

**A FUNCTIONALIST APPROACH TO THE SEPARATION OF
POWERS: HOW MARYLAND’S EMERGENCY RESPONSE TO
ABSENTEE VOTING MAY OBSCURE GOVERNMENT
ACCOUNTABILITY**

***IN RE EMERGENCY REMEDY BY MD. STATE BD. OF
ELECTIONS, 292 A.3D 319 (MD. 2023).***

*Christian Joseph Pirri**

TABLE OF CONTENTS

I.	INTRODUCTION	1184
II.	STATEMENT OF THE CASE.....	1185
III.	BACKGROUND	1187
	A. <i>Canvassing Absentee Ballots and Election-Related Deadlines</i>	1187
	B. <i>Varied Interpretations of State Separation of Powers</i>	1188
	C. <i>Maryland’s Approach to the Separation of Powers</i>	1189
IV.	THE COURT’S REASONING	1190
	A. <i>The Majority Opinion</i>	1191
	1. Whether Election Law Section 8-103(b)(1) Violates Separation of Powers Principles	1191
	2. Whether the Anticipated Volume of Absentee Ballots in the November 2022 Gubernatorial General Election Constituted “Emergency Circumstances”	1193
	B. <i>The Concurring Opinion</i>	1195
V.	ANALYSIS AND IMPLICATIONS	1196
	A. <i>The Court Correctly Found That the Election Law Does Not Violate Maryland’s Separation of Powers Provision</i> ..	1197
	B. <i>The Court Correctly Determined That Emergency Circumstances Existed, but Its Statutory Interpretation May Warrant Future Reevaluation</i>	1199
VI.	CONCLUSION	1201

* J.D., Rutgers School of Law, 2025. This comment is dedicated to Marisa Franceschini, Louis Pirri, Daniela Pirri, and my late grandfather, Joseph Franceschini (“Poppi”), for their love and support throughout my law school journey. *For love is the key to life, hate the breeder of evil and death.* - Poppi

I. INTRODUCTION

The federal separation of powers doctrine does not apply to the states.¹ And unlike the Federal Constitution, which implies separation of powers through its respective articles, many state constitutions include an “express, *textual* affirmation of the doctrine.”² But does such an express statement demand a more rigorous separation of powers analysis than its federal counterpart? As is often the case in the law, it depends. Each state has its own unique arrangements concerning the distribution of powers among the three branches of government, thereby requiring a “*state-specific*” analysis.³

Maryland is among the states with an explicit constitutional guarantee of separation of powers.⁴ Yet it has embraced a flexible rather than rigid application of the doctrine.⁵ In *In re Emergency Remedy by the Maryland State Board of Elections*,⁶ the Maryland Supreme Court examined the appropriate degree of flexibility in the context of Election Law section 8-103(b)(1), which allows a court in limited emergency circumstances to impose a remedy that protects the integrity of the electoral process.⁷ Specifically, the court considered whether this delegation of authority violated Maryland’s constitutional provision for the separation of powers.⁸

The court held that the statute does not offend the Maryland Constitution because the task of safeguarding elections is a judicial function.⁹ The court reasoned that the Maryland judiciary has long intervened in election disputes when necessary to uphold the integrity of elections, and the statute ensures that the court’s decision remains an exercise of judicial rather than legislative discretion by requiring a finding of emergency circumstances.¹⁰ The court then found that the anticipated volume of absentee ballots for the 2022 gubernatorial general election constituted emergency circumstances under the statute.¹¹

1. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 272 (2nd ed. 2023).

2. *Id.* at 269 (citations omitted).

3. *Id.* at 270.

4. *See* MD. CONST., DECL. OF RTS., art. 8.

5. DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION* 34 (2011).

6. 292 A.3d 319 (Md. 2023).

7. *See id.* at 331; MD. CODE ANN., ELEC. LAW § 8-103 (West 2025).

8. *Emergency Remedy*, 292 A.3d at 331.

9. *Id.* at 337–38.

10. *See id.* at 335–37.

11. *Id.* at 342.

This Comment will first provide the pertinent facts and procedural history of the case, as well as a brief synopsis of the implicated state constitutional and statutory provisions. It will then analyze the court's reasoning, including both the majority and concurring opinions. Finally, this Comment argues that while the majority's decision was correct under its current interpretation of the separation of powers doctrine, the court should consider implementing a more pragmatic approach that balances judicial oversight with government transparency.

II. STATEMENT OF THE CASE

In *Emergency Remedy*, the Maryland Supreme Court considered an appeal brought by gubernatorial candidate Daniel Cox, who challenged a lower court order “permitt[ing] local boards of election to begin ‘canvassing’ absentee ballots more than a month before the November 2022 general election.”¹² Canvassing, a term central to this case, encompasses “the entire process of vote tallying, vote tabulation, and vote verification, culminating in the production and certification of the official election results.”¹³

Leading up to Cox's challenge, the COVID-19 pandemic introduced unprecedented challenges to canvassing absentee ballots in Maryland.¹⁴ In 2020, Governor Lawrence J. Hogan, Jr. declared a state of emergency and issued several executive orders that made absentee voting easier and “strongly encouraged” its use.¹⁵ Voters responded by utilizing absentee ballots at record levels during the 2020 primary and general elections.¹⁶ As a result, the Maryland State Board of Elections (the “State Board”) struggled to meet statutory deadlines for counting those ballots.¹⁷

In 2022, the Maryland General Assembly, in anticipation of further difficulty in meeting deadlines for finalizing election results, passed two bills allowing absentee ballots to be processed (but not counted) earlier.¹⁸ These bills sought to amend Maryland Election Law, section 11-302, which prohibits local boards from opening absentee ballots until after election day.¹⁹ Although Governor Hogan “lauded” the idea, he ultimately

12. *Id.* at 323.

