UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

LISA M.F. KIM, et al., *Plaintiffs*,	:	
vs.	:	Case No. 1:21-cv-655-DKC
BOARD OF EDUCATION OF HOWARD COUNTY, *Defendant.*	:	

DEFENDANT'S MOTION TO DISMISS

Defendant Board of Education of Howard County hereby moves under Rule 12(b)(6) of the Federal Rules of Civil Procedure for dismissal of this case with prejudice for the reasons set forth in the accompanying memorandum of law.

The Board believes that the legal issues in this case are sufficiently straightforward to enable this Court to dismiss Plaintiffs' Complaint on the papers; however, to the extent that the Court is inclined to grant any relief to Plaintiffs, the Board would request an opportunity to present oral argument under Loc. R. 105.6.

Dated: April 27, 2021

Respectfully Submitted,

/s/ Jonathan L. Backer

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2021, I electronically filed the foregoing motion with the Clerk of the U.S. District Court for the District of Maryland by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

The Maryland General Assembly has created student positions on the State Board of Education as well as county boards of education throughout the state. These positions are intended to give students a voice on the policies that affect their school lives and to provide students civic education by involving them in the actual process of governance. The Board of Education of Howard County is among the bodies on which the General Assembly has created a position reserved for a public-school student. Through this lawsuit, Plaintiffs hope to overturn that policy decision and silence Howard County Public School System (HCPSS) students.

Plaintiffs allege that § 3-701(f) of the Maryland Education Article violates the Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Exercise Clause by allowing HCPSS students in grades six through eleven to participate in the selection of the Student Member to the exclusion of Howard County residents who do not attend HCPSS schools. Plaintiffs' free-exercise claim is easily dismissed because § 3-701(f) is a hornbook example of a neutral, generally applicable law to which the Free Exercise Clause's safeguards do not apply. The main focus of the Complaint is Plaintiffs' equal-protection claims. Those claims also are unavailing.

The Complaint's foundational error is that it presumes that the Student Member position is an elective office, when it clearly is not. Adult registered voters participate in elections, not minor students. Elections in Maryland are governed by

the state's Election Law Article, not the HCPSS school policies that govern the selection of the Student Member. Plaintiffs' counsel said it best in a press release: the process for selecting the Student Member is not "a real government election."[1] Because the Equal Protection Clause's voting safeguards do not apply to non-elective offices, Plaintiffs' equal-protection claims should be dismissed.

Plaintiffs equal-protection claims also fail because they fail to state a claim even if one assumes that the Student Member position is an elective office. Section 3-701(f) does not deny a single adult resident of Howard County the right to vote in Board elections. To the contrary, the statute preserves a dominant voice on the Board for Howard County's adult residents, who alone determine the selection of seven of the Board's eight members. Section 3-701(f) reflects the General Assembly's deliberate choice to give HCPSS students a voice in shaping the policies that affect their school lives by providing them a single seat with carefully circumscribed voting power on a Board otherwise filled by adult residents of Howard County. Plaintiffs' real objection is not that HCPSS students wield *disproportionate* power on the Board. In truth, they object that HCPSS students exercise any power at all. This Court should dismiss this case with prejudice and decline Plaintiffs' invitation to second-guess the General Assembly's decision to empower HCPSS

[1] Press Release, Public Interest Legal Foundation, PILF Clients Demand End to Howard County, MD School Board's Election Scheme that Lets Children Vote for School Board (Mar. 16, 2021), https://perma.cc/R7LM-YMR6 [hereinafter PILF Press Release].

students by giving them a voice on the Board.

BACKGROUND

A. Statutory and Factual Background

The Maryland Constitution mandates that the Maryland General Assembly "establish throughout the State a thorough and efficient System of Free Public Schools." Md. Const. art. VIII, § 1. Pursuant to that provision, the General Assembly has established local boards of education in each county. Md. Code, Educ. § 3-103. In most counties, the General Assembly has reserved one or more school-board seats for high-school students. Whether student board members can vote on substantive issues varies by county. Plaintiffs challenge § 3-701(f) of the Maryland Education Article, which establishes a Student Member position with limited voting power on the Howard County Board.

Section 3-701(f) is the product of a twenty-year, student-led effort. In 1987, a HCPSS student unsuccessfully pushed for the creation of a student position on the Board. *Hearing on H.B. 513 Before H. Comm. on Ways and Means*, 2007 Leg., 423rd Sess. 1 (Md. 2007) (statement of Joshua L. Michael) (attached as Exhibit 1). The Board created a nonvoting student position as a compromise. *Id.* Two decades later, a former student member of the State Board of Education and a former nonvoting student member of the Howard County Board spearheaded a renewed legislative push for a voting position. *Id.* at 1–2. The students' advocacy resulted in the enactment of § 3-701(f) by a unanimous vote in the House of Delegates and a 42-4 vote in the

Senate.[2] 2007 Md. Laws 3887 (codified as amended at Md. Code, Educ. § 3-701).

Since 2007, the Howard County Board has been an eight-member body. Seven of the positions are occupied by "elected members," who are chosen by Howard County voters in elections governed by Maryland's Election Law Article. Md. Code, Educ. § 3-701(a)(1)(i). Five of the Elected Members represent "councilmanic districts" within Howard County and are "elected by the voters of [each] district." *Id.* § 3-701(a)(2)(i). The other two are "at large" Members who are "elected by the voters of the county" as a whole. *Id.* § 3-701(a)(2)(ii). The final position on the Board is filled by the "student member," a high-school junior or senior enrolled in a HCPSS school. *Id.* §§ 3-701(a)(1)(ii), (f)(1).

Like the at-large Elected Members, the Student Member represents all Howard County residents. Compl. Ex. A, at 4 (stating that the Student Member "represents students, staff, parents, and others in the community by presenting a student perspective on matters that come before the Board"). But unlike the Board's Elected Members, the Student Member exercises limited voting power, as he or she is prohibited from voting on fourteen different categories of subject matter, including the appointment and salary of the county superintendent; staff and student discipline; and—contrary to what Plaintiffs allege—budgetary matters.[3] Md. Code, Educ.

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[2] *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).

[3] Plaintiffs also object that Howard County residents who attend private schools or

§ 3-701(f)(7); Compl. ¶ 53.

A multi-step process governs the selection of the Student Member of the Howard County Board. In January of each year, HCPSS students may apply to serve as the Student Member, and those applications are reviewed by the Howard County Association of Student Councils advisor, a HCPSS employee. Compl. Ex. B, at 2. Then, each HCPSS middle school and high school forms a committee comprised of the school's principal, a student-government advisor or a counselor, and three students chosen by the principal. *Id.* Those committees select students to serve as delegates to a convention, where the delegates select two candidates for the Board seat and an alternate from among the student applicants. *Id.* at 2–3. After a campaign period, HCPSS students in grades six through eleven choose between the two candidates by casting confidential ballots, the tabulation of which is overseen by student-government members at the high-school level and by student-council advisors at the middle-school level. *Id.* at 3. The Superintendent or her designee must certify the results of the vote in June, and the Student Member takes office at the first meeting in July, after receiving approval of the Board. *Id.*; Md. Code, Educ. § 3-701(f)(3)(i).

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are educated at home have no say on the County's busing polices. Compl. ¶ 64. But transportation is another subject on which the Student Member exercises no voting power. Md. Code, Educ. § 3-701(f)(7)(vi).

B. Procedural Background

Plaintiffs Lisa Kim and William Howard, two adult residents of Howard County, and Kim's son, J.K., filed this putative class action against the Board on March 16, 2021. They allege that § 3-701(f) violates the Fourteenth Amendment's Equal Protection Clause by allowing only HCPSS students to participate in the selection of the Student Member. Plaintiffs Kim and J.K. also allege that the statute violates the First Amendment's Free Exercise Clause by precluding students like J.K. who attend private religious schools or others who are educated at home for religious reasons from participating in the selection of the Student Member. In their prayer for relief, Plaintiffs seek only declaratory relief. Compl. 15–16. The Board moves to dismiss the Complaint with prejudice.

LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a case is subject to dismissal if the complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In reviewing a 12(b)(6) motion, a court must "accept a plaintiff's allegations of material facts as true and construe the complaint in the plaintiff's favor." *Malkani v. Clark Consulting, Inc.*, 727 F. Supp. 2d 444, 447 n.2 (D. Md. 2010). The court may also take judicial notice of "fact[s] that [are] not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *Bowman v. Jack Cooper Transp. Co.*, 399 F. Supp. 3d 447, 451 (D. Md. 2019). In addition, the court may "consider documents that are explicitly incorporated into the complaint by reference." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016).

ARGUMENT

I. Plaintiffs fail to state a claim under the Equal Protection Clause.

Counts I and II of the Complaint allege that § 3-701(f) violates the Fourteenth Amendment's Equal Protection Clause by granting HCPSS students undue political power on the Board. Plaintiffs frame this supposed political windfall in two different, but related ways. In Count I, Plaintiffs allege that § 3-701(f) allows eighteen-year-old HCPSS students to vote for more Board members than other Howard County residents and, therefore, gives them greater representation on the Board. Compl. ¶¶ 41–42, 47. Count II alleges that the Student Member represents a much smaller number of constituents than the at-large Elected Members, implying that HCPSS students wield disproportionate influence over the Board. *Id.* ¶¶ 56–58.

