IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

TRACI SPIEGEL & KIM FORD,	:	
Plaintiffs,	:	
vs.	:	Civil Case No. C-13-CV-20-000954
BOARD OF EDUCATION OF HOWARD COUNTY,	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT*

* This brief also serves as Defendant's opposition to Plaintiffs' summary-judgment motion.

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INTRODUCTION

Ordinarily, citizens in a democracy pursue their desired policy outcomes in the political arena rather than the courtroom. Plaintiffs in this case, however, have taken a different approach. Having failed to persuade their local school board to adopt their preferred methods of instruction, Plaintiffs now seek to advance their policy agenda by asking this Court to alter the composition and structure of the board itself. In short, they seek to achieve through litigation what they failed to achieve through the political process. Several basic doctrinal barriers stand in their way.

Plaintiffs have challenged a Maryland statute that requires one seat on Howard County's Board of Education to be held by a student enrolled in a local public school. They allege that the statutory procedure for appointing the student—which involves a rigorous, multi-step process, culminating in a vote of the student body and confirmation by the other Board members—is unconstitutional. In particular, they argue that the General Assembly "violat[ed] Article I, section 1 of the Maryland Constitution by enacting a statute that permits persons under 18 years old to vote in a general election" and by "allow[ing] a minor to hold an otherwise adult-elected position." Summary-Judgment Mot. 6–7.

As explained below, the central premise of Plaintiffs' argument—namely, that the student Board seat is an "elected" office—is wrong. Maryland's Constitution does not require all school-board seats to be filled via a formal election of registered voters. Rather, the Constitution grants the General Assembly broad authority to fill school-

board seats through whatever process it chooses—including through a non-elective appointment process. The General Assembly acted well within that authority when it established a non-elective process for filling the student seat in Howard County (just as it did when it established similar processes for appointing students to school boards in various other counties).

Furthermore, even if Plaintiffs' novel reading of Article I, section 1 were correct (which it is not), Plaintiffs' suit would still fail for a host of other reasons. Plaintiffs not only failed to file their complaint in a timely manner, but also failed to name any election administrators as a defendant—in stark contrast with virtually every other case that has arisen under Article I, section 1. Those procedural defects provide independent grounds for dismissal here, separate and apart from Plaintiffs' failure to state a valid claim on the merits.

FACTUAL AND LEGAL BACKGROUND

A. Statutory Background

As in many states, local school boards in Maryland are a product of state legislation. The General Assembly exercises broad authority under the Maryland Constitution to establish the size and structure of each local board. Over the past five decades, it has used that authority to create a designated "student seat" on school boards in numerous counties. In many of those counties, including several of the largest in the state, the General Assembly has expressly granted the student school-board member the power to vote on substantive matters before the board.

In 2007, the General Assembly amended Howard County's Board of Education by creating a new voting seat on the Board for a student member. *See* 2007 Md. Laws, ch. 611, § 1.[1] Pursuant to Education Article § 3-701, the Board is now comprised of eight seats "consist[ing] of: (i) Seven elected members; and (ii) One student member." Md. Code, Educ. § 3-701(a)(1). Two of the "elected members" are elected at-large, while the other five are elected from each of the County's councilmanic districts. *Id.* § 3-701(a)(2).

The student member, in contrast, is chosen through a multi-step "nomination and election process," which must be "approved by the Howard County Board of Education." Md. Code, Educ. § 3-701(f)(3). That process typically begins each spring, when school administrators select standout students to participate in a convention organized by the Howard County Association of Student Councils, a student-led advisory committee chartered by the Board. *See* Compl. 10. At that convention, student delegates from the County's middle and high schools narrow the pool of interested candidates down to two finalists. *Id.* Those finalists then run against each other in a student-body election; all currently enrolled students in grades 6 through 11 may participate in the election. *See id.*; Md. Code., Educ. § 3-701(f)(3). The selection process culminates with the elected Board members confirming the

[1] The legislation passed overwhelmingly, receiving unanimous support in the House of Delegates and obtaining a 42-4 vote margin in the Senate. *See* Md. Senate Roll Call Vote, 2007 Sess. H.B. 513 (Apr. 6, 2007); Md. House of Delegates Roll Call Vote, 2007 Sess. H.B. 513 (Mar. 8, 2007).

appointment of whichever student garnered the most student-body votes. *See, e.g.*, Board of Education of Howard County, *Meeting Agenda Item* (June 11, 2020), https://perma.cc/C6XJ-P6PD. That student then takes his or her seat on the Board on July 1st. *See* Md. Code, Educ. § 3-701(f)(2).

The student Board member generally exercises "the same rights and privileges as an elected member." Md. Code, Educ. § 3-701(f)(6). But § 3-701 also differentiates the student member from the elected members in other respects. For instance, the student member serves only a one-year term, rather than a four-year term. *Id.* § 3-701(f)(2). The student's position is also the only uncompensated position on the Board. *Id.* § 3-701(f)(8). And the student is barred from voting on certain topics, *see id.* § 3-701(f)(7), and may not participate in the Board's closed sessions absent invitation, *id.* § 3-701(f)(6). In all other respects, however, the student member's responsibilities mirror those of the other Board members, and the student member contributes to the Board's work in significant ways.