13. MD. CODE ANN., ELEC. LAW § 11-101(c)(1) (West 2025).

14. *Emergency Remedy*, 292 A.3d at 327–28.

15. *See id.*

16. *See id.* at 328.

17. *Id.*

18. *Id.* at 327 (citing S.B. 163, 2022 Leg., 444th Sess. (Md. 2022) § 1; H.B. 862, 2022 Leg., 444th Sess. (Md. 2022) § 1).

19. *Id.* (citing MD. CODE ANN., ELEC. LAW § 11-302(b)(1) (West 2025)).

vetoed the bills due to the lack of additional ballot security measures.²⁰ With the General Assembly's 2022 session concluded, no further legislation could be passed.²¹

On September 2, 2022, the State Board petitioned the Circuit Court for Montgomery County to authorize local boards of election to begin canvassing absentee ballots on October 1, 2022—more than one month before the general election.²² The State Board sought that authority under Section 8-103(b)(1) of the Election Law Article, which provides that “[i]f emergency circumstances, not constituting a declared state of emergency, interfere with the electoral process, the State Board . . . may petition a circuit court to take any action the court considers necessary to provide a remedy that is in the public interest and protects the integrity of the electoral process.”²³ The State Board argued that emergency circumstances existed due to the anticipated volume of absentee ballots and the corresponding risk of missing statutory deadlines for certifying election results.²⁴

Cox opposed the State Board's petition, asserting that Section 8-103(b)(1) violated Maryland's separation of powers by “impermissibly delegat[ing] to the courts the nonjudicial function of regulating the timing and manner of elections.”²⁵ He further argued that the anticipated volume of absentee ballots did not constitute emergency circumstances “because the problem had been foreseen in time to have made a legislative change during the General Assembly's 2022 session.”²⁶

The circuit court rejected Cox's challenges, holding that the election law was constitutional and that the facts presented by the State Board constituted emergency circumstances.²⁷ It then granted the State Board's requested remedy.²⁸ Cox appealed to the Appellate Court of Maryland, but what is now called the Supreme Court of Maryland (then known as the Court of Appeals of Maryland) granted the State Board's writ of

20. *Id.* at 327.

21. See *Maryland General Assembly—2022 Session*, MD. MANUAL ON-LINE (Apr. 12, 2022), <https://msa.maryland.gov/msa/mdmanual/07leg/html/sessions/2022.html> (indicating that the legislative session concluded on April 11, 2022); Letter from Larry Hogan, Governor, State of Maryland, to Bill Ferguson, President of the Maryland Senate, and Adrienne A. Jones, Speaker of the House of Delegates (May 27, 2022), https://mgaleg.maryland.gov/2022RS/veto_letters/hb0862.pdf (indicating the governor vetoed both bills following the conclusion of the 2022 Legislative Session).

22. See *Emergency Remedy*, 292 A.3d at 323, 329.

23. *Id.* at 329–330; MD. CODE ANN., ELEC. LAW § 8-103(b)(1) (West 2025).

24. *Id.* at 329–30.

25. *Id.* at 331.

26. *Id.* at 341.

27. *Id.* at 330.

28. *Id.*

certiorari before the case was heard.²⁹ On October 7, 2022, the court issued an order affirming the circuit court's decision, with its reasoning explained in an opinion discussed below.³⁰

III. BACKGROUND

Before analyzing the Supreme Court of Maryland's holding, this section provides a brief overview of the canvassing process and the statutory deadlines for certifying election results. It then explores the varied interpretations of state separations of powers, as well as Maryland's distinctive approach to the doctrine.

A. *Canvassing Absentee Ballots and Election-Related Deadlines*

The time-consuming process of canvassing absentee ballots is spelled out in detail by regulation in Maryland.³¹ The process begins with the election director distributing batches of ballots to a local board's review "team," which verifies each ballot's timeliness, signature, and envelope integrity.³² Next, the team carefully opens each envelope, ensuring it contains only one ballot and placing certificates of voter assistance into separate piles.³³ The team then inspects each ballot for "compliance and tabulating acceptability,"³⁴ referring any issues to the local board for resolution.³⁵ After processing a batch, the local board categorizes each ballot as either acceptable, acceptable but contested, or rejected.³⁶ Votes from the first two categories are tabulated and included in the unofficial vote count.³⁷ Once removed from their envelopes, ballots must be tabulated "without unreasonable delay."³⁸

Amidst the canvassing process are strict statutory deadlines for reporting election results. Each local board must verify the vote count within 10 days of the election.³⁹ The local board must then certify the accuracy of the results and transmit them to the governor, the State Board, and the clerk of the local circuit court by the second Friday after

29. *Id.*

30. *In re* Emergency Remedy by Md. State Bd. of Elections, 283 A.3d 1214, 1216 (Md. 2022) (per curiam).

31. *See generally* MD. CODE REGS., 33.11.04.01–11 (2025).

32. *Id.* at 33.11.04.05A–C.

33. *Id.* at 33.11.04.05D–G.

34. *Id.* at 33.11.04.07A.

35. *Id.* at 33.11.04.06, 33.11.04.08.

36. *Id.* at 33.11.04.07D, 33.11.04.09A.

37. *Id.* at 33.11.04.09B.

38. *Id.* at 33.11.04.10.

