

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

* IN THE
* CIRCUIT COURT
* FOR
* MONTGOMERY COUNTY
* No. C-15-CV-22-_____

* * * * *

**PETITION FOR EMERGENCY REMEDY TO PERMIT EARLY CANVASSING
AND TABULATION OF MAIL-IN BALLOTS FOR THE 2022
GUBERNATORIAL GENERAL ELECTION**

As authorized under § 8-103(b)(1) of the Election Law Article, the Maryland State Board of Elections (“the State Board”), petitions this Court for an emergency remedy permitting the early canvassing and tabulation of mail-in ballots for the 2022 gubernatorial general election. This is the same relief permitted by gubernatorial executive order during the 2020 election cycle, when election workers were permitted to open and canvass mail-in ballots on October 1, 2020, at 8:00 a.m., 25 days before the beginning of the early voting period.

Current law prohibits the opening of mail-in ballots before 8:00 a.m. on the Wednesday following election day. Md. Code Ann., Elec. Law § 11-302(b)(1) (LexisNexis 2017). But, as during the 2020 election cycle, the local boards of election responsible for counting the vast majority of mail-in ballots require more time for canvassing and tabulating these ballots or there is a substantial risk that they will not be able to meet critical deadlines established by law. The State Board therefore requests that this Court grant an

emergency remedy permitting canvassing and tabulation of mail-in ballots to begin at on October 1, 2022, at 8:00 a.m. As explained below, this emergency remedy serves the public interest and protects the integrity of the electoral process. *See also* Exhibits 21 – 25.

STATEMENT OF THE CASE

The 2022 Gubernatorial Primary Election

For this year’s primary election, local boards of election issued nearly 500,000 mail-in ballots to Maryland voters, and 345,230 (69%) of those ballots were returned (more than ten times the amount returned during the 2018 gubernatorial primary election). *See Mail-In Sent and Returned Report for the 2022 Gubernatorial Primary Election*, Md. State Bd. of Elections (Aug. 8, 2022), attached hereto as Exhibit 1. The overwhelming increase in the number of mail-in ballots, and the inability of election boards to process them until after election day, resulted in some jurisdictions canvassing, tabulating, and auditing mail-in ballots for weeks after the July 19, 2022, primary election day. The canvass effort transgressed statutory deadlines because many post-canvass events—such as certification of local and statewide results, judicial challenges and recounts, and fulfillment of vacant nomination spots—could not take place until almost a month after election day. As drawn out as the mail-in ballot canvass was for the primary election, election officials anticipate that voters will request and return even more mail-in ballots during the general election.

A similar or greater delay in finalizing general election results would likely delay some successful candidates from timely assuming their elective offices. County Codes require the terms of certain local offices to begin during the first week of December. *See*

e.g., Montgomery County Code, Part I, art. I, § 105 & art. II, § 202 (mandating the term of office for Members of the Montgomery County Council and County Executive begin at noon on the first Monday in December); Charter for Prince George’s County art. III, § 306 & art. IV, § 404 (mandating the same for Members of the Prince George’s County Council and County Executive). The Election Law Article requires results of statewide elections and ballot questions to be certified within 35 days of the election (December 13, 2022). Elec. Law § 11-503(a)(2). And Maryland itself is obliged to certify the results of its congressional elections in a timely manner, so that Congress may meet its constitutionally imposed deadline to convene on January 3, 2023. U.S. Const. amend. XX, § 2.

Historical Background on the Use of Mail-In Ballots

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

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

See Absentees Sent and Returned by District: 2010 Gubernatorial General Election, Md. State Bd. of Elections (Nov. 23, 2010), attached hereto as Exhibit 2; *see also, Absentees Sent and Returned by County: 2014 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 14, 2014) attached hereto as Exhibit 3; *Absentees Sent and Returned by*

County: 2018 Gubernatorial General Election, Md. State Bd. of Elections (Nov. 18, 2018), attached hereto as Exhibit 4.

