IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 73

MELISANDE C. FRITSZCHE, *et al.,*

Petitioners,

v.

MARYLAND STATE BOARD OF ELECTIONS, *et al.,*

Respondents.

On Appeal from the Circuit Court for Anne Arundel County
(Joseph P. Manck, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF RESPONDENTS

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November 9, 2006

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STATEMENT OF THE CASE

This is an interlocutory appeal from the denial of the petitioners' November 6, 2006 request for a temporary restraining order by the Circuit Court for Anne Arundel County. In their motion, the petitioners ("Ms. Fritszche"[1]) sought an order directing the respondents (collectively, the "State Board") to:

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[1] As discussed below, the factual record, even as augmented by the documents submitted with the petitioners' motion to supplement the record, does not explain in any detail how the other petitioner, Malcom G. Vinzant, Jr., would be affected by the remedy sought by the petitioners. The petitioners' brief similarly does not even mention Mr. Vinzant. For these reasons and for convenience, the petitioners will be referred to simply as Ms. Fritszche in this brief.

1. Allow Absentee Ballots to be accepted if postmarked on Election Day, Tuesday November 7, 2006.

– OR IN THE ALTERNATIVE –

2. [Preserve] all Absentee Ballots postmarked on November 7, 2006 . . . until such time as a full hearing on this matter may be conducted.

Motion at 11; *see also* Complaint at 7 (Prayer for Relief).

At approximately 4:45 p.m. on Monday, November 6, Ms. Fritszche filed her complaint and motion, and a hearing on the motion was conducted shortly thereafter. The complaint contained four counts asserting (1) violations of the right to vote under Article I, §§ 1 and 3 of the Maryland Constitution and Article 7 of the Maryland Declaration of Rights; (2) violation of the equal protection guarantee in Article 24 of the Declaration of Rights; (3) violation of the equal protection guarantee provided by the Fourteenth Amendment to the federal Constitution; and (4) violation of rights conferred by Md. Code Ann., Election Law ("EL") § 9-304 and assertedly made actionable by Article 19 of the Declaration of Rights. *See* Complaint at 4-7.

During the hearing before the circuit court, counsel for Ms. Fritszche apparently withdrew her request for the alternative form of relief being sought, after being informed that it was the practice of the boards of elections to retain the documents she sought to have preserved for 22 months. *See* November 7, 2006 Affidavit of Anthony T. Pierce ¶¶ 6-8 (attached to petitioners' motion to supplement the record). After hearing argument, the circuit court denied Ms. Fritszche's request for a temporary restraining order. On Wednesday,

November 8, Ms. Fritszche noted an appeal to this Court; she subsequently noted a separate appeal to the Court of Special Appeals and petitioned this Court for a writ of certiorari, which was granted later in the day on November 8, 2006.[2]

QUESTION PRESENTED

Did the circuit court act within its discretion in denying a motion for a temporary restraining order that sought to extend, on behalf of an undefined class of voters, the statutorily authorized deadline for submitting an absentee ballot by mail?

STATEMENT OF FACTS

The papers filed by only one party below and the approximately 15-minute hearing that followed, *see* Pierce Affidavit ¶ 5, provide a meager factual record upon which to evaluate Ms. Fritszche's claims, both in this appeal and in the context of the lower court's expedited hearing of the motion for a temporary restraining order. Many of the pertinent facts about Ms. Fritszche's situation were developed only after the circuit court's hearing, and the State Board did not have an opportunity to present any facts to the trial court concerning the processing

[2] Ms. Fritszche also moved, pursuant to Rule 8-431(a) (motions, generally), to supplement the record with an affidavit by her counsel describing the circuit court proceedings and her own affidavit, executed on November 7, 2006 describing events that occurred subsequent to the circuit court hearing. This motion was not made pursuant to Rule 8-414 (correction of record); thus, the State Board does not interpret the motion to suggest that her affidavit or the facts set forth in it were presented to the circuit court. The State Board further recognizes that the affidavit of counsel was meant, in the interest of facilitating the expeditious adjudication of this appeal, merely to serve as a substitute for an order from the circuit court and a transcript of the hearing, which at the time of the filing of the brief were unavailable. *Cf.* Rule 8-413(a). The circuit court docket entries and the Civil Hearing Sheet evidencing the circuit court's order are included in the appendix to this brief, and we anticipate that a transcript will be available later today, obviating the need for Mr. Pierce's affidavit.

