IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2007

No. 122

STATE BOARD OF ELECTIONS,

Appellant,

v.

CLIFFORD E. SNYDER, JR., *et al.*,

Appellees.

On Appeal From the Circuit Court for Anne Arundel County
(The Honorable Paul A. Hackner, presiding without a jury)

BRIEF OF APPELLEE RICHARD BOLTUCK

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For nearly four decades, generations of young Marylanders have voted without restriction for the first time at age 17 in any and all primary election contests, including non-partisan Board of Education races. This state policy has never been controversial, much less challenged in Maryland courts by any allegedly aggrieved citizen. Based on this history, the absence of any court ruling ever invalidating their right to vote at this age, or any changes by the General Assembly to Maryland's

longstanding and consistently applied voter registration statute, Election Law Article ("EL") § 3-102, the present cohort of over 15,000 registered 17-year old Maryland voters reasonably anticipated that they, too, were entitled to vote in the primary election scheduled for Tuesday, February 12, 2008.

However, extrapolating from a single sentence of this Court's decision in *Lamone v. Capozzi*, the State Board of Elections, on the advice of a single Assistant Attorney General, overturned 40 years of elections law practice in Maryland and initially sought a wholesale invalidation of § 3-102 as being in violation of Article I, § 1 of the Maryland Constitution. E. 63-70.

After a tortured process,[1] the State Board of Elections has now determined to allow application of § 3-102, but only as to the primaries of the Democratic and Republican Parties. E. 71-75. However, that determination explicitly reaffirmed the earlier decisions to forbid 17 year olds from voting in non-partisan primary elections.

For the reasons set forth below, Appellee RICHARD BOLTUCK respectfully submits that this Court should affirm the Circuit Court's ruling in all material respects, and allow those registered voters who are 17 and will be 18 prior to the November general election to vote without restriction in the February 12, 2008 primary election, as mandated by the provisions of § 3-102.

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[1] Appellee directs the Court's attention to the page of the State Board of Elections' website which addresses the issue of the voting rights of 17 year olds who will be 18 before the November general election. http://elections.state.md.us/voter_registration/17_year_olds.html. How a lay member of the public, either a teenage voter or a parent of one, is supposed to make sense of this language is beyond reasonable comprehension.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE CONSTITUTIONAL REQUIREMENTS FOR VOTING ONLY APPLY TO CONSTITUTIONAL ELECTIONS

At the trial judge's instigation, the parties argued the applicability of this Court's decision in *Hanna v. Young*, 84 Md. 179 (1896) to the issues before the circuit court. Following that argument, the trial judge concluded that the Maryland Constitution does not apply to non-partisan elections involving Board of Education or municipal elections. E. 189. Appellee RICHARD BOLTUCK submits that this conclusion was correct and that this Court should affirm the decision of the Circuit Court on this basis.

In its brief, Appellant attempts to distinguish *Hanna* on several bases. As an initial matter, Appellee disputes the notion advanced by Appellant that *Hanna* is some type of rogue case that is outside the mainstream of this Court's decision-making. Review of numerous cases, both before and after *Hanna*, makes clear that it was correctly decided and that it remains good law that this Court should apply it to the instant case.

Hanna addressed the question of whether, in the context of a municipal election, the General Assembly could impose greater requirements on voter eligibility than those set forth in Article I, § 1 of the Constitution. In answering this question

in the affirmative,[2] this Court, rejecting the constitutional attack on the statute establishing municipal elections in Bel Air, held that:

> "It is only at elections which the constitution itself requires to be held, or which the legislature, under the mandate of the constitution, makes provision for, that persons having the qualifications set forth in said section 1, art. 1, are by the constitution of the state declared to be qualified electors."

Hanna, *supra*, 84 Md. at 183. This was not the first case to make a distinction between "constitutional" and "non-constitutional" elections, nor was it the last.

Prior to *Hanna*, this Court decided the case of *Smith v. Stephan*, 66 Md. 381 (1887). In that case, a challenge was brought to a municipal election in Westminster that was allegedly held in derogation of the constitutional requirement that only registered voters be allowed to vote. In rejecting this claim, this Court opined as follows:

> "This section of the constitution denies the right to vote at federal and state elections, and municipal elections in the city of Baltimore, to all persons whose names do not appear in the list of registered voters. It makes no allusion to municipal elections in any other town or city. The distinction is clearly made in the constitution between federal and state elections on one side and municipal elections on the other."