39. MD. CODE ANN., ELEC. LAW § 11-308(a) (West 2025).

the election.⁴⁰ These deadlines are critical because the Board of State Canvassers must certify the results within thirty-five days of the election,⁴¹ which triggers a three-day deadline to file a petition for a recount.⁴² Finally, the United States Congress must “assemble . . . at noon on the 3d day of January.”⁴³

B. Varied Interpretations of State Separation of Powers

Many state constitutions include an “express, *textual* affirmation” of the separation of powers doctrine.⁴⁴ Yet each state applies the doctrine uniquely. As Professor Robert F. Williams explains, “[t]he federal Constitution does not mandate a specific separation or distribution of powers for the states.”⁴⁵ Consequently, states vary significantly in how they distribute power among the branches, with some even changing their approaches over time.⁴⁶ For instance, New Jersey has elevated the governor from a historically weak position to one of the most powerful state chief executives in the country,⁴⁷ whereas California has maintained strong legislative control over certain executive functions.⁴⁸ Resolving state separation of powers issues therefore “call[s] for a *state-specific*” analysis.⁴⁹

Since there is little scholarship on state constitutions’ separation of powers, the doctrine often “mimic[s] themes in federal constitutional law” and draws upon “Madisonian idea[s] of constitutional design.”⁵⁰ Under this view, the doctrine is “based primarily on carefully balanced

40. *Id.* §§ 11-308(b), 401(a), 401(c)(1).

41. *See id.* § 11-503(a)–(c).

42. *Id.* § 12-101(d).

43. U.S. CONST. amend. XX, § 2.

44. WILLIAMS & FRIEDMAN, *supra* note 1, at 269 (citation omitted). In fact, this is “true for forty of the states.” *Id.* (citing G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 14 (1988)).

45. *Id.* at 272. Another reason for the development of independent state constitutional separation of powers doctrines is that, as Professor Robert Schapiro explains, the “federal separation of powers doctrine has never been ‘incorporated’ or applied to the states.” *Id.* at 272 (citing Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 92–93 (1998)). As a result, state courts have limited experience in applying it. *Id.*

46. *Id.* at 270–71.

47. *Id.* at 271 (citing *Comm’n Workers of Am., AFL-CIO v. Florio*, 617 A.2d 223, 231 (N.J. 1992); *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978)).

48. *Id.* at 271 (citing *Marine Forests Soc’y v. Cal. Coastal Comm.*, 113 P.3d 1062, 1078–82 (Cal. 2005)).

49. *Id.* at 270 (citing James A. Gardner, *The Positivist Revolution That Wasn’t: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109 (1998)).

50. Jonathan L. Marshfield, *America’s Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 549 (2023).

intragovernment rivalries that are fueled by the private ambition of government officers,”⁵¹ enforced through a system of internal checks and balances.⁵² This backdrop has led state courts and scholars to analyze state separation of powers through two lenses: formalism and functionalism.⁵³ The formalist approach suggests there is a clear line of demarcation between the branches of government.⁵⁴ As one scholar described it, formalism is “the maxim that ‘the legislature makes, the executive executes, and the judiciary construes the law.’”⁵⁵ By contrast, the functionalist approach focuses on whether the actions of one branch interfere with the core functions of another, “stress[ing] not the independence, but the interdependence of the branches.”⁵⁶

Yet Professor Jonathan L. Marshfield contends that state courts should follow “neither the formalist nor functionalist theories.”⁵⁷ He criticizes the Madisonian approach for its failure to account for state constitutions’ “deep commitment to majoritarianism and direct popular involvement in governance.”⁵⁸ Instead, Marshfield proposes the “accountability doctrine,” which “places a premium on detailed constitutional text.”⁵⁹ And when the text is unclear, courts should consider “whether the proposed power would obfuscate the public’s ability to track accountability for decisions.”⁶⁰ Rather than relying on the government to self-regulate through the traditional tripartite division of power or rigid internal checks and balances, his approach suggests organizing government into distinct departments so “responsibility is more isolated.”⁶¹

C. Maryland’s Approach to the Separation of Powers

Maryland is among the forty states with an explicit constitutional guarantee of separation of powers. Article 8 of the Maryland Declaration of Rights states: “That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other;

51. *Id.*

52. *Id.* at 551.

53. WILLIAMS & FRIEDMAN, *supra* note 1, at 324.

54. *See id.*

55. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24 (1991) (quoting *Wayman v. Southard*, 25 U.S. (10 Wheat.) 1, 46 (1825)).

56. *Id.* at 1527–28.

57. Marshfield, *supra* note 50, at 626.

58. *Id.* at 550.

59. *Id.* at 626–27.

60. *Id.* at 628.

61. *See id.* at 551.

and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.”⁶²

Despite the ostensibly absolute language of article 8, Maryland courts often prefer a more “flexible interpretation.”⁶³ As the Maryland Court of Appeals has explained, the three branches are not “*wholly* separate and unmixed,”⁶⁴ and the doctrine should be applied with a “sensible degree of elasticity.”⁶⁵ To evaluate the proper degree of elasticity, Maryland courts focus on how close a function is to the “core” functions of a given branch.⁶⁶ For the judiciary, the court has done so by “repeatedly [holding] that ‘Article 8 prohibits the courts from performing *nonjudicial functions*.’”⁶⁷

While there is no “precise definition” of a judicial function,⁶⁸ Maryland caselaw reflects a two-factor inquiry. First, courts consider whether the delegated task requires a court to act in a manner inconsistent with the “standards or rules normally applied by courts in the exercise of their usual judicial functions”⁶⁹ or to exercise powers “not within the ‘ordinary or recognized powers’” of a court.⁷⁰ Second, courts examine “whether the legislative body has provided sufficient guidance limiting the court’s discretion so that the court is not called upon to make a decision based on policy, expediency, or politics[.]”⁷¹ This two-factor inquiry was the approach taken by the Supreme Court of Maryland in *Emergency Remedy*.⁷²

IV. THE COURT’S REASONING

The seven justices of the Maryland Supreme Court unanimously held that Election Law Section 8-103(b)(1) does not violate the separation of powers guaranteed by article 8 and that the anticipated volume of

62. MD. CONST., DECL. OF RTS., art. 8.

63. FRIEDMAN, *supra* note 5, at 34.

64. *Murphy v. Liberty Mut. Ins. Co.*, 274 A.3d 412, 434 (Md. 2022) (emphasis added) (quoting *Crane v. Meginnis*, 1 G. & J. 463, 476 (Md. 1829)).