These claims potentially implicate three distinct branches of equal-protection

jurisprudence. Counts I and II explicitly rely upon the Fourteenth Amendment's "one-person, one-vote" principle. Compl. ¶¶ 37, 39, 41–43, 55, 58–59. That principle "refers to the idea that each vote must carry equal weight," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019), and it safeguards against "dilution or debasement" of the right to vote. *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 54 (1970). But Plaintiffs' real objection to § 3-701(f) is not that HCPSS students exercise more voting power than other Howard County residents in Board elections. Rather, Plaintiffs object that § 3-701(f), as they understand it, extends to HCPSS students the right to participate in the process of selecting the Student Member, while at the same time denying that right to other Howard County residents. Counts I and II therefore potentially implicate case law concerning both (1) vote denial, *see Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969), and (2) extension of the franchise, *see, e.g.*, *Spahos v. Mayor & Councilmen of Town of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga. 1962) (three-judge court), *aff'd* 371 U.S. 206 (per curiam). None of the aforementioned theories furnish an analytical framework under which Plaintiffs can prevail.

As explained below, Counts I and II fail at the outset for a simple reason: the Equal Protection Clause's voting safeguards do not apply to non-elective offices like the Student Member position. And, even if the Student Member position were elective (which it is not), Plaintiffs' complaint would still fail to state a claim under any potentially applicable equal-protection theory. Because the Student Member

represents all Howard County residents—contrary to what Plaintiffs allege—§ 3-701(f) does not implicate the one-person, one-vote principle. Nor can § 3-701(f) be said to deny the franchise to adult Howard County residents, because they retain a dominant voice in selecting Board members. Moreover, § 3-701(f) is narrowly tailored to Maryland's compelling interest in empowering students and providing them with civic education and therefore survives any level of judicial scrutiny to which it might be subjected.

A. The Equal Protection Clause's voting safeguards are inapplicable to non-elective offices.

The fundamental obstacle to Plaintiffs' equal-protection claims—however they might be construed—is that the Equal Protection Clause's voting safeguards do not apply to non-elective offices, like the Student Member position. The Supreme Court has held that the one-person, one-vote principle has "no relevancy" to non-elective offices like the Student Member position. *Sailors v. Bd. of Educ. of Kent Cty.*, 387 U.S. 105, 111 (1967). As the Court has explained, "where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws." *Hadley*, 397 U.S. at 58.

In *Sailors*, the Court held that the one-person, one-vote principle did not apply to positions on a county school board because they were non-elective. 387 U.S. at

111. The board's members were selected through a two-step process: First, local (i.e., sub-county) school boards chose delegates to attend a meeting for the selection of the county-school-board members; second, the delegates "cast . . . votes" for county-school-board members from a slate of candidates. *Id.* at 106–07, 109 n.6, 111. The Court concluded that this two-step process rendered the board "basically appointive rather than elective." *Id.* at 109. That conclusion was "evident" to the Court because the board's "membership . . . [was] not determined, directly or indirectly, through an election in which the residents of the county participate." *Id.* at 109 n.6. Rather, the board's "electorate" was composed of "the delegates from the local school boards." *Id.*

Thus, under *Sailors*, the decisive factor in determining whether the Equal Protection Clause's voting safeguards apply is whether the electorate as a whole fills the position in question. *See Hadley*, 397 U.S. at 58 (identifying the "use [of] the process of popular election" as the trigger for application of the one-person, one-vote rule); *Vander Linden v. Hodges*, 193 F.3d 268, 273 (4th Cir. 1999) (holding that the one-person, one-vote principle applied to a system of county governance by popularly elected state legislators because "the power to determine the membership of a legislative delegation reside[d] in the electorate"); *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885, 893 (W.D. Wash. 1990) (an office is non-elective when "the selection of [officeholders], and the non-selection of others . . . [is] decided upon not by the voters but by others charged by law with the duty of choosing"); *Rosenthal v. Bd.*

of Educ. of Cent. High Sch. Dist., 385 F. Supp. 223, 226 (E.D.N.Y. 1974) (three-judge court) (identifying the "popular election" as the "crucial factor in the application of the Fourteenth Amendment considerations to any apportionment scheme").

Although *Sailors* specifically addressed the non-applicability of the one-person, one-vote principle to non-elective offices, courts have held that the same logic applies to vote-denial claims. *See Butts v. Aultman*, 953 F.3d 353, 360 (5th Cir. 2020) ("*Kramer* focuses on statutory schemes that extend the *franchise* in a selective manner" and not to "appointive positions" (emphasis in original)); *Mixon v. Ohio*, 193 F.3d 389, 405–06 (6th Cir. 1999) (explaining that "problems of voter inclusion would arise" only if the school boards at issue were, contrary to the facts of the case, "elected bodies"). Similarly, franchise-extension claims, as the label suggests, concern the electorate as a whole. *See Collins v. Town of Goshen*, 635 F.2d 954, 958 (2d Cir. 1980). The elective/non-elective distinction set forth in *Sailors* therefore applies to all of the Equal Protection Clause's voting safeguards.

Courts also have held that *Sailors* applies to non-elective positions on multi-member bodies on which both elected and non-elected members serve. "[A]ppointed members of a mixed board should not be counted in calculating the deviation [in the ratio between residents and representatives], because the voters do not select them. The aim of one person, one vote—to protect each voter's right to an equal voice in choosing elected representatives—is not involved where members of a board are appointed." *Cunningham*, 751 F. Supp. at 894; *see also Butts*, 953 F.3d at

360 (rejecting "plaintiff's argument that the court is obligated to compare the relative strength of the elective positions and the appointive positions on . . . [a school] board"). Therefore, the fact that the Elected Members of the Howard County Board are—quite plainly—elected is irrelevant to whether the Equal Protection Clause's voting safeguards apply to the selection of Student Member.

B. The Student Member position is a non-elective office.

The Student Member position is a non-elective office, as established by the plain text of § 3-701(f), the process by which the Student Member is selected, and Maryland authorities construing the position. Counts I and II therefore are meritless.

Section 3-701 itself makes clear that the Student Member position is a non-elective office. 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) (establishing qualifications for "[a] candidate who becomes an elected member of the county board"), *with id.* § 3-701(f)(1) (establishing separate qualifications for "[t]he student member"). Because § 3-701 does not group the Student Member with the positions on the Board that the General Assembly calls "elected," it cannot be considered an elective position.

The process by which the Student Member is selected also demonstrates that the General Assembly intended to create a non-elective position. As Plaintiffs' own

counsel put it in a press release, the process for selecting the Student Member does not resemble "a real government election."[4] That is because it is *not* an election. Rather, the General Assembly designed a selection process in which HCPSS students in grades 6 through 11—who are *ineligible* to vote in any actual election—participate with careful oversight and input from school administrators. *Compare* Md. Const. art. I, § 1 (guaranteeing the franchise to U.S.-citizen Maryland residents who are 18 years old and above), *with* Md. Code, Educ. § 3-701(f)(3)(iii); *see also* Compl. Ex. B. (detailing the process for the nomination and selection of the Student Member and the role of HCPSS school administrators in those processes). The Student Member position is therefore "basically appointive" because its "electorate" is not "the people of the county" but, rather, the HCPSS student body. *Sailors*, 387 U.S. at 109 & n.6.

The non-elective nature of the Student Member position is confirmed by the numerous ways in which the process for filling the position is wholly unlike the process for popular elections set forth in Maryland's election-law statutes. Plaintiffs themselves highlight several of those distinguishing features. *See* Compl. ¶ 48 (describing the procedures governing the selection of the Elected Members as "entirely different" from those applicable to the Student Member); *id.* ¶ 49 (alleging that the procedures governing the selection of the Student Member do not include,

[4] PILF Press Release, *supra*; *see also* Compl. ¶ 49 (stating that the "procedures used to elect the Student Member" do not resemble "regular Maryland elections conducted under Maryland code").

among other things, "registration, government administered secret ballots, polling place notices under the Help America Vote Act of 2002, deadlines to certify, observer rights, and myriad of other standard procedures and safeguards that characterize Maryland elections"); *id.* ¶ 51 (noting the lack of a primary election and participation of Howard County voters in the process of selecting the Student Member); *id.* ¶ 52 (discussing the involvement of school employees in nominating Student Delegates to the Student Convention and staffing that convention, including the alleged "outsize role" that the Superintendent plays in the process).