B. Procedural History

Plaintiffs, Traci Spiegel and Kimberly Ford, filed this lawsuit against the Board on December 16, 2020. In their complaint, they outline their objections to the Board's policies regarding the COVID-19 pandemic, focusing primarily on their objections to the school-reopening plan that the Board tentatively adopted last November. *See* Compl. 5–12. Still, despite the extensive discussion of the reopening policy, the complaint's sole cause of action focuses exclusively on § 3-701(f):

specifically, Plaintiffs allege that § 3-701(f)'s procedure for filling the student seat on the Board violates certain provisions of Article I of Maryland's Constitution. Compl. 14–16. In their prayer for relief, they seek a declaratory judgment holding that certain clauses of § 3-701 are unconstitutional, as well as an injunction to strip the current student Board member of all voting power. *See* Compl. 17.

Plaintiffs moved for summary judgment shortly after filing their complaint. They did not submit any evidence in support of the motion; instead, the motion relies exclusively on the allegations in their verified complaint.

ARGUMENT

Plaintiffs challenge the constitutionality of Education Article § 3-701's procedure for filling the "student seat" on the Howard County Board of Education. They claim that § 3-701 "violates Article 1, Section 1 of the Maryland Constitution because it permits persons under 18 years old to vote in a general election . . . and it allows a minor to hold an otherwise adult-elected position that dilutes the voting rights of adult voters." Summary-Judgment Mot. 6–7; *see also* Compl. 13–14. That argument fails for numerous reasons.

I. Section 3-701(f) does not violate the Maryland Constitution.

Plaintiffs' entire constitutional argument rests on the premise that the student seat on the Board is a position that must be filled through an election of registered voters. That premise is wrong. As explained below, the General Assembly has broad powers to create *non*-elective positions—including school-board positions—and to fill

them through whatever appointment process it chooses. Plaintiffs' argument to the contrary cannot be squared with longstanding precedent or historical practice. Moreover, if Plaintiffs' theory were accepted here, it would inevitably cast doubt on countless other statutes enacted by the General Assembly. This Court should therefore reject Plaintiffs' constitutional claim on the merits.

A. Article I, section 1 does not require the Board's student seat to be filled through an election.

Article I, section 1 of the Maryland Constitution provides that "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 the citizen resides at all elections." Plaintiffs allege that Education Article § 3-701(f) violates Article I, section 1 by permitting minors to vote for the student Board member, and "prohibit[ing] residents of Howard County over the age of 18 to vote in an election for public office." Summary-Judgment Mot. 12. In Plaintiffs' view, "Article I, Section 1 must apply to the election of a student member to the Board because the student member has the power to make a binding vote on most Board matters." *Id.* at 11.

Plaintiffs' reading of Article I, section 1 is incorrect. Nothing in Article I, section 1—or any other provision of the Maryland Constitution—requires that every local school-board seat be filled through a formal election among registered voters. Rather, the General Assembly has broad authority to determine how local school-

board seats should be filled. As the Court of Appeals recently explained: "Where the office is of legislative creation, the [General Assembly] can modify, control or abolish it, and within these powers is embraced the right to change the mode of appointment." *State v. Falcon*, 451 Md. 138, 171 (2017) (citation omitted; alteration in original). That authority has always been central to Maryland's constitutional structure. *See, e.g.*, *Scholle v. State*, 90 Md. 729, 743 (1900) ("When, therefore, the Legislature has created an office by Act of Assembly, the Legislature can designate by whom and in what manner the person who is to fill the office shall be appointed." (quoting *Davis v. State*, 7 Md. 151, 151–52 (1854)).

Here, the General Assembly acted well within its authority in creating the student seat on the Board and establishing a non-elective appointment process for filling it. The statutory procedures for filling local school-board seats vary widely across Maryland, employing a mix of elective and non-elective selection methods. In Baltimore City, for instance, the majority of the school board's twelve seats are filled through mayoral appointments. *See* Md. Code, Educ. § 3-108.1(d). In Prince George's County, by contrast, nine of the board's fourteen seats are filled via district-specific elections. *See id.* § 3-1002(b). Meanwhile, in Wicomico County, all seven board members are elected—five via district-specific elections and two via at-large elections. *See id.* § 3-13A-01(a). This diversity of selection procedures plainly refutes Plaintiffs' theory that the Maryland Constitution requires every voting member of a school board to be selected in exactly the same manner. And it likewise refutes their

theory that a school-board member must be elected in order to have the "power to make a binding vote." Summary-Judgment Mot. 11.

Nor does the General Assembly's decision to fill a school-board seat through a non-elective process infringe the voting rights of any adult. To state the obvious, the constitutional guarantees that protect the right to vote for *elected* officials do not create an independent right to vote for *non-elected* officials, whom the legislature has deliberately insulated from elections. *Cf. Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989) ("[W]e have considerable doubt as to whether Virginia's choice of an appointive system over an elective scheme for selecting school board members even implicates Section 2 of the Voting Rights Act."). Legislatures often have good reasons for creating non-elected government positions, particularly in the school-board context. For example, a non-elective appointment process may help "promot[e] diversity in viewpoints which otherwise may not achieve representation on an elected school board" and "avoid[] the problem of single issue campaigns which frequently occur with elected school boards." *Mixon v. State of Ohio*, 193 F.3d 389, 403 (6th Cir. 1999) (citation omitted). Nothing in Maryland's Constitution prevents the General Assembly from making that deliberate choice.

