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 REPLY
IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Opposition to the Board's Motion to Dismiss both clarifies and mystifies. On the one hand, Plaintiffs confirm that Counts I and II of the Complaint allege claims under the one-person, one-vote principle. Plaintiffs also disclaim any attempt to bring a vote-denial or franchise-expansion claim. At the same time, however, Plaintiffs confound matters further by contending that Counts I and II implicitly assert claims under *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), even though the Complaint never references that case and the Supreme Court itself expressly limited its holding in *Bush* to the facts of that case alone.

Despite the confusing nature of Plaintiffs' equal-protection claims, they can be resolved in a straightforward manner. The Equal Protection Clause's voting doctrines simply do not apply to the Student Member position because it is not an elective office. Plaintiffs do not have a persuasive rejoinder on that front. They argue that the Student Member position must be an elective office because they alleged it to be so in their Complaint. But whether a government position is an elective office is a question of law, not fact. Plaintiffs also catalogue instances in which Maryland statutes and other authorities refer to the process by which the Student Member is selected as an "election," even though the bedrock case on point, *Sailors v. Kent County Board of Education*, 387 U.S. 105 (1967), makes clear that such shorthand does not, on its own, establish that an office is elective.

But even if this Court deems the Student Member position to be an elective office, Plaintiffs do not state a claim under the one-person, one-vote principle because Counts I and II are premised on the incorrect assumption that one-person, one-vote claims concern deviations in voter-eligible population rather than total population. Nor do Plaintiffs state a claim under *Bush* (assuming that case has any precedential force) because the gravamen of their Complaint is about HCPSS students exercising undue political power, not a lack of procedural uniformity.

Plaintiffs fare no better in arguing against dismissal of their free-exercise claim (Count III). All of the cases Plaintiffs cite in support of that claim involve laws or government actions that targeted religious entities or people for disfavored treatment. Section 3-701(f) does no such thing. It excludes from the process of selecting the Student Member all students who attend private schools—whether secular or religious—simply because they do not attend the schools for which the Board makes policy. The statute is therefore a neutral, generally applicable law to which the Free Exercise Clause does not apply.

ARGUMENT

I. The Equal Protection Clause's voting doctrines do not apply to § 3-701(f).

According to Plaintiffs, Counts I and II of the Complaint plead equal-protection violations under at least three different theories: (1) the one-person, one-vote-principle; (2) "[u]nequal voting power," a label that Plaintiffs do not tether to any

particular equal-protection doctrine; and (3) *Bush v. Gore*, a case that Plaintiffs reference nowhere in their Complaint. Pls.' Opp'n 2–3. Although the analytical contours of Plaintiffs' claims are murky, one thing is clear: If the Student Member position is a non-elective office, Counts I and II must be dismissed.

A. Whether an office is elective is a question of law.

Plaintiffs argue that because the Complaint repeatedly refers to the process for selecting the Student Member as an "election," those allegations "conclusively establish[]" that the position is an elective office for the purposes of the Board's Motion to Dismiss. Pls.' Opp'n 8–9. But, as Plaintiffs themselves acknowledge elsewhere in their brief, whether a governmental position is an elective office is a question of law, not fact. *See id.* at 11 ("Determination of 'Election' is a Question of Federal Law."). That makes good sense. Were it otherwise, a complaint challenging the President's appointment of an Article III judge under the one-person, one-vote principle could survive a motion to dismiss merely by alleging that Article III judges are elected officials.[1] To avoid waste of judicial resources, courts often dismiss claims similar to Plaintiffs' at the motion-to-dismiss stage based on the legal conclusion that the government office in question is a non-elective position. *See, e.g.*, *Butts v.*

[1] In a more common context, under Plaintiffs' conception of the standard of review, a plaintiff in a Title VII case could survive a motion to dismiss merely by alleging that he or she suffered "discrimination" without pleading any facts that establish a prima facie case of disparate treatment.

Aultman, No. 4:18CV001-NBB-JMV, 2018 WL 6729987, at *4, *7 (N.D. Miss. Dec. 21, 2018) (dismissing equal-protection claim to school-board positions after finding the offices to be non-elective), *aff'd* 953 F.3d 353 (5th Cir. 2020); *Rosenthal v. Bd. of Educ. of Cent. High Sch. Dist.*, 385 F. Supp. 223, 227 (E.D.N.Y. 1974) (three-judge court) (same), *aff'd* 420 U.S. 985 (1975); *see also Spiegel v. Bd. of Educ. of Howard Cty.*, No.C-13-CV-20-000954, slip op. at 11–12 (Md. Cir. Ct. Howard Cty. Mar. 25, 2021) (dismissing state constitutional challenges to the Student Member position after finding the office to be non-elective), *appeal docketed*, No. CSA-REG-0117-2021 (Md. Ct. Spec. App. Mar. 29, 2021), Def.'s Mot. Ex. 2.

B. The Student Member position is not an elective office.

Plaintiffs misconstrue *Sailors v. Kent County Board of Education*, 387 U.S. 105 (1967), the bedrock case that establishes that the Equal Protection Clause's voting doctrines do not apply to non-elective offices like the Student Member position. According to Plaintiffs, *Sailors* held that all government positions are either "appointive" or "elective," and that only appointive offices are exempt from the Equal Protection Clause's voting doctrines. Pls.' Opp'n 7. But *Sailors* did not adopt the rigid dichotomy that Plaintiffs suggest. Rather, *Sailors* held that the one-person, one-vote principle did not apply to school-board positions that were "*basically* appointive." 387 U.S. at 109 (emphasis added). That key modifier, which Plaintiffs conspicuously omit from their summary of *Sailors*, demonstrates that an office need not be appointive in a traditional or technical sense for the position to be exempt

from the Equal Protection Clause's voting doctrines. *See id.* at 111 ("[A] State can appoint local officials or elect them or combine the elective and appointive systems as was done here."). Instead, those restrictions apply only if the office in question is filled, "directly or indirectly, through an election in which the residents of the county participate." *Id.* at 109 n.6. In other words, as numerous courts have recognized, an office is elective only if the electorate as a whole fills the position in question. *See* Def.'s Mot. 10–11.

