 1160-61.

The 1867 Constitution is essentially the same as the 1864 Constitution and had very little debate. The sole conclusion that can be drawn from this historical analysis is that the Framers certainly did not intend the result suggested by the plaintiffs when they drafted Art. XV, § 7. Instead, the principal goal was to make elections more convenient. The Early Voting Law furthers that goal and is therefore consistent with the both the Framer's language and intent.

2. Article I, §1 Does Not, By Its Plain Terms, Or Under This Court's Precedents, Preclude Offering a Voter An Alternative, More Convenient Location To Cast A Ballot.

Art. I, §1 provides, in pertinent part, that every citizen "shall be *entitled* to vote in the ward or election district in which he resides at all elections to be held in this State." [emphasis added]. By its terms, the provision does not *require* a citizen to vote or *require* a citizen to vote in his or her "ward or election district." Instead of imposing a duty on voters, the provision was enacted to impose a duty on election officials to provide convenient polling places with applicable ballot styles.

The Early Voting Law in no way interferes with a citizen's Constitutional right to vote

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[11] Thus, the constitutional provisions relied on by the plaintiffs were modified to conform to federal statutes like those construed by the federal courts in resolving claims that Tennessee and Texas' early voting statutes were preempted by conflicting federal law. The sensible conclusion reached by those courts applies readily to the present case.

where he or she resides. Rather, EL §10-301.1(c)(1) provides that a voter "may" vote at an early voting polling place, thereby offering the *option* of an additional voting time and location. It is axiomatic that a person may waive a constitutional right. There is no reason why that principle does not apply with equal force to a voluntary waiver, by a voter, of the entitlement to vote where he or she resides, in order to take advantage of the flexible timing and location provided by early voting. In short, Art. I, § 1 creates a right to vote in the district of residence; however, it does not, as the lower court held, erect a prohibition against voting outside of that district. In fact, pursuant to *Munsell v. Hennegan,* 182 Md. 15, 22 (1943), under the provisions of Art. I, § 1, and Art. III, § 49, electors should have "the fullest opportunity to vote for candidates. . . ." It is the Board's analysis, not the plaintiffs' inflexible, textually unsupported argument, that properly applies Art. I, § 1.

The lower court relied on two decisions of this Court, *Smith v. Hackett,* 129 Md. 73 (1916), and *Kemp v. Owens,* 76 Md. 235 (1892), to hold that Art. I, §1 does not entitle, but requires, a voter to vote in the physical location of his or her ward or district. The plaintiffs and the lower court misconstrued the import of the holding in *Kemp*, which they cite for the proposition that "a voter cannot lawfully vote where he does not *reside*." (E. 289 (emphasis added).) Neither the facts nor the rationale of the decisions cited by the lower court supports invalidation of the Early Voting Law.

This Court has described *Kemp* as a "voter registration case in which the plaintiff moved from one ward to another and was allowed to vote in the new ward because both were in the same legislative district." *Blount v. Bd. of Supervisors of Elections of Balt. City,* 247 Md. 342, 345 (1967). In point of fact, *Kemp* stands for an entirely unremarkable proposition: that a voter cannot lawfully vote where he or she is not *registered* to vote. The physical

location where the vote by a properly registered voter is cast mattered in *Kemp* only insofar as it was – at that time – necessary to ensure that the voter received a ballot bearing the correct list of candidates. A review of the history of the evolution of Article I, § 1, both preceding and following the version in place at the time *Kemp* was decided, bears out that the concern of the Framers was not with the location of the polling place, but with the availability of the correct ballot for the voter.[12] That concern is not applicable in the context of electronic voting. Under the Board's Guidelines, electronic voting machines will be programmed with the proper ballot styles and list the proper choices. (E. 146 (PFN 42).)

Hackett, 129 Md. at 73, presented an issue far removed from the issues involved in early voting. In that case, a precinct polling place was located outside of the voters' precinct, but within the district. The losing candidate challenged the extraterritorial votes. The Court held that voters were permitted to vote in precincts that were in their district, but not where they reside. *Id.* at 141-42. ("[T]he act of the voters of the Second precinct in voting at the only place thus provided for them in the district of their residence was wholly within the right conferred upon them by the Constitution."). When the Court noted that a vote must be cast in the district of residence, it was referring to the fact that a voter may not be compelled to vote elsewhere. The Court described this as a "right to vote in the election district of [one's] residence." One who has a right or entitlement can choose to exercise the right or to enjoy the entitlement – and can equally choose not to do so. Neither *Kemp* nor *Hackett* supports invalidation of the Early Voting Law.

In light of the clear language of Art. I, §1, especially as applied to the permissive Early

[12]To the extent, if any, that the cited decisions compel a voter to vote in the ward or district of residency, they are inconsistent with the text of Article I, §1.

Voting Law, the Court need not resort to legislative history to interpret it; however, that history bolsters the conclusion that the provision was intended to ensure that each person was able to voted for the candidates who would represent the district where the person resides, and only those candidates. For example, this Court has described the purpose of Article I, § 1, stating that it was designed "not merely for the purpose of identifying the voter and as a protection against fraud, but also that he should become in fact a member of the community, and as such have a common interest in all matters pertaining to its government." *Shenton v. Abbott*, 178 Md. 526, 531 (1940) (citing *Shaeffer v. Gilbert*, 73 Md. 66, 70 (1890)). Just as it is not inconsistent with the text of the Constitution, the Early Voting Law is not inconsistent with that purpose.

Art. I, § 1 was concerned with adapting the logistics of voting to the technology of the time and ensuring that the ballots that were made available to voters contained the names of those officials, and only those officials, who represented the voter's area of residence. The concept of voting in a ward or district is based on the antiquated voting process of *viva voce*, or oral, voting. In colonial times, and until 1802, voting was *viva voce*. Under the 1776 Constitution, eligible voters gathered in a single place in the county and orally voted for their representatives. This method required that a person be physically present when the vote was held in his county in order to state his vote. It was soon abandoned.

Election by ballot was adopted in 1802. Chapter 90 of 1801, ratified 1802. That provision was amended in 1810. Chapter 198 of 1809, ratified 1810. There is no history on either of these amendments that would indicate the intention of the General Assembly with respect to the issue at hand. Thus, the provision continued to operate to ensure that voting was convenient and that, in the days of the horse and buggy, voters could not be deprived of

their franchise by being subjected to lengthy trips to the polls.