Relative to statewide in-person vote totals, the 2010 through 2018 mail-in ballot totals constituted a small fraction of the voting electorate. In 2010, the State Board tabulated 1,747,435 in-person votes in the general election. *See Unofficial Polling Place Turnout (Statewide) in the 2010 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 2, 2010), attached hereto as Exhibit 5. Mail-in votes accordingly accounted for 4.7% of the total votes in that primary election. In 2014, the State Board tabulated 1,655,375 in-person votes. *See 2014 Gubernatorial General Election Unofficial Early Voting and Election Day Turnout*, Md. State Bd. of Elections (Nov. 4, 2014) attached hereto as Exhibit 6. Mail-in votes accounted for 3.2% of that vote total. And in 2018, the State Board tabulated 2,160,101 in-person votes. *See Official Turnout (by Party and County): 2018 Gubernatorial General Election*, Md. State Bd. of Elections (Nov. 6, 2018), attached hereto as Exhibit 7. Mail-in ballots for the 2018 primary election likewise made up 5.3% of that vote total.

Maryland voters overwhelmingly voted in person during the 2010, 2014, and 2018 gubernatorial general elections. Besides the absence of a public health emergency, Maryland law encouraged in-person voting during those elections. The statutory electoral framework provided flexibility for in-person polling by allowing for early voting at certain polling locations. *See* 2009 Md. Laws ch. 445 (establishing the process by which a Maryland voter could choose to vote early at a polling center up during a 10-day period two weeks before election day); *see also* Elec. Law § 10-301.1(a) (LexisNexis Supp. 2021).

Meanwhile, voting by mail-in ballot required a voter to apply for and request a new absentee ballot for each election. Elec. Law. § 9-305. And Maryland did not yet utilize a drop box system for the easy deposit and collection of mail-in ballots.

Conditions changed drastically, however, during the 2020 presidential primary and general elections. Due to the COVID-19 public health emergency, Governor Hogan issued a series of emergency executive orders that, among other things, allowed the primary and general elections to be conducted principally by mail-in ballot. *See Proclamation: Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19*, Gov. Lawrence J. Hogan, Jr. (Apr. 10, 2020), attached hereto as Exhibit 8; *see also Proclamation: Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19*, Gov. Lawrence J. Hogan, Jr. (May 6, 2020), attached hereto as Exhibit 9; *Proclamation: Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19*, Gov. Lawrence J. Hogan, Jr. (Aug. 10, 2020), attached hereto as Exhibit 10.

To achieve that feat, the Governor, among several actions, issued an emergency order permitting each unit of State government to suspend “any legal or procedural deadline” pertinent to that unit’s administration. *See Order of the Governor of the State of Maryland: Amending and Restating the Order of March 12, 2020, Extending Certain Licenses, Permits, Registrations, and Other Governmental Authorizations, and Authorizing Suspension of Legal Time Requirements*, ¶ III(a), Gov. Lawrence J. Hogan, Jr. (June 19, 2020), attached hereto as Exhibit 13. The State Board used that delegated authority to suspend § 11-302(b)(1) of the Election Law Article as it applied to the general

election, which forbade the opening of a mail-in ballot envelope before 8:00 a.m. on the Wednesday after election day. *See Public Notice: Dates and Times for the Canvassing and Opening of Mail-In Ballots and the Reporting of Unofficial Results of the Mail-In Ballot Vote Tabulation*, Md. State Bd. of Elections (Aug. 19, 2020), attached hereto as Exhibit 14. Instead, election workers were permitted to open and canvass mail-in ballots on October 1, 2020, at 8:00 a.m., 25 days before the beginning of the early voting period. *Id.*

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

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

See Mail in Ballot Sent and Returned by County: 2020 Presidential General Election, Md. State Bd. of Elections (Dec. 1, 2020), attached hereto as Exhibit 11. During that same election, voters cast 1,426,467 ballots in person. *See Official Turnout (by Party and County: 2020 Presidential General Election)*, Md. State Bd. of Elections (Nov. 3, 2020), attached hereto as Exhibit 12. Mail-in ballots therefore accounted for 51.7% of all votes cast. Nonetheless, because of the emergency orders suspending the Election Law Article restriction and permitting extra time before election day to canvass mail-in ballots, most local boards of election certified the results of the millions of mail-in ballots cast to the State Board within 11 days.¹ *See Report on November 3, 2020 Election: Appendix 2*

¹ Montgomery County, tasked with canvassing and tabulating the lion's share of mail-in votes (348,293), required 29 days after election day 2020 to certify its results. Exhibit 15, at 41. But this certification time frame met all required code and statutory

(*Timeline of Key Dates*), Md. State Bd. of Elections (Jan. 28, 2021), attached hereto as Exhibit 15.