This constitutional interpretation was subsequently enacted into law by the General Assembly, and it remains the law today.

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[2] Appellee acknowledges that this fundamental holding of *Hanna* lacks controlling force in light of numerous recent cases, most recently *Nader for President 2004 v. Maryland State Board of Elections*, 399 Md. 681, 697, 926 A.2d 199, 208 (2007). However, the distinction that *Hanna* made between those elections covered by the Constitution and those beyond its mandate, Appellee submits, remains of controlling vitality. Moreover, Appellee notes, as argued below, that there is a qualitative difference between *restrictions* on voter eligibility and statutory *enhancements* to voter eligibility, at least insofar as primary elections are concerned.

Subsequent to *Hanna*, numerous decisions of this Court upheld the general principle that primary elections, in particular, were not subject to the constitutional voter qualifications of Art. I, § 1.

In *Kenneweg v. Allegany County Commissioners*, 102 Md. 119, 62 A. 249 (1905), this Court was faced with the question of whether a law passed by the General Assembly which addressed solely primary elections was subject to attack on the basis that it violated the Constitution. This Court rejected such an attack.

> "The General Assembly possesses all legislative power and authority, except in such instances and to such extent as the Constitutions of the state and of the United States have imposed limitations and restraints thereon. In this respect the Legislature differs from the Congress of the United States, which has, and can exercise, only such power as the federal Constitution expressly or by necessary implication confers upon it. In the General Assembly plenary power to legislate is vested, unless restrained by the Constitution. In the Congress the power to legislate is not vested, unless confided by the federal Constitution. In the state Constitution we look, not for the power of the General Assembly to adopt an enactment, but for a prohibition against its adoption. In the federal Constitution we look, not for the prohibition, but for the delegated power to enact a measure. The General Assembly being, then, the depository of all legislative power, except when restrained by the organic law, it follows that it is clothed with full power to enact a primary election law, if there is no provision in the Constitution depriving it of that authority. *There is no such provision to be found in the Constitution of the state*. It is true that section 42 of article 3 of the Constitution [now Art. I, § 7] provides: "The General Assembly shall pass laws for the preservation of the purity of elections"-but *the power to enact a primary election law lies back of and beyond this provision, and is not derived from it at all*. The power to legislate in regard to elections-primary or general-if unrestrained by the Constitution itself, is inherent in the General Assembly, and the provision just cited, instead of conferring the power, is a mandate to execute a power implicitly assumed to exist independently of the mandate. "The General Assembly shall pass laws," is a direction to bring into activity an

antecedent and independent authority."

Kenneweg, *supra*, 102 Md. at 121, 62 A. at 250 (emphasis added).

In *Jackson v. Norris*, 173 Md. 579, 195 A. 576 (1937), this Court, citing *Smith* and *Hanna*, held that, while there is a constitutional right to a write-in ballot,

> "[t]he conclusion of the court that it is the constitutional right of an elector to cast his ballot for whom he pleases, and that it is necessary for him to be given the means and the reasonable opportunity to write or insert in the ballot the names of his choice is subject to this limitation that the right is not applicable to primary elections nor to municipal elections other than those of the city of Baltimore. This exception must be made since the provisions of article 1, § 5 of the Constitution have been held to apply *solely* to the right to vote at federal and state elections, and municipal elections in the city of Baltimore."

Jackson, *supra*, 173 Md. at 603-604, 195 A. at 588 (emphasis added).

In *Hennegan v. Geartner*, 186 Md. 551, 47 A.2d 393 (1946), this Court, quoting at length from *Kenneweg*, *supra*, concluded that the legislature had the power to restrict "voting at a primary to those who legally and properly belong to the party for which the primary is held." *Hennegan*, *supra*, 186 Md. at 558, 47 A.2d at 396. In so concluding, this Court opined that the "Legislature has power to create and regulate primary elections, subject only to such prohibition as may be found in the State Constitution, and subject as to Congressional elections to any prohibitions in the Federal Constitution." *Id*. at 556, 47 A.2d at 395.

This Court's decision in *Jackson*, *supra*, regarding the unavailability of write-in votes in primary elections, was subsequently reaffirmed in three later cases of this Court. *See Board of Supervisors of Elections of Baltimore City v. Blunt*, 200 Md.