And, here, there is no question that the General Assembly's choice to make the student Board seat an appointed position was deliberate. The text of § 3-701 makes clear that the General Assembly intended the student Board seat to be a *non-elected* position. The first clause of the statute explicitly distinguishes between the Board's

"[s]even *elected* members" and the "[o]ne *student* member"—a distinction maintained consistently throughout the statute. Md. Code, Educ. § 3-701(a)(1) (emphases added); *compare, e.g.*, *id.* § 3-701(b)(1) ("A candidate who becomes an elected member of the county board shall be a resident and registered voter of Howard County."), *with id.* § 3-701(f)(1) ("The student member shall be a bona fide resident of Howard County and a regularly enrolled junior or senior year student from a Howard County public high school."). That distinction reflects a clear choice by the General Assembly to employ a different selection process—and different qualifications—for the "student member" than for the "elected members." That legislative choice falls squarely within the General Assembly's power to establish the "mode of appointment" for each seat on the Board. *Falcon*, 451 Md. at 171.

Not surprisingly, the Attorney General's Office reached the exact same conclusion when it opined on the constitutionality of a bill creating a student seat (with voting power) on the school board in Prince George's County. *See* Md. Att'y Gen. Op. No. 80-030, 1980 WL 127893 (Mar. 12, 1980) (unpublished). The bill provided that the student member would be "elect[ed]" by a group of student delegates, rather than registered voters. Yet, despite that statutory language, the Attorney General concluded that "the selection of the student member was more properly regarded as appointive rather than elective." *Id.* at *1. In reaching that conclusion, Attorney General Sachs explicitly rejected the very theory that Plaintiffs have raised in this suit, stating: "If, as we conclude, the selection process is considered

appointive from a constitutional point of view, then the question you raise of enfranchising students in possible violation of Article I, § 1 of the State Constitution is not an issue." *Id.* at *2; *see also id.* at *1 n.1 (noting that the bill "expressly distinguishes between the nine 'elected members,' as there defined, and the one student member[,] thus evidencing an intent not to consider the student member as one who is 'elected'").

The same logic governs here. The General Assembly deliberately created the student seat on the Howard County Board as a position that would *not* be elected by the registered voters of the county. The fact that the statute's multi-step appointment process includes a student-body "election" does not render the appointment process unconstitutional. As the Attorney General explained, "the statute's use of the term 'elect' to describe the selection process of the student member" is "not dispositive of the fundamental question of whether, from a constitutional point of view, that selection process is more properly regarded as an election or an appointment." *Id.* at *1. That is especially true with respect to § 3-701(f), which explicitly provides that the "nomination and election process for the student member . . . *[s]hall be approved* by the Howard County Board" itself. Md. Code, Educ. § 3-701(f)(3) (emphasis added).

Moreover, the student Board member is hardly the only appointed education official in Maryland who is "elected" by a vote of his or her peers. For instance, the General Assembly created a seat on the State Board of Education for a "certified teacher who is actively teaching," and explicitly provided that the seat be filled by the

person "who received the highest number of votes after an *election* by teachers in the State." Md. Code, Educ. § 2-202(b)(4) (emphasis added). That appointment process does not implicate (much less violate) Article I, section 1 of the Maryland Constitution. Nor do any of the countless other appointment processes that the General Assembly has established for filling positions through peer-based elections.[2]

Yet, under Plaintiffs' theory, all of those positions would presumably be subject to the requirements of Article I, section 1. *See* Summary-Judgment Mot. 11 ("Article I, Section 1 must apply to the election of a student member to the Board because the student member has the power to make a binding vote on most Board matters."). Such a result would contravene both history and common sense. More importantly, it would undermine the carefully designed governance structures that the General Assembly adopted in order to ensure a diversity of perspectives on local education matters.

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[2] *See, e.g.*, Md. Code, State Pers. & Pens. § 21-104(b) (providing that certain trustees of the State Retirement and Pension System "shall be elected by the members and the retirees of that State system"); Md. Code, Fin. Inst. § 10-103 (providing that three members of the Maryland Deposit Insurance Fund Corporation be "elected by the member associations, subject to the approval of the Secretary of Labor"); Md. Code, Local Gov't § 25-302–303 (providing that "[e]ach landowner is entitled to one vote in the election of the board of directors" of Baltimore City's Public Watershed Association); Md. Code, Local Gov't § 30-104(b) (providing that certain trustees of the Baltimore City Police Department Death Relief Fund "shall be elected at large by the officers and civilian employees of the Department"); Md. Code, Educ. § 7-409(f) (providing that the Advisory Council on Health and Physical Education "shall elect a chair, vice chair, and any other officers necessary to carry out the Advisory Council's functions").

B. The student seat on the Board is not an "elective office" under Article I, section 12.

Plaintiffs contend that, in addition to violating Article I, section 1 of the Maryland Constitution, § 3-701(f) also violates Article I, section 12. That provision states that "a person is ineligible to enter upon the duties of, or to continue to serve in, an elective office created by or pursuant to the provisions of this Constitution if the person was not a registered voter in this State." Md. Const. art. I, § 12.