Expansion of Mail-in Voting During the 2021 Legislative Session

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

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

deadlines for local, state, and federal purposes. This certification time frame also included early canvassing of mail-in ballots that began on October 1, 2020.

² During the 2022 legislative session, the General Assembly passed two bills that would have repealed the restriction on canvassing absentee ballots until after election day. *See* S.B. 163, 2022 Reg. Legis. Sess.; H.B. 862, 2022 Reg. Legis. Sess. Both bills would have permitted election workers to canvass and tabulate mail-in ballots for the 2022 gubernatorial primary election eight business days before the beginning of the early voting period. S.B. 163 at 3, 8; H.B. 862 at 3, 8-9. Both bills were vetoed by the Governor on May 27, 2022.

It is worth noting, however, that Governor Hogan supported the early canvassing provisions in the bills despite his veto. By veto statement transmitted to the President of the Senate and Speaker of the House, the Governor offered that early canvassing of ballots was a “positive change” because it “would allow hard working election officials to get a much-needed head start on the deluge of ballot envelopes that, under current law, must wait until Election Day for processing.” *See Letter by the Governor to the President of the*

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

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

Use of Mail-In Ballots During the 2022 Gubernatorial Primary Election

With Maryland voters having experienced widespread use of mail-in voting during the 2020 election season, the General Assembly having responded to that experience by easing structural access to mail-in ballots, and statutory restrictions on the ability to canvass and tabulate mail-in ballots returning to force, the 2022 gubernatorial primary election stood as a stress test of the State’s new electoral paradigm. While many jurisdictions

Maryland Senate and Speaker of the House of Delegates, Gov. Lawrence J. Hogan, Jr. (May 27, 2022), attached hereto as Exhibit 16. The Governor’s veto, therefore, was not a rejection of or disagreement with the remedy sought in this petition, but stemmed from the bills’ overall failure to provide “basic security measures such as signature verification” and failure to “address ballot collecting.” *Id.*

observed manageable increases in the number of mail-in ballots compared to primary elections past, seven jurisdictions saw increases in orders of magnitude greater than before:

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

See Absentee Statistics: 2010 Gubernatorial Primary Election, Md. State Bd. of Elections (Sept. 14, 2010), attached hereto as Exhibit 17; *see also, Absentees Sent and Returned by County: 2014 Gubernatorial Primary Election*, Md. State Bd. of Elections (June 25, 2014) attached hereto as Exhibit 18; *2018 Gubernatorial Primary Election: Absentee Voting*, Md. State Bd. of Elections (June 26, 2018), attached hereto as Exhibit 19; *Mail-In Sent and Returned: 2022 Gubernatorial Primary Election*, Md. State Bd. of Elections (Aug. 1, 2022), attached hereto as Exhibit 20.

Statewide, Maryland voters returned 25,276 mail-in ballots in 2010, 18,984 ballots in 2014, and 30,122 ballots in 2018. Exhibits 17-19. During the 2022 primary election, voters returned an unprecedented 345,081 mail-in ballots—ten to 18 times as many ballots

as past gubernatorial primaries. Exhibit 20. And while the emergency measures adopted in 2020 allowed local boards of elections to begin canvassing and tabulating mail-in ballots three weeks before a voter entered a polling booth, the applicable law in 2022 forbade even the opening of a mail-in ballot envelope until 8:00 a.m. on the Wednesday after election day.