120, 123, 88 A.2d 474, 475 (1952), *Hill v. Mayor and Town Council of Colmar Manor*, 210 Md. 46, 50-51, 122 A.2d 462, 464 (1956) and particularly *State Administrative Board of Elections v. Calvert*, 272 Md. 659, 327 A.2d 290 (1974), in which this Court, applying *Kenneweg*, *Jackson* and *Hennegan*, held that

> "[a] primary election is merely an officially supervised party nominating procedure. It appears to have been unknown in Maryland prior to the first decade of this century. See Hennegan v. Geartner, 186 Md. 551, 47 A.2d 393 (1946), and Kenneweg v. Allegany County, 102 Md. 119, 62 A. 249 (1905). In Jackson v. Norris, 173 Md. 579, 195 A. 576 (1937), this Court held that voting machines must be so constructed and arranged as to permit an individual to cast a vote for a candidate whose name did not appear on the official ballot but said 'that the right is not applicable to primary elections . . ..' In Supervisors of Elections v. Blunt, 200 Md. 120, 88 A.2d 474 (1952), the writ of mandamus was sought to compel 'the write-in slots on the voting machines of Baltimore City (to be) unlocked for the Primary Election to be held on May 5, 1952 so as to give the voters at said Primary Election an opportunity to write on the ballot and mark in the proper place the name of any person other than those printed on the ballot.' In an opinion by Judge Henderson this Court said that 'the write-in privilege was never applicable to primary elections, and, indeed, is inconsistent with the whole theory of primary elections.' The election laws were extensively revised by Chapter 739 of the Acts of 1957. At that time there was written into the law a provision, now found in Code (1957, 1971 Repl.Vol.) Art. 33, s 5-3(d), specifically providing that '(t)here shall be no names of candidates written in at primary elections,' thus recognizing the decision in Blunt.
>
> "The fact that primary elections are a party matter for the selection of candidates was set forth for this Court by Chief Judge Marbury in Hennegan v. Geartner, supra. In that case Geartner took issue with the provision of law, now embodied in Code (1957, 1971 Repl.Vol., 1973 Cum.Supp.) Art. 33, s 3-8(b), specifying when one might change his party affiliation. Judge Marbury there said for the Court:
>
> "'Primaries are provided only for majority parties. Those belonging to minor parties must nominate their candidates by

> convention or petition (Article 33, Sections 32, 33, and 34). No individual may become an independent candidate at the general election who has been a candidate for nomination by a political party in a primary preceding the general election at which he desires to stand for office. Article 33, Section 34. No one can file as a candidate for a party unless he is affiliated with that party. Article 33, Section 49. An exception is made to this last rule for those seeking the office of judge.
>
> "'All of the provisions above quoted and referred to indicate the intention of the Legislature to restrict voting at a primary to those who legally and properly belong to the party for which the primary is held. If this can be lawfully done, the permission to a comparatively small number of voters (new and declined) to join a party within six months of the primary, and to participate in the primary, could not invalidate a general provision designed to carry out a lawful intention. The right given them might even be upheld on the doctrine of de minimis, but it is not necessary to invoke this. The direct primary is a creature of the Legislature, designed for the purpose of permitting the members of a party to select their candidates under official supervision and control. According to its history and interpretation in this State, it is substituted for conventions or meetings of voters. Such conventions or meetings were always restricted to those belonging to the parties by whom they were held, and so the direct and official primary is so restricted.' Id. 186 Md. at 558, 47 A.2d at 396.

Most recently, this Court has cited with approval the relevant language of *Hennegan*, *supra*, 186 Md. at 556, 47 A.2d at 395. *Suessmann v. Lamone*, 383 Md. 697, 708, 862 A.2d 1, 7 (2003).

What is clear from the foregoing analysis is that, contrary to the assertions of the Appellant, there is a definite line of cases running from *Hanna* down to a case decided by this Court as recently as 2003. These cases establish that, as stated in *Hanna* and as reaffirmed consistently in the subsequent cases, there is a class of elections that do not fall within the ambit of the various constitutional provisions

regarding election qualifications. Despite the best efforts of the Appellant to isolate and delegitimize the force of this Court's *Hanna* decision, it remains good law.