65. *Dep’t of Nat. Res. v. Linchester Sand & Gravel Corp.*, 334 A.2d 514, 521 (Md. 1975).

66. FRIEDMAN, *supra* note 5, at 34.

67. *Sugarloaf Citizens Ass’n, Inc. v. Gudis*, 573 A.2d 1325, 1331 (Md. 1990) (emphasis added) (quoting *Reyes v. Prince George’s Cnty.*, 380 A.2d 12, 21 (Md. 1977)).

68. *Id.*

69. *Id.* (quoting *Beasley v. Ridout*, 52 A. 61, 66 (Md. 1902)).

70. *Id.* (quoting *Close v. S. Md. Agric. Ass’n*, 108 A. 209, 214 (Md. 1919)). Tasks found to be non-judicial include rendering advisory opinions, issuing pari-mutuel betting licenses, and providing referendum concerning the issuance of liquor licenses. Friedman, *supra* note 5, at 36 (citations omitted).

71. *In re Emergency Remedy by Md. State Bd. Of Elections*, 292 A.3d 319, 333 (Md. 2023); *see also Sugarloaf*, 573 A.2d at 1331; *Schisler v. State*, 907 A.2d 175, 207 (Md. 2006).

72. *See Emergency Remedy*, 292 A.3d at 333.

absentee ballots for the 2022 general election constituted emergency circumstances.⁷³ Justice Biran concurred in the judgment but wrote separately to emphasize that any court-imposed remedy must be narrowly tailored.⁷⁴

A. *The Majority Opinion*

The majority opinion, authored by Chief Justice Fader, begins by establishing the standard of review: the circuit court's determination of the election law's constitutionality is a legal conclusion reviewed without deference, but the question of whether emergency circumstances existed is a mixed question of law and fact entitled to deferential review.⁷⁵ Additionally, when evaluating the constitutionality of a statute, there is a presumption it is constitutional.⁷⁶ To overcome this presumption, the challenging party must demonstrate "a clear and unequivocal breach of the Constitution."⁷⁷

The majority then addressed Cox's challenges in two parts: (1) whether Section 8-103(b)(1) violated the separation of powers guaranteed by article 8, either on its face or as applied, and (2) whether the circuit court erred in finding the existence of emergency circumstances.⁷⁸

1. Whether Election Law Section 8-103(b)(1) Violates Separation of Powers Principles

Before applying its two-factor judicial function inquiry, the court first examined the text of Section 8-103(b)(1) to determine the task it delegates to courts.⁷⁹ The court broke the statute down into four components:

The first three define the preconditions to court action: (1) there must be "emergency circumstances" that do not rise to the level of "a declared state of emergency"; (2) those circumstances must "interfere with the electoral process"; and (3) the State Board . . . must "petition a circuit court" to intervene. The fourth component is the circuit court's authority . . . to impose a remedy that both "is in the public interest" and "protects the integrity of the

73. *Id.* at 343.

74. *Id.* (Biran, J., concurring).

75. *Id.* at 330–31 (majority opinion) (citations omitted).

76. *Id.* at 331 (citing *Mahai v. State*, 255 A.3d 1050, 1057 (Md. 2021)).

77. *Id.*

78. *See id.* at 331, 338.

79. *See id.* at 335.

electoral process. . . .” [W]e interpret these dual requirements as authorizing a remedy that both (1) protects electoral integrity by addressing the emergency circumstances at issue, and (2) is not otherwise contrary to the public interest.⁸⁰

With the statute’s task in mind, the court held that section 8-103(b)(1) delegates a judicial function.⁸¹ First, it determined that the task has traditionally been performed by the judiciary, both procedurally and substantively.⁸² The court explained that the statute “contemplates a decidedly judicial proceeding,” as it is initiated by a petition, “set[s] forth statutory factors that can be established by evidentiary proof,” and allows a circuit court to impose a remedy only if harm is proven.⁸³ As to substance, the court emphasized that the statute is situated within the Election Law Article of the Maryland Code, which is “replete” with provisions permitting or requiring court intervention to ensure the integrity of the electoral process.⁸⁴ Similarly, Maryland precedent is “filled” with decisions supporting the prospect of judicial intervention in electoral matters.⁸⁵

The court then applied the second factor and found that “Section 8-103(b)(1) provide[s] more than sufficient guidance to render a court’s decision an exercise in judicial, rather than legislative, discretion.”⁸⁶ The court reasoned that the statute allows for a remedy “only if it finds the existence of emergency circumstances that interfere with an election, and its remedy must protect the integrity of the electoral process by addressing those specific emergency circumstances.”⁸⁷

To illustrate its reasoning, the court distinguished the statute here from the unconstitutional ordinance in *Sugarloaf*.⁸⁸ In *Sugarloaf*, the Maryland high court held that an ordinance granting the court “unguided discretion” to permanently void an official act based solely on the court’s assessment of whether it was “in the public interest” was unconstitutional.⁸⁹ The statute at issue in *Sugarloaf* is distinguishable from section 8-103(b)(1) because “the circuit court’s task in determining whether to impose a *short-term* remedy to address emergency

80. *Id.* (quoting MD. CODE ANN., ELEC. LAW § 8-103(b)(1) (West 2025)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* at 335–36 (citing MD. CODE ANN., ELEC. LAW §§ 12-201–04 (West 2025)).