Plaintiffs' argument under Article I, section 12 fails for the same fundamental reason that their argument under Article I, section 1 fails: specifically, because the student Board seat is not an "elective office." As explained, the General Assembly deliberately and explicitly made the student seat on the Board a non-elected position. *See supra* Part I.A. The position, therefore, is no more subject to Article I, section 12 than it is to Article I, section 1.

Article I, section 12's emphasis on "elective" office is not accidental or inconsequential. The preceding three sections of Article I—which establish the qualifications and oath-taking obligations of public officials—all explicitly govern both "elected" *and* "appointed" officials. *See* Md. Const. art. I, § 9 ("Every person elected, or appointed, to any office . . . ."); *id.* art. I, § 10 ("Any officer elected or appointed . . . ."); *id.* art. I, § 11 ("Every person, hereafter elected, or appointed, to office . . . ."). The drafters' decision to focus exclusively in section 12 on "elective" office thus underscores the provision's more limited reach. Plaintiffs' effort to extend

that reach to encompass appointed school-board positions cannot be squared with the provision's text.

Furthermore, Plaintiffs' expansive reading of Article I, section 12 would cast doubt on various other Maryland statutes, including Education Article § 2-202(c), which creates a student seat on the *State* Board of Education. The student member of the State Board—like the student seat on the Howard County Board—is selected through a process that does not involve an election of registered voters. *See* Md. Code, Educ. § 2-202(b)(6) ("The student member shall be selected by the Governor from a list of 2 persons nominated by the Maryland Association of Student Councils."). Thus, if Plaintiffs' reading of Article I, section 12 were correct, then it would likely cast doubt on the constitutionality of § 2-202(c)—as well as all of the statutes establishing student seats (with voting power) on local school boards. Plaintiffs' atextual understanding of Article I, section 12 provides no basis for invalidating such broad swath of duly enacted state statutes.

C. All of Plaintiffs' remaining arguments are untenable.

Plaintiffs raise a variety of ancillary arguments in support of their claims, but none of those fares any better than their main argument.

They argue, for instance, that § 3-701 "enables a person to vote *twice* for a voting member of the Board" because some students who are able to vote for the student member may turn eighteen in time to vote in the general election for the other Board members. Summary-Judgment Mot. 16. According to Plaintiffs, this

possibility renders § 3-701(f) "inconsistent with Article I, Section 5's prohibition that a person may not 'vote in more than one election district, or precinct.'" *Id.* But, even if this imagined "double-voting" phenomenon were real, it is not unlawful (or even unusual) for someone to vote for multiple members of a *multi-member* school board.[3] In fact, most of Howard County's adult voters typically cast ballots for multiple Board members by voting for both the at-large members and their local district member. Such behavior is expressly permitted by Maryland law. *See* Md. Code, Elec. Law § 8-806(a) ("In a general election for board of education members, a voter may vote for a number of nominees equal to the number of members to be elected.").

Plaintiffs' assertion that § 3-701(f) conflicts with other Maryland statutes is similarly unavailing. For instance, they suggest that § 3-701(f) somehow conflicts with Education Article § 3-114(g)'s rule that individuals "subject to the authority" of a local school board are prohibited from serving on that board. *See* Summary-Judgment Mot. 4. But that argument ignores the "commonplace [rule] of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374,

[3] Incidentally the number of Howard County students who would even be eligible to vote for both the student Board member and an elected Board member in the same year is exceedingly small. The student-body vote is limited to students who have not yet reached their senior year, which means that virtually all of them are under the age of eighteen. The vast majority of them therefore would not be eligible to vote for any elected Board member. Moreover, the elected Board members serve staggered four-year terms, with elections every two years, so Plaintiffs' imagined hypothetical only becomes feasible every other year. It is hardly surprising then that Plaintiffs have failed to identify a single person who has actually voted for both the student Board member and an elected Board member in the same year.

384 (1992). If the General Assembly actually believed that § 3-114(g) barred students from serving on local school boards, then it would not have specifically created such a seat on Howard County's Board—nor on various other school boards. *See, e.g.*, Md. Code, Educ. § 3-2B-05 (establishing a seat on Baltimore County's school board for an "11th or a 12th grade student"). Indeed, construing § 3-114(g) to conflict with § 3-701(f) would undermine the General Assembly's clear intent in creating the student Board seat. And it would violate the basic principle that "statutory laws regarding the same subject are to be read and harmonized together in order to avoid leaving the provision at issue ineffective." *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 54 (2013).

Plaintiffs' remaining arguments—which rest on their own policy preferences and unsupported scientific claims—likewise fall flat. Their blanket assertion that "minors cannot and should not be treated as adults because their minds are not fully developed," Summary-Judgement Mot. 13, ignores all of the ways in which Maryland law does, in fact, treat minors as adults. Several jurisdictions in Maryland, for example, permit sixteen- and seventeen-year-olds to vote in local elections. *See* Clara Niel, *Takoma Park Is One of Five Cities Where Minors Can Vote. And Young Voters Are Turning Out*, The Diamondback (Oct. 1, 2020), https://perma.cc/3VRC-6VKN. State law also empowers prosecutors to charge minors as adults; and, each year, roughly a thousand Maryland minors are prosecuted in adult court. *See* Governor's Office of Crime Prevention*, Youth, and Victim Services, Juveniles Charged as Adults in Maryland*

(1/1/2019–6/30/2019), at 3 (Dec. 31, 2019) (showing that 490 juveniles were charged as adults in Maryland during the first six months of 2019).[4] And, of course, the General Assembly has long permitted high-school students to sit on local school boards across the State, while carefully delineating their specific powers on those boards. Thus, contrary to Plaintiffs' simplistic (and often inaccurate[5]) understanding of Maryland law, state and local lawmakers have taken a more nuanced approach to assessing young people's capacity for civic participation.