The only remaining question is whether elections for Board of Education positions fall within the ambit of *Hanna* and its progeny. Appellant attempts to characterize *Hanna* as creating a "broad carve-out from the voter eligibility requirements of Art. I, § 1." Appellant's Brief at 14. This is simply not so. The only application of *Hanna* that is required is with respect to Board of Education elections. The parties agree that as to partisan party primaries, these parties, as well as others similarly situated, may vote.[3] As to municipal elections, this Court in *Smith*, *supra*, 66 Md. at 383, concluded that munipal elections other than in Baltimore City are not within the ambit of the constitutional standards governing elections. This principle is now codified in the Maryland Election Law Article at § 1-101(v)(3) (elections defined to exclude municipal elections other than those in Baltimore City). The only issue that *Hanna* addresses that requires this Court's attention is the question of the right to vote in non-partisan Board of Education contests and local ballot questions. Appellant makes no effort to address the issue of local ballot questions (*see* Appellant's Brief at 14-22), and as a result Appellee submits that this issue has been waived pursuant to Rule 8-131.

That leaves only the question of Board of Education elections, and Appellee

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[3] Appellee agrees fully with the position of the State Board of Elections as set forth in Appellant's Brief at 22 n.5. The issue of voting in party primaries is not before this Court and should not be considered.

notes that such elections only occur in certain counties, and thus cannot be considered to be “constitutionally mandated,” which is the touchstone of the *Hanna* reasoning and analysis. As a result, Appellee respectfully submits that the decision of the trial court should be affirmed in all respects.

II. THIS COURT MAY AFFIRM THE TRIAL COURT’S DECISION ON ANY GROUND SHOWN BY THE RECORD BELOW

To the extent that this Court does not agree with the position taken in Section I, *supra*, Appellee nevertheless submits that this Court may still affirm the decision of the Circuit Court. As a general principle, “[a]n appellate court may affirm the Circuit Court's decision on a ground adequately supported by the record even though the ground was not relied upon by the trial court, and it is not uncommon for this Court to exercise its discretion and affirm a trial court on such alternative grounds.” *Police Patrol Sec. Systems, Inc. v. Prince George's County*, 378 Md. 702, 716, 838 A.2d 1191, 1199 (2003). Appellee respectfully submits that there are several bases upon which this Court may rely in taking such a course of action.

A. The Language of Article I, § 1 of the Constitution is Non-Prohibitory

This Court would be thoroughly justified to find that the age clause of Art. 1, § 1 is non-prohibitory, and permits the General Assembly to expand voter qualifications when it has a rational basis to do so, as indisputably exists here. The age clause of Art. I, § 1 was adjusted by amendment in 1978 to conform to the

voting rights of citizens 18 and above established in the 26th Amendment to the U.S. Constitution in 1971. In adopting this amendment to Art. I, § 1, the People of Maryland chose language that is, in plain reading, not obviously more prohibitory of legislative expansion then is the language of the 26th Amendment itself.

According to a recently published survey of state laws on this issue (http://teacher.scholastic.com/scholasticnews/indepth/upfront/features/index.asp?article=f011408_Young_Voters), 18 states permit 17 year olds to participate in primary elections or precinct caucuses if they will be 18 by the next succeeding general election. No one has suggested these states have acted in derogation of the 26th Amendment. Should the Court find that language in the Maryland Constitution prohibits the General Assembly from doing so as well, it would place Maryland severely out of step with what is an obvious legal consensus across the country.

Appellant, in its brief, does not offer a considered argument that the age clause of Art. I, § 1 is prohibitory, but merely assumes it is based on statements in the Court's *Capozzi* opinion, and other opinions of this Court. In fact, however, the question of whether the age clause is prohibitory is one of first impression. The Court, in past cases, has dealt exclusively with efforts to contract or restrict voter qualifications, and has not faced questions of expanding them, although the Court has on occasion suggested, in what is truly *dicta*, that the Constitutional age qualifications may not be enlarged. Yet no one has ever argued that question before

the Court, nor has any such case or controversy been presented.

Significantly, contraction and enlargement are not simply two sides of the same coin. Contraction of rights is *per se* a violation of the basic entitlements established by Art. I, § 1, whereas enlargements are not. The apparent symmetry in some past *dicta* of this court with respect to prohibitions that apply to expansion of voter qualifications set out in Art. I, § 1, when the court has decried both contractions or enlargements of (or additions to or substractions from) qualifications in the same breath, is one of linguistic style only, not one of substance.