The 1851 Constitution provided that a qualified person"shall be entitled to vote in the ward or election district in which he resides, in all elections hereafter to be held." Most of the debate on Article I, § 1 focused on proposals to impose durational residency requirements in the election district or ward in which a person was to vote. *See* 1850 Debates at 31, 41-42, 47, and, 70. The debate gave no indication that the drafters wished to alter the purpose of the provision. The problems discussed in the debates were ones that arose from allowing a person to vote for officials who represent areas other than that of his own residence, rather than any advantage from having a voter physically present in the district when the vote was cast. Thus, it was stated that the people should be represented by "the votes of their own proper constituency." 1850 Debates at 37 (Delegate Dirickson). In short, the debate focused on Art. I, §1 as a mechanism to ensure that each voter received a ballot that contained the choices, and only the choices, pertinent to that voter's area of residence. It was a process aimed at precluding interlopers and ensuring a convenient polling place. Physical location was used as a mechanical way of ensuring that outcome under the limited technology of the day. As noted, below,[13] however, in modern times the voter registration process addresses that issue.

The 1864 Constitution was, in pertinent part, similar to the 1851 language. *See The Debates of the Constitutional Convention of the State of Maryland* ("1864 Debates") at 1650-

[13]Delegate McClane stated that the districts were established "for the convenience of the people, and not for the better security of the ballot box." 1850 Debates at 47. More recently, voter registration has been recognized as a more efficient approach to the prevention of voter fraud than residency requirements, and one less restrictive of access to the polls as well. *See Dunn v. Blumstein*, 405 U.S. 330, 346-48 (1972). In any event, however, the purpose of the provision - - to ensure that the voter was provided with only the proper choices - - remained unchanged.

1653. The 1867 Constitution made several changes that are not relevant to the present inquiry. Additional changes have been made to the section in the relatively recent past. The 1967 Constitutional Convention Commission noted that "modern communications media make it significantly easier for citizens to acquaint themselves with issues and candidates than was the case a century ago," Interim Report of the Constitutional Convention Commission § 2.01. The purpose of Art. I, §1 remained unchanged.[14] Again, in 1978, Article I, § 1 was amended. The provision on retention of the right to vote in an election district or ward was maintained. The 1978 change brought the section to the form that it has today, without altering its purpose. If anything, the recent changes eliminated any vestigial language suggesting that physical presence within the ward or election district was required.

In sum, the "entitlement" language of Art. I, § 1 does not, by its express terms, support the plaintiffs' position that voters must vote in their ward or district. The history demonstrates that it was designed to identify voters, protect against multiple voting or importing unqualified voters, provide a sense of community, *Munsell,* 182 Md. at 22, ensure that each voter receives a ballot that lists the proper choices, and guarantee a convenient polling place. None of these goals is inconsistent with early voting. Voter identification is not affected by early voting. Electronic poll books address issues related to multiple voting. And, under the Board's

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[14] The Chair of the Suffrage and Elections Committee of the 1967 Constitutional Convention described the pertinent portion of a proposed amendment as "substantially the same language as you will find in Article I, section 1 of the present Constitution." *Debates of the Constitutional Convention of Maryland 1967-1968* ("1967 Convention Debates") at 3183. She further stated, as a reason for this provision, that "[i]t was certainly our intention that, in order to be eligible to vote for a member of the House of Delegates, or a Senator, or a Congressman, one had to be a registered voter in that district." *Id.* This demonstrates that Art. I, § 1 is designed to further a purpose that is now fulfilled by voter registration. The concept of physical presence was simply a proxy furthering that goal.

Guidelines, electronic voting machines are programmed with the proper ballot styles and list the proper choices. Voters will vote early only if they find it more convenient to do so. (E. 143 (PFN 26).)

This history provides every reason to believe that Article I, § 1, in providing that a person is entitled to vote in the ward or election district in which he or she resides, requires that a person cast ballots only for the officers running in elections for that ward or election district, and not that a voter be physically located in the ward or election district at the time that he or she casts that vote on a properly formatted ballot. And, there is nothing in the Constitution that prevents a voter from declining the "entitlement" of voting within the district of one's residence if it is more convenient to cast the same ballot on another day or in a district near one's place of employment, for instance.

3. No Constitutional Provision Prescribes A Day Or Place For The Casting Of Ballots In Primary Elections.

Primary elections are subject to statutory enactments; the conduct of primary elections is not governed by the Constitution. Article XV, § 7 of the Constitution provides:

> Time for holding general elections. All general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur.

By its terms, Art. XV, § 7 applies to "general elections." That phrase is clear and unambiguous. *See Cohen v. Governor,* 255 Md. 5, 21 (1969) (construing Art. XIV, § 1). Similarly, Art. I, § 1 is inapposite to primaries. *See Hill v. Mayor of Colmar Manor,* 210 Md. 46, 53 (1956) ("Undoubtedly, the Legislature has plenary powers which are not restricted by the provisions of Article I of the Constitution of Maryland with regard to both primary elections and municipal elections (outside of the City of Baltimore)."); *Supervisors of*

Elections v. Blunt, 200 Md. 120, 123 (1952). Plaintiffs below effectively conceded this point in oral argument, relying only on language in subsequent concurring and dissenting opinions to avoid this holding. (E. 268, 277.) Nor does the Fewer Elections Amendment, Art. XVII, §§1, 2 apply to primaries. The entire context of the Amendment indicates otherwise. If the provision did relate to primaries, for example, it would mandate that primary elections must be held on Tuesday, at the same time as general elections.

The entire challenge to the Early Voting Law as it relates to primary elections is not well-founded. Because there were no primary elections when the Constitution was adopted, *Hennegan v. Geartner,* 186 Md. 551, 554 (1946), the General Assembly has the power to create and regulate primaries, and it can enact any reasonable law to govern those elections. *Id.* at 556, 559; *Suessman v. Lamone,* 383 Md. 697, 707-08 (2004). The plaintiffs' constitutional challenges to the Early Voting Law as it relates to primary elections have no textual basis in the Constitution. Thus, the Constitution does not bar early voting in primaries.

B. Article I, § 3, The Constitutional Provision Relating To Voters Who Are Absent Or Unable To Vote Personally, Authorizes Early Voting.

Early voters are absentee voters and, to the extent, if any, that express Constitutional authorization of early voting is required, Article I, § 3 provides it. That section provides:

> The General Assembly of Maryland shall have 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 *and for voting by other qualified voters who are unable to vote personally* and for the *manner* in which and the *time* and *place* at which such absent voters may vote, and for the canvass and return of their votes.

This provision authorizes time, place, and manner statutes, as long as a voter is "absent at the time of any election" or "unable to vote personally. . . ." It does not define those terms.

Like every other provision of the Constitution, this provision has been amended over time to expand, not to contract, the franchise. It places no limits on who may be eligible to vote under its umbrella, other than that they be qualified voters. There is no restriction with respect to the reason for their absence or inability to vote personally, the distance of their absence, the duration of their absence, the time, place, or manner in which they may vote, so long as it is as provided by the General Assembly.