In addition to the differences Plaintiffs stress, the procedures specified in § 3-701(f) for the selection of the Student Member differ from Maryland elections in several other key ways. Whereas voters have the final say over which candidate will assume an elective office, the Board itself must approve the Student Member. Md. Code, Educ. § 3-701(f)(3)(i); *see also, e.g.*, Board of Education of Howard County, *Meeting Agenda Item* (June 11, 2020), https://perma.cc/C6XJ-P6PD. The Student Member selection process takes place at a different time than the date on which all general elections in Maryland must occur and on a different cycle. *Compare* Md. Code, Educ. § 3-701(f)(2) (providing that the Student Member serves a one-year term beginning on July 1); Compl. Ex. B, at 3 (requiring HCPSS students to select a new Student Member each year by April 30), *with* Md. Const. art. XV, § 7 ("All general elections in the State shall be held on the Tuesday next after the first Monday in the month of November . . . ."); Md. Code, Elec. Law § 8-301(a)(1) (providing that

statewide general elections take place in even-numbered years). And in the event that the Student Member is unable to perform her statutory duties, the runner-up in the selection process assumes the role. *Compare* Md. Code, Educ. § 3-701(f)(4), *with id.* §§ 3-701(d)(3)–(7) (providing a process for vacancies among the Elected Members to be filled through appointment or election). Had the General Assembly intended to make the Student Member position an elective office, it would not have provided an entirely different set of procedures to govern the process for filling the position than those that apply to all other elective offices in Maryland.

That conscious decision to establish the Student Member position as a non-elective office is not negated by § 3-701(f)'s use of the words "election" and "vote" as shorthand. In *Sailors* itself, "the word 'elect' is used by the court notwithstanding the court's holding that the county board is appointive and therefore not within the one man, one vote principle." *Rosenthal*, 385 F. Supp. at 225. Nor do attributes common to elections such as candidates, ballots, or majority rule render the selection process elective.[5] *Sailors*, 387 U.S. at 109 n.6 (concluding that a selection process in which delegates "cast . . . votes" was non-elective). All that matters is that the Student Member is not selected, "directly or indirectly, through an election in which the residents of the county participate." *Id.*

[5] The fault line between elective and non-elective offices certainly is not whether the selection process conjures for some observers comparisons to the 1999 high-school comedy *Election*. Compl. ¶ 49.

Consistent with this analysis, a state trial court recently held that the Student Member position is non-elective. Just last month, in *Spiegel v. Board of Education of Howard County*, the Circuit Court for Howard County explicitly rejected a pair of parents' claim that § 3-701(f) violates the Maryland Constitution by diluting the votes of Howard County's adult residents. No. C-13-CV-20-000954, slip op. at 15, 17 (Md. Cir. Ct. Howard Cty. Mar. 25, 2021), *appeal docketed*, No. CSA-REG-0117-2021 (Md. Ct. Spec. App. Mar. 29, 2021) (attached as Exhibit 2). Citing the "plain language of Section 3-701," "the statutory scheme as a whole," and "the various processes by which the General Assembly has established to fill the seats of the boards of education," the court found that "the student member position is not elected" but, rather, is filled through a process "specific to student members, whereby students hold the position and are selected in some fashion by other students." *Id.* at 12–13. Moreover, in reaching that conclusion, the court explicitly noted that its holding that the Student Member position is "not . . . subject to popular election also avoids any Fourteenth Amendment challenges." *Id.* at 12 (citing *Hadley*, 397 U.S. at 58; *Sailors*, 387 U.S. at 111).

The Maryland Attorney General's Office reached the same conclusion when it opined that a bill creating a student seat (with voting power) on the school board in Prince George's County would be constitutional. *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. *Id.* at *1. But Attorney General Stephen Sachs concluded that the statute's use of the term "elect" was "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" and thus that "the selection of the student member was more properly regarded as appointive rather than elective." *Id.* at *1. Accordingly, Attorney General Sachs found that the student seat on the Prince George's County Board was not "subject to the one-person, one-vote principle," *even if* the selection process were viewed "as an 'election' by the students of their representative." *Id.* at *2 & n.3; *see also* Letter from Douglas F. Gansler, Att'y Gen. of Md., to Martin O'Malley, Governor of Md. 1 (Apr. 19, 2007) (approving H.B. 513, the bill that enacted § 3-701(f), "for constitutionality and legal sufficiency") (attached as Exhibit 3).

If, despite all the evidence to the contrary, this Court were to conclude that the Student Member position is an elective office, that holding would jeopardize numerous other statutes. The Student Member is not unique among Maryland governmental officials in being selected to serve through 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) (emphases added). Several members of the State's Attorney's Coordination Council are "chosen by a majority

vote" of the State's Attorneys in several counties. Md. Code, Crim. Proc. §§ 15-202(a)(7)–(11) (emphasis added). And the Board of Trustees of the Baltimore City Police Department Death Relief Fund is "*elected* from the Department." Md. Code, Local Gov't, § 30-104(a)(1) (emphasis added). *Sailors* provides a bright-line rule that shields positions like these from heightened judicial scrutiny because none of them are selected through a vote by the electorate as whole.

Because the Howard County electorate does not select the Student Member, it is a non-elective office to which the Equal Protection Clause's voting safeguards do not apply. Counts I and II should therefore be dismissed.

C. To the extent that the Student Member position can be considered elective, it does not violate any of the Equal Protection Clause's voting safeguards.

Even if the Student Member position were elective—and it is not—Plaintiffs have not stated an equal-protection claim of any sort.

1. One-person, one-vote principle

Plaintiffs do not state a claim under the one-person, one-vote principle because, although they allege malapportionment on the Board, that allegation is belied by HCPSS policy that is incorporated by reference into the Complaint and by the legal principles that govern apportionment. A bedrock assumption underlying Counts I and II is that the Student Member represents only HCPSS students, while the at-large Elected Members represent all Howard County residents within their voting district. Compl. ¶ 57. But that is not true. As HCPSS policy makes clear, the Student

Member is required to represent not just his or her fellow students, but also all of the "staff, parents and *others in the community* by presenting a student perspective on matters that come before the Board." Compl. Ex. A, at 4 (emphasis added).

HCPSS policy aside, Plaintiffs fundamentally misconceive the population that is relevant to one-person, one-vote claims. Total population—not voting population—is the relevant populace for apportionment considerations. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130 (2016) ("States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations."). Thus, the Supreme Court has held that the one-person, one-vote principle is "followed automatically" when elected officials "are chosen . . . on a statewide basis" because characterizing such a scheme as weighting the "votes of inhabitants" differently would be "extraordinary." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). The same analysis governs at-large elections within a particular jurisdiction. *City of Mobile v. Bolden*, 446 U.S. 55, 78 (1980) ("There can be, of course, no claim that the 'one person, one vote' principle has been violated in . . . elections . . . conducted at large."). Each vote cast in an at-large election "automatically" has equal weight to any other because, as in a statewide election, each vote represents an equal slice of the total population.

Plaintiffs concede that, to the extent that the Student Member can be considered an elected official, he or she represents an at-large district. Compl. ¶ 41 ("The jurisdiction from which the Student Member is elected is limited to students of HCPSS, without regard to district residence, hence at-large."). They also concede

that elected officials represent all residents within their jurisdiction, irrespective of voting eligibility. *Id.* ¶ 29 ("HCPSS students are constituents of and already represented by the two at large board members and a single-district board member where they live."). The same is true of the Student Member position. Students throughout Howard County participate in the selection of the Student Member, and he or she, like the two at-large Elected Members, represents all Howard County residents, including those who are ineligible to participate in his or her selection. Accordingly, the one-person, one-vote principle has no application to the position. *See Bolden*, 466 U.S. at 78.

Plaintiffs fare no better in stating a one-person, one-vote claim limited in scope to 18-year-old students, a population with which Count I is preoccupied. According to Plaintiffs, 18-year-old HCPSS students are able to vote for four members of the Board (two at-large Elected Members, one district-level Elected Member, and one Student Member), whereas other adult residents of Howard County can vote for only three Elected Members. Compl. ¶¶ 38–43. But students typically turn eighteen during their twelfth-grade year, and Plaintiffs do not identify a single individual who actually wields the undue power alleged in the Complaint.[6] Even if Plaintiffs were to identify such an individual (and, again, assuming that the Student Member position is

[6] The Board also notes that the possibility of eighteen-year-old HCPSS students voting for four Board Members would occur only when the stars align so that a hypothetical student turns 18 in an even-numbered year during which Elected Members are on the ballot. *See* Md. Code, Elec. Law § 8-301(a)(1).

elective), § 3-701(f) should be read to preclude eighteen-year-old HCPSS students from participating in the selection of the Student Member to "avoid a potential constitutional problem." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (construing the Age Discrimination in Employment Act of 1967 to not apply to state judges to avoid reaching a Tenth Amendment claim).

Accordingly, Plaintiffs fail to state a claim under the one-person, one-vote principle, even if the Student Member position is considered elective.

2. Vote denial

Because the Student Member represents the same number of constituents that the two at-large Elected Members represent, Counts I and II are better understood not as claims under the one-person, one-vote principle, but as vote-denial claims. Plaintiffs' true objection therefore is that they are denied the right to participate in the selection of the Student Member while HCPSS students are permitted to do so. But even (generously) construed in that light, Plaintiffs still have failed to state a viable claim.

Although there is no constitutional right to vote in school-board elections, *Sailors*, 387 U.S. at 108, the Supreme Court has held that strict scrutiny applies to statutes that "grant[] the franchise to residents on a selective basis" and thus deny certain residents an "effective voice." *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626–27 (1969); *see also Locklear v. N.C. Bd. of Elections*, 514 F.2d 1152, 1154 n.5 (4th Cir. 1975) ("The implied premise of *Kramer* was that a citizen in a given jurisdiction has an

equal right to vote with other citizens.").