The sheer number of ballots caused cascading issues through the local and statewide canvassing and certification process. In Montgomery County, a recount of the race for County Executive could not begin until August 19, 2022, or 31 days after election day. It was concluded, with final local certification of the results, on August 24, 2022, which was 36 days after election day. In Frederick County, issues with the mail-in ballot canvass required the local board of elections to decertify its results on August 10, 2022, and re-scan all 15,640 mail-in ballots it received.³ Karina Elwood, *Frederick Officials Re-Scan Ballots After Finding Error in Primary Results*, Wash. Post, Aug. 10, 2022, <https://www.washingtonpost.com/dc-md-va/2022/08/10/frederick-county-decertify-primary/>. Because of these issues, and others, Maryland's voters did not know the final results of their primary races, and the State Board did not identify conclusively who to place on the general election ballot, for more than a month after the polls closed.

Because of these cascading effects and the resultant delays that they caused, Maryland missed statutory deadlines for ascertaining and finalizing the nominees for the

³ The Frederick County Board of Elections also re-scanned all the provisional ballots it had received from the early voting period and election day.

general election ballot. Section 9-207(a)(2) of the Election Law Article requires the State Board to “certify and publicly display” the general election ballot “64 days” before election day (Sept. 6, 2022).⁴ To accomplish this, the State Board must know who the final nominees are to place on the ballot. Accordingly, § 5-801(b)(2)(i) of the Election Law Article requires the winner of a primary election who wishes to decline the nomination do so “by the first Tuesday in August immediately preceding the general election” (August 2, 2022); and, Election Law §§ 5-1002 through 5-1004 require the appropriate political body to fill that vacant nomination by the 88th day before the general election (August 12, 2022). Moreover, if a nominee passes away or is disqualified,⁵ that vacancy must be filled by the 81st day before the general election (August 19, 2022). Elec. Law, §§ 5-1002(b)(1)(ii), 5-1003(5), & 5-1004(b)(2). Local boards of elections continued counting and re-counting ballots as these deadlines passed.

The State Board was therefore forced to exercise singular, emergency authority granted to it by the Court of Appeals for the primary election to postpone the deadlines for declining a nomination and fulfilling a vacant nomination. By emergency vote at an open

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

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

meeting on August 1, 2022, the State Board extended the deadline for declining a nomination to August 16, 2022 and extended the deadline for filling any vacancy (by declination, disqualification, or death) to August 19, 2022. The authority for the State Board to negate and extend such statutory deadlines expired after the conclusion of the primary election. Nothing comparable exists for the deadlines associated with the general election.

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

This rippling delay occurred during the 2022 gubernatorial primary in Prince George's County. The Prince George's County Board of Elections finished canvassing all ballots and certified primary election results on August 1, 2022. But the Democratic primary election for the House of Delegates Seat in District 23 concluded with a margin of victory of .03% of the vote (19 votes), triggering a recount under § 12-107(b)(2)(iii)(1) of the Election Law Article. State Board of Elections, *Official Gubernatorial Primary*

Election Results for Prince George’s County, 2022 Primary Results (last updated Aug. 15, 2022, at 1:30 p.m.) https://elections.maryland.gov/elections/2022/primary_results/gen_results_2022_by_county_17.html. Because a seat in the House of Delegates is considered a statewide office, *see* Elec. Law § 5-302 (providing that a certificate of candidacy for an office in the General Assembly of Maryland shall be filed with the State Board, rather than a local board of election), the opportunity to request a recount did not occur until the State Board certified statewide results on August 15, 2022. The District 23 recount therefore took place almost three weeks after Prince George’s County completed its canvass, from August 22 through August 24, 2022. Delays elsewhere in the state forced Prince George’s County to wait over a month to ascertain the result of its primary races.

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

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

Compare Exhibits 2-4 with 17-20. Using that historical trend and recalling that 1,527,460 (or 51.7% of the voting electorate) returned mail-in ballots during the 2020 Presidential

election, one could reasonably anticipate that local boards of election will receive between *1,000,000 and 1,300,000 mail-in ballots* during the upcoming general election.