To the extent such restrictions historically appeared in this provision, they have been deleted by amendment. Thus, while the original provision, adopted in 1918 for soldiers in World War I, authorized absentee ballots only for persons "absent and engaged in the Military or Naval Service of the United States," Chapter 20 of 1918, that restriction was removed by Chapter 480 in 1953. Similarly, a prior restriction limited the umbrella to persons whose inability to vote personally was caused by a disability that kept them confined to a hospital or to bed, Chapter 100 of 1956. That disability limitation, however, was removed by Chapter 881 in 1974.

At one point, there was a requirement that, in order to vote absentee, the voter had to be absent from the ward or district in which they were entitled to vote; however, the 1974 amendment also deleted the last remaining restriction when it removed that reference. As it now stands, Art. I, § 3 leaves the place from which a person must be absent to the General Assembly. These amendments, deleting restrictions on absentee voting, make it clear that the General Assembly may authorize any qualified voter who is "absent," or who is "unable to vote personally," as defined by the General Assembly, to vote at a time and location that differs from election day.

Ms. Lucas has, in the past, been "unable to vote personally" due to her day care

arrangements, shift work, and use of public transportation. She is not alone. Some voters may have already made their election-day plans. (E. 143 (PFN 28).) Other voters cannot vote on election day because it is not convenient. (E. 144-45 (PFN 31, 38).) Service employees find standard voting procedures cumbersome, due to irregular hours and shifts. (E. 144 (PFN 33, 37).) Business travelers are often unable to vote personally. (E. 144 (PFN 32).) People with child care obligations may be precluded from appearing on election day. (E. 145, 151 (PFN 36; Lucas Affidavit).) Without early voting, these voters may be denied the right to vote. The early voting law permits these voters, who are "unable to vote personally" to vote during days set by the General Assembly in the places set by the General Assembly, in the manner set by the General Assembly and by the Board under authority granted by the General Assembly.

The plaintiffs argued that the early voting law was not within the scope of Article I, § 3 because they were not codified in the portion of the Code dealing with absentee balloting and that calling early voting "absentee" voting would violate the single-subject rule of Article III, § 29. (E. 251-56.) The lower court held that there was no indication that the legislature intended that early voters be considered absentee voters, that the statute did not recite the constitutional prerequisite of being absent or unable to vote personally, and that the statute states "except as provided under title 9, subtitle 3 of this article [the subtitle captioned 'Absentee Voting']" and, therefore, the Early Voting Law was inconsistent with and exceeded the scope of Article I, § 3.

If the lower court's decision is correct, then all voters (perhaps with the exception of traditional absentee voters acting under Title 9, Section 3, of the Election Law article) must be physically present to vote on Tuesday, in order for them to be at an election. By definition

– or, more precisely, by the lower court's definition of an election – if a voter is not present on Tuesday, that voter is absent "at the time of" the "election" and "unable to vote personally. . . ." And, because all constitutional and statutory restrictions other than absence or inability have been removed from Article I, § 3, there can be no inquiry into the reason for, duration of, or any other aspect related to the absence. Therefore, Article I, § 3 confers on the General Assembly the power to prescribe the time and place for that person to vote. That time and place can be - - indeed, must be - - a time and place other than the polls on Election Day.

The circuit court found "no indication that the General Assembly intended early-voters to be considered absentee voters." Even if this were so, the failure of the Legislature to identify the precise constitutional basis for its actions does not render a statute unconstitutional. *See McGlaughlin v. Warfield,* 180 Md. 75, 81 (1941) (disregarding mistaken citation); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 287-289 (1977) (holding that validity of a tax under the Commerce Clause should be judged by what the tax actually does, rather than on the words used while doing it). Nor are "magic words" mandated, and the lack of reference to the constitutional language is not a defect of constitutional magnitude. Statutes are presumed to be constitutional and are not to be found void unless the Constitutional impediment is clear. *See Maryland State Bd. of Educ. v. Bradford,* 387 Md. 353, 387 (2005). Finally, if a law is constitutional, it makes no difference whether it is codified in the State Government article, the Courts and Judicial Proceedings article, or the Health-General article. *See* Md. Ann. Code, art. 1, § 18 (statutory captions and headlines are mere catchwords). The "except as provided" language relied on by the lower court was not argued below. It does no more than demonstrate that early voting is not available to one who votes by other, traditional absentee methods. Article I, § 3 expressly authorizes the Early

Voting Law.

II. INJUNCTIVE RELIEF IS UNAVAILABLE IN THE ELECTION CONTEXT WHERE NO HARM IS SUFFERED BY THE PLAINTIFFS AND WHERE UNDUE DELAY AND PREJUDICE ARE SHOWN.

A. Because The Plaintiffs May Vote In Their Ward Or District On Election Day, And Because They Should Not Be Permitted To Defeat The Rights Of Other Voters, The Plaintiffs Cannot Demonstrate Any Harm Justifying Injunctive Relief.

Under *Colandrea,* 361 Md. at 381 and *El Bey,* 362 Md. at 354, irreparable injury is a necessary predicate for a final injunction. The sole injury alleged and found by the lower court was the intangible harm caused by an allegedly unconstitutional elections process, even though the plaintiffs themselves were not required to vote any differently than they would if the General Assembly had not created an early voting option. There is no allegation, for example, of vote dilution or fraud.

The lower court erred in holding that there was an irreparable injury. A court of equity will not "restrain acts, actual or threatened, merely because they are illegal *or transcend constitutional powers,* unless it is apparent that irremediable injury will result." *El Bey,* 362 Md. at 354 (emphasis added). "The mere assertion that apprehended acts will inflict irreparable injury is not enough. The complaining party must allege and prove facts from which the court can reasonably infer that such would be the result." *Id*.; *accord Carey v. Piphus,* 435 U.S. 247, 266-67 (1978) (denial of due process without proof of damages entitles one to nominal damages). The lower court's decision is clearly erroneous because it finds that merely holding an election in violation of a Constitutional provision is itself an irreparable harm.

As a general rule, a constitutional violation may be sufficient to show irreparable

injury. The general rule, however, as stated in *El Bey,* is not universal and is not applicable here. For example, it has been held that the assertion of a violation of First Amendment rights does not automatically require a finding of irreparable injury. *Hohe v. Casey,* 868 F.2d 69 (3d Cir. 1989), *cert. denied,* 493 U.S. 848 (1989); *Public Service Co. of N.H. v. Town of W. Newbury,* 835 F.2d 380, 383 (1st Cir. 1987). Where a claimed constitutional deprivation is speculative, it does not support a finding of irreparable injury. *Goldies Bookstore v. Superior Court of CA.,* 739 F.2d 466, 472 (9th Cir. 1984). A constitutional claim must be at least colorable to support a claim of irreparable injury. *Viacom International, Inc. v. FCC,* 828 F.Supp. 741, 743 (N.D. Cal. 1993).