In *Locklear*, the Fourth Circuit invalidated an electoral scheme where residents of cities in a certain geographical area were eligible to vote for members of their own independent school boards and also for some seats on another independent school board that served county (i.e., rural) residents in the same area. 514 F.2d at 1153–54, 1156. The court held that the scheme implicated *Kramer* because it denied county residents a vote in city-school-board elections while granting city residents the right to vote in county-school-board elections. *Id.* at 1156. In addition, the court found that that scheme was not narrowly tailored to the asserted government interest in giving city residents a voice in county elections because that interest could have been served without subjecting county voters to less favorable treatment. *Id.* at 1155–56. The court therefore held that the scheme violated the Equal Protection Clause. *Id.* at 1156.

Plaintiffs cannot state a claim under *Kramer* and its progeny because the electoral scheme that governs the Howard County Board (again, assuming that the Student Member is part of that scheme) is not comparable to the one in *Locklear*. Unlike the scheme in *Locklear*, § 3-701 does not deny any Howard County voter the right to participate in any election. On some issues that come before the Board, § 3-701(f) marginally mitigates the otherwise total exclusion of HCPSS students from the political decisions that affect their school lives. Section 3-701 does not deny adult residents of Howard County the right to vote in Board elections. Indeed, adult

Howard County residents retain a dominant voice on the Board, as they alone select seven of the eight members of the Board. If anything, § 3-701(f) is therefore a franchise-*expansion* scheme, not a vote-*denial* scheme. *Kramer* is simply inapposite.

In addition, if *Kramer* applies, § 3-701(f) survives strict scrutiny. In the only written testimony that accompanied the law's passage, Joshua Michael, a former student member of the State Board of Education, testified that the purpose of the legislation was to "promote student advocacy" and to "empower students to take ownership of their communities and the world around them." *Hearing on H.B. 513 Before H. Comm. on Ways and Means*, 2007 Leg., 423rd Sess. 1–2 (Md. 2007) (statement of Joshua L. Michael). Section 3-701(f) serves those compelling interest by giving students limited representation on the Board and by involving the entire HCPSS student body in the selection of the Student Member. *Cf. Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1112, 1133 (D. Haw. 2015) (holding that limiting participation in a convention addressing Native Hawai'ian sovereignty to "qualified native Hawaiians" was justified by the state's "compelling interest in facilitating a forum that might result in a unified and collective voice amongst Native Hawaiians"), *granting application for injunction pending appeal*, 577 U.S. 1024, *dismissing appeal as moot*, 835 F.3d 1003.

Alternative methods of involving students in the school-board selection process would not achieve the General Assembly's goals as effectively. Allowing HCPSS students to vote alongside adult residents of Howard County for one or more of the seats on the Board would not "empower" students because they would be a

tiny minority in the electorate. *Cf. Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (holding that using apportionment to "provide a rough sort of proportional representation in the legislative halls of the State" does not violate the Fourteenth Amendment). Legislatures often have good reasons for creating non-elective government positions, particularly in the school-board context. For example, a non-elective selection 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 within elected school boards." *Mixon*, 193 F.3d at 403 (citation omitted). And although a non-voting seat on the Board—which Howard County had prior to 2007—provides a limited vehicle for educating students about the political process, a voting seat (even if limited to certain issues) imbues the selection process with more gravity and higher stakes, increasing the likelihood that students will engage with the issues that the Board's business comprises and that they will be empowered by the selection process. That is why HCPSS students fought for twenty years to realize their goal of attaining a voting seat on the Board. Accordingly, § 3-701(f) survives strict scrutiny.

3. Franchise expansion

Because § 3-701(f) effects no malapportionment and does not deny any adult Howard County resident the right to vote in Board elections, franchise expansion is the only equal-protection doctrine that the statute arguably implicates (again, assuming that the Student Member position is an elective office, which it is not). Courts have

held that rational-basis review applies to "claims by persons who have the vote that extension of the franchise to others with a lesser interest in an election impermissibly dilutes their voting power." *Collins*, 635 F.2d at 958; *see also Spahos*, 207 F. Supp. at 692; *Brown v. Bd. of Comm'rs of City of Chattanooga*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989) ("the traditional 'rational basis' test" applies to statutes that "*expand* rather than curtail the franchise" (emphasis in original)).

In *Spahos*, for example, a three-judge court upheld a statute that expanded the electorate of a town council to include non-resident property owners and restricted the electorate for three of the seats on the council to those non-residents, 207 F. Supp. at 689, 692, and the Supreme Court affirmed that decision, 371 U.S. at 206. According to the district court, the electoral scheme did not violate the Equal Protection Clause because it was rationally related to the legislature's interest in "permitting those persons with property within the municipality, many of whom were summer residents therein, to have a voice in the management of its affairs." 207 F. Supp. at 692.

Similarly, § 3-701(f) is rationally related to the General Assembly's interest in giving HCPSS students a voice on the Board's management of their schools.[7] Just as

[7] Rational-basis review also applies to the General Assembly's decision not to extend the selection process to Howard County residents who attend private schools or are educated at home. *See* Compl. ¶¶ 44–47; *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (applying rational-basis review to a law that guaranteed the right to vote to people educated through at least sixth grade in an American-flag school, but not to people educated in non-American-flag schools); *Holt Civic Club v. City of Tuscaloosa*, 439

the legislature's decision in *Spahos* to reserve seats on the town council for non-resident property owners did not render the electoral scheme irrational, the General Assembly did not act irrationally in ensuring that HCPSS students had an audible voice on the Board by reserving to them the role of selecting the Student Member. Accordingly, the statute would not violate the Equal Protection Clause even if the Student Member position were an elective office.[8]

II. Plaintiffs' equal-protection claims are untimely.

In addition to failing on the merits, Counts I and II also are untimely. When federal law fails to provide a statute of limitations, as is the case for Plaintiffs' Fourteenth Amendment claims, courts often employ the doctrine of laches as an alternative. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 160–62 (1983). "Laches is 'an equitable defense' that 'is distinct from the statute of limitations.'" *Belmora LLC v. Bayer Consumer Care AG*, 987 F.3d 284, 294 (4th Cir. 2021) (quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002)). The doctrine "generally applies to preclude relief for a plaintiff who has unreasonably 'slept' on his

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U.S. 60, 69–70 (1978) (holding that Tuscaloosa was not required to extend the franchise for municipal elections to residents of an unincorporated community on the city's outskirts simply because the community's residents were subject to some of the Tuscaloosa's laws).

[8] Of note, several Maryland cities have enfranchised youth and noncitizens for the purpose of voting in municipal elections. *See, e.g.*, 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; Rachel Chason, *Non-Citizens Can Now Vote in College Park, Md.*, Wash. Post (Sept. 13, 2017), https://perma.cc/VBW2-8LN4.

rights." *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011). "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).

The Fourth Circuit applied the doctrine of laches to bar vote-dilution and related claims brought seventeen years after an allegedly unconstitutional redistricting plan for a county board of supervisors took effect. *White v. Daniel*, 909 F.2d 99, 100–01, 104 (4th Cir. 1990). In *White*, the court found that the plaintiffs' delay in challenging the redistricting plan was "inexcusable and unreasonable" because at no point in the preceding seventeen years did they "voice[] [any] objection" and because they waited until "months after" the most recent election conducted under the plan to bring suit. *Id.* at 102–03. Given the extreme tardiness of the plaintiffs' lawsuit, the court also held that the county was not required to "show the degree of prejudice" that would have been required for less "aggravated" delay. *Id.* at 103. The court held that the prejudice prong of the laches test was satisfied because of the "disruption" that the county would have experienced if forced to redistrict. *Id.* at 104; *see also Simkins v. Gressette*, 631 F.2d 287, 296 (4th Cir. 1980) (finding a vote-dilution claim equitably foreclosed because the plaintiffs, without "good reason," "wait[ed] for more than three years until the eve of the 1980 elections" to bring suit).

This case is on all fours with *White*. Section 3-701(f) has been on the books for over thirteen years. 2007 Md. Laws 3887. Yet, until now, Plaintiffs have never

voiced any objection to the statute. Moreover, HCPSS students most recently concluded the process of selecting a Student Member nearly a year ago, *see* Compl. Ex. B, at 3 (requiring that the process for selecting the Student Member be concluded by April 30), and that individual has been in office since June 2020, *Meeting Agenda Item*, *supra* section I.B. Remedying the defect that Plaintiffs perceive in the Student Member position also would cause great disruption. Elected Board seats will not be on the ballot again until November 2022. *See* Md. Code, Elec. Law § 8-301(a)(1). Therefore, any remedy would require the mid-term elimination of a voting seat on the board, the creation of an entirely new appointive process for filling the Student Member position, or a special election to be held at significant expense to state taxpayers. In light of Plaintiffs' extreme delay, such disruption would not be equitable.

III. Plaintiffs fail to state a free-exercise claim because § 3-701(f) is a neutral, generally applicable law.

Count III alleges that § 3-701(f) violates the First Amendment's Free Exercise Clause because it "penalizes religious activity" by precluding students at non-HCPSS schools, including "Catholic schools, other religious schools, and those who are homeschooled for religious purposes" from participating in the selection of the Student Member. Compl. ¶¶ 61–62. This claim fails because § 3-701(f) is a neutral, generally applicable law and therefore does not implicate the Free Exercise Clause.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S.