of absentee ballots. Many of the pertinent statistics related to this subject are in flux, because new data about the number of returned ballots arrive constantly. The State Board will present relevant facts in this brief, notwithstanding the lack of a trial court record, and will also endeavor to collect updated information in advance of the oral argument scheduled for November 13.[3]

Ms. Fritszche is a registered voter in Baltimore County; her co-plaintiff is a registered voter in Baltimore City. At the November 6 hearing, neither of the two named plaintiffs testified nor provided affidavits in support of the motion for a temporary restraining order. Both plaintiffs alleged that they had requested but had not received absentee ballots.[4] Instead, the only evidence in the record to support the allegations related to the plaintiffs' particular circumstances was a copy of an email from Ms. Fritszche stating that she had requested an

[3] Many of the pertinent facts are subject to judicial notice. *See* Rule 5-201(c) (judicial notice may be taken at any stage in the proceeding). Because the State Board believes it is important to bring additional recent facts to the attention of the Court, the State Board proffers that, if this case were remanded to the circuit court for a full adversary hearing pursuant to Rules 15-505(a) or judicial relief procedures set forth in the Election Law Article, admissible evidence in support of these facts could be readily adduced.

[4] As a courtesy, an attempt was made by the Baltimore City Board of Elections on the morning of November 7 to hand-deliver an absentee ballot to Mr. Vinzant. *See* EL § 9-307 (permitting the use of an agent to pick up and return an absentee ballot); EL § 9-305(c) (providing for delivery of an absentee ballot in person by the voter or the voter's agent to the office of the local board of elections until the closing of the polls on election day). The attempt was unsuccessful; it is not presently known whether Mr. Vinzant availed himself of the other option available to voters who request absentee ballots but do not return them – namely, casting a provisional ballot at the voter's polling place.

absentee ballot in August but had not received it as of November 6.[5]

In 2006, the General Assembly enacted, over the Governor's veto, a law providing for "no-excuse" absentee voting. *See* 2006 Laws of Maryland, ch. 6. The 2006 election cycle featured a number of other innovations, including the first state-wide use of electronic voting machines at polling places, in compliance with the federal Help America Vote Act, and "e-poll books" used to check in voters at polling places. After the September 12 primary and concerns about the possible repetition of those problems in the general election, some candidates encouraged their supporters to vote by absentee ballot instead. A record number of voters in fact took advantage of the newly liberalized rules for obtaining and casting absentee ballots. The total number of applications received for the 2006 general election was 193,487, nearly triple the number that were *cast* in the last gubernatorial election cycle in 2002.

While Ms. Fritszche points out that some ballots were not mailed by the Prince George's County Board of Elections until Saturday, November 4, *see* Brief at 7, this fact does not tell the whole story. Many Maryland voters apparently waited until the midnight of the October 31 deadline to request an absentee ballot. *See* COMAR 33.11.02.02D. The local boards of elections processed large numbers of these requests on the days preceding the

[5] Ms. Fritszche's November 7 affidavit states that the ballot was indeed delivered on November 6 but that she was not home to receive it in time to complete it and return it at a post office "within [her] area of familiarity." Fritszche Affidavit ¶¶ 6-10. COMAR 33.11.03.08B(2)(a) permits a voter to return the ballot through "the United States Postal Service or a private mail carrier."

November 6 postmark deadline: 7,187 requests on November 1; 2,322 requests on November 2; 2,084 requests on November 3; and 531 requests on November 4. The local boards processed many absentee ballots to voters close to the deadline, *e.g.,* 2361 ballots sent on November 3 and 903 ballots on November 4. It is impossible to determine whether this processing close to the November 6 postmark deadline was due to a large backlog of requests, the timing of the requests; or a combination of those factors..