Here, the plaintiffs' complaint is not that *they* are being deprived of the right to vote in their ward or district on election day. After all, the plaintiffs, themselves, are completely free to vote in their ward or district on the date of the primary election, September 12, and the date of the general election, November 7. No one is *compelling* them to vote early or at a different location - - EL § 10-301.1(c)(1) provides that a voter "may" vote at an early voting polling place.

Instead, the plaintiffs assert that *other* voters are improperly being *given* an *option* to vote on impermissible dates, and the plaintiffs contend that providing that option irreparably injures the plaintiffs. Those other voters, however, may, or may not, choose to exercise that option. In short, plaintiffs are claiming to assert - - or, more accurately, defeat - - the rights of third persons. Even if the plaintiffs were correct in their constitutional analysis, they have shown only that *other* voters have been given the option of waiving their constitutional rights; however, the plaintiffs have not shown that *they* have suffered injury, much less irreparable harm.

The plaintiffs cannot assert the rights of third parties. "Ordinarily, a person may not assert the constitutional rights of others." *Faulkner v. American Cas. Co.,* 85 Md. App. 595, 621 (1991), *cert. denied,* 323 Md. 1 (1991); *Turner v. State,* 299 Md. 565, 571, (1984); *Suessman v. Lamone,* 383 Md. 697, 712 (2004) (focus for standing is on party seeking to get his or her complaint before the court and not on the issues that he or she wishes to have adjudicated); *Committee for Responsible Development of 25th Street v. Mayor & City Council of Baltimore,* 137 Md. App. 60, 72-73 (2001) ("Standing to bring a declaratory judgment is the same as for other cases; there must be a legal interest such as one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. . . . Ordinarily, only the public authorities have standing to seek redress for violations of the public laws, and a private individual has standing to do so only when she can show that she has suffered some special damage [read injury] from such wrong differing in character and kind from that suffered by the general public.") (citations omitted); *Warth v. Seldin,* 422 U.S. 490 (1975).

Here, the plaintiffs - - having been deprived of no right themselves (because they are not compelled to vote early) - - improperly seek to deprive other voters of their option to select a more convenient time and place for voting. In short, the plaintiffs have suffered no injury and cannot bootstrap their claim on the alleged injuries of others, especially where those other voters are not being compelled to do anything and, instead, are given the option of selecting more convenient times and locations to vote. The plaintiffs have not shown the type of irreparable injury mandated by *Colandrea* and *El Bey* for entry of an injunction.

B. Equitable Principles Militate Against Injunctive Relief That Will Interfere With An Ongoing Elections Process.

Regardless of this Court's construction of the relevant constitutional provisions, injunctive relief would not be appropriate in this case. The plaintiffs have brought this claim on the eve of the electoral process; the timing of the suit and the effect of the relief sought is analogous to eleventh-hour challenges to redistricting plans. The Supreme Court has made clear on several occasions that injunctive relief may be inappropriate in a redistricting case even where a violation has been shown if the election is too close for the State to realistically be able to adopt and implement a new plan before the election. In *Reynolds v. Sims,* 377 U.S. 533, 585 (1964), the Court said:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

See also Wells v. Rockefeller, 394 U.S. 542, 547 (1969); *Kilgarin v. Hill*, 386 U.S. 120, 121 (1967). And in *Chavis v. Whitcomb*, 305 F. Supp. 1364 (D. Ind.1969), the Supreme Court permitted an election to be held in Indiana even though the District Court had found the Indiana apportionment statute to be unconstitutional. *Whitcomb v. Chavis,* 396 U.S. 1055 (1970); *Whitcomb v. Chavis,* 396 U.S. 1064 (1970). In that case, the federal court's plan was announced December 15, 1969, over two months before the beginning of the beginning of the

period for filing of declarations of candidacy, yet the Court stayed the order of the lower court, and later refused to dissolve the stay, thus allowing the election to take place under the plan that the lower court had held to be unconstitutional.

Following this rationale, courts have denied or dismissed claims for injunctive relief on equitable principles based on the nearness of the elections and the harm to the State, candidates and citizens from the disruption of the electoral process. In doing so, courts have looked to the elements of laches, that is whether the plaintiff delayed inexcusably or unreasonably in filing suit, and whether there is prejudice to the defendant. *See White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991) (finding Voting Rights Act challenge was barred by laches); *Knox v. Milwaukee County Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (same).

There can be no question that plaintiffs unreasonably delayed the filing of this suit, or that there would be substantial prejudice to the Board and citizens of Maryland if the requested relief were granted. Of paramount importance is the simple fact that the plaintiffs can offer no assurance that an injunction will not deny the right to vote to citizens who may have relied on the implementation of a law that is presumptively constitutional. It is difficult to envision a more compelling bar to an injunction at this stage—nineteen days from the filing of this brief until the first scheduled day for casting a ballot in the primary (and a mere eleven days from the date of argument.) Paling by comparison, but still compelling, is the disruption that would be caused to the election process by diverting State and local boards of election personnel to the task of dismantling the processes already underway and taking the necessary steps to inform over 3 million registered voters of the change. When these considerations are added to the resulting waste of substantial State resources, the plaintiffs' claim to injunctive

relief must certainly fail.

These are clearly the types of disruptions that make a grant of injunctive relief inappropriate in this context. For example, in *Pohoryles v. Mandel*, 312 F. Supp. 334 (D. Md.), *aff'd sub nom Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), the court found that the request for injunctive relief was barred by laches when the suit was filed on April 6, and the filing date was July 6. Similarly, in *Shapiro v. State of Md.*, 336 F. Supp. 1205 (D. Md. 1972), the Court found that injunctive relief was inappropriate where the suit was not filed until November 18, 1971, and the motion to dismiss was argued less than nine weeks before the filing date of March 6, 1972 for the May 16, 1972 primary. And in *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980), injunctive relief was refused where the case was not filed until two days before the beginning of the filing period, and, although the case was expedited, the hearing was not held until after the filing deadline had passed and only 5½ weeks remained before the primary election. In each of these cases, the election was further away than is the case here, and injunctive relief was denied nevertheless. For the same reasons, the plaintiffs' claim for injunctive relief should be denied.

C. The Plaintiffs' Claim Is Barred Because The Board Demonstrated Both Undue Delay and Prejudice to Itself, Voters, and Others.