872 (1990), the Supreme Court held that that a neutral, generally applicable law does not violate the Free Exercise Clause merely because it incidentally affects religious practice. *Id.* at 878–79; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995). Neutral laws are those that "proscribe[] conduct without regard to whether that conduct is religiously motivated." *Hines v. S.C. Dep't of Corr.*, 148 F.3d 353, 357 (4th Cir. 1998). Generally applicable laws "make[] no distinction between action based on religious conviction and action based on secular views." *Id.*

Section 3-701(f) is a hornbook example of a neutral, generally applicable law. It precludes non-HCPSS students from participating in the selection of the Student Member whether they attend a secular private school or a parochial school, and whether they are educated at home for religious or secular reasons. And, of course, the statute excludes all nonstudents from the selection process irrespective of their religious beliefs or practices. By the same token, § 3-701(f) is neutral and generally applicable in that it permits HCPSS students of all faiths—and those who adhere to no faith at all—to participate in the process of selecting the Student Member.

Plaintiffs' free-exercise claim is very similar to the unsuccessful claim in *Goodall ex rel. Goodall v. Stafford County School Board*, 60 F.3d 168 (4th Cir. 1995). In that case, a

hearing-impaired child and his parents brought suit under the Free Exercise Clause challenging the school board's refusal to provide a cued-speech transliterator to the child once he left public school to attend a parochial school. *Id.* at 169. The Fourth Circuit held that the plaintiffs free-exercise claim failed because the child "would receive the services of a cued speech transliterator free of charge if he attended the County's public schools." *Id.* at 173. Similarly, Plaintiff J.K. would be eligible to participate in the selection of the Student Member if he attended a HCPSS school. His enrollment at a different school—which simply *happens* to be a parochial school—is the only reason that he is ineligible to do so.

Because § 3-701(f) is a neutral, generally applicable law, it does not violate the Free Exercise Clause. Count III should therefore be dismissed.

CONCLUSION

For all of the foregoing reasons, the Board respectfully requests that this Court dismiss Plaintiffs' Complaint with prejudice.

Dated: April 27, 2021

/s/ Jonathan L. Backer

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2021, I electronically filed the foregoing with the Clerk of the U.S. District Court for the District of Maryland by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

LISA M.F. KIM, et al., *Plaintiffs*,	:	
vs.	:	Case No. 1:21-cv-655-DKC
BOARD OF EDUCATION OF HOWARD COUNTY, *Defendant.*	:	

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Complaint, Defendant's Motion to Dismiss, and the accompanying briefing, Defendant's Motion is GRANTED. It is hereby ORDERED that Plaintiffs' Complaint is DISMISSED with prejudice.

_____ _____

DATE UNITED STATES DISTRICT JUDGE

EXHIBIT 1

 HB 513

Legislative Testimony

presented by

Joshua L. Michael

to the

Ways and Means Committee
House of Maryland

Delegate Sheila E. Hixson, Chair
Delegate Ann Marie Doory, Vice Chair

Wednesday, February 21, 2007

Good afternoon Chairman Hixson, Vice Chairman Doory, and other distinguished committee members.

My name is Josh Michael and I am currently a student at the University of Maryland, Baltimore County, in the Sondheim Public Affairs Scholars Program. I am a lifelong resident of Howard County and a proud graduate of Howard County Public Schools.

It is my distinct pleasure to speak before you today as both a former Student Member of the State Board of Education and as a Howard County citizen in strong support of House Bill 513 – Board of Education - Qualifications and Election of the Student Member. This bill provides a partial voting student member on the Howard County Board of Education.

Howard County is not the first jurisdiction to request a voting student member on its Board of Education to promote student advocacy. Anne Arundel County established a full-voting student member in 1974. Baltimore City, Baltimore County, Montgomery County, and Prince George's County all have Boards of Education with partial voting student members. Additionally, the State Board of Education is comprised of a voting student member. Legislators and local public servants should be applauded for their efforts to promote student advocacy through voting student members on these Boards of Education.

In 1987, citizens of Howard County rallied behind a cause of student advocacy through a voting student member position on the Board of Education of Howard County. After two years of efforts, elected officials of the County decided that the County was not ready for a voting student member. Through compromise, a non-voting Student Associate position was created on the Board of Education. The student to lead this effort and also the first student to serve in such a capacity was Marcy Leonard, now the Principal at Atholton High School. In later years, students advocated for an opinion vote and a name change to "Student Member."

Jeff Lasser, a former student member of the Howard County Board of Education, and I were determined in the Summer of 2005 to see that these efforts, prolonged for almost two decades, were finally brought to fruition. Jeff and I worked for months, lobbying Board members, local public servants, and state legislators, to see a dream of twenty years come alive. When we found that we appeared simply as two high schools students seemingly working on some Gifted and Talented project that would soon die out, we went to the public. In three weeks, we collected over two-thousand petition signatures in support of legislation for such an effort. Additionally, over twenty individuals spoke out in support of the concept at a Board of Education Public Hearing—only three people came to express their disapproval for the idea.

Subsequently, in May 2006, the Board of Education voted unanimously to submit legislation to the Howard County Delegation. Last month at its January 31st meeting, the Howard County Delegation voted to support House Bill 513 by a margin of 7-1 in the House and 2-1 in the Senate.

This bill comes before you today with twenty years of history. The cause of student advocacy is one of great importance to Howard County, the State of Maryland, and our Nation. Today's students will dictate our future. The priorities set in grade school inevitably will last for a lifetime. We must empower students to take ownership of their communities and the world around them. I can think of no better way to meet this vision than by providing students with a binding stake in the very decision-making process of their own education. Accordingly, I ask for your support for House Bill 513.

Thank you for your time this afternoon.

Respectfully submitted,

Joshua L. Michael

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EXHIBIT 2

E-FILED; Howard Circuit Court
Docket: 3/25/2021 3:04 PM; Submission: 3/25/2021 3:04 PM

TRACI SPIEGEL, *et al.*,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
BOARD OF EDUCATION OF HOWARD COUNTY,	*	HOWARD COUNTY
	*	Case No: C-13-CV-20-000954
Defendant		

* * * * * * * * * * * *

MEMORANDUM OPINION

This matter came before the Court upon consideration of the Plaintiff's Motion for Summary Judgment, the Defendant Board of Education of Howard County's Motion to Dismiss, or in the alternative, for Summary Judgment, and the responses thereto. A hearing on these motions was held on March 16, 2021, after which the Court held these matters sub curia.

BACKGROUND

The Plaintiffs instituted this declaratory judgment action against the Board of Education of Howard County ("Board") on December 16, 2020, after two "4 to 4 stalemate[s]," where the student member of the board "caus[ed] the stalemate," hindered efforts to return students to school for in-person instruction. (Compl. 11-12.) Shortly thereafter, on December 18, 2020, the Plaintiffs filed a Motion for Summary Judgment, arguing that the statute creating the student member of the board, subsection (f) of Maryland Code, Education, Section 3-701 (hereinafter "Section 3-701") violates the Maryland Constitution. The Plaintiffs request that the Court declare that Section 3-701(f) is unconstitutional and enjoin the current student member of the board from voting on any measure before the Board. (Compl. 17.)

The Board filed an opposing Motion to Dismiss or, in the alternative, for Summary Judgment on February 10, 2021, arguing in support of the validity of Section 3-701(f) and

requesting that the Court issue a declaratory judgment in the Board's favor. An Amicus Brief[1] in support of the Board's position was filed on February 9, 2021.

At the virtual motions hearing held on March 16, 2021, the Court heard the Plaintiffs' argument against the validity of Section 3-701(f) and the Board's defense thereof. The Amici did not participate in oral argument. At the conclusion of the hearing, the Court held these matters sub curia with this written decision to follow.

STANDARD OF REVIEW

Pursuant to Maryland Code, Courts & Judicial Proceedings, § 3-406, any person "whose rights, status, or other legal relations are affected by a statute, municipal ordinance, administrative rule or regulation. . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, administrative rule or regulation. . . and obtain a declaration of rights, status, or other legal relations under it." Maryland courts will grant a declaratory judgment in a civil case "to terminate the uncertainty or controversy giving rise to the proceeding, and if: (1) An actual controversy exists between contending parties; (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it." MD. CODE. ANN., CTS. & JUD. PROC., § 3-409(a).

Pursuant to Maryland Rule 2-501(f), "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." "[I]t is permissible for trial courts to resolve matters of law by summary judgment in

[1] The Amici are 128 former student members of the board from every jurisdiction in the State.

declaratory judgment actions." *Lovell Land, Inc. v. State Highway Admin.*, 408 Md. 242, 255-56 (2009) (citations omitted).