The State Board of Elections failed to recognize these distinctions in its application of the *Capozzi* decision. Based on the advice of an Assistant Attorney General, the Board concluded that permitting 17-year-olds to register and vote in Maryland primaries was inconsistent with Art. I, § 1 because it violated what was seen as the "plain language" of *Capozzi*: since this Court had held that Art. I, § 1 prohibits the state from allowing voters to vote outside of their election districts, it must similarly prohibit the state from permitting 17 year olds to vote in primary elections.

Yet the analogy of the age clause to the voting-location clause in Art. I, § 1 is transparently flawed. Art. I, § 1 states that voters aged 18 years and upwards *shall be entitled* to vote in their respective election districts. In holding that the early-voting statute was offside this requirement, the Court simply recognized that such voters had a *right* (or entitlement) to vote within their district that the state intended

to violate. The outcome followed directly. By contrast, however, when the General Assembly permits 17-year-olds to vote in non-partisan primary elections under EL § 3-102, it has violated no rights of anyone established in Art. I, § 1. This is a fundamental and inescapable difference.

The Court should note the implications flowing from the sequence of legislation that brings this matter before the Court. In 1971, Congress and the States adopted the 26th Amendment which mandated that citizens aged 18 years and over shall be allowed to vote. The following year, the Maryland General Assembly, in conformity with the requirements of the 26th Amendment and in fulfillment of its obligations under Md. Const. Art. I, § 2, amended the voter-registration statute, EL § 3-102, to permit those citizens resident in Maryland to register and vote if they would be 18 years or older by the next succeeding special or general election. In doing so, the General Assembly adopted a reasoned implementation of the voting age entitlement established under the 26th Amendment, and one that did not violate Art. I, § 1. Then in 1978, by the chronology set out in Appellant's brief, Maryland amended Art. I, § 1 to bring it in conformity with the 26th Amendment by guaranteeing that Maryland citizens aged 18 years and upwards could vote, just as the 26th Amendment had guaranteed for U.S. citizens generally.

Throughout this period, both before and after the 1978 amendment to Art. I, § 1, state election officials continued to apply Maryland's voter-registration statute as written, allowing 17 year olds to vote in primary elections if they would reach the

age of 18 on or before the next general elections. It defies logic and all sense that by lowering the age of guaranteed voting rights in the Maryland Constitution in 1978, the State anticipated invalidating the state's existing voter-registration statute, which itself had been amended in the wake of the 26th Amendment. Such an absurd result cannot be countenanced based on a "plain language" reading of a single sentence of a single appellate case.

B. Section 3-102 of Maryland's Election Law is Consistent With the Constitutional Language

As Appellee argued in the trial court, the constitutional provision is silent on the issue of ***when*** a voter must have reached the age of 18. As a result, the General Assembly, within bounds of reasonable interpretation of the constitutional provision, was and is free to make such a determination consistent with the language and the intentions of the constitutional provision.

The legislative determination, set forth in § 3-102, is that the relevant date for determining the age eligibility for voters is "on or before the day of the next succeeding general or special election." Appellee submits that this interpretation is in complete harmony with the constitutional provision – what other date would make more sense?

The General Assembly in § 3-102 further made the determination that being eligible to vote in such a general election also makes the voter eligible for

participation in the primary election that determines the choices available in the general election.

Is this a rational reading of the constitutional provision? Appellee submits that it is.

In this regard, the Court should note the significance of the difference between partisan and non-partisan primary elections. A partisan primary is conducted as part of the decision-making process of a political party, so that those voters who the party wishes to take part have the opportunity to select the party-endorsed nominee, or standard-bearer, in the general election. In most cases in Maryland, for instance, voters in a party primary are restricted to those who have chosen to affiliate with the party through the voter-registration process.

By contrast, a non-partisan primary (for example, a Board of Education primary) is, in fact, the first part of a two-part election. Every candidate who seeks election must appear on the primary ballot. The outcome of the primary winnows the field to twice the number of candidates as positions to be filled. (EL, § 8-804). Voters who take part in the first part of the election, the primary, are not restricted by party affiliation or any other criteria; all registered voters may vote in the non-partisan primary. The Board of Education contest on the day of the general election, the second part of the Board of Education election, then selects the winners of Board of Education seats from among these remaining candidates.