The equitable doctrine of laches provides an alternative, but related, framework for balancing the interest in avoiding disruption to the elections machinery while providing a forum for the resolution of genuine disputes, brought as timely actions. Laches should be available as a defense in an election case under the *Reynolds* analysis. Courts should not ignore the mechanics of an imminent election because, to do so, may threaten the election in

a way that is far more dangerous than the alleged problem raised in the lawsuit.

SB 478 became law on February 16, 2006. HB 1368 became law on April 10, 2006. Nothing prevented plaintiffs from beginning preparation to sue on February 17.[15] The *Roskelly* plaintiffs, for example, were able to circulate petitions *and* file suit on *June* 27, 2006.[16] The plaintiffs in this case, however, did not sue until July 17, 2006. At no time have they offered any explanation for the delay. At most, plaintiffs' counsel provided an ambiguous reply to the trial court's question on this point. (E. 186-87.)

The circuit court held that the Board had failed to make a factual showing of inexcusable delay. (E. 192.) The Board pointed to its unanswered discovery requests, noting that those requests were aimed at developing the factual predicate. (E. 195-96.) The court responded that no facts that could be discovered would supply the missing information. (E. 196-97.)[17]

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[15]The Court may judicially notice the fact that the early voting legislation was widely publicized. Md. Rule 5-201. Because it has not had discovery, the Board does not know when the plaintiffs became aware of the bills' enactment. In light, however, of their silence, one may assume that they were aware of the statute in February 2006.

[16] The Board requests that this Court take judicial notice of this fact. Md. Rule 5-201. *Roskelly, et al. v. Lamone, et al.,* No. 141 (Md. Ct. App. Sept. Term 2006), was filed on *June* 27, 2006, and it proceeded through the trial court to this Court, where it was concluded by final decision on July 25, 2006. The *Roskelly* plaintiffs were able to commence their challenge to early voting long before the current plaintiffs, even though the *Roskelly* plaintiffs (unlike the present plaintiffs) had to circulate and submit referendum petitions.

[17] The Board timely propounded interrogatories, a request for production of documents, and a request for admission of facts, and promptly filed a motion for extension of time to respond to plaintiffs' motion for summary judgment and a Rule 2-501(d) affidavit. (E. 107-35.) The discovery requests were, in part, directed toward the laches defense. Under *Basiliko v. Royal National Bank of N.Y.,* 263 Md. 545, 548 (1971), defendants are entitled to discovery responses before they are required to respond to a motion for summary judgment. "The presence of unanswered interrogatories having an obvious bearing on this proceeding might

(continued...)

The standard for laches is undue delay, without reference to duration, plus a resulting disadvantage. *See, e.g., Salisbury Beauty Schools v. Board of Cosmetologists,* 268 Md. 32, 63 (1973). Whether delay is undue depends on all of the facts and circumstances. *See Day v. Day,* 237 Md. 229, 236 (1965). Where a party adopts a "wait and see" attitude, where the Board expended efforts during the period of delay, or where the electorate is prejudiced, the delay is undue. *See Ross,* 387 Md. at 672.

The facts presented demonstrate undue delay. A party seeking to challenge an election has an express duty to act promptly. As this Court noted: "Ross's unjustified delay must be juxtaposed against *his duty to petition for redress without delay* when the election approaches. . . ." *Ross,* 387 Md. at 669 (emphasis added) (citation omitted). Under these facts and circumstances, even without discovery, the Board has shown undue delay by the plaintiffs. The plaintiffs have presented no evidence explaining their delay.

Relying on two decisions of this Court, the circuit court held, (E. 189-95; 280), that the doctrine of laches did not apply to bar a challenge contending that a statute is intrinsically void. *See Ross v. State Board of Elections,* 387 Md. 649, 670, 671 n. 9 (2005); *Schaeffer v. Anne Arundel County,* 338 Md. 75, 80 (1995). *Ross* and *Schaeffer* are factually distinguishable; this Court has never held that a person may delay seeking relief and

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[17](...continued)
well have been a basis for postponement of a hearing on the motion for summary judgment. . . ." That analysis should apply with greater force when a court consolidates a hearing on the merits with a hearing on a temporary restraining order, and when the court also suggests factual deficiencies in the defense presented. In short, the Board's defense was rejected on factual grounds at a time when the pertinent facts were in possession of the plaintiffs. The Board was entitled to find out, for example, if the plaintiffs made a tactical decision to delay filing suit while *Roskelly, et al. v. Lamone, et al.,* No. 141 (Md. Ct. App. Sept. Term 2006), was pending.

jeopardize an election; and, *Reynolds v. Sims,* 377 U.S. 533, 585 (1964), and its progeny[18] provide persuasive guidance in the election context.[19]

In *Ross,* 387 Md. at 669-70, 705, this Court considered the impact of plaintiffs' delay on the electorate in holding that laches was a bar. The Court noted that: *"What amounts to 'prejudice,' such as will bar the right to assert a claim after the passage of time, depends upon the facts and circumstances of each case, but it is generally held to be any thing that places [the defendant] in a less favorable position." Id.* at 669-70 (citations omitted) (emphasis added). On the undisputed evidence, the Board, the local boards of elections, voters, and others were prejudiced by the plaintiffs' delay.

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[18] *Soules v. Kauians for Nukolii Campaign Committee,* 849 F.2d 1176, 1182 (9th Cir. 1988) (equal protection challenge to election barred on the ground of laches).

[19] It is no answer to this question to rely on the "balance of convenience" factor applicable to requests for interlocutory injunctive relief as a solution. Here, the circuit court circumvented that factor by deciding, over the Board's objection, to consolidate the hearing on the merits with the interlocutory hearing, under Rule 15-505(b), and by then rejecting the Board's assertion that it must balance the convenience when entering a final injunction. If laches is unavailable as a defense, then "balance of convenience" may be equally unavailable.

The circuit court declined to apply the standard for granting a permanent injunction urged by the Board. The circuit court instead pointed to P. Niemeyer and L. Schuett, Maryland Rules Commentary 619 (3d ed. 2003) as authority for the proposition that a final injunction is proper when a plaintiff shows "irreparable harm from something that is wrongful." Based on that treatise, the circuit court concluded that it need not review the "balance of convenience" or "public interest" factors that should be considered in assessing a claim for interlocutory injunctive relief. A more satisfactory standard for permanent injunctions in election cases was set forth in *eBay Inc. v. MercExchange, L.L.C.,* 126 S. Ct. 1837, 1839 (2006) (reaffirming four-factor test for permanent injunction, based on "well-established principles of equity"). If this Court were to adopt that standard, the availability of a laches defense would be less critical; adoption of that standard would also mandate reversal of the decision below because the circuit court did not consider those factors in granting a permanent injunction.