85. *See id.* at 336–37 (citations omitted).

86. *Id.* at 337.

87. *Id.*

88. *Id.* (citing *Sugarloaf Citizens Ass’n, Inc. v. Gudis*, 573 A.2d 1325, 1333 (Md. 1990)).

89. *See Sugarloaf*, 573 A.2d at 1332–33.

circumstances affecting the integrity of an impending election is a judicial function.”⁹⁰ The court was unwilling to extend its holding in *Sugarloaf* because “[t]here is nothing inappropriate in the General Assembly directing the court to also consider the public interest in fashioning its remedy.”⁹¹ Based on the foregoing, the court concluded that Section 8-103(b)(1) is not facially unconstitutional.⁹²

The court then addressed whether the election law was unconstitutional as applied in this case.⁹³ Cox argued that the law was unconstitutional because the circuit court’s remedy effectively voided Governor Hogan’s veto, which would have disallowed early ballot canvassing.⁹⁴ “That is not what occurred here,” the court held, because “[t]he remedy imposed by the circuit court was a temporary, emergency measure that had effect in only one election, not a modification of State law with lasting effect, and it was imposed pursuant to an express statutory authorization that was itself passed by a General Assembly and signed by a Governor.”⁹⁵ The court also noted that Governor Hogan in fact “favored permitting the early canvassing of absentee ballots, even absent emergency circumstances.”⁹⁶ Thus, the court was neither “asked to, [n]or did, weigh in to tip the scales in a policy dispute between the political branches.”⁹⁷

2. Whether the Anticipated Volume of Absentee Ballots in the November 2022 Gubernatorial General Election Constituted “Emergency Circumstances”

After determining that section 8-103(b)(1) was constitutional, the majority considered whether “the circuit court erred in finding that ‘emergency circumstances’ existed that justified the court’s intervention.”⁹⁸ Before resolving this issue, the court first interpreted the meaning of “emergency circumstances” under the election law.⁹⁹

The court stated that its goal in statutory interpretation is to “ascertain and effectuate the actual intent of the General Assembly.”¹⁰⁰

90. *Emergency Remedy*, 292 A.3d at 337 (emphasis added).

91. *Id.*

92. *Id.* at 337–38.

93. *Id.* at 338.

94. *Id.*

95. *Id.* (citing 1998 Md. Laws ch. 585).

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 338–41.

100. *Id.* (quoting *Thornton Mellon LLC v. Adrienne Dennis Exempt Tr.*, 274 A.3d 380, 400 (Md. 2022)).

It begins by looking to the text of the statute, “giving it its natural and ordinary meaning.”¹⁰¹ In interpreting the statute’s plain language, the court also considers “the context of the statutory scheme to which it belongs, considering the purpose, aim or policy of the Legislature in enacting the statute.”¹⁰² If the statute is unambiguous, however, the court “need not look beyond the statutory language to determine the General Assembly’s intent[.]”¹⁰³

With the canons of construction in mind, the court began by consulting various dictionaries and determined that the “popular, ordinary definitions” of emergency circumstances are “unexpected or unforeseen conditions that require immediate attention to prevent harm.”¹⁰⁴ It then turned to the text of section 8-103 and found that “[t]he statutory context in which the relevant terms appear is consistent with the breadth of that definition.”¹⁰⁵ For context, section 8-103 contains two subsections.¹⁰⁶ Subsection (a) applies during a state of emergency, and “‘emergency’ has a specific meaning defined by statute.”¹⁰⁷ In contrast, subsection (b) “applies to ‘emergency circumstances, not constituting a declared state of emergency’” but lacks a corresponding statute defining “emergency.”¹⁰⁸ So the court inferred that “emergency circumstances” for the purposes of subsection (b) are those that “fall below the threshold required to declare a state of emergency.”¹⁰⁹

The court further noted that the legislative history—though “scant”—also supports a broad interpretation.¹¹⁰ Specifically, the court cited a drafter’s note from the predecessor statute to section 8-103, which indicates it was adopted “to address the potential problem of a wide range

101. *Id.* (quoting *Peterson v. State*, 226 A.3d 246, 254 (Md. 2020)).

102. *Id.* at 339 (quoting *Berry v. Queen*, 233 A.3d 42, 49 (Md. 2020)).

103. *Id.* (quoting *Peterson*, 226 A.3d at 254).

104. *Id.*; *id.* at n.18; see also *Circumstance*, NEW OXFORD AM. DICTIONARY 315 (3d ed. 2010); *Emergency*, BLACK’S LAW DICTIONARY 660 (11th ed. 2019); *Emergency*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 407 (11th ed. 2014); *Emergency*, NEW OXFORD AM. DICTIONARY 567 (3d ed. 2010).

105. *Emergency Remedy*, 292 A.3d at 339–40 (citing *75-80 Properties, L.L.C. v. Rale, Inc.*, 236 A.3d 545, 560 (2020)).

106. MD. CODE ANN., ELEC. LAW § 8-103 (West 2025)).

107. *Emergency Remedy*, 292 A.3d at 340 (citing MD. CODE ANN., PUB. SAFETY § 14-101(c) (West 2022) (defining “emergency” as “the imminent threat or occurrence of severe or widespread loss of life, injury, or other health impacts, property damage or destruction, social or economic disruption, or environmental degradation from natural, technological, or human-made causes.”)).

108. *Id.* (quoting MD. CODE ANN., ELEC. LAW § 8-103(b)(1) (West 2025)).