It is important to appreciate that every person who wishes to be considered for election to a Board of Education seat must be on the primary ballot, and cannot otherwise eventually be elected. It is also important that voters in both parts of the election, primary and general election, are not restricted by any criteria other than the requirement to be a registered voter. Finally, candidates who appear on the ballot in the contest on general election day have won nothing other than the right to contest the second part of the election; for instance, they are not the endorsed candidates of any party or organization as a result of having prevailed in the primary election.

In crafting a two-part election procedure, the General Assembly recognized that it is both inequitable and illogical for a voter to be eligible to participate in the second part of this procedure and not the first part, particularly based on an arbitrary qualification such as the timing of one's birthday. Restricting a voter to participation in only the general election deprives the voter of the opportunity to have a say in the selection of the candidates who will appear on the ballot for the general election. As a result, the General Assembly made the determination, unchallenged for over 40 years, that eligibility to participate in a general election is tantamount to eligibility to participate in the primary election preceding that general election. Nothing in Art. I, § 1 bars such a policy; the constitutional provision is wholly silent on this question.

In short, the General Assembly made a legislative determination that for any given election process, the general and primary elections are to be treated as one

process, and that eligibility for the general election shall be treated as eligibility for the primary election as well. Nothing in either *Capozzi* or the Maryland Constitution bars such a determination by the General Assembly. As a result, this Court may affirm the decision of the trial court on this ground.

C. *Capozzi* Only Addresses The Time, Place and Manner of Elections – It Is Not Applicable To The Question of Voter Eligibility

As noted above, *Capozzi* dealt solely with the issue of early voting. It did not address in any fashion the question of eligibility to vote based on age, and it did not in any manner address the interpretation of § 3-102 of the Election Code. *Capozzi*, *supra*, 396 Md. at 60-61 and n.7, 912 A.2d at 678 and n.7. In this regard, Appellee notes that this Court relied upon Art. III, § 49 of the Constitution, which states that "[t]he General Assembly shall have the 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."

There is no similar explicit restriction on the General Assembly's power to determine voter eligibility, either in the Constitution or in any statute. In fact, to the contrary, there is an explicit statutory *command* (§ 3-102) that voters who will be 18 prior to the general election shall be eligible to vote in the preceding primary election, notwithstanding the fact that such a voter will not be 18 at the time of the primary.

Appellee submits that this critical distinction, between "time, place and manner" restrictions on voting, which were undoubtedly the subject of *Capozzi*, and voter eligibility restrictions, which were not in any way at issue in *Capozzi*, mandate that *Capozzi* has no controlling authority on the issues presented in this case.

D. Application of *Capozzi* as Urged by the State Board of Elections Would Run Afoul of Numerous Constitutional and Statutory Provisions

If the interpretation of *Capozzi* urged by Appellant is adopted by this Court, voters such as the Appellees herein shall be eligible to vote for certain election contests, but not others. This would be a rather flagrant violation of Art. I, § 2 of the Constitution, which reads as follows:

> “The General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless his name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.”

Voters such as the Appellees herein, although registered, shall not have the “right . . . . to vote at any election thereafter held in this State.” Registration of voters such as the appellees shall be anything but “uniform.”

As a matter of statutory and constitutional construction, this Court has held that “[i]t is well settled that we should construe the statute so that it will survive the test of constitutionality.” *Maryland-National Capital Park and Planning Commission v. McCaw*, 246 Md. 662, 685, 229 A.2d 584, 596 (1967). Construing Art. I, § 1 of the Constitution

in a manner so as to create a blatant violation of Art. I, § 2 is not a valid construction unless there is simply no way to interpret the constitutional language otherwise. Appellees submit that the interpretation offered herein avoids such a construction.

In addition, the “plain meaning” interpretation urged by the Appellants would also lead to the invalidation of a host of election laws. As noted above, municipal elections are exempted from Art. I, § 1 by the existence not only of *Smith*, *supra*, but also of § 1-101(v)(3) of the Election Law Article.

Moreover, an excessively expansive interpretation of *Capozzi* would essentially gut § 1-201 of the Election Law Code, which, among other requirements, mandates that “all persons be treated fairly and equitably.” In addition, § 8-205, applying the rationale of *Jackson*, *supra*, bars write-in votes in primary elections. However, if there is absolutely no distinction between primary and general elections, as the Appellant urges, then this provision is also unconstitutional.