Primary Legal Framework Applicable to Processing Absentee Ballots

By law, canvassing and tabulating a mail-in ballot is a painstaking, time-intensive task. A mail-in ballot, upon return to a local board of elections, will be sealed in either one or two envelopes—a ballot envelope and/or a return envelope. Elec. Law § 9-310(a)(3). The process begins with a batch: an election director will group together and issue a manageable number of unopened mail-in ballots (generally 25) to a team of election workers. COMAR 33.11.04.05(A). The team must then visually inspect each unopened ballot for three conditions: (1) a time stamp or postmark that verifies the timeliness of the ballot, COMAR 33.11.04.05(B); (2) a signed oath as required by Election Law Article § 9-310(a)(5); COMAR 33.11.04.05(C)(1)(a); and (3) that the returned envelope, containing the ballot, remains properly sealed, COMAR 33.11.04.05(C)(1)(b). Any ballots that fail this visual inspection in any way must be manually separated out and referred to the local board for further action. COMAR 33.11.04.05(B)(4) & (C)(2).

Teams must then open an individual return envelope “by any means that will not damage the contents,” and place that individual envelope on a table with the mailing label facing down. COMAR 33.11.04.05(D). No contents may be removed from any envelope at this point. “After all the return envelopes in the batch have been opened and placed with the mailing address face down, the team shall remove the ballots from the return envelopes one at a time, taking care that each envelope remains face down.” COMAR 33.11.04.05(E). While completing this task, team members must remove and separate any

certificates of voter assistance that were returned in the envelope with a mail-in ballot. COMAR 33.11.04.05(F). Each team member must also inspect to make sure that each envelope contains one ballot, and no more. COMAR 33.11.04.05(G). Only after all the ballots in a batch are removed from their respective envelopes can the team set aside the stack of envelopes. COMAR 33.11.04.05(H).

The job is not yet completed. With envelopes (and their identifying mailing labels) set aside, the team of election workers must visually inspect each ballot within the batch for “compliance and tabulating acceptability.” COMAR 33.11.04.07(A). Team members must look here for any intentional marks that may identify a ballot; correctional marks (like correctional fluid or cross-throughs); or, tears, folds, or spills that might render the ballot “unacceptable for machine tabulation” or “[r]aise a question of voter intent.” COMAR 33.11.04.07(B). Any ballot with such an issue must be placed individually into a plain envelope marked with the team’s identifying number, the ballot batch’s identifying information, and the observed issue. COMAR 33.11.04.07(C). These resealed ballots are then referred to the local board, who must rule on whether to accept or reject the ballot. COMAR 33.11.04.08. If the Board votes to accept the ballot, but the ballot is unsuitable for scanning, it must first be duplicated by election staff.

With those tasks complete, the election director may retrieve the batch of mail-in ballots and place them aside for tabulation. COMAR 33.11.04.07(D). Return envelopes are filed away separately. COMAR 33.11.04.07(D)(2). Ballots must then be tabulated “without unreasonable delay.” COMAR 33.11.04.10.

The above process applies to a paper mail-in ballot sent by mail to a voter and returned in an envelope issued by a local board of elections. Maryland law, however, provides a second avenue for completing and returning a mail-in ballot: the internet. Elec. Law §9-308.1. A Maryland voter may request an online mail-in ballot from their local board of elections. COMAR 33.11.02.02(A)(1). If a mail-in ballot is requested online, it must generally be transmitted to the voter online (usually by emailing a link to a web-based system from which the voter can mark a ballot and print out their selections on a home printer). COMAR 33.11.03.05(A)(1). The result of this electronic transmission is the receipt of a mail-in ballot printed on non-standard paper of a different size and weight than a normal, standard ballot. The non-standard, home-printed ballot cannot be properly scanned or read by Maryland's ballot scanners. Accordingly, every mail-in ballot delivered via the internet must be duplicated on to a readable ballot form before it can be scanned and tabulated by the State's voting system.