109. *Id.*

110. *Id.*

of ‘emergencies.’”¹¹¹ Otherwise, the legislative history provided little clarity on the meaning of “emergency circumstances.”¹¹²

In sum, the court held that “based on plain language and context, and consistent with legislative history, ‘emergency circumstances’ for purposes of § 8-103(b)(1) includes any unexpected or unforeseen conditions that require immediate attention to prevent harm, but that do not rise to the level of urgency or threatened harm required for a declared state of emergency.”¹¹³

Applying that broad definition, the court held that the conditions faced by the State Board constituted “emergency circumstances” that interfered with the electoral process.¹¹⁴ The court reasoned that the state’s experience with absentee ballots during the 2020 elections, coupled with Maryland missing deadlines for reporting election results during the 2022 primary, “caused the State Board to forecast the likelihood of a volume of absentee ballots cast in that year’s general election that would overwhelm the ability of local boards to process them.”¹¹⁵

Finally, because Cox only challenged the circuit court’s authority to impose a remedy, the court did not address the appropriateness of the particular remedy.¹¹⁶ However, to provide guidance for future petitions, the court emphasized that a circuit court’s ruling “should . . . explain the basis for [its] conclusion that [the] remedy is appropriately tailored to address the particular emergency circumstances at issue without going further than is necessary under the circumstances.”¹¹⁷

B. *The Concurring Opinion*

Justice Biran concurred. He wrote separately to emphasize the majority’s statement that any court-imposed remedy under Section 8-103(b)(1) must be necessarily tailored.¹¹⁸ Justice Biran was particularly “skeptical” that the October 1 start date issued by the circuit court in this case was necessary.¹¹⁹ He explained: “If the circuit court had ordered canvassing and tabulating of absentee ballots to begin no earlier than October 15, 2022 or another date around that time, it seems likely that

111. *Id.* (quoting S.B. 118, 1998 Leg., 412th Sess. (Md. 1998)).

112. *Id.* at 341.

113. *Id.*

114. *Id.* at 342.

115. *Id.*

116. *Id.*

117. *Id.* at 343.

118. *Id.* (Biran, J., concurring).

119. *Id.* at 344.

the local boards would have been able to perform their work as effectively as they did with a start date of October 1.”¹²⁰

Justice Biran concluded by offering further guidance for future State Board petitions.¹²¹ He recommended: “If the circuit court finds that there is [evidence establishing] an emergency that warrants relief, the court should then make findings as to whether the requested relief is tailored to address the emergency and, if it is not, the court should grant different relief that is so tailored.”¹²²

V. ANALYSIS AND IMPLICATIONS

As the United States Supreme Court returns many critical issues to the states,¹²³ it becomes increasingly important to resolve state separation of powers questions carefully. This is particularly true, as Professor Jonathan L. Marshfield—a constitutional law scholar—argues, because the traditional formalist and functionalist approaches to the doctrine often overlook one of its fundamental purposes: “to address the concern that self-interested officials are likely to collude across branches rather than compete; thereby short-circuiting intragovernment checks.”¹²⁴

In *Emergency Remedy*, the Supreme Court of Maryland reaffirmed its flexible interpretation of the separation of powers doctrine, holding that an election law delegating the task of protecting electoral integrity to courts is a judicial function.¹²⁵ Yet, by upholding the statute, the court arguably legitimized some of Professor Marshfield’s concerns in that it may have, in his words, “obfuscate[d] the public’s ability to track accountability for [government] decisions.”¹²⁶ Voters—especially non-jurists—may struggle to discern which branch of government is ultimately responsible for regulating elections. Ordinarily, that power is vested in the Maryland legislature.¹²⁷

120. *Id.* at 343–44.

121. *See id.* at 344.

122. *Id.*

123. *See, e.g.,* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 292 (2022) (“We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”).

124. Marshfield, *supra* note 50, at 546.

125. *See Emergency Remedy*, 292 A.3d at 335, 343.

126. Marshfield, *supra* note 50, at 628.

127. MD. CONST. art. 3, § 49 (“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.”).

To address this concern, the court should heed Professor Marshfield's advice and favor allocations of power that "keep the lines of accountability most clear."¹²⁸ While this Comment ultimately argues that the court made the right decision under its current approach to the separation of powers, it urges the court to adopt a more pragmatic approach that balances judicial oversight with government transparency.

A. *The Court Correctly Found That the Election Law Does Not Violate Maryland's Separation of Powers Provision*

Maryland courts appear to adopt a more functionalist approach to state separation of powers issues. Instead of making formalistic distinctions between the branches of government, they recognize that the functions of each branch may "overlap" to some degree.¹²⁹ In *Emergency Remedy*, the Maryland Supreme Court applied this functionalist approach and convincingly demonstrated through a two-factor test and precedent that section 8-103(b)(1) delegates a judicial function.¹³⁰

As to the first factor, the task the statute assigns is traditionally performed by the judiciary. As the Maryland Court of Appeals has explained, a task is more likely judicial in nature when it requires resolving issues based on "adjudicative" rather than "legislative" facts.¹³¹ Here, section 8-103(b)(1) asks the court to determine whether the State Board has provided sufficient evidence of "emergency circumstances" interfering with the electoral process and, if so, whether imposing a remedy is warranted. The court is thus tasked with resolving issues based on adjudicatory facts—not general questions of policy decided by the legislature.¹³²

Maryland precedent also supports the prospect of judicial intervention in electoral matters.¹³³ For instance, in *Fritzsche v.*

128. Marshfield, *supra* note 50, at 628.

129. See *Murphy v. Liberty Mut. Ins. Co.*, 274 A.3d 412, 434 (Md. 2022).

130. See *In re Emergency Remedy by Md. State Bd. of Elections*, 292 A.3d 319, 335–38 (Md. 2023).

131. See, e.g., *Talbot Cnty. v. Miles Point Prop., LLC*, 2 A.3d 344, 353–55 (Md. 2010).

132. Cf. *Talbot*, 2 A.3d at 353–55 (finding the denial of a zoning plan amendment was legislative in nature, as the County Board of Appeals relied primarily on broad policy considerations, such as aiming to prevent discouragement of property development in growth areas).