As of the morning of November 9, the number of absentee ballots that have been returned is 154,591. The return rate varies by jurisdiction, but the overall rate is presently approximately 79.9%. While this figure will rise slightly as more ballots arrive, particularly from overseas,[6] it is currently below the only Maryland historical figures available, from the 2004 presidential election year, when the figure was approximately 90%. However, such historical figures provide limited guidance in interpreting this year's data, in light of the liberalization of absentee voting and the unprecedented demand for absentee ballots under the "no-excuse" absentee ballot law.

National data from the 2004 election published by the Election Assistance Commission indicate that the percentage of ballots returned in states with no excuse absentee laws is lower

[6] The State Board has preliminary data on how many of the returned ballots are postmarked on November 7: Montgomery County had 350 ballots; Baltimore City, 183; Baltimore County, 301; and Calvert County, 28. More data will be available by Monday's argument date. In any case, a lower bound can be established for the number of timely returned ballots. As of November 7, more than 139,000 had been received, and none of these could have been postmarked after the November 6 deadline.

than in states without such laws.[7] Several states in the EAC survey had a lower return rate than Maryland.[8] Thus, despite the unprecedented number of requests for absentee ballots by Maryland voters, the return rate was well within national norms. At the very least, however, there is nothing in the record or any facts adduced to date that would support Ms. Fritszche's contention that the "discrimination" she attacks is "solely . . . a result of the [State Board's] negligent failure to prevent a known problem: the high demand for absentee ballots and the unresponsiveness of the State's vendor in fulfilling orders." *See* Petitioners' Brief at 17.

At this point, only two days after the election, a number of the pertinent facts are simply unknown, including: how many ballots will be returned that are postmarked November 7; how many of that number were sent by people who made late requests for the ballots; how many of the November 7 postmarked ballots were sent by people who received the ballots in time to return them by the November 6 deadline but waited to put them in the mail; how many late-arriving ballots were due to tardy mail delivery, as opposed to late mailing by the local board; or and any number of other pertinent facts. Some of these facts can be ascertained in the coming days, some can never be ascertained, and none of them was known to the circuit court three days ago, when it denied the plaintiff's request for a TRO.

SUMMARY OF ARGUMENT

On the scant record the circuit court had before it, the denial of the extraordinary relief

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[7] *See* http://www.eac.gov/electionsurvey 2004/html/EDS-chap%205%20absentee%20ballots2.htm.

[8] *See* http://www.eac.gov/election_survey_2004/chapter_table/Chapter5_Absentee.htm.

sought by Ms. Fritszche was the responsible course of action. However, even if the claims had been fully supported with an appropriate factual presentation, granting the relief requested would have created irrational and inequitable distinctions among putative voters. There is simply no basis for granting relief to voters who may have mailed an absentee ballot late when it is impossible to grant similar relief to those citizens who opted not to mail their ballots at all, in the wholly justified belief that it was too late by virtue of a statutorily authorized and duly promulgated deadline was meaningful. Taken to its logical conclusion, Ms. Fritszche's argument would then require courts to entertain petitions from prospective voters attesting that they would have mailed the ballot *but for* their reliance on the law. The potential for mischief and interference with the integrity of the election process under such a scenario is patent.

Nor is there a principled or practical basis upon which to limit the arguments advanced by Ms. Fritszche to the facts of this particular case or this particular election. Ms. Fritszche acknowledges this Court's holding in *Lamb v. Hammond,* 308 Md. 286 (1987), which is directly applicable to this case in its ruling that absentee ballots postmarked on election day rather than by the deadline one day earlier could not be considered timely received. From this holding, Ms. Fritszche construes the case to stand for the broader proposition "that state election statutes should be strictly applied notwithstanding the negligence of election officials." Brief at 10. Despite that controlling precedent, Ms. Fritszche seeks judicial intervention, without any showing of negligence, and the State Board's action is consistent with a strict application of the applicable statutes.