In any event, Plaintiffs' policy preferences do not constitute legal authority. Nor do the decade-old press statements made by Brian Frosh before he became Attorney General. *See* Summary-Judgment Mot. 12 n.3 & 14 n.4 (quoting a now-defunct blog describing then-Senator Frosh's opposition, on policy grounds, to the creation of a student school-board seat in Montgomery County). As previously noted, the only time that the Attorney General's Office ever formally opined on the legality of appointing students to a local school board, it expressed the unequivocal view that such appointments were lawful. *See supra* Part I.A.

II. Plaintiffs have failed to plead a proper vote-dilution claim.

Plaintiffs repeatedly assert that § 3-701(f) "has the effect of diluting the votes of

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[4] *Available at* http://goccp.maryland.gov/wp-content/uploads/juveniles-charged-as-adults-201901-201906.pdf.

[5] Plaintiffs incorrectly suggest that the age of consent in Maryland is eighteen. *See* Summary-Judgment Mot. 13; Compl. 13. In fact, the age of consent in Maryland (as in many other states) is sixteen. *See* Md. Code, Crim. Law §§ 3-304–308.

legal, registered voters in Howard County." Summary-Judgment Mot. 12; *see also, e.g.*, Compl. 15–16 ("This statutory scheme has diluted the votes of adult citizens of Howard County who have reached the age of majority and have exercised their right to vote in [School Board elections]."). Yet, despite these repeated assertions, they have not articulated a legally cognizable theory of vote dilution. Indeed, they have not even identified the source of law on which their vote-dilution claim is based.

Vote-dilution claims typically arise under the Fourteenth Amendment to the U.S. Constitution, and rest on the principle of "one-person, one-vote," which "refers to the idea that each vote must carry equal weight." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).[6] Plaintiffs here, however, failed to invoke (or even mention) the Fourteenth Amendment anywhere in their complaint. Instead, they focus entirely on Article I of the Maryland Constitution—a provision that has never been construed to support a vote-dilution claim. Nowhere in any of their pleadings do Plaintiffs cite any authority for the proposition that a vote-dilution claim may arise under Article I of the Maryland Constitution. And the handful of vote-dilution cases that they do cite all arose (predictably) under the Fourteenth Amendment, not the Maryland Constitution.

[6] Vote-dilution claims may also sometimes rest on the Fourteenth Amendment's prohibition against intentional racial discrimination, or on similar prohibitions under the Voting Rights Act. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (noting that "a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities'" (citation omitted)). Plaintiffs do not appear to be asserting any such claims here.

See Summary-Judgment Mot. 12.[7]

In any event, even if Plaintiffs had properly invoked the Fourteenth Amendment here, their vote-dilution claim would still fail on its own terms. The Fourteenth Amendment does not preclude states from creating *appointed* school-board seats. *See supra* Part I.A (explaining that the student Board seat is an appointed position). As the U.S. Supreme Court has stated, "where a State chooses to select members of an official body by appointment rather than election," the fact that the appointed officials do "not 'represent' the same number of people" as the elected ones "does not deny those people equal protection of the laws." *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 58 (1970). That precedent alone negates Plaintiffs' claim that § 3-701's appointment process somehow dilutes their voting power.

Nor does the Fourteenth Amendment mandate that every school-board member run for election before the exact same electorate. If such a requirement existed, it would inevitably cast doubt on the constitutionality of several school boards, which—like Howard County's—include both at-large members (who are

[7] The only provision of the Maryland Constitution that would likely support a vote-dilution claim is Article III, section 4, but that provision applies exclusively to "legislative district[s]" and, as such, has no bearing on the voter-eligibility requirements for school-board elections. Although Article 24 of the Declaration of Rights contains an implicit equal-protection guarantee, Plaintiffs have not cited that provision in their pleadings, nor have they cited any cases recognizing a vote-dilution claim arising under that provision.

elected by all of the voters in the jurisdiction) and district members (who are elected by the subset of voters residing in their local district). Plaintiffs have offered no principled explanation as to how such a structure could be permissible under their novel and expansive theory of vote dilution.

III. To the extent that the student-member selection process is subject to Article I, section 1, then Plaintiffs' suit is untimely.

As just explained, Plaintiffs' central argument in this case—that Article I, section 1 precludes the General Assembly from creating a non-elected student seat on the Board—is wrong. But even if it were not wrong, their claims would still have to be dismissed for a different reason: namely, because they are untimely.