133. See, e.g., *Ademiluyi v. Egbuonu*, 215 A.3d 329, 362 (Md. 2019) (enjoining the State Board from certifying a general election ballot with a disqualified candidate to protect the integrity of the electoral process); *Cabrera v. Penate*, 94 A.3d 50, 51 (Md. 2014) (excluding an ineligible candidate's name from a primary election ballot); *Fowler v. Bd. of Supervisors of Elections for Prince George's Cnty.*, 270 A.2d 660, 662 (Md. 1970) (declining to invalidate an election for irregularities); see also *Lamb v. Hammond*, 518 A.2d 1057, 1068–70 (Md. 1987) (ballots that did not comply with statutory requirements could not be canvassed).

Maryland State Board of Elections, the Maryland Court of Appeals held that judicial intervention was necessary to exclude votes contained in noncompliant absentee ballots to “safeguard the election process.”¹³⁴ The court in *Fritzsche* clarified in a footnote that its intervention did not violate the separation of powers because it was “not overturning a legislative decision.”¹³⁵ While dicta, the same logic applies here. The circuit court, pursuant to express statutory authorization, issued a temporary remedy it deemed necessary to protect the 2022 general election. Put differently, the court neither overturned a legislative decision nor made a permanent one.

As to the second factor, the court correctly found that section 8-103(b)(1) provides sufficient guidance for a court to render a decision in its judicial capacity.¹³⁶ To illustrate this, consider *Cromwell v. Jackson*, where the Maryland Court of Appeals was tasked with determining whether an individual was “a fit person” to receive a liquor license or whether the place where liquor would be sold was “a proper one.”¹³⁷ The court held that these tasks were non-judicial because they required determinations based solely on “public policy,” with “no rule to guide the [c]ourt.”¹³⁸ In other words, the issue in *Cromwell* was not the court’s consideration of public policy; rather, it was the absence of a “definite guide” for the court to exercise its discretion.¹³⁹

By contrast, section 8-103(b)(1) provides the court with a clear directive. Specifically, the statute permits the court to impose a remedy only if it finds that emergency circumstances exist that interfere with an election’s integrity.¹⁴⁰ And contrary to Cox’s argument, the statute’s requirement that the remedy also be “in the public interest” does not render the task nonjudicial.¹⁴¹ Maryland courts routinely weigh the public interest without venturing into legislative territory, like when deciding whether to grant injunctive relief.¹⁴² So long as a court’s decision

134. 916 A.2d 1015, 1024 (Md. 2007).

135. *Id.* at 1022 n.16.

136. *In re Emergency Remedy by Md. State Bd. of Elections*, 292 A.3d 319, 337 (Md. 2023).

137. 52 A.2d 79, 87–88 (Md. 1947).

138. *Id.* at 88.

139. *See id.* at 88–89.

140. *See* MD. CODE ANN., ELEC. LAW § 8-103(b)(1) (West 2025).

141. *See Emergency Remedy*, 292 A.3d at 337.

142. *See, e.g., State v. Falcon*, 152 A.3d 687, 698 (Md. 2017); *Schade v. Md. State Bd. of Elections*, 930 A.2d 304, 325 (Md. 2007); *accord Ramirez v. Collier*, 595 U.S. 411, 421 (2022) (quoting *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (noting that one factor a party seeking a preliminary injunction must establish is “that an injunction is in the public interest”).

relies primarily on adjudicatory facts, as it did here, it aligns with Maryland precedent.¹⁴³

In short, the task delegated by the General Assembly in section 8-103(b)(1) is a judicial function. The court therefore correctly held that this delegation does not offend Maryland's separation of powers provision and that the statute is not unconstitutional, which is supported by the strong presumption accorded to a statute's constitutionality.¹⁴⁴

B. The Court Correctly Determined That Emergency Circumstances Existed, but Its Statutory Interpretation May Warrant Future Reevaluation

Consistent with Maryland's canons of construction, the court appropriately interpreted "emergency circumstances" under section 8-103(b)(1) broadly.¹⁴⁵ Yet its expansive definition may prove difficult for circuit courts to apply uniformly. For this reason, the Maryland State Legislature should enact a statutory definition of "emergency circumstances" under subsection (b), just as it did for subsection (a).¹⁴⁶ This would allow the court to interpret its meaning more precisely, thereby promoting consistency and circumventing future litigation.

There are, however, a few issues this Comment raises with the court's statutory interpretation. In interpreting the meaning of "emergency circumstances" under the statute, the court looked to the legislative history—a single drafter's note from section 8-103's predecessor statute.¹⁴⁷ The note states that section 8-103 was adopted "to address the potential problem of a wide range of 'emergencies.'"¹⁴⁸ While this note favors a broad reading, it applies equally to both subsections (a) and (b) and thus fails to clarify the particular meaning of "emergency circumstances" under subsection (b).

The court's reliance on a single drafter's note also introduces practical concerns about the use of legislative history in statutory interpretation. "Even if legislative intent did exist," Justice Antonin Scalia often argued, "there would be little reason to think it might be

143. In *Talbot Cnty. v. Miles Point Prop., LLC*, the Maryland high court recognized that "decision-making processes may require both legislative and adjudicative roles." 2 A.3d 344, 355 (Md. 2010) (citing *Mayor & Council of Rockville v. Woodmont Country Club*, 705 A.2d 301, 306–07 (Md. 1998)). A court's valid exercise of power under such a duality, however, is predicated on the court relying primarily upon adjudicatory facts. *See id.*

144. *Mahai v. State*, 255 A.3d 1050, 1057 (Md. 2021).