If Ms. Fritszche's approach were adopted, the holding would provide shelter for any disappointed candidate's supporters to posit that a perfect storm of candidate-inspired voter behavior and administrative "errors" required election officials to disregard the mailing deadline at issue in this case, or a plethora of other regulatory requirements that are critical to the conduct of a fair election. As a practical matter, there is no doubt that the relief sought in this case would have prospective effects and that those effects would be deleterious. This election presented unique complications, *but every election does*. The magnitude may vary, but these complications tend to have at least one thing in common – their unpredictability. Precise guidelines for conducting an election, whether set forth in statute or regulation, and strict adherence to those guidelines, serve to ensure that elections are conducted in a fair and orderly fashion, while reducing the potential for unpredictable circumstances to lead to litigation and uncertain electoral outcomes. Here, the State Board decided not to depart from the statutorily authorized and duly promulgated guidelines governing the deadlines for returning absentee ballots, and the circuit court properly declined to intervene in that quintessentially executive decisionmaking function.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED A TRO WHERE PLAINTIFFS FAILED TO DEMONSTRATE THEY WERE ENTITLED TO THAT EXTRAORDINARY REMEDY.

This is an appeal from the denial of a TRO. Despite naming the Board of Elections, a State agency, and State elections officials as defendants, Ms. Fritszche erroneously requests this Court to review the denial of the TRO under the standard used for resolution of disputes

for private litigants. Under that standard, if the party requesting the TRO meets the threshold showing of irreparable harm, the Court should examine the following four factors to determine whether a TRO should issue: 1) the likelihood that the plaintiff will succeed on the merits; 2) the balance of convenience determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; 3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and 4) the public interest. *Dep't of Transportation v. Armacost*, 299 Md. 392, 404-05 (1984) (citing *Dep't of Health & Mental Hygiene v. Baltimore County*, 281 Md. 548, 554-57 (1977).

In contrast, where, as here, a plaintiff seeks to enjoin the government, the standard is different. "[W]hen government interests are at stake, fewer than all four of the factors will apply, and trial courts, exercising their traditional equity powers, have broader latitude than when only private interests are at stake." *DMF Leasing*, 161 Md. App. 640, 648 n.3 (citing *Dep't of Health & Mental Hygiene v. Baltimore County*, 281 Md. at 555-57). The balance of convenience factor "normally will not be considered in a dispute between two government parties" because "consideration of the comparative hardship to each side is not relevant; the only interest to be considered is the public interest." *Armacost*, 299 Md. at 404 n.6.

This is particularly apt here, in the elections context, where the General Assembly has delegated to the State Board of Elections the authority to establish processes for the orderly conduct of elections, which benefits the electorate as a whole. *See Lamb v. Hammond*, 308 Md. at 310 (recognizing the "care that the Legislature has traditionally shown in crafting the

State election laws. . . .").

A. The TRO Was Properly Denied Where Plaintiffs Failed To Show Irreparable Harm To The Electorate.

Unquestionably, the right to vote is fundamental. *See, e.g., Lamb*, 308 Md. at 303. At best, however, Ms. Fritszche has shown only that she was unable to exercise that right in the 2006 gubernatorial election. That harm, however, is simply insufficient to meet the threshold showing of irreparable harm to the entire class of individuals who did not mail their absentee ballots by the November 6 deadline, which would be necessary to warrant a TRO requiring that date to be extended.

It is well-settled that "constitutional rights are personal and may not be asserted vicariously," and thus a person may not challenge a law's constitutionality "on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (internal citations omitted). Nevertheless, the plaintiffs filed the action below and seek to prosecute this appeal not only on behalf of themselves, but on behalf of "similarly situated voters."

Ms. Fritszche seeks to supplement the record with an affidavit, which was was not available to the circuit court, detailing only her personal experience with an absentee ballot in the recent election. She has failed to present any evidence to show that any other member of the electorate is similarly situated, much less that anyone suffered harm as a result of the November 6 postmark deadline. Though the Petitioner's argument rests on the premise that the November 6 postmark deadline risks "disenfranchising a substantial number of absentee

voters," Petitioner's Brief at 8, this assertion is unsupported by any facts in the record before either this Court or the lower court.

Nevertheless, Ms. Fritszche seeks a remedy that would open the door to allow other unidentified persons whose absentee ballots might be received with a November 7 deadline to "receive a special privilege," *see Lamb*, 308 Md. at 309, of having their votes counted despite their failure to comply with a "law specially designed to protect the integrity of the elective process," *id.* at 311. This Court declined to do so in *Lamb* and Ms. Fritszche has provided no reason why it should deviate from that result here.