A. Plaintiffs' suit is barred by § 12-202(b) of the Election Article.

The Court of Appeals has repeatedly stressed that "any claim against a state electoral procedure must be expressed expeditiously." *Lamone v. Schlakman*, 451 Md. 468, 488 (2017) (citation omitted). The rationale for this rule is straightforward: "election participants should not be allowed to ambush an adversary or subvert the election process by intentionally delaying a request for remedial action to see first whether they will be successful at the polls." *United States v. City of Cambridge*, 799 F.2d 137, 141 (4th Cir. 1986); *see also, e.g.*, *Liddy v. Lamone*, 398 Md. 233, 255 (2007) ("Allowing challenges [to a candidate's eligibility] to be brought at such a late date would call into question the value and the quality of our entire elections process and would only serve as a catalyst for future challenges.").

The General Assembly addressed this concern in Election Article § 12-202. That statute imposes strict time limits on lawsuits that challenge "any act or omission relating to an election . . . on the grounds that the act or omission: (1) is inconsistent with this article or other law applicable to the elections process; and (2) may change or has changed the outcome of the election." Md. Code, Elec. Law § 12-202(a). Specifically, the statute requires that such challenges be filed:

> within the earlier of: (1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or (2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.

Id. § 12-202(b) . The provision applies to all suits challenging a candidate's qualifications for office or alleging an infringement of voting rights under Maryland law. *Schlakman*, 451 Md. at 482 (citation and quotation marks omitted). Plaintiffs' assertions in this suit—all of which arise under the "Elective Franchise" article of Maryland's Constitution—therefore bring it squarely within the ambit of § 12-202. *See, e.g.*, Summary-Judgment Mot. 16 (asserting that "Section 3-701(f) is a 'material impairment of an elector's right to vote'" (citation omitted)); *id.* at 17 (arguing that § 3-701(f) is unconstitutional because it "permits minors to hold elected positions in government").

Under § 12-202(b), Plaintiffs' deadline to challenge the current student Board member's qualifications would have elapsed several months before they filed this suit. Plaintiffs themselves acknowledge that the current student Board member was

"elected" in June 2020 and seated in July 2020. *See* Compl. 10 (noting that the student member "joins the [Board] for one year, starting July 1st"); *see also* Md. Code, Educ. § 3-701(f)(2) (noting that the student member's term "begin[s] on July 1"). Thus, the limitations period for filing this suit would have expired, at the very latest, in August 2020—a full four months before this action was filed.[8]

That four-month delay cannot be explained by Plaintiffs' lack of knowledge of the relevant facts. Shortly after filing this suit, Plaintiffs published a letter in the Baltimore Sun describing how they had "spent *months* watching meetings, emailing the school board, filing petitions, filling out surveys, [and] attending rallies," among other activities. Kim Ford & Traci Spiegel, *Howard County Parents: Lawsuit Was Needed To Prevent School Board 'Gridlock,'* Baltimore Sun (Dec. 30, 2020) (emphasis added). They cannot plausibly claim that they remained ignorant, throughout that months-long period, of the statutory process for selecting the student Board member. Moreover, even if they truly were unaware of that process, that still would not excuse their delay here. As the Court of Appeals has explained, a "voter may not simply bury his or her

[8] In fact, the limitations period would have expired much earlier if not for the Court of Appeals' administrative order tolling statutes of limitations for the first several months of the COVID-19 pandemic. *See Sixth Revised Administrative Order on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory & Rules Deadlines Related to the Initiation of Matters and Certain Statutory & Rules Deadlines in Pending Matters* (Dec. 22, 2020), https://perma.cc/Q32F-UK9J (adding 15 days, beginning on July 20, 2020, to any limitations period that began to run prior to July 20). To the extent that Plaintiffs were aware of § 3-701(f)'s selection process prior to the pandemic, the limitations period would have expired even earlier.

head in the sand and, thereby, avoid the triggering of the 10-day statutory time period, prescribed by § 12-202." *Abrams v. Lamone*, 398 Md. 146, 160 n.18 (2007).

Notably, Plaintiffs have made no attempt to explain their delay in filing this suit—a striking omission in light of their repeated insistence that this matter be resolved urgently. *See, e.g.*, Opp. to Defendant's Extension Mot. 2 (asserting that "time [is] of the essence"). To the extent that they contend that their delay is justified because their legal injury did not arise until the Board's school-reopening vote last fall, that argument is unavailing. Once again, the "act or omission" that Plaintiffs are challenging in this suit—the entire basis for their *legal* claim—is the process by which the student Board member is selected. That process occurred, with Plaintiffs' full knowledge, months before they filed suit. The Board's subsequent actions (whether with respect to school-reopening or any other issue) cannot revive that otherwise-stale legal claim. After all, if voters could simply wait to see how their elected officials might behave in office before deciding whether or not to challenge those officials' qualifications, then § 12-202(b) would serve no purpose. The entire rationale for the statute is to prevent that "wait-and-see" approach to election-related litigation. *Cf. Ross v. State Bd. of Elections*, 387 Md. 649, 672 (2005) (explaining that the plaintiff's "decision to 'wait and see' until after the election" prejudiced both the defendant official and election administrators).