Some voters may have relied on their right to vote early in making their plans.[20] The proffer shows that any attempt to communicate new, changed policies to 3.3 million voters, at this late date, presents a real risk of voter confusion and error. (E. 140-41 (PFN 11).) And, voters will be inconvenienced. As shown by the undisputed proffer, the Board and local boards conducted extensive voter outreach programs while plaintiffs were silent. Public funds will have been wasted. Given the undue delay and the prejudice, laches should bar the plaintiffs' claims.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court for Anne Arundel County should be reversed.

Respectfully submitted,

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[20]Similarly, candidates may have made strategic campaign decisions that cannot now be reversed.

Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman - 13 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of August 2006, a copy of the foregoing Brief of Petitioners was sent by email and served by hand delivery on:

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APPENDIX

Pertinent Statutes and Constitutional Provisions

Md. Code Ann., Election § 10-301.1

Generally

(a) Except as provided under Title 9, Subtitle 3 of this article, a voter shall vote:

(1) in the voter's assigned precinct on election day; or

(2) in an early voting polling place as provided in this section.

Voting hours

(b) Each early voting polling place shall be open for voting:

(1) beginning the Tuesday before a primary or general election through the Saturday before the election; and

(2) during the hours between 7 a.m. and 8 p.m. during the period specified under paragraph (1) of this subsection.

Establishment of polling places

(c)(1) As provided in this subsection, each local board shall establish the early voting polling places in its county.

(2)(i) In the following counties, the local board shall establish three early voting polling places for each primary or general election as specified in subparagraph (iii) of this paragraph:

1. Anne Arundel;
2. Baltimore City;
3. Baltimore County;
4. Harford;
5. Howard;
6. Montgomery; and
7. Prince George's.

(ii) 1. Except for Charles County, in each county other than a county specified in subparagraph (i) of this paragraph, the local board shall establish one early voting polling place for each primary or general election in the county seat.

2. In Charles County, the early voting polling place shall be established in Waldorf.

(iii) Early voting polling places shall be established at the locations specified in this subparagraph for the following counties:

1. Anne Arundel County:
   A. Brooklyn Park Senior Center 202 Hammonds Lane Baltimore, MD 21225;
   B. West County Library 1325 Annapolis Road Odenton, MD 21114; and
   C. American Legion Post #141 1707 Forest Drive Annapolis, MD 21401;
2. Baltimore City:
   A. Morgan State University 1700 E. Cold Spring Lane Baltimore, MD 21251;
   B. Coppin State University 2500 North Avenue Baltimore, MD 21216; and
   C. Du Burns Recreation Center 1301 S. Ellwood Avenue Baltimore, MD 21224;

3. Baltimore County:
A. Randallstown Library 8604 Liberty Road Randallstown, MD 21133;
B. Towson University 8000 York Road Towson, MD 21252; and
C. Essex Library 1110 Eastern Boulevard Essex, MD 21221;
4. Harford County:
A. Aberdeen Branch Library 21 Franklin Street Aberdeen, MD 21001;
B. Harford County Government Building 212 South Bond Street Bel Air, MD 21014; and
C. Joppa Branch Library 655 Towne Center Drive Joppa, MD 21085;
5. Howard County:
A. East Columbia Library (Owen Brown) 6600 Cradlerock Way Columbia, MD 21045;
B. Miller Branch Library 9421 Frederick Road Ellicott City, MD 21042; and
C. Savage Branch Library 9525 Durness Lane Laurel, MD 20723;
6. Montgomery County:
A. Germantown Public Library 12900 Middlebrook Road Germantown, MD 20874;
B. Silver Spring Public Library 8901 Colesville Road Silver Spring, MD 20910; and
C. Rockville City Hall 111 Maryland Avenue Rockville, MD 20850; and
7. Prince George's County:
A. Upper Marlboro Library 14730 Main Street Upper Marlboro, MD 20772;
B. Harmony Hall Regional Center 10701 Livingston Road Fort Washington, MD 20744; and
C. Hyattsville Public Library 6530 Adelphi Road Hyattsville, MD 20872.

(3) If the State Administrator determines, or a local election director notifies the State Administrator, that a site specified under this subsection cannot be used to accommodate early voting, the State Administrator shall select another site, proximate to the site rejected, that is accessible to voters.

(4) Beginning 30 days prior to each primary and general election, the State Board and each local board shall undertake steps to inform the public about early voting and the location of early voting polling places in each county, including a series of public service media announcements, mailings to all registered voters, and other efforts.

(5) Polling places established by a local board under this section shall meet the requirements of § 10-101 of this title.

Voting place

(d)(1) A voter may vote at any early voting polling place in the voter's county of residence.

(2) The local board shall ensure that every ballot style used in the county for the election is available at the early voting polling places.

Regulations

(e) On or before January 1, 2006, the State Board shall adopt regulations and guidelines for the conduct of early voting.

Provisions applicable to election day

(f) Any provision of this article that applies to election day also shall apply to early voting.

Md. Const., Art. I, § 1 Elections by ballot; qualifications to vote

All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

Md. Const., Art. I, § 3 Absentee voting

The General Assembly of Maryland shall have 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 and for voting by other qualified voters who are unable to vote personally and for the manner in which and the time and place at which such absent voters may vote, and for the canvass and return of their votes.

Md. Const., Art. 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.

Md. Const., Art. XV, § 7 General elections

All general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur.

Md. Const., Art. XVII, § 1 Purpose; definition of officers

The purpose of this Article is to reduce the number of elections by providing that all State and county elections shall be held only in every fourth year, and at the time provided by law for holding congressional elections, and to bring the terms of appointive officers into harmony with the changes effected in the time of the beginning of the terms of elective officers. The administrative and judicial officers of the State shall construe the provisions of this Article so as to effectuate that purpose. For the purpose of this Article only the word "officers" shall be construed to include those holding positions and other places of employment in the state and county governments whose terms are fixed by law, but it shall not include any appointments made by the Board of Public Works, nor appointments by the Governor for terms of three years.

Md. Const., Art. XVII, § 2 Time of elections for State and county officers

Except for a special election that may be authorized to fill a vacancy in a County Council under Article XI-A, Section 3 of the Constitution, elections by qualified voters for State and county officers shall be held on the Tuesday next after the first Monday of November, in the year nineteen hundred and twenty-six, and on the same day in every fourth year thereafter.