"Generally speaking, the same rules that are applicable to the construction of statutory language are employed in interpreting constitutional verbiage[.]" *Abrams v. Lamone*, 398 Md. 146, 172 (2007) (quoting *Brown v. Brown*, 287 Md. 273, 277 (1980)). "Our predominant mission is to ascertain and implement the legislative intent, which is to be derived, if possible, from the language of the statute (or Rule) itself." *Lamone v. Schlakman*, 451 Md. 468, 490-91 (2017) (quoting *Downes v. Downes*, 388 Md. 561, 571 (2005)). "[W]hen this Court seeks to ascertain the meaning of a constitutional provision, it first will look to the 'normal, plain meaning of the language,' and, if the language is clear and unambiguous, it will not look past those terms." *Lamone v. Capozzi*, 396 Md. 53, 72 (2006) (citations omitted).

"[W]hen the meaning of a word or phrase in a constitutional or statutory provision is perfectly clear, this Court will not give that word or phrase a different meaning than is plainly understood." *Id.* The Court does "not add words or ignore those that are there. If there is any ambiguity, we may then seek to fathom the legislative intent by looking at legislative history and applying the most relevant of the various canons that courts have created." *Schlakman*, 451 Md. at 490-91 (quoting *Downes*, 388 Md. at 571 (2005)). "[W]here a statutory provision is a part of a statutory scheme, that provision will be interpreted within the context of that statutory scheme." *State Bd. of Elections v. Snyder*, 435 Md. 30, 55 (2013) (citations omitted). "Just as a statute is read in the context of a regulatory scheme, this Court construes constitutional provisions as part of the Constitution as a whole." *Id.* This Court has undertaken to interpret the relevant statutes and constitutional provisions to determine whether Section 3-701(f) is constitutional. This Court has not considered the political expediency of having a student member of the board.

LEGAL FRAMEWORK

The only constitutional provisions specifically applicable to education are found in Article VIII of the Maryland Constitution.[2] Section 1 states:

> The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.

MD. CONST. art. VIII, § 1. Nowhere in the Maryland Constitution does it specify that school officials must be elected, nor does it mandate a system of various boards of education. The only constitutional provision that mentions local boards of education is Article XVII, § 7, which exempts "members of *any* elective local boards of education" from Sections 1, 2, 3, and 5 of the Article related to quadrennial elections.[3] MD. CONST. art. XVII, § 7 (emphasis supplied).

The General Assembly adopted a system of boards of education to carry out the mandate of Article VIII, establishing by statute one state board and a local board for each county and Baltimore City. The statutes establishing the various boards of education are found in the Education Article of the Maryland Code. MD. CODE ANN., EDUC., § 3-101, *et seq.*

Section 3-103 states that "[t]here is a county board of education for each county school system."[4] Section 3-105 establishes the number of board members based on the number of enrolled students. For example, Section 3-105(c) indicates that if a county school system has an enrollment of 50,000 students or more but less than 100,000 students, the county board shall have seven members. However, subsection (a) clarifies that subsection (c) does not apply to a county if the number of members of the county board is regulated by other provisions of Title 3.

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[2] MD. CONST. art. VIII, § 2 continues the pre-existing school system until the end of the first session of the General Assembly. MD. CONST. art. VIII, § 3 relates to school funding.
[3] MD. CONST. art. XVII, § 1 explains the purpose of the article, MD. CONST. art. XVII, § 2 details the time of elections for state and county officers, MD. CONST. art. XVII, § 3 establishes terms of office for state and county officers, and MD. CONST. art. XVII, § 5 establishes terms of office for appointed officers.
[4] The board of education for Baltimore City is established in Section 3-108.1 of the Education Article.

Section 3-114(a) decrees that "the members of the county board shall be elected" in Howard County and eighteen other listed counties. The remaining five jurisdictions have a provision for a combination of elected and appointed members, but Howard County does not. EDUC., § 3-114(b)-(f). Subsection (h) states that "The election of the county boards shall be held as provided in Subtitles 2 through 14 of this title and the Election Law Article." EDUC., § 3-114(h). Section 3-108 provides that members of the county boards of educations shall be appointed by the Governor, except in three named jurisdictions, and for the counties listed in Section 3-114.

Turning to the statute at issue, Section 3-701(a)(1) states: "The Howard County Board consists of: (i) Seven elected members; and (ii) One student member." The statute sets forth residency requirements for the seven elected members and establishes their term of office. EDUC., § 3-701(b)-(d). The student member is elected to a "term of 1 year beginning on July 1 after the member's election, subject to confirmation of the election results by the county board." EDUC., § 3-701(f)(2) (emphasis supplied).

The nomination and election process of the student member:

(i) Shall be approved by the Howard County Board of Education;
(ii) Shall include a provision that provides for the replacement of one or both of the final candidates if one or both of them are unable, ineligible, or disqualified to proceed in the election; and
(iii) Shall allow for any student in grades 6 through 11 enrolled in a Howard County public school to vote directly for one of the two student member candidates.

EDUC., § 3-701(f)(3). The student member has the same rights and privileges as an elected member except in certain statutorily enumerated circumstances, such as employee discipline and budgetary matters. EDUC., § 3-701(f)(5)-(7). Section 3-701(g) provides that board motions are passed with the affirmative vote of five members if the student member is authorized to vote or four members if the student member is not authorized to vote.

DISCUSSION

I. The Parties' Contentions

The Plaintiffs argue that Section 3-701(f) violates the Maryland Constitution because it permits a minor to hold elective office after being chosen through an election that excludes lawfully registered voters. (Pls. Mem. 12; Pls. Opp'n. 8.) Specifically, the Plaintiffs argue that having an "elected" student member of the Board violates Article I, Section I of the Maryland Constitution, which provides, in part, that "every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State . . . shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State." (Pls. Mem. 9-12.)

The Plaintiffs further assert that Section 3-701(f) violates Article I, Section 12 of the Maryland Constitution because it permits a student who is not eligible to be a registered voter to hold elective office. (Pls. Mem. 17; Pls. Opp'n. 14-15.) Additionally, the Plaintiffs claim that the selection process violates Article 7 of the Maryland Declaration of Rights, which guarantees qualified citizens the right of suffrage. (Pls. Mem. 6.) The Plaintiffs argue that Section 3-701(f) infringes on the right of lawfully registered voters to select elected officials and violates the one person, one vote principle, as it may allow a subset of student "voters"[5] to select both the student member and participate in the general election of the other members of the Board. (Pls. Mem. 12; Pls. Mem. 15.) The Plaintiffs take the position that the one person, one vote principle is applicable and is ultimately violated because the student member of the board position is an elective office and because the Board exercises general governmental powers. (Pls. Opp. 18-19.)

While the Plaintiffs concede that it is not per se improper to have a student member of the board, they assert that vesting such a member with voting authority makes the student member

[5] This subset includes students enrolled in the Howard County public school system who are over the age of 18 and otherwise registered to vote at the time of the general election. (Pls. Mem. 15.)

position unconstitutional. All of the Plaintiffs' arguments against the validity of Section 3-701(f), which have been summarized above, rest on one major premise: that the student member of the Howard County Board of Education is elected, as contemplated by the Maryland Constitution and the Election Laws of this State. If the student member's seat is not an elective office, the Plaintiffs' arguments fail.

The Plaintiffs presented at the hearing the argument that, if the student member is not elected, the student member position is nevertheless violative of the guiding principal that the government is to be governed by adults. Further, they assert that, even if the General Assembly created this non-elective process, that local boards are constitutional in origin, rather than mere creatures of statute, thereby limiting the General Assembly's authority to create alternative selection methods. (Pls. Opp'n. 2-3.) Finally, at the hearing, the Plaintiffs altered their 'general governmental powers' argument to claim that 'constitutional scrutiny' applies whenever a board, agency, or entity is exercising general governmental functions.

In contrast, the Board argues that neither Article I, Section 1 of the Maryland Constitution, nor Article I, Section 12 apply because the student member position is an appointed position. (Def. Mem. 8-9.) The Board contends that the Maryland Constitution does not require all school board seats to be filled via a formal election and that the General Assembly has broad powers to create non-elective positions and fill them through whatever appointment process it chooses. (Def. Mem. 7.) The Board emphasizes that Section 3-701(a) distinguishes between Howard County's "[s]even elected members" and the "[o]ne student member." (Def. Mem. 9.) They argue that the General Assembly created the student seat as a non-elected position and the multi-step appointment process' inclusion of a student-body 'election' doesn't render the appointment process unconstitutional. (Def. Mem. 10.) Finally, the Board asserts that the Plaintiffs' challenge to an

elective process is untimely under Maryland Election law, is barred by the doctrine of laches, and, to the extent that a student member selection process is deemed subject to Article I, Section 1, then the State and County Boards of Elections are necessary parties. (Def. Mem. 19-35.) The Amici similarly argue that the student member seat is not an elective office. (Amici Mem. 12-17.)

II. The Student Member of the Board Selection Process

The Court must determine whether the process for selecting the student member of the Howard County Board of Education as set forth in Section 3-701(f) violates the Maryland Constitution. Both parties have described two ways for selecting board members: election and appointment. Whether the selection process is violative of the Maryland Constitution turns on whether the student member is an elected member of the Board. The Court will first discuss whether the student member position fits squarely within the conception of an elected position.

Section 3-701(a)(1) states: "The Howard County Board consists of: (i) Seven *elected* members; and (ii) One *student* member." (emphasis supplied). This provision sets the student member apart from the seven elected members. Beyond this phrasing distinguishing between the two groups, there are major differences between the election of the seven elected Board members and the selection of the student member.