At any rate, even if the Board's school-reopening policy could somehow "re-start" the clock on § 12-202(b) limitations period—which it cannot—this suit would

still be untimely. Howard County schools had been closed to in-person instruction for months prior to this litigation, so Plaintiffs cannot claim any new injuries resulting from that policy. Furthermore, as Plaintiffs themselves admit in their complaint, the Board held a vote on the reopening issue on November 16, 2020—a full month before Plaintiffs filed this suit. Thus, even under the most forgiving (albeit legally untenable) view of Plaintiffs' injury in this case, their suit would still be time-barred under § 12-202(b).

B. Plaintiffs' suit is barred by the doctrine of laches.

"[I]ndependent of EL § 12–202(b)'s statutory limitations period for challenging any act or omission relating to an election, a registered voter's action may be barred by the doctrine of laches." *Ademiluyi v. State Bd. of Elections*, 458 Md. 1, 9 (2018). Laches is "a defense in equity against stale claims . . . based upon grounds of sound public policy by discouraging fusty demands for the peace of society." *Parker v. Bd. of Election Supervisors*, 230 Md. 126, 130 (1962). The doctrine imposes a "duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible." *Ross*, 387 Md. at 672 (quoting *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)). Maryland courts have found election-related claims to be barred by laches even when they are not barred by § 12-202(b). *See, e.g.*, *Baker v. O'Malley*, 217 Md. App. 288, 297 (2014) ("[E]ven though Ms. Baker's claims were not subject to the time limits imposed by EL § 12-202(b), the circuit

court's alternative ruling that Ms. Baker's claims are barred by laches was clearly correct.").

Here, laches bars Plaintiffs from obtaining any relief. As explained above, Plaintiffs waited several months after the student Board member was selected to challenge the statutory process underlying his selection (as well as to challenge his qualifications to hold the position). *See supra* Part II.B. That delay is comparable to or greater than the delays in other elections cases that Maryland courts have dismissed under the doctrine of laches.[9] The fact that Plaintiffs seek to challenge the validity of a statute that was enacted more than a decade before they filed this suit only compounds the unreasonableness of their delay. *Cf. Hendon*, 710 F.2d at 182 ("The regulations which the appellants challenged have been in effect since 1955. The appellants introduced no evidence of any reason why they could not have challenged the constitutionality of these laws before the 1982 general election.").

These factors justify the dismissal of Plaintiffs' complaint regardless of whether their underlying legal theory is actually sound (which it is not). The Court of Appeals

[9] *See, e.g.*, *Ademiluyi*, 458 Md. at 49 (holding that "waiting until more than six months after the election to challenge a candidate's eligibility for judicial office was unreasonable"); *Schlakman*, 451 Md. at 490 (holding that the plaintiffs' delay of "over a month" after they discovered the facts underlying the complaint was unreasonable); *Ross*, 387 Md. at 668 (dismissing challenge filed "a full three days after the election occurred" and three weeks after the plaintiff discovered the facts underlying the complaint); *Baker*, 217 Md. App. at 298 (noting that a delay of five and a half months "would constitute an unreasonable delay in challenging a governor's failure to issue a commission after an election").

has made clear that untimely challenges to an elected official's qualifications must be dismissed without regard to the merits of the challenger's claim. In *Ademiluyi*, for instance, the Court expressly rejected the plaintiff's contention that, "if [the challenged elected official] is ineligible for judicial office, then it would actually be beneficial to the State and the voters of [the] County to remove [the official] from office." 458 Md. at 50. The Court rightly characterized that argument as "circular," noting that it "depends wholly on the validity of [the plaintiff]'s position concerning [the official]'s eligibility for judicial office." *Id.*; *see also, e.g.*, *McMahon v. Robey*, No. 1804, 2017 WL 6570728, at *4 (Md. Ct. Spec. App. Dec. 26, 2017) (rejecting challenge to sheriff's legal authority as untimely even though it was undisputed that sheriff had failed to take the required oath of office). Thus, even if Plaintiffs had stated a viable claim here, their suit would still have to be dismissed as untimely.

IV. To the extent that the student-member selection process is subject to Article I, section 1, then Plaintiffs were required to name both the State and County Boards of Elections as necessary parties.

Besides the timeliness requirement, Plaintiffs have also flouted other procedural requirements that flow from their contention that the student Board member is an "elected" official. Most glaringly, they have failed to name the State and County Boards of Elections as defendants in this lawsuit in violation of Rule 2-211.

Rule 2-211 requires a plaintiff to join all necessary parties in any civil suit. *See also* Md. Code, Cts. & Jud. Proc. § 3-405(a) ("If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be

made a party."). That requirement is "intended to assure that a person's rights are not adjudicated unless that person has had his 'day in court' and to prevent multiplicity of litigation by assuring a determination of the entire controversy in a single proceeding." *City of Bowie v. Mie Props., Inc.*, 398 Md. 657, 703 (2007) (quotation marks and citations omitted). Under Rule 2-211(a), a person is a necessary party "if in the person's absence (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action." Md. Rule 2-211(a).