B. Plaintiffs Were Not Entitled To A TRO Because There Was No Likelihood Of Success On The Merits.

On appeal, Ms. Fritszche first contends that EL § 9-304 confers upon her an absolute right to be free from any administrative requirement that under some conceivable circumstance might operate to impair her ability to cast an absentee ballot. This contention is without merit. The amendment of § 9-304 to remove the requirement that a voter possess one of six statutorily defined justifications in order to vote by absentee ballot, *see* former EL § 9-304(a)(1)-(6), was enacted "[f]or the purpose of eliminating the circumstances that are required to exist for a voter to qualify for voting by absentee ballot." 2006 Laws of Maryland, ch. 6 (HB 622 (2005 Session)). The actual alterations to statutory provisions are limited to § 9-304 and slight conforming changes to other provisions.

There is no suggestion that the legislation introducing "no-excuse" absentee balloting was intended to alter the effect of any provision of the Election Law Article other than the

ones actually amended. In particular, the preceding provision, EL § 9-303, remained intact. That provision not only authorizes, but expressly mandates, that the State Board "establish guidelines for the administration of absentee voting by the local boards." These guidelines are required to provide for "determining the timeliness of receipt of applications and ballots. . . ." EL § 9-303(b)(4). Carrying out this statutory duty, the State Board has adopted COMAR 33.11.03.08, the regulation challenged by Ms. Fritszche in this case.

The provision delegating authority to the State Board to promulgate guidelines addressing the many detailed issues related to the administration of absentee balloting was enacted in 1998 as part of a comprehensive reform of the election code. *See* 1998 Laws of Maryland, ch. 585 § 2 (enacting former Art. 33, § 9-304). The December 1997 Report of the Commission to Revise the Election Code explained that the revisions giving authorization to the State Board to adopt guidelines related to absentee balloting were made because "[t]hese issues are incompletely addressed in the present code." This is precisely the type of situation in which legislatures regularly and validly delegate authority to administrative agencies: to fill in gaps in statutes, applying the agency's expertise. The State Board promulgated the pertinent regulations, citing § 9-303 as authority, in 2000. *See* 27:2 Md. Reg. 259-262 (January 28, 2000) (Notice of Proposed Action).[9]

[9] In accordance with EL § 9-303(c), the State Board has periodically assessed the guidelines and has made minor alterations to the timeliness provisions of COMAR 33.11.03.08. *See*, e.g., 29:15 Md. Reg. 1202-03 (July 26, 2002); 30:15 Md. Reg. 1050-51 (July 25, 2003); 30:24 Md. Reg. 1784-85 (December 1, 2003); 31:19 Md. Reg. 1462 (Sept. 17, 2004); 33:14 Md. Reg. 1249 (July 7, 2006).

Ms. Fritszche's argument rests on the unsupportable assertion that this Court's directly applicable precedent in *Lamb* should be disregarded because the postmark deadline, formerly set forth in Art. 33, § 27-9(c), is now set forth in a regulation that "represents the discretionary exercise of [the State Board's] regulatory powers." Brief at 5. This is a distinction without a difference. Significantly, after the General Assembly determined that regulations were required to be promulgated, the State Board adopted its regulation incorporating the timeliness provisions without any functional changes. The regulation then and today imposes a deadline in essentially the same manner as the statute this Court examined in *Lamb*. In adopting the regulation, the State Board saw its purpose as "establish[ing] regulations for certain administrative procedures and guidelines that were removed from the Annotated Code by the 1998 revision. . . ." 27:2 Md. Reg. 259 (Jan. 28, 2000). The guidelines regarding timeliness of receipt of absentee ballots "that were removed" were simply restored.

In the same vein, Ms. Fritszche attempts to undermine the regulatory postmark deadline, although it operates no differently in her case than the postmark deadline enforced by this Court in *Lamb*, by postulating that, as a result of the transposition of the deadline from statute to regulation, the deadline is no longer "the dictate of a state law." Brief at 11. This is flatly incorrect. As this Court stated in *Maryland Port Administration v. John W. Brawner Contracting Co.*: "The rule here was adopted pursuant to statutory authority. It has the force and effect of law." 303 Md. 44, 60 (1985); *see also Waverly Press, Inc. v. State Dep't of Assessments & Taxation,* 312 Md. 184, 191 (1988) (regulations constituting "legislative rules

'receive statutory force upon going into effect'") (citation omitted)). There is no contention here that the pertinent COMAR provisions were not properly adopted. Accordingly, a presumption applies that "the regulation is authorized by law and carries the force of a statute." *Maryland Racing Comm'n v. Castrenze,* 335 Md. 284, 298 n.8 (1994).