EARLY AND ABSENTEE VOTING LAWS (AS OF 7/26/06)

16 states allow no-excuse early voting. (AZ, AR, CA, CO, FL, GA, IL, LA, MD, NV, NM, NC, ND, TN, TX, WV)
15 states allow no-excuse in-person absentee voting. (AK, HI, ID, IN, IA, KS, ME, MT, NE, OK, SD, UT, VT, WI, WY)
4 states and the District of Columbia require an excuse for in-person absentee voting. (DC, KY, MN, MO, VA)
1 state is all vote-by mail. (OR)
14 states do not allow early or in-person absentee voting. (AL, CT, DE, MA, MI, MS, NH, NJ, NY, OH, PA, RI, SC, WA - in Washington, 34 of 39 counties have vote by mail)
29 states allow no-excuse absentee voting by mail. (AK, AZ, AR, CA, CO, FL, GA, HI, ID, IA, KS, ME, MD, MT, NE, NV, NJ, NM, NC, ND, OH, OK, OR, SD, UT, VT, WA, WI, WY)
21 states and the District of Columbia require an excuse to vote absentee by mail. (AL, CT, DE, DC, IL, IN, KY, LA, MA, MI, MN, MS, MO, NH, NY, PA, RI, SC, TN, TX, VA, WV)

State	Early Voting	Absentee Voting
Alabama	No. In-person absentee voting repealed in 2001.	Excuse required. Source: Code of Alabama Section 17-10-3 and Secretary of State Web site Source: Code of Alabama Section 10-17-12 and Secretary of State Web site.
Alaska	Yes. In-person absentee voting. No excuse required. 15 days prior to an election through election day at regional election office buildings and airports. Source: Alaska Division of Elections Web site and Alaska Statute 15.20.061	No excuse required. Source: Alaska Statute 15.20.010
Arizona	Yes. Early voting. No excuse required. Starts 33 days before election day and ends 5pm the Friday before election day.	No excuse required. Source: Arizona Revised Statutes 16-541(A)
Arkansas	Yes. Early voting. No excuse required. Early voting shall be available to any qualified elector who applies to the county clerk's designated early voting location, beginning fifteen (15) days before a preferential primary, general primary, general election, or general run-off election between the hours of 8:00 a.m. to 6:00 p.m. Monday through Friday and 1:00 p.m. to 4:00 p.m. Saturday and ending at 6:00 p.m. on the Monday before the election. Ark. Code Ann. 7-5-418	No excuse required. To be qualified to vote an absentee ballot, you must meet one of the following criteria: You will be unavoidably absent from your polling site on election day (the law does not require you to give a reason). Source: Arkansas Secretary of State Web site
California	Yes. Early voting. No excuse required. Starting 29 days prior to election. Source: Calif. Election Code 3018	No excuse required. Source: Calif. Election Code 3003

Colorado	Yes. Early voting. No excuse required. Starting 15 days prior to general election. Source: Colo. Rev. Stat. 1-8-202	No excuse required. Source: Colo. Rev. Stat. 1-8-102
Connecticut	No.	Excuse required. Source: Conn. Election Code 9-135
Delaware	No.	Excuse required. Source: Delaware Code 5502
District of Columbia	Yes. In-person absentee voting. Excuse required. Source: DC Board of Elections and Ethics Web site	Excuse required. Source: D.C. Code Ann. 1-1001.09 (b)(2)
Florida	Yes. Early voting. No excuse required. Begins 15 days prior to election. Source: Fla. Stat. Title 9 Chapter 101.657	No excuse required.
Georgia	Yes. Advance voting. No excuse required. An elector who casts an absentee ballot in person at the registrar's office or absentee ballot clerk's office during the period of Monday through Friday of the week immediately preceding the date of a primary, election, or run-off primary or election shall not be required to provide a reason as identified in subsection (a) of this Code section in order to cast an absentee ballot in such primary, election, or run-off primary or election. Source: Ga. Code 21 - 2-380(b)	No excuse required. Source: Ga. Code 21-2-381
Hawaii	Yes. In-person absentee voting. No excuse required. The absentee polling places shall be open no later than ten working days before election day, and all Saturdays falling within that time period, or as soon thereafter as ballots are available. Source: Hi. Code 15-7	No excuse required. Source: Hi. Code 15-4(a) 25-1119
Idaho	Yes. In-person absentee voting. No excuse required. Source: Idaho Statutes 34-1006	No excuse required Source: Idaho Statutes 34-1001
Illinois	Yes. Early voting. No excuse required. The period for early voting by personal appearance begins the 22nd day preceding a general primary, consolidated primary, consolidated, or general election and extends through the 5th day before election day. A permanent polling place for early voting must remain open during the hours of 8:30 a.m. to 4:30 p.m., or 9:00 a.m. to 5:00 p.m., on weekdays and 9:00 a.m. to 12:00 p.m. on Saturdays, Sundays, and holidays. Source: 10 Ill. Comp. Stat. Ann. 5/19A-15	Excuse required. Source: 10 Ill. Comp. Stat. Ann. 5/19-1
Indiana	Yes. In-person absentee voting. No excuse required. The voter may vote before the board not more than twenty-nine (29) days nor later than noon on the day before election day. Source: IC 3-11-10-26	Excuse required. Source: IC 3-11-10-24

Iowa	Yes. In-person absentee voting. No excuse required. Not more than forty days before the date of the primary election or the general election, the commissioner shall provide facilities for absentee voting in person at the commissioner's office. Source: Iowa Code, Title 2, Chapter 53.10	No excuse required. Source: Iowa Code, Title 2, Chapter 53.1
Kansas	Yes. Advance voting. No excuse required. Source: Kan. Stat. 25 - 1122a You may vote in person in the county election office starting the Tuesday before election day, or up to 20 days before the election, depending on the county. Source: Kansas Secretary of State Web site	No excuse required. Source: Kan. Stat.
Kentucky	Yes. In-person absentee voting. Excuse required. Absentee voting shall be conducted in the county clerk's office or other place designated by the county board of elections and approved by the State Board of Elections during normal business hours for at least the twelve (12) working days before the election. A county board of elections may permit absentee voting to be conducted on a voting machine for a period longer than the twelve (12) working days before the election. Source: Ky. Rev. Stat. 117.085(c)	Excuse required. Source: Ky. Rev. Stat. 117.085(a) and Ky. Rev. Stat 117.075
Louisiana	Yes. Early voting. No excuse required. The periods for conducting early voting shall be from twelve days to six days prior to any scheduled election. Source: La. Rev. Stat. 18-1309	Excuse required. Source: La. Rev. Stat. 18-303(B)
Maine	Yes. In-person absentee voting. No excuse required. You may go in person to vote at the clerk’s office as soon as absentee ballots are available. Absentee ballots are available 30 to 45 days before the election at the municipal clerk’s office. Source: Maine Rev. Stat. Title 21A 9-753-B(8)	No excuse required. Source: Maine Rev. Stat. Title 21A, Chapter 9-751
Maryland	Yes. Early voting. No excuse required. Each early voting polling place shall be open for voting: (1) beginning the Tuesday before a primary or general election through the Saturday before the election; and (2) 8 hours each day during the period specified under paragraph (1) of this subsection. Source: Maryland Code, Chapter 10-301.1	No excuse required. Source: Maryland Code, Chapter 9-304
Massachusetts	No.	Excuse required. Source: M.G.L. Chapter 54, Section 86
Michigan	No.	Excuse required. Source: Michigan Compiled Laws Act 116 of 1954, Secion 168-759