In this case, "complete relief" cannot be provided without the input and participation of state and local election administrators. Plaintiffs' entire case rests on their theory that the student Board member is an "elected" official who should be subject to the same legal requirements as every other member of the Board. *See* Summary-Judgment Mot. 11 (asserting that "Article I, Section 1 must apply to the election of a student member to the Board"). If that theory is correct,[10] then any judicial relief that they might obtain here would ultimately have to be implemented by state and local election administrators. Among other things, election administrators would presumably need to begin holding formal elections to fill the Board position currently held by the student member in order to bring that position into compliance

[10] As explained in Part I, Plaintiffs' theory is not correct. The Court therefore does not need to reach the joinder question if it dismisses Plaintiffs' complaint on the merits.

with Article I under Plaintiffs' theory. *See* Md. Code, Elec. Law § 8-801 (requiring school-board elections to be administered in the same manner as all other general elections). That task alone would require the State and County Boards of Elections to:

- Determine whether the new seat should be filled through an at-large election (like two of the other seats on the School Board) or a district election (like the remaining five seats);
- Revise all election ballots and voting instructions to account for the additional School Board seat;
- Process an increased volume of candidate certificates submitted by people seeking to run for the new seat (pursuant to Election Law Article § 5-302);
- Verify the qualifications of each of those candidates (pursuant to Election Law Article § 8-803); and
- Canvass all of the votes cast in the election for the new seat (pursuant to Election Law Article § 11-301), verify the vote totals (pursuant to Election Law Article § 11-308), and certify the election results (pursuant to Election Law Article § 2-202(b)(7) and § 11-603).

State and local election administrators plainly have a direct interest in any matter that could impose these additional responsibilities on them. *Cf. State Admin. Bd. of Election*

Laws v. Talbot Cty., 316 Md. 332, 343–44 (1988) (noting that "state and local elections boards are ordinarily named as co-defendants" in cases challenging the constitutionality of election-related statutes).

Plaintiffs cannot evade the mandatory-joinder rule here by arguing that the Board's student member should simply be stripped of all voting power, rather than replaced by a new elected member. Maryland courts abide by the longstanding "general rule that courts try to uphold all parts of an act which can be put in force, even though other parts are invalid." *Bell v. Bd. of Comm'rs of Prince George's Cty.*, 195 Md. 21, 32 (1950). And, here, the text of § 3-701 reflects the General Assembly's clear intent to create a Board with eight members—not seven. As noted above, the very first clause of the statute states: "The Howard County Board consists of: (i) Seven elected members; and (ii) One student member." Md. Code, Educ. § 3-701(a)(1). Plaintiffs have not explained why that language—which creates eight voting members on the Board—should be excised from the statute simply because the procedure for filling one of those seats is invalidated. If anything, Plaintiffs' proposed reading of § 3-701 would seem to require *preserving* the eighth seat on the Board; after all, under Plaintiffs' theory, the student Board member is an "elected" official who must be treated like all of the other Board members. If they are right about that, then there cannot be any basis for eliminating the eighth seat from the Board. Rather, the remedy would be to fill the student seat through an election of

registered voters.[11]

Plaintiffs' own cited authorities reaffirm that election administrators have an interest in cases, like this one, that allege "a 'material impairment of an elector's right to vote.'" Summary-Judgment Mot. 16 (quoting *Jackson v. Norris*, 173 Md. 579, 596 (1937)). Almost every case Plaintiffs cite in their summary-judgment brief names at least one (and often more than one) election administrator as a defendant.[12] That fact is hardly surprising: the overwhelming majority of cases arising under Article I, section 1 of the Maryland Constitution were filed against some combination of the State Board of Elections, a county board of elections, or members of such boards. Plaintiffs' failure to adhere to that basic practice reflects their lack of interest in remedying the actual *legal* violation that they have alleged here, and reaffirms that their primary goal in this litigation is to achieve a policy objective unrelated to that violation. More importantly, however, their failure to name any election

[11] Plaintiffs themselves appear to acknowledge that there is no basis for invalidating the opening clause of § 3-701. In their prayer for relief, the only provisions of § 3-701 that they ask this Court to declare invalid are "provisions (f) and (g)(1)." Compl. 17. They conspicuously do not ask the Court to invalidate subsection (a)(1), which establishes the number of seats on the Board. Thus, even if Plaintiffs were to prevail on their constitutional claims—and even if they were to obtain all of the declaratory relief they have requested—that still would not require a wholesale restructuring of the Board. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) ("Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts.").

[12] *See, e.g.*, *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30 (2013); *Lamone v. Capozzi*, 396 Md. 53 (2006); *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003); *Jackson v. Norris*, 173 Md. 579 (1937); *Southerland v. Norris*, 74 Md. 326 (1891).

administrators as a party (in contravention of their own cited cases) provides yet another basis for dismissal.[13]

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment, issue a declaratory judgment in the Board's favor, and provide the Board with an opportunity to recover attorney fees and costs under Rule 1-341.

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Respectfully submitted,

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[13] To the extent that the Court is not inclined to dismiss this suit based on Plaintiffs' failure to serve necessary defendants, it should require Plaintiffs to serve the State and County Boards of Election and give those parties an opportunity to respond.

[14] Jonathan de Jong, a second-year student at Georgetown University Law Center, assisted in the preparation of this brief (under supervision of counsel).

CERTIFICATE OF SERVICE

I hereby certify on this 9th day of February, 2021, that a true and accurate copy of the foregoing motion and memorandum of law was filed with the Clerk of the Court and served on all parties via the Maryland Electronic Courts (MDEC) system.

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