Of course, after all this, the process for canvassing and tabulating mail-in ballots does not take place in a vacuum. A local board may not certify election results to the State Board until after completing certain verification and auditing procedures. COMAR 33.08.05.03. This includes an audit of randomly selected mail-in ballots to ensure the accuracy of that voting process. COMAR 33.08.05.07. And the audit that must take place after a general election is more extensive than the audit required after a primary election. *Compare* Elec. Law § 11-309(c) *with* § 11-309(b) & (d). Sometimes, given the number of mail-in ballots being handled, these auditing procedures occur concurrently with the

canvassing process. Whether concurrent or not, an audit of ballots remains another task that must be completed in the finite time available to staff and election directors.⁶

REASONS FOR EMERGENCY RELIEF

Election workers around the State will undoubtedly need to execute the above meticulous process hundreds of thousands, and likely millions, of times during the upcoming 2022 gubernatorial general election. Yet, current law forbids them from opening a single mail-in ballot envelope for nearly 12 hours after the polls close on election day. Elec. Law § 11-302(b)(1). As Maryland experienced during the primary election, weeks may pass before local boards can certify results to the Board of State Canvassers, who must accordingly certify those results to the public, leaving election results unknown for an unforeseen period.⁷ The failure to ascertain election results in a timely manner may cause unintended and deleterious legal effects at the state and national level. That failure may also sow uncertainty and unjustified mistrust in the final results of the election.

The issue is simply one of math. Faced with 345,081 mail-in ballots to count and beginning that count two days after election day, final ascertainment of the 2022

⁶ The canvass and audit of mail-in ballots is not the final step before results can be certified. After mail-in ballots are canvassed and tabulated, the local board must move on to canvassing provisional ballots, which is a far more time-intensive task. *See generally*, Elec. Law § 11-303; COMAR 33.16.04 – 06.

⁷ Section 11-302(e) of the Election Law Article directs local boards to “prepare and release a report of the unofficial results of the absentee ballot vote tabulation” after every day of canvassing. While helpful, these unofficial reports can only shed light on the state of local races. For statewide office, local reports paint only part of the picture. And, as learned during recent elections, having the public learn the outcome of a race by piecemeal reports issued over a multi-week period may fail to instill trust in the outcome.

gubernatorial primary election results required 36 days. Faced with three-to-four times as many ballots and failing to count a single one of them until two days after the election may require 100 to 120 days (or nearly 4 months). Maryland, however, does not have 100 days; Maryland does not even have the 36 days that the primary canvass required.

The first obstacle to the post-general election timeline is national holidays. The primary canvass saw no national holidays during the mail-in ballot canvassing period—after Independence Day on July 4, the next national holiday on the calendar is Labor Day on September 5. Election workers canvassed every day, as needed, without losing any days to holiday closures. After the general election day on November 8, 2022, there is Veterans Day on November 11, Thanksgiving on November 24, and American Indian Heritage Day on November 25. Christmas Day will be observed as a holiday on Monday, December 26 this year; and, likewise, New Year’s Day will be observed on Monday, January 2, 2023. Some canvassing and tabulation days will likely be lost to these national holidays.

Accordingly, 36 days out from November 8, 2022, is not December 14, 2022, but in fact December 17, 2022. And 100 days out is not February 16, 2023, but February 21, 2023. Without the emergency relief requested, Maryland may not ascertain the results of the 2022 gubernatorial general election until after President’s Day in 2023.

The inability to ascertain results of the general election within a reasonable period will run afoul of the mandate imposed by law on the State Board and the State to report election outcomes on a specific timeline. First, § 11-308(a) of the Election Law Article contemplates that each local board of elections will “verify the vote count” within *10 days*

of election day. That deadline falls on November 18, 2022, for the upcoming gubernatorial general election.

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

Thereafter, state law requires the assembly of a special administrative body to certify the statewide results of the general election. The Secretary of State, Comptroller, State Treasurer, Clerk of the Court of Appeals, and Attorney General convene as the Board of State Canvassers to determine the outcome of every election and ballot question in the state. Elec. Law § 11-502(a) & 11-503(a). The Board of State Canvassers must convene to accomplish this task “within 35 days of the election.” *Id.* at 11-503(a)(1)(ii). The 35th day after this year’s general election day is December 13, 2022.