Minnesota	Yes. In-person absentee voting. Excuse required. An eligible voter may vote by absentee ballot during the 30 days before the election in the office of the county auditor and at any other polling place designated by the county auditor. Source: Minnesota Statues 203B.081	Excuse required. Source: Minnesote Stautes 203B.02
Mississippi	No.	Excuse required.
Missouri	Yes. Advance voting. Excuse required. Advance voting period shall begin fourteen days prior to such election and end at 5:00 p.m. on the Wednesday before the day of such election. Source: Missouri Rev. Stat. Section 115-126	Excuse required. Source: Missouri Rev. Stat. Section 155.277
Montana	Yes. In-person absentee voting. No excuse required. Begins 30 days prior to general election. Source: Mont. Code Ann. 13-13-222	No excuse required. Source: Mont. Code Ann. 13-13-201
Nebraska	Yes. In-person absentee voting. No excuse required. Source: Neb. Stat. 32 - 942	No excuse required. Source: Neb. Stat. 32-938
Nevada	Yes. Early voting. No excuse required. The period for early voting by personal appearance begins the third Saturday preceding a primary or general election and extends through the Friday before election day, Sundays and holidays excepted. Source: Nev. Rev. Stat. 293.356	No excuse required. Source: Nev. Rev. Stat. 293.313
New Hampshire	No.	Excuse required. Source: NH Rev. Stat. 657:1
New Jersey	New Jersey No.	No excuse required. Source: New Jersey Statutes 19:57-2-4
New Mexico	Yes. Early voting. No excuse required. Commencing on the third Saturday prior to an election, an absent voter may vote in person, on an electronic voting machine at an alternate location established by the county clerk. Source: N.M. Stat. 1-6-5G	No excuse required. Source: N.M. Stat. 1-6-3
New York	No.	Excuse required. Source: N.Y. Stat. 8-400

North Carolina	Yes. One-stop absentee voting. No excuse required. Not earlier than the third Thursday before an election, in which absentee ballots are authorized, in which a voter seeks to vote and not later than 1:00 P.M. on the last Saturday before that election, the voter shall appear in person only at the office of the county board of elections, except as provided in subsection (g) of this section. A county board of elections shall conduct one-stop voting on the last Saturday before the election until 1:00 P.M. and may conduct it until 5:00 P.M. on that Saturday. Source: N.C. Gen. Stat. 163-227.2	No excuse required. Source: N.C. Gen. Stat. 163-226a
North Dakota	Yes. Early voting. No excuse required. Early voting must be authorized during the fifteen days immediately before the day of the election. The county auditor shall designate the business days and times during which the early voting election precinct will be open and publish notice of the dates and times in the official county newspaper once each week for three consecutive weeks immediately before the day of the election. Source: N.D. Stat. 16.1-07-15	No excuse required. Source: N.D. Stat. 16.1-07-01
Ohio	Ohio No.	No excuse required. Source: O.R.C. 3509.02
Oklahoma	Yes. In-person absentee voting. No excuse required. A registered voter may apply for an in-person absentee ballot at a location designated by the secretary of the county election board from 8 a.m. to 6 p.m. on Friday and Monday immediately preceding any election and from 8 a.m. to 1 p.m. on Saturday immediately preceding a state or federal election. Source: Ok. Stat. 26-14-115	No excuse required. Source: Ok. Stat. 26-14-105
Oregon	All mail-in voting.	No excuse required. Source: Oregon Stat. 252.020
Pennsylvania	No.	Excuse required. Source: Pennsylvania Department of State Web site
Rhode Island	No.	Excuse required. Source: R.I. Stat. 17-20-2
South Carolina	No.	Excuse required. Source: S.C. Code 7-15-320
South Dakota	Yes. In-person absentee voting. No excuse required. At anytime prior to an election, a voter may apply in person to the person in charge of the election for an absentee ballot during regular office hours up to 3:00 p.m. of the day of the election. Source: S.D. Code 12-19-2.1	No excuse required. Source: S.D. Code 12-19-1

Tennessee	Yes. Early voting. No excuse required. A voter who desires to vote early shall go to the county election commission office within the posted hours not more than twenty (20) days nor less than five (5) days before the day of the election. Source: Tenn. Code 2-6-102	Excuse required. Source: Tenn. Code 2-6-201
Texas	Yes. Early voting. No excuse required. Early voting in person starts 17 days before each election unless the first day falls on the weekend, then early voting begins on the following Monday and ends 4 days before each election. Source: Tex. Elec. Code 81.001	Excuse required. Source: Tex. Elec. Code 82.001
Utah	Yes. In-person absentee voting. No excuse required. Source: Utah Elec. Code 20A-3-304	No excuse required. Source: Utah Elec. Code 20A-3-301
Vermont	Yes. In-person absentee voting. No excuse required. Voting starts 30 days before the primary or general election. Source: Vermont Stat. 17 V.S.A. 2537	No excuse required. Source: Vermont Stat. 17 V.S.A 2531
Virginia	Virginia Yes. In-person absentee voting. Excuse required. Absentee voting in person begins approximately 45 days before a November General Election and approximately 30 days before other elections and ends at 5:00 p.m. on the Saturday before the election. Source: Va. Code 24.2-707	Excuse required. Source: Va. Code 24.2-700
Washington	Washington No.	No excuse required. Source: R.C.W. 29A.40.010
West Virtginia	Yes. Early voting. No excuse required. The regular period of early voting in person begins twenty days before the election and continues until three days before the election. Source: W.V. Code 3 - 3-1(a)	Excuse required. Source: W.V. Code 3-3-1(b)
Wisconsin	Yes. In-person absentee voting. No excuse required. Ballots are available 3 weeks ahead of each election and must be received by 5 p.m. the day before an election.	No excuse required. Source: Wi. Code 6.20
Wyoming	Yes. In-person absentee voting. No excuse required.	No excuse required. Source: Wyo. Stat. 22-9-202