145. *See Emergency Remedy*, 292 A.3d at 338–41.

146. *See id.* at 340–41.

147. *Id.* (citing S.B. 118, 1998 Leg., 412th Sess. (Md. 1998)).

148. *Id.* (quoting S.B. 118, 1998 Leg., 412th Sess. (Md. 1998)).

found in the sources that the courts consult.”¹⁴⁹ Legislative materials—such as committee reports or, in this case, an isolated drafter’s note—rarely reflect the understanding of the full legislative body, as they are usually created by a minority of members.¹⁵⁰

But more fundamentally, Justice Scalia opposed the use of legislative history because intentions do not undergo the constitutional requirements of bicameralism and presentment.¹⁵¹ Thus, to Scalia, even if legislative history could offer insight into a statute’s purpose, such insight would be inherently illegitimate.¹⁵² As he explained: “I don’t care what the legislators intended. I care what the fair meaning of [a] word is.”¹⁵³ While this Comment does not contend that textualism is a panacea for all statutory interpretation issues,¹⁵⁴ it does suggest that a textualist approach can prevent courts from using legislative history to improperly usurp power from both the legislative and executive branches.

Turning to the facts of this case, and with the court’s comprehensive definition in mind, the court correctly found that emergency

149. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 376 (2012).

150. See, e.g., *Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) (“Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful.”). Justice Scalia also warned that legislative history is vulnerable to manipulation and gamesmanship because, while power is vested in the elected members of a legislature, legislative staff and lobbyists often write the floor statements, reports, and messages that make up the legislative history. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 34 (1997) (“One of the routine tasks of the . . . lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten ‘floor debate’—or, even better, insert into a committee report.”). But see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992) (arguing legislators are responsible for their staff’s work, which helps prevent renegade staff from making policy on their own).

151. See *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

152. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”).

153. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1616 (2012); see also SCALIA, *supra* note 150, at 20 (“Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case.”).

154. Of course, there are times—perhaps where a drafter’s note adds necessary context—when it “may be beneficial” to “analyze the statute’s ‘relationship to earlier . . . legislation.’” See *Berry v. Queen*, 233 A.3d 42, 49 (Md. 2020) (quoting *Blackstone v. Sharma*, 191 A.3d 1188, 1203 (Md. 2018)). But that was not the case here. As the court conceded, “[o]ther than [the] . . . phrase suggesting an intent for the provision to operate broadly, the legislative history . . . does not shed light on the meaning of ‘emergency circumstances.’” *In re Emergency Remedy by Md. State Bd. of Elections*, 292 A.3d 319, 341 (Md. 2023).

circumstances existed.¹⁵⁵ Since the onset of COVID-19, absentee voting in Maryland has experienced significant volatility.¹⁵⁶ Even at the height of the pandemic, absentee voting dropped from accounting for around ninety-seven percent of the total votes in the 2020 primary election to about fifty percent in the 2020 general election.¹⁵⁷ And while the percentage decreased in the 2022 primary election, it remained well above pre-pandemic levels, causing local boards to miss deadlines for reporting election results.¹⁵⁸ Given the anticipated volume of absentee ballots for the 2022 gubernatorial general election, the risk of missing statutory deadlines, and the deferential standard of review,¹⁵⁹ the court properly affirmed the circuit court's judgment.¹⁶⁰

Looking ahead, Justice Biran's concurrence raises important considerations for future petitions under section 8-103(b)(1).¹⁶¹ While the specific remedy imposed by the circuit court was not at issue on appeal, his concern that the October 1 start date may have been earlier than necessary is well-founded.¹⁶² The statute makes clear that any court-imposed remedy "must necessarily be tailored to address only the particular emergency circumstances . . . [that] interfere with the electoral process."¹⁶³ Seemingly, the General Assembly intended for such remedies to be limited. If circuit courts fail to tailor remedies accordingly, litigants may continue to allege separation of powers violations. Therefore, Maryland circuit courts should heed Justice Biran's guidance when crafting remedies in future cases.¹⁶⁴

VI. CONCLUSION

In *Emergency Remedy*, the Supreme Court of Maryland reaffirmed its flexible interpretation of the separation of powers, holding that an election law delegating the task of protecting electoral integrity to courts is a judicial function. Yet, as the United State Supreme Court defers many critical issues to the states, Maryland courts should consider adopting a more pragmatic approach that balances judicial oversight

155. See *Emergency Remedy*, 292 A.3d at 342.

156. See *id.*

157. *Id.*

158. *Id.*

159. See, e.g., *Liddy v. Lamone*, 919 A.2d 1276, 1285 (Md. 2007); *Gore Enter. Holdings, Inc. v. Comptroller of Treasury*, 87 A.3d 1263, 1269–70 (Md. 2014).

160. *Emergency Remedy*, 292 A.3d at 342.

161. See *id.* at 343–44 (Biran, J., concurring).

162. *Id.*

163. *Id.* at 343 (majority opinion) (quoting MD. CODE ANN., ELEC. LAW § 8-103(b)(1) (West 2025)).

164. *Id.* at 344 (Biran, J., concurring).

1202 *RUTGERS UNIVERSITY LAW REVIEW* [Vol. 77:1183

with government transparency. And while the court correctly found that “emergency circumstances” existed in this case, its statutory interpretation of the election law provides limited guidance to circuit courts tasked with applying it. Thus, if the legislature provides more clarity in the future, the court should consider refining its interpretation to circumvent unnecessary litigation. Finally, Justice Biran’s concurrence underscoring the need for carefully tailored remedies serves as a reminder of the delicate balance courts must strike between judicial intervention and legislative prerogatives.