Ms. Fritszche argues that the postmark deadline, now that it is embodied in regulation, should be "overturned" because it is "both arbitrary and unreasonable." Brief at 11.[10] It is neither. The choice of a November 6 postmark deadline as opposed to a November 7 deadline is justified on a number of grounds. First, as noted, it was the choice previously endorsed by the General Assembly as a statutory enactment. Second, this Court discerned an eminently reasonable justification for a strict mailing deadline in *Lamb*. If Ms. Fritszche's arguments were accepted, "it would allow a group of voters actually to *cast* their ballots after the polls had closed, and thus open the way for some very unwholesome machinations." *Lamb,* 308 Md. at 310.

While Ms. Fritszche undoubtedly did not seek the advantage of casting a ballot after the polls had closed, there is no reliable way of knowing how many other absentee ballots postmarked on November 7 were mailed after the polls had closed at 8:00 p.m. that day, and

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[10] The State Board notes that, with this argument, Ms. Fritszche appears to be bringing a facial challenge to the regulation, not limited by the particular circumstances of her case or of this election. In the trial court, Ms. Fritszche disclaimed any intention to challenge the regulation facially, describing the argument as an as-applied challenge instead. *See* Motion at 4 n.1 ("Plaintiffs do not bring a facial challenge to COMAR 33.11.03.08(b). Rather, Plaintiffs argue that application of the regulation in the context of the present election . . . violates their statutory and constitutional rights.")

results were being announced. It would be unfair and unreasonable to count those votes, some of which were perhaps cast by voters who had received their ballots weeks before. There is, in short, no way to distinguish between the unfortunate and faultless on the one hand, and the dilatory or unscrupulous on the other hand. And there is no way to know with certainty how many fall into each category.

There is no conflict in giving "force and effect," *John W. Brawner,* 303 Md. at 60, to (1) EL § 9-304 and its liberalized eligibility requirements for voting an absentee ballot; (2) EL § 9-303 and its mandate that the State Board adopt guidelines for absentee balloting; and (3) COMAR 33.11.05.08 and its fulfillment of that statutory mandate. Giving effect to each, and permitting a reasonable regulation to be evenly applied, is consistent with the teachings of *Lamb*, in which this Court declined to "sanction[] the counting of ballots that were plainly in violation of a law particularly designed to protect the integrity of the elective process." 308 Md. at 311.

Arguing for the first time that § 12-202 provides an avenue for judicial relief, *see* Brief of Appellants at 13-14, Ms. Fritszche ignores that counting absentee ballots postmarked November 7 would not likely change the outcome of any election in which her ballot would count. This Court has held that: "[t]o sustain a judicial challenge pursuant to § 12-202, the litigant must prove, by clear and convincing evidence, a *substantial probability* that the outcome would have been different but for the illegality." *Suessmann v. Lamone*, 383 Md. 697, 720 (2004) (emphasis in original). Instead of presenting such evidence, Ms. Fritszche

seeks to avoid *Suessman* on the basis that she filed her TRO before the election. Brief of Appellants at 14 n.8. However, Ms. Fritszche cites no authority for so limiting *Suessmann's* substantial probability bar and there is none. *See* § 12-202(a) (applies "whether or not the election has been held").