First, and the most obvious difference, the student member must be a junior or senior year student from a Howard County public high school. EDUC., § 3-701(f)(1). Second, the election results must be approved by the Board itself.[6] EDUC., § 3-703(f)(3). Third, the student member is selected outside of the normal election cycle. EDUC., § 3-701(f)(2). Fourth, the statute permits the runner-up to hold office if the selected student member is unable or ineligible to complete his or

[6] While the nomination process is not codified, the Plaintiffs explained that the selection process for the student member begins with nominations by principals, followed by delegates attending the Howard County Association of Student Counsels Convention selecting two student candidates, and finally an election among students grade 6 through 11 who attend Howard County Public Schools to choose between the two candidates. (Pls. Mem. 3.)

her term. EDUC., § 3-701(f)(4). Such provisions are uncharacteristic of elections carried out under the Election Law Article. *See* MD. CONST. art. XV, § 7 (establishing the date of all general elections in this State); *see also* MD. CODE ANN., ELECTION LAW, § 8-301 (setting forth the date of the statewide general election); *see also* EDUC., § 3-701(d) (establishing the term of the elected Howard County Board Members and the procedure for filling vacancies). Further, unlike the seven elected members, the student member's selection process, whereby registered voters over the age of eighteen are not involved in the selection, is not governed Article I, Section 1 of the Maryland Constitution or Section 8-806 of the Election Law Article, which provides for a general election for board of education members. The Court also notes that the student body 'election' does not meet the definition referenced by the Court of Appeals and first espoused by the Supreme Court in *Foster v. Love* for an election. The oft-quoted definition is "the 'combined actions of voters and officials meant to make a final selection of an office holder.'" *Capozzi*, 396 Md. at 78 (quoting *Foster v. Love*, 522 U.S. 67, 71 (1997)). The lack of involvement of election officials, namely the State or County Boards of Elections,[7] in the student member selection process is noteworthy.

It is presumed that the General Assembly knows the constitutional requirements for holding elective office. The requirements for eligibility for a student board member are clearly stated in Section 3-701(f)(1). These requirements are notably different from the requirements for holding elective office set forth in Article I, Section 12 of the Maryland Constitution. In contrast, the seven elected members are explicitly required to comply with the constitutional requirements for holding elective office. Subsection (b) of Section 3-701 mirrors the constitutional requirements for holding elective office, as it requires the seven elected members to be residents and registered

[7] *See* ELECTION LAW, § 2-202(b)(1) (stating that the local boards of election oversee the conduct of all elections held in its county); *see also* ELECTION LAW, § 2-102(b)(1) (stating that the State Board of Elections shall supervise the conduct of elections in the State).

voters of Howard County. The Court cannot conclude that the legislature intended to create a student member position that was elected and yet wholly incapable of complying with constitutional law. Rather, the Court's view is that the General Assembly explicitly set apart the student member of the board position and the selection process for same.

The student member selection process in Section 3-701(f) need not be considered in isolation. The Court interprets it within the context of the statutory scheme establishing local boards of education. *Snyder*, 435 Md. at 55. The General Assembly has seven statutes[8] within Title 3 of the Education Article establishing student members of the board with voting authority.[9] Four of these statutes colloquially refer to the selection process of student members as an election.[10]

Specifically, in Prince George's County, the student member, set apart in the statute from the nine elected members and four appointed members, is 'elected' by the delegates of the Prince George's County Regional Association of Student Governments. EDUC., § 3-1002. Similarly, in Baltimore County, the one student member, explicitly set apart from the seven elected members and four appointed members, is "elected by the middle and high school students of the county in accordance with procedures established by the Baltimore County student councils." EDUC., § 3-2B-01; EDUC., § 3-2B-05. The same is true in Harford County, where the student member is set apart from the elected and appointed county board members, specifically excluded from their definition of an elected member, and is 'elected' by high school students. EDUC., § 3-6A-01. Lastly,

[8] EDUC., § 3-2A-01 (Anne Arundel County); EDUC., §3-108.1 (Baltimore City); EDUC, § 3-1002 (Prince George's County); EDUC., §3-2B-05 (Baltimore County); EDUC., § 3-6A-01 (Harford County); EDUC., § 3-701 (Howard County); and EDUC., § 3-901 (Montgomery County).

[9] In Baltimore City, Prince George's County, Baltimore County, the student member of the board is expressly excluded from voting on school closings and reopenings. EDUC., §3-108.1(m)(4)(iii); EDUC., § 3-1002(g)(3)(ii); EDUC., § 3-2B-05(c)(4). In Harford County, the student member may not vote on issues related to the school calendar. EDUC., § 3-6A-01(g)(3)(iii)(15).

[10] As the Attorney General suggested in Opinion No. 80-030 regarding the Prince George's County statute, the use of the term "elect" is not dispositive. The Honorable William R. McCaffrey, Opinion No. 80-030, 1980 WL 127893 (Mar. 12, 1980).

in Montgomery County, the board consists of five elected members with a district residence requirement, two elected members without a district residence requirement, and one student member, who is elected through a complicated process of students voting for delegates who winnow the number of student candidates, and finally hold an election by all the middle and high school students to choose between the remaining two candidates. EDUC., § 3-901.

While none of these statutes are under attack, examining the entire statutory scheme sheds light on the intent of the General Assembly in drafting Section 3-701. The General Assembly knows how to establish an elective office and has chosen a different method of selection in the case of student members of the various boards of education who exercise voting authority. It appears that the General Assembly's decision to qualify the seven adult members with the term 'elected,' but not the student member, was deliberate and establishes an alternative selection process for the student member, thereby avoiding any constitutional challenges. *See State v. Falcon*, 451 Md. 138, 175 (2017) (stating that "when the General Assembly creates an office by statute, the General Assembly has the authority to designate the mode of appointment to that office"). The Court believes that the General Assembly used the words 'election' and 'vote' in a non-technical manner and as a way to efficiently describe the process whereby the student stakeholders express their opinion and select their representative.[11]

There is no provision in the Maryland Constitution that requires that board of education members be elected nor does the General Assembly lack the power to create non-elective positions. Therefore, Section 3-701 is a valid exercise of legislative authority. This interpretation also avoids the potential statute of limitations issue foreclosing a challenge of the qualifications of the current

[11] Certain stakeholders are prohibited from holding board positions, as board members vote on employee discipline, collective bargaining, and other similar matters. Unlike teachers, who are subject to the authority of the board, and therefore ineligible to hold a board position, the student member is expressly prohibited from casting votes on those kinds of issues. EDUC., § 3-114(g); EDUC, § 3-701(f)(7).

student member of the board, as the statute, found within the Election Law Article, does not apply to non-elective positions. *See* ELECTION LAW, § 12-202. Construing the position as not being subject to popular election also avoids any Fourteenth Amendment challenges, as the Supreme Court explained:

> [W]here a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws.

Hadley v. Junior College Dist. of Met. Kansas City, 397 U.S. 50, 58 (1970) (citing *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105 (1967)); *see also Sailors*, 387 U.S. at 111 (stating that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principal of 'one man, one vote' has no relevancy"). While not binding authority, the Attorney General in Opinion 80-030 also suggested in a footnote that they "do not believe that any representational 'imbalance' alleged to exist within the process for choosing this student member [in Prince George's County] could be said to violate the constitutional rights of the general electorate to choose the nine 'elected' board members." The Honorable William R. McCaffrey, Opinion No. 80-030, 1980 WL 127893 at fn. 3 (Mar. 12, 1980).

While the Court finds that the student member position is not elected, thereby eliminating the constitutional concerns, the Court must clarify that it is not finding that the student member position meets the statutory definition of an 'appointment' as it relates to the boards of education in Section 3-108. Under Section 3-108, members of the county boards of education shall be appointed by the Governor, except in Baltimore City, Harford County, Caroline County, and for the counties listed in Section 3-114, which establishes elected boards of education. Appointed members are selected based on their character and fitness, but there is notably no age requirement. EDUC., § 3-108(b). Section 3-114 establishes elected boards for the nineteen counties listed but

permits a combination of appointed and elected positions in Baltimore City, Baltimore County, Caroline County, Harford County, and Prince George's County. Howard County is absent from this list of counties with hybrid methods. However, each of the hybrid counties contains not only student members, but also *separate* appointed members. All of these counties provide for direct appointment by a duly elected official(s), either the Governor, Mayor, County Executive, or County Council. Only one of these counties, namely Caroline County, does not also provide for a voting student member of the board.

Within the context of the statutory scheme, the Court cannot find that Howard County's student member is an appointed position in the same way that adult members are appointed. Rather, the Court views the student member as occupying its own role, selected neither through traditional appointment nor by popular election. All of the seven counties which provide for voting student members provide for their selection by other students, either by an 'election' whereby students vote directly for the candidate or through the county's student council/student congress, or some combination thereof. To put it differently, none fall within the ambit of Section 3-108 for appointed board members, Section 3-114(a) for elected members, or the hybrid models permitted under Section 3-114(b)-(f). Therefore, the Court, looking at the plain language of Section 3-701, does not find it to be ambiguous. Rather, looking at the statutory scheme as a whole, and the various processes by which the General Assembly has established to fill the seats of the boards of education, the Court finds that the General Assembly intended to create a third method of selection, specific to student members, whereby students hold the position and are selected in some fashion by other students.