Finally, the 118th Congress of the United States “shall assemble . . . at noon on the 3d day of January” in 2023. U.S. Const., amend. XX, § 2. Maryland must therefore

ascertain the winners of its congressional races within 56 days to meet this constitutionally imposed deadline.

These failures would invite unwarranted suspicion and mistrust in Maryland's electoral process. Maryland would stand alone on the national stage, counting mail-in ballots well past statutory deadlines. As weeks passed to canvass and tabulate mail-in ballots, questions would arise about the efficacy and reliability of Maryland's system for elections.

"Preserving the integrity of the electoral process" is a governmental interest "of the highest order." *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 788-89 (1978). Equally important is the "[p]reservation of the individual citizen's confidence in government." *Id.* The Election Law Article recognizes this core principle, stating as its overarching purpose:

The intention of this article is that the conduct of elections should inspire public confidence and trust by assuring that:

* * *

(6) security and integrity are maintained in the casting of ballots, canvass of votes, and reporting of election results[.]

Elec. Law § 1-201(6).

A prolonged canvassing and tabulation period would call into question the reliability and veracity of those processes. Voters may assume that mistakes are causing the delay or that more nefarious activities might be prolonging the count and causing the violations. Either way, "[t]his is no idle concern; faith in elections is enhanced when the process appears to be orderly and fair—and eroded when it appears otherwise." Editorial Board, *Pennsylvania's Vote-Counting Rules Risk 2024 Electoral Chaos*, Wash. Post, June 14,

2022<https://www.washingtonpost.com/opinions/2022/06/14/pennsylvanias-vote-counting-rules-risk-2024-electoral-chaos/>.

“[T]he conduct of elections should inspire public confidence and trust” Elec. Law § 1-201. The State must therefore follow the mandates set forth by all applicable laws for the fair and just administration of elections. The State cannot countenance a prolonged canvass and tabulation period and the consequences it may breed.

The delays threatened by the enormous volume of mail-in ballots anticipated for the 2022 gubernatorial general election and the painstaking process by which they must be canvassed pose a risk to the perceived integrity of the State’s electoral process. The mail-in ballots imperil the State’s ability to follow its own laws for the timely reporting of election results and terms of office. Section 8-103(b)(1) of the Election Law Article permits this Court to mitigate these risks by crafting “a remedy that is in the public interest and protects the integrity of the electoral process.”

CONCLUSION

The Maryland State Board of Elections therefore petitions this Court to provide such a remedy by

1. Suspending from application to the 2022 gubernatorial general election the requirement of § 11-302(a) of the Election Law Article that each local board of elections meet to canvass mail in ballots “[f]ollowing an election”; and,
2. Suspending from application to the 2022 gubernatorial general election the prohibition of § 11-302(b)(1) of the Election Law Article that forbids the

opening of any mail-in ballot envelope “prior to 8 a.m. on the Wednesday following election day”; and,

3. Permitting by order of the Court all local boards of canvassers in Maryland to meet and to open envelopes, canvass, and tabulate mail-in ballots no earlier than 8:00 a.m. on October 1, 2022; and,
4. Suspending from application to the 2022 gubernatorial general election the requirement of § 11-302(e) of the Election Law Article that a local board of elections “prepare and release a report of the unofficial results” of the mail-in ballot canvass after each day of canvassing; and,
5. Prescribe by order of the Court that a local board of elections may prepare and release an unofficial report of the mail-in ballot tabulation no earlier than the closing of the polls on election day, November 8, 2022, and thereafter at the end of each day of canvassing.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Daniel M. Kobrin

ROBERT A. SCOTT
Attorney No. 9512140140
DANIEL M. KOBRIN
Attorney No. 112140138
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
dkobrin@oag.state.md.us
(410) 576-6472
(410) 576-6955 (facsimile)

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on this 2nd day of September, 2022 the foregoing was filed and served electronically by the MDEC system on all persons entitled to service.

/s/ Daniel M. Kobrin

Daniel M. Kobrin