Nor does the limited record contain *any* evidence, much less clear and convincing evidence, of a substantial probability of a different outcome. As described above, preliminary data suggests only a small number of absentee voters whose ballots were postmarked on November 7. Of the 193,487 absentee ballots sent out, 154,591 (or 79.9%) have now been returned. Montgomery County, the most populous jurisdiction in the State, sent out 39,036 absentee ballots; of those, 30,022 have been returned as of November 9. Of the 30,022 absentee ballots that have been returned in Montgomery County, only 350, or 1.17%, were postmarked November 7. Similarly, in Baltimore County, where Ms. Fritszche is registered to vote, of the 32,541 absentee ballots requested, 26,668 have been returned. Of those returned, 301, or 1.1% bore a November 7 postmark. There are no Baltimore County races in which these ballots would affect the outcome, and only one close race in her legislative district.[11]

Recognizing that she cannot satisfy the standard set forth in EL § 12-204(a) and (d), as articulated by this Court in *Suessmann,* Ms. Fritszche invokes Article 19 of the Declaration

[11]Legislative District 08, where Ms. Fritszche resides, has a race for the House of Delegates in which two candidates are separated by 244 votes, before the absentee ballots that meet the deadline are counted.

of Rights in an attempt to fashion a cause of action out of whole cloth. However, Article 19 was never conceived of as a free-floating invitation to litigation grounded on every provision in the Maryland Code. Where a cause of action already exists, and subject to the limitations inherent in the cause of action itself, Article 19 provides some measure of protection against abrogation of the action or restrictions on it. No case, however, has ever held that Article 19 can be employed as Ms. Fritszche seeks to use it here: as a means to create a cause of action where none exists. *See Piselli v. 75th Street Med.,* 371 Md. 188, 206 (2002) ("Article 19 does not require the recognition of a new tort cause of action which has never previously been recognized in Maryland."). EL § 9-303 was not intended to create a cause of action, and it may not, through the mere invocation of Article 19 be transformed into one. In short, Article 19 protects access to the courts; it does not create it.[12]

II. BECAUSE THE ABSENTEE BALLOT DEADLINE IS A LEGITIMATE ELECTION REGULATION, IT DOES NOT VIOLATE THE CONSTITUTION.

In *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1968), the Supreme Court addressed a challenge brought by pretrial detainees to a state statute limiting the use of absentee ballots to physically incapacitated individuals. The detainees, though not physically incapacitated, were unable to go to the polls to vote, by dint of their incarceration.

[12] Ms. Fritszche's reliance on both EL § 12-202 (which requires that there be no other timely and adequate remedy in the Election Law Article) and Article 19 (as a basis for transforming EL § 9-304 into a cause of action to ensure that where there's a right, there's a remedy) overlooks provisions designed to provide relief to candidates and voters who contend that an uncounted absentee ballot should have been counted. *See* EL § 11-304.

The Supreme Court upheld the constitutionality of the statute, concluding that, since the restriction did not absolutely prohibit the detainees from exercising their right to vote, the rational basis standard applied and the State had identified legitimate interests warranting the restriction. *Id.* at 810-11.

In *Greidinger v. Davis*, 988 F.2d 1344 (1992), the United States Court of Appeals for the Fourth Circuit, in surveying the history of equal protection challenges in the election context, observed that the Supreme Court has historically differentiated between those cases involving state laws that prohibited an identified class of voters from voting, traditionally subject to strict scrutiny, from those regulating the conduct of elections, to which the rational basis test applied.

Here, the State Board's regulation setting the deadline for mailing absentee ballots does not disenfranchise a select group of voters; instead, it is effectively a time, place, and manner regulation subject to rational basis review. As the Supreme Court has recognized:

> there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process. In any event, the States have evolved comprehensive, and in many respects, complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections. . . .

Id. at 1349 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Even assuming that strict scrutiny applied, however, the regulation would pass constitutional muster. As this Court has recognized in *Lamb*, regulation of elections protects the integrity of the right of the electorate as a whole and it is a "greater evil to ignore the law itself by permitting election officials to

ignore statutory requirements designed to safeguard the integrity of elections, i.e., the rights of all the voters." *Id.* at 311.

It is ironic that, while asserting an equal protection violation, Ms. Fritszche asks for a remedy that would effectively – and impermissibly – create a privileged class of voters, namely, those who are permitted to vote, despite the fact that their ballots were not timely received. Such a result is untenable, as this Court recognized in *Lamb*. No different conclusion is warranted here.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court for Anne Arundel County denying the petitioners' motion for a temporary restraining order should be affirmed.

Respectfully submitted,

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Dated: November 9, 2006

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

CERTIFICATE OF SERVICE

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