It is not for this Court to determine whether it is prudent to have students with voting power on boards of education. Rather, this Court merely must determine whether it is legal. Neither party

has argued that the General Assembly is required to establish boards of education that are wholly elected. Such an argument would not be consistent with the Maryland Constitution or with Section 3-108 of the Education Article. Additionally, it has not been argued that having hybrid methods to select board members, whereby some members are appointed but others are elected constitutes impermissible vote dilution.

The Plaintiffs' assertion that the General Assembly lacks the authority to choose how to carry out its constitutional mandate to establish a system of free public schools other than through school boards is untenable. The Court of Appeals has already addressed the issue in *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, where the Court unequivocally stated that "County school boards are creatures of the General Assembly."[12] 358 Md. 129, 135 (2000). The Court cannot find that Section 3-701(f) is unconstitutional. Furthermore, given that at least two jurisdictions, namely Prince George's County and Baltimore City provide for persons other than the Governor to select non-student board members, the Court cannot find that the use of alternative selectors is impermissible. Using those other than the Governor to select board members is patently constitutional. Article II, § 10 of the Maryland Constitution states that the Governor shall nominate . . . and "appoint all civil and military officers of the State, whose appointment, or election, is not otherwise herein provided for, *unless a different mode of appointment be prescribed by the Law creating the office.*" (emphasis supplied). As Section 3-701(f) is a law creating a different mode of selection for the student member position, someone

[12] At the hearing, the Plaintiffs mentioned that, although they were not making a separation of powers argument, that this is an executive agency and, when you have that, the General Assembly cannot withdraw from the authority of the executive. The Court of Appeals in *Chesapeake Charter, Inc.* explained, contrary to the Plaintiffs' argument, that "[a]though legally State agencies . . . [County school boards] are not normally regarded, for structural or budgetary purposes, as units within the Executive Branch of the State government." 358 Md. at 137. Further, *Schisler v. State*, a plurality opinion relied upon by the Plaintiffs, which involved the legislature attempting to exercise removal power, states that "the Legislature can by express provision in a prospective statute commit the appointment process to entities other than the Executive." 394 Md. 519, 584 (2006).

other than the Governor can select student members. This Court could locate no law curbing the General Assembly's creativity in divining the board member selection process. In *State v. Falcon*, which dealt with changes to a county school board nominating commission, the Court of Appeals explained:

> [T]his Court has historically recognized that, when the General Assembly creates an office by statute, the General Assembly has the authority to designate the mode of appointment to that office. . . . Stated otherwise, where the General Assembly has created the office by statute, the General Assembly "can modify, control or abolish it, and within these powers is embraced the right to change the mode of appointment."

451 Md. 138, 175 (2017) (quoting *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 410 (1981)). The Court finds that *State v. Falcon* is controlling in light of the Court of Appeals' prior finding that school boards are statutory creatures. *Chesapeake Charter, Inc.*, 358 Md. at 135. The Court finds that the General Assembly's decision to create a selection process whereby students choose the student member of the board is not violative of the Maryland Constitution. [13]

III. The Exercise of General Governmental Power by Minors

The Court must now examine whether there is a constitutional impediment to vesting a minor with voting authority. The Plaintiffs assert that whether an official is appointed or elected, the official must be registered to vote. The Plaintiffs claim that there cannot be people holding office where they exercise general governmental power but ignore the Constitutional requirement that the individual must be eighteen years old and registered to vote to hold such an office.

The prerequisite for holding office of having registered to vote is found in Article I, Section 12 of the Maryland Constitution. In its entirety, Section 12 states:

[13] The Court does not rely on *McCurdy v. Jessup*, 126 Md. 318 (1915), cited by the Board, in making this conclusion, as that court did not conduct an in-depth analysis of the delegation issue when it determined that the legislature had the authority to require county commissioners to appoint to the game warden office a person recommended by a corporation. The *McCurdy* Court merely found that the selection process was not "manifestly in conflict with some provision of the Constitution." *Id.* at 38.

> Except as otherwise specifically provided herein, 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 on the date of the person's election or appointment to that term or if, at any time thereafter and prior to completion of the term, the person ceases to be a registered voter.

MD. CONST. art. I, § 12 (emphasis supplied). While the word appointment is used toward the end of the constitutional provision, it is preceded by a qualification that the provision applies to "an elective office." The Court also notes that the Section itself is entitled "Unregistered Voters Ineligible for *Elective* Office." *Id.* (emphasis supplied). As such, the Court cannot find, based on the plain reading of the provision, that Article I, Section 12 applies to appointments outside of replacing duly elected officials who cannot serve their term. *See* MD. CONST. art. XV, § 5 (vesting the General Assembly with the authority to provide by law for the replacement of officials unavailable to perform their duties); *see also Capozzi*, 396 Md. at 72 (citations omitted) (stating that the Court does not look past the "normal plain meaning of the language" if the constitutional provision is unambiguous).

Having determined that Article I, Section 12 does not set an age or voter registration requirement on non-elective officials, such a requirement must be found elsewhere for the Plaintiffs to prevail. After careful investigation, this Court could not find, nor could the Plaintiffs cite, either in the Maryland Constitution or within the Education Article, a requirement that non-elected members must be over the age of eighteen. The Plaintiffs asserted at the hearing that only adults can exercise general governmental power. It is the Court's view that the general governmental power argument has only been extended to elected officials. In reaching this decision, the Court considered the Supreme Court's decision in *Hadley v. Junior College District of Metropolitan Kansas City*, in which they explained:

> [I]n situations involving *elections*, the States are required to insure that each person's vote counts as much, insofar as it as practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The

> consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions.

Hadley, 397 U.S. at 54 (emphasis supplied); *see also* The Honorable William R. McCaffrey, Opinion No. 80-030, 1980 WL 127893 (Mar. 12, 1980) (Richard Israel in the letter attached to the Attorney General's opinion, explained that only elections and not appointments are subject to the one-person, one-vote principle, which itself only applies where the elected official exercises general governmental powers). This Court has not found that the Plaintiffs' broad general governmental power argument or the more narrow suggestion that minors may not exercise such powers applies to non-elective positions. Absent specific guidance imposing an age requirement to exercise general governmental power, the Court will not read one into existence.

The General Assembly has decided, as a political matter, that it is appropriate to have a student member of the board with the authority to cast votes on specified issues before the board. The General Assembly, in the statutes providing for voting student members, has carved out areas where the student member cannot vote. Baltimore City, Prince George's County, Baltimore County, and Harford County all prohibit the student member from voting on school opening and closing.[14] That Howard County omitted such an exclusion has resulted in this litigation, but it does not render Section 3-701(f) unconstitutional.

CONCLUSION

For the foregoing reasons, the Court finds that Section 3-701(f) is a valid exercise of the General Assembly's authority to determine the selection method for the members of the board of

[14] EDUC., §3-108.1(m)(4)(iii); EDUC., § 3-1002(g)(3)(ii); EDUC., § 3-2B-05(c)(4); EDUC., § 3-6A-01(g)(3)(iii)(15).

education and that said statute does not violate the Maryland Constitution. The Court will issue a declaratory judgment consistent with the findings herein.

Turning briefly to the issue of attorneys' fees, the Board expressed that it may seek fees under Maryland Rule 1-341. Such an award would require the Court to find that the Plaintiffs maintenance of the action was "in bad faith or without substantial justification." Md. Rule 1-341(a). The award of attorney's fees is "an extraordinary remedy, intended to reach only intentional misconduct." *Talley v. Talley*, 317 Md. 428, 438 (1989). While it is difficult to see how the Board would meet such a burden in this case, which involves complex statutory and constitutional interpretation, the Court will evaluate any such request along with any response thereto.

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03/25/2021
Date

Richard S. Bernhardt
Richard S. Bernhardt, Judge
Circuit Court for Howard County

Entered: Clerk, Circuit Court for
Howard County, MD
March 25, 2021

EXHIBIT 3

HB 513

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April 19, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE		SENATE
251[A]	908	332[E]
252[B]	942[E]	374[H]
303[C]	969	434
513	1049[F]	565[B]
602	1078	774[F]
618[D]	1089	885[I]
682	1225	974
881	1356[G]	984[G]

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
cc: Joseph Bryce
Secretary of State
Karl Aro

104 Legislative Services Building · 90 State Circle · Annapolis, Maryland 21401
410-946-5600 · 301-970-5600 · Fax 410-946-5601 · TDD 410-946-5401 · 301-970-5401

Footnotes

A. HB 251 is identical to SB 224.

B. HB 252 is identical to SB 565.

C. HB 303 is identical to SB 441

D. In our view, HB 618 is not invalid as a special law under Maryland Constitution, Article III, §33. *See* Bill Review Letter on SB 78, dated April 10, 2006.

E. HB 942 is identical to SB 332

F. HB 1049 is identical to SB 774.

G. HB 1356 is identical to SB 984.

H. SB 374 is identical to HB 323.

I. In our view, SB 885 does not violate the one subject requirement of Maryland Constitution Article III, §29.