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January 22, 2026

The Honorable Kris Fair
Maryland General Assembly
306 House Office Bldg.
Annapolis, Maryland 21401
Via email

Re: *House Bill 156, "Election Law - Affiliating With a Party and Voting - Unaffiliated Voters"*

Dear Delegate Fair:

You asked for advice on two questions related to HB 156. You asked:

1. "Whether allowing an unaffiliated voter to affiliate with a political party and immediately cast a ballot in that political party's primary election at an early voting center during a primary election violates the political party's First Amendment right of association."
2. "Whether allowing only unaffiliated voters, and not voters who are already affiliated with a political party, to change their party affiliation and immediately cast a ballot for the voter's new political party at an early voting center during a primary election violates the Equal Protection Clause of the 14th Amendment."

Summary answers

Allowing unaffiliated voters to join a political party and vote in its primary during early voting does not impose an unconstitutional burden on the party's First Amendment associational rights in my view. Courts have held that parties have the constitutional right to decide who may participate in their primaries, and unaffiliated voters have no right to vote in a party's primary unless the party permits it. While

parties can claim a right not to associate, the proposal still requires voters to affirmatively declare party membership, and parties retain control over their internal affairs. Allowing an unaffiliated voter an added 16 days to affiliate with a party is not a meaningful burden on the party's right not to associate.¹ Same-day affiliation during early voting does not force parties to accept nonmembers and aligns with existing election-day registration practices. Thus, I believe it is a minimal burden that the State's regulatory interests can justify.

In addition, HB 156 likely does not violate the Equal Protection Clause even though it allows only unaffiliated voters—rather than already-affiliated voters—to change party registration during early voting. Courts use a balancing test that weighs how much a regulation burdens voters against the state's reasons for adopting it. Requiring affiliated voters to switch parties 21 days before a primary is a relatively minor burden. The State can also argue that unaffiliated and affiliated voters are not similarly situated, since unaffiliated voters are joining a party for the first time. Finally, the law could be justified by goals such as expanding access, boosting participation, increasing trust in elections, or preventing strategic party-switching.

Current Law

Any eligible individual may register to vote—including choosing a party affiliation—online or by submission of an application to their local election board or the State Board of Election. Voters may change their party affiliation at any time when voter registration is open. Maryland closes voter registration from the 21st day before an election through the 11th day after the election. However, there are two important exceptions during this closed period:

1. During early voting: A resident may go to any early voting center in their home county to register to vote or update their address and then cast the appropriate ballot.
2. On Election Day: A resident may go to their precinct polling place, register to vote, and then vote.

Accordingly, registered voters who are currently unaffiliated and wish to change their party affiliation must do so at least 21 days before the primary election if they want to participate in Maryland's closed primary. On the other hand, individuals who are not yet registered to vote may register during early voting and on election day— and may select a party affiliation at that time.

¹ For the 2026 primary election, any party affiliation changes under law need to be made by June 2, 2026. HB 156 would allow unaffiliated voters through the end of early voting—June 18 in the 2026 primary—to affiliate with a party and vote in the primary.

Analysis

First Amendment Right of Political Parties

The issue raised by your first question is whether the State would severely burden a political party's First Amendment right by allowing unaffiliated voters to affiliate with a major political party and participate in that party's primary during early voting. Even assuming a party objects to allowing changes in a primary during early voting, I do not believe the State burdens party First Amendment rights because the State would not be forcing a political party to allow voters unaffiliated with it to participate in its primary.

The Supreme Court has confirmed that political parties have a fundamental First Amendment right to determine who can participate in their primary elections. The political party's right of association gives a party the opportunity to decide who can and cannot vote in its primary, so long as no other constitutional barriers are present. *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In addition, unaffiliated voters have no fundamental right to vote in primary elections of a party to which they do not belong. *Suessman v. Lamone*, 383 Md. 697, 723 (2004).

A corollary of the right to associate is the right not to associate. *Jones*, 530 U.S. at 574. The freedom of association includes an organization's ability to decide who its members are and to limit membership to people who share its goals and interests. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

Courts weigh the "character and magnitude" of the burden the State imposes when deciding whether a state election law violates First and Fourteenth Amendment associational rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest, but when regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (internal quotation marks omitted).

Although it is possible that a political party opposed to changes in party affiliation during early voting could argue that the practice effectively creates an open primary, I do not view this system as imposing a significant burden on a party's First Amendment rights. Voters must still make an explicit declaration of party membership before participating in that party's primary, and parties remain free to manage their internal affairs. In addition, current law already permits election-day registration, which includes the option to affiliate with a political party. Moreover, voters under current law can party switch 22 days before an election. HB 156 is not imposing much more of a burden on a party's right not to associate than is already imposed.

Equal Protection

Your second question asks whether HB 156 violates the Equal Protection Clause of the Fourteenth Amendment by allowing only unaffiliated voters—but not already-affiliated voters—to change their party registration and immediately vote in their new party’s primary at an early voting center.

Regarding equal protection and election laws, courts recognize that every election regulation places at least some burden on voters, but the Supreme Court has said that not every burden is serious enough to trigger the highest level of constitutional scrutiny. If strict scrutiny applied to every election rule, states would struggle to run elections fairly and efficiently. Instead, the Court uses a flexible balancing test that looks at (1) how serious the burden is on voters and (2) how strong the state’s reasons are for having the regulation. This approach comes from *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Maryland’s Supreme Court applies the same idea. *Burruss v. Bd. of Co. Comm’rs of Frederick Co.*, 427 Md. 231, 264 (2012). It first looks realistically at what the regulation actually requires of voters and how much it affects their ability to vote or associate politically. The level of scrutiny depends on the size of that burden. Under this framework, if an election rule creates only reasonable, nondiscriminatory limits, then the state’s important interests in running orderly, secure elections are usually enough to justify the rule.

Some may argue that requiring party affiliation changes for those already affiliated with a party to be made 21 days before the primary election day imposes a burden on those voters. I think it unlikely, however, that a court would find that the burden is to the level that it disenfranchises them, nor does it dilute or debase their votes, or even the weight of their votes as a class. Compare *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802 (1969) (finding no Equal Protection violation where although prisoners were denied the ability to vote by absentee ballot, other means of exercising their right to vote were available to them), with *O’Brien v. Skinner*, 414 U.S. 524 (1974) (finding Equal Protection violation where prisoners who were otherwise eligible to vote had no means available to them, in effect, resulting in “an absolute denial of the franchise”). Moreover, there is an argument that the two groups you identify are not similarly situated. One group are voters who are not members of a political party who are being given the opportunity to join a party and participate in its primary. The other group has already made the decision to join a party when they registered.

An equal protection analysis also requires examining the State’s justification for treating the two groups differently. For that reason, the legislative record should include evidence explaining why only unaffiliated voters may change their party registration during early voting and on Election Day. Lawmakers might point to testimony that this policy expands ballot access, increases voter participation, and enhances confidence in

election outcomes. Supporters could also argue that restricting party changes to unaffiliated voters helps guard against members of opposing parties from attempting to “game the system” by switching affiliations to influence the results of a primary.

In summary, I believe HB 156 passes constitutional muster.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley". The signature is fluid and cursive, with a large initial "S" and "B".

Sandra Benson Brantley
Counsel to the General Assembly