

December 19, 2007

The Honorable Jamie Raskin
Room 122
James Senate Office Building
Annapolis, Maryland 21401

Dear Senator Raskin:

You asked whether recent changes in the rules of the State's two principal political parties affect the advice of this Office to the State Board of Elections ("SBE") concerning the application of Annotated Code of Maryland, Election Law Article ("EL"), §3-102(a). That statute provides, among other things, that an individual may register to vote if the individual will be 18 or older on the date of the next general or special election. In the past, the election boards have allowed individuals who will be 18 by the time of a general election to vote in a primary election even if the individual was not 18 at the time of the primary. However, a recent Court of Appeals decision held that a State constitutional provision that, among other things, requires a voter to be 18 or older, applies to primary elections. This Office advised SBE of the implications of that decision and, following that advice, SBE required voters to be 18 to vote in a primary election.

Your letter raises two issues, one of which this Office has previously addressed in the advice letter to SBE and one of which has arisen in the past week as a result of the changes adopted by the State's two principal political parties. As explained below, this Office reaffirms the advice previously given to SBE that the Maryland Constitution, as construed in a recent Court of Appeals case, requires that voters be 18 to vote in primary elections. Nonetheless, because the political parties have, in recent days, asserted their *federal* constitutional rights to freedom of association, you have asked the Office to address the *different* question whether the Maryland Constitution as recently construed – at least with regard to the voter-age requirement – violates the parties' First Amendment associational rights to include in their primaries certain voters under the age of 18.

For the reasons explained below, it is my view that the conflict between the Maryland constitutional provision and the First Amendment rights now asserted by the parties requires that SBE permit 17-year-olds who will be 18 by the next general election to vote in the parties' primary elections.

Background

Article I, §1 of the Maryland Constitution sets forth the basic qualifications for voting in Maryland. It provides:

Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State.

In the past it had been assumed that the qualifications set forth in Article I, §1 applied only to general elections and that, pursuant to EL §3-102(a), an individual who would be 18 by the general election could vote in a primary, even if not 18 by the date of the primary.

On December 11, 2006, the Court of Appeals issued its opinion in *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006). In that case, the Court held that an "early voting" system created by the Legislature was unconstitutional. In extending that holding to primary elections, the Court held that Article I, §1 applied to primary elections. It stated:

[P]rimary elections are included within the meaning of "at all elections to be held in this State" in Article I, § 1: if Article I, § 1 were read to exclude primary elections, "such a reading could lead to an absurd result, as it would eliminate *all* Constitutional qualifications for primary elections. Thus, a 12 year-old, non-U.S. citizen, residing in Virginia, would not be barred by the [Maryland] Constitution from voting in the Maryland primary election." Such a reading simply cannot be correct.

396 Md. at 89, 912 A.2d at 695 (quoting from circuit court opinion). Although the *Capozzi* case itself did not concern the age of primary voters, one ramification of its holding that the qualifications set forth in Article I, §1 apply to primary elections was that a voter must be 18 in order to vote in a primary election. This Office promptly advised SBE of the implications

of the *Capozzi* decision and, following the advice of counsel, SBE instituted a policy stating that a voter must be 18 on or before the day of any election in which the individual wishes to vote. While that advice was correct, you have advised that the parties have recently changed their rules and have therefore introduced the second question raised by your inquiry.

Party Rule Changes

Under the State election law, the two principal parties in the State, the Democratic and Republican parties, are required to select their candidates for most offices through primary elections. EL §8-202. Until recently, the two principal political parties simply adopted the primary system established by State law. However, we understand that the Democratic party has changed its rules to allow 17-year olds to vote in its primary election if they will be 18 at the time of the general election. You state in your letter that the Republican party is going to make a similar change. Both parties have requested that the SBE allow all individuals who meet the qualifications of EL § 3-102(a) be allowed to register and vote in all elections, including the primary election on February 12, 2008. Thus, both principal political parties have indicated that they wish to open their nomination processes to individuals who will be 18 by the time of the general election even if they are not 18 on the date of the primary.

Analysis

Maryland law recognizes that the United States Constitution “shall be the Supreme Law of the State ... anything in the Constitution or Law of this State to the contrary notwithstanding.” Maryland Declaration of Rights, Article 2. The federal constitution recognizes certain rights possessed by political parties, including First Amendment associational rights. Your request, together with the recent rule changes adopted by the Democratic and Republican parties, requires that we consider those rights in advising how SBE should implement EL §3-102(a).

The Supreme Court has held that political parties have a First Amendment right of association to determine who will participate in “the basic function of selecting the Party’s candidates.” *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986); *see also Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)(“[P]artisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments”). The Court has outlined the tests to be applied to state regulation of elections as follows:

Regulations that impose severe burdens on association rights must be narrowly tailored to serve a state government interest. ... [W]hen regulations impose lesser burdens, “a state’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”

Clingman v. Beaver, 544 U.S. 581, 586-87 (2005) (citations omitted).

Here, the two principal parties, which are compelled by State law to use the State’s primary election apparatus to select their nominees, have indicated that they wish to ensure the participation in that selection process of certain members who will be eligible to vote in the general election – *i.e.*, individuals who will be 18 by the time of the general election but who have not attained that age by the time of the primary. The exclusion of those individuals from the primary undeniably burdens the associational rights of Maryland’s political parties. “[I]t is ‘[t]he moment of choosing the party’s nominee’ that matters ... for that is ‘the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’” *Id.* at 590 (citations omitted); *see also id.* at 599 (“It is here that the parties invite voters to join in selecting their standard bearers. The outcome is pivotal, of course, for it dictates the range of choices available at – and often the presumptive winner of – the general election”) (O’Connor, J., concurring).

Under the analysis established by the Supreme Court, a burden on associational rights is weighed against the State interest in the policy that affects those rights. Here, however, it is not necessary to determine whether application of an 18-year old age requirement to primary elections would impose a severe or lesser burden. Under either test, it is my view that no State interest is implicated that would override the parties’ rights of association under the First Amendment. Indeed, the General Assembly, in enacting EL § 3-102(a), expressed a legislative policy in favor of permitting such voters to exercise the franchise in the primary – a policy that coincides with the associational interests recently embraced by the parties. The Court of Appeals in *Capozzi* did not articulate a State interest in excluding these voters from the parties’ primary elections; rather, it simply applied Article I, §1, of the State Constitution to primary elections. To our knowledge, nothing in the history of Article I, §1, indicates a specific State interest in excluding from primary elections those 17-year olds who will be 18 by the time of the general election. Faced with this conflict between a long-standing legislative enactment, reinforced by the United States Constitution on one hand, and the Court of Appeals’ general holding with respect to Article I, §1 of the State Constitution on the other, the new party rules and legislative policy reflected in EL §3-102(a) should be given effect.

The Honorable Jamie Raskin
December 19, 2007
Page 5

Conclusion

In short, it is my view that, in light of the recent party rule changes that implicate the parties' associational rights under the federal constitution, SBE should implement EL §3-102(a) as it has in the past – by registering and allowing to vote those persons who are at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election.

Sincerely,

Douglas F. Gansler
Attorney General

cc: State Board of Elections