Finally, Appellee notes that this Court has held that (1) there is no right to vote in a party primary unless the voter is a member of the political party holding the primary, *Hennegan*, *supra*; and (2) that unaffiliated voters are not required to be allowed to vote in judicial primaries, *Suessmann*, *supra*. A literal interpretation of *Capozzi* would require, that both of these cases, one decided in the past five years, be overruled as being in conflict with the constitutional mandate. That cannot be the meaning of *Capozzi*.

In short, Appellee submits that there are numerous interpretations of *Capozzi* that are not as limitless as the dogmatically inflexible reading that Appellant puts on this Court's language. Any of these potential interpretations would (1) put some limit on the extent and reach of *Capozzi*, and (2) avoid conflict with numerous other constitutional and statutory provisions. This Court can and should adopt such a limiting interpretation, and any such interpretation will result in an affirmance of the trial court's bottom line determination: that Appellees and others similarly situated should be allowed to vote without restriction in the primary election on February 12, 2008.

III. TO THE EXTENT THAT THIS COURT DETERMINES TO APPLY CAPOZZI IN THE MANNER URGED BY APPELLANT, IT WAS WRONGLY DECIDED AND SHOULD BE RECONSIDERED AND/OR OVERRULED IN THE CONTEXT OF VOTER ELIGIBILITY

In Sections I and II, *supra*, Appellee has offered numerous alternative bases for limiting or distinguishing *Capozzi* from the issues presented in this case. To the extent that this Court adopts any one of those bases, it is unnecessary for this Court to consider the arguments of this Section III. However, if the Court is determined to apply *Capozzi* in the manner urged by Appellant, Appellee submits that *Capozzi*, as regards the issue of voter eligibility, was wrongly decided and should be reconsidered.

In the earlier sections of this brief, Appellee has demonstrated how a broad reading of *Capozzi* will result in a wholesale evisceration of a longstanding, carefully

crafted package of election laws. Voters of a certain age, in contravention of both constitutional and statutory mandates, will be eligible to vote in some but not all elections. Such an interpretation should be avoided.

With respect to the issue of whether Art. I, § 1 applies to primary elections, this Court has ruled and has done so decisively. However, Appellee notes that *Capozzi* makes reference to two cases (*Hill* and *Blunt*) that are at the fringes of the issue presented here: whether, as to the question of voter eligibility, the constitutional mandate applies to primary elections. To the extent that the Court does not otherwise restrain the flat language of *Capozzi*, that it should instead look at the line of cases of which *Blunt* and *Hill* are simply the furthest extensions and recognize that, as to voter eligibility, this Court has ***never applied the constitutional mandate to primary elections***. Appellee stresses that he is not asking this Court to repudiate the core holding of *Capozzi*, namely that as to the time, place and manner of primary elections, the constitutional directive governs and must be obeyed. That is a different question. What is at issue here is voter eligibility: while it is clear that the General Assembly may no longer *contract* voting rights, what is sought to be upheld in this case is a minor *expansion* of voter eligibility, only for purposes of primary elections.

That was not at issue in *Capozzi*. The line of cases going back over a century (see Section I, *supra*) makes clear that based on the facts and circumstances of this case, application of an unrestrained and uncabined interpretation of *Capozzi* would

eviscerate not only this Court's own holdings, but also a series of statutory provisions that were in no small part based on this Court's case law. As a last resort, this Court can and should overrule and/or reconsider the *Capozzi* decision to rein in its broad and expansive language so as to maintain, to the greatest extent possible, a comprehensive statutory scheme that has been in place for decades.[4]

CONCLUSION

For all of the foregoing reasons, Appellee RICHARD BOLTUCK respectfully requests this Court to affirm the decision of the Circuit Court for Anne Arundel County.

Date: February 7, 2008

Respectfully submitted,

JONATHAN S. SHURBERG, P.C.

__/s/___________________________

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[4] Appellant appears to agree that some "clarification or reconsideration of *Capozzi* by this Court" may be necessary. See Appellant's Brief at 12.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2008, a copy of the foregoing was sent by electronic mail and by first-class mail (2 copies), postage prepaid, to: Austin Schlick, Esquire, 200 St. Paul Place, 20th Floor, Baltimore, MD 21202 and to Clifford E. Snyder, Jr., Esquire, 4964 Flossie Avenue, Frederick, MD 21703.

__/s/___________________________
Jonathan S. Shurberg

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