Plaintiffs interpret the *Sailors* rule to mean that any time that any number of residents—as opposed to nonresidents—vote to fill the position in question, an election has occurred. Pls.' Opp'n 7. But *Sailors* never mentions whether the delegates who "cast . . . votes" for the non-elective school-board positions in that case were residents of Kent County. 387 U.S. at 109 n.6. Plaintiffs cite no case supporting the proposition that an election occurs whenever any small subset of a jurisdiction's residents decide a political question by a raise of hands.[2]

[2] To be sure, jurisdictions sometimes make political decisions on an electorate-wide basis while excluding some members of the traditional electorate from participating in the electoral process. *See, e.g.*, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 623, 633 (1969) (striking down a statute that allowed school-district residents to set school policy at annual meetings but restricted the right to vote in those meetings to otherwise qualified voters (a) who owned or leased real property in the district or (b) whose children attended the district's schools). Despite discussing at length several vote-denial cases in this vein, Pls.' Opp'n 11–13, Plaintiffs do not challenge § 3-701(f) on vote-denial grounds, *id.* at 20–21.

According to Plaintiffs, *ARC Students for Liberty Campaign v. Los Rios Community College District*, 732 F. Supp. 2d 1051 (E.D. Cal. 2010), supports the conclusion that a selection process need not "include the entire electorate" to be considered an election. Pls.' Opp'n 12–13. But *ARC Students* presented a narrow question unrelated to this case. There, the court considered whether a college board of trustees' failure to follow a state statute by appointing a nonvoting student trustee amounted to a denial of substantive due process. 732 F Supp. 2d at 1058. The case involved no one-person, one-vote claim or, indeed, any constitutional challenge to a state statute. *Id.* It is therefore of little persuasive value for the questions presented here. *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015), on which Plaintiffs similarly rely, addresses only a question of Article III standing and does not even discuss the *Sailors* rule. *Id.* at 1313.

The Student Member position is not an elective office because the adult residents of Howard County—its electorate—have no say over how the position is filled. Only HCPSS students in grades 6 through 11—individuals who are precluded from voting in any actual election—can participate in the selection process. *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). Whether the process by which the Student Member is selected is best described as "appointive," "basically appointive," or something else entirely, it is not a selection process in which

Howard County's electorate participates. The Equal Protection Clause's voting doctrines therefore do not apply to the position.

As previously noted, Maryland's courts and Attorney General have reached the same conclusion. Def.'s Mot. 16–17; *see also Spiegel*, slip op. at 11–12; Md. Att'y Gen. Op. No. 80-030, 1980 WL 127893 (Mar. 12, 1980) (unpublished). Plaintiffs dismiss these authorities by arguing that whether a governmental position is an elective office is a federal question. Pls.' Opp'n. 14. But these Maryland authorities are nevertheless persuasive analyses of whether the Student Member position is an elective office. Their persuasive force is underscored by Plaintiffs' failure to meaningfully engage with them.

Plaintiffs struggle to identify anything that contradicts the conclusion that the Student Member position is a non-elective office. They argue that the Student Member position must be an elective office because the Maryland Education Article does not name Howard County among the counties that have both appointed and elected members on their boards of education.[3] Pls.' Opp'n 7, 11 (citing Md. Code, Educ. § 3-114). But § 3-114 refers only to the non-student positions on the various

[3] Similarly, Plaintiffs contend that Howard County's website does not identify the Student Member as an appointed official. Pls.' Opp'n 10. But neither does the website refer to the Student Member as an elected official. Although the website lists the Student Member along with the Elected Members of the Board, the website states that "[v]oters elect *seven* members." *County Government Officials*, Howard County, Maryland, https://perma.cc/6KU2-YHJS (last visited May 19, 2021) (emphasis added). Because the Student Member is the eighth member of the Board, the website correctly implies that he or she is *not* elected.

county boards. That is clear because the subtitle under which § 3-114 is housed creates only seven board positions for a jurisdiction of Howard County's size, even though the Board has eight members (including the Student Member). *See id.* §§ 3-105(c), -701(a)(1). Moreover, § 3-114 also identifies Anne Arundel County as a jurisdiction in which the relevant board members must be elected, *id.* § 3-114(a)(2), but the student member in that county is indisputably appointed, *id.* § 3-2A-05(a)(2). Section § 3-114 therefore does not require that the Student Member of the Howard County Board must be elected.

Plaintiffs also catalogue several instances in which Maryland statutes and other authorities refer to the process by which the Student Member is selected as an "election" or those who participate in the process as "voters." Pls.' Mot. 9–10. But *Sailors* itself uses such shorthand as a convenient way to discuss the non-elective process addressed in that case. 387 U.S. at 106 (describing the delegates as "elect[ing]" the school-board members); *id.* at 109 n.6. (describing the delegates as "cast[ing] . . . votes"); *id.* (describing the delegates as the relevant "electorate"). Such jargon plainly does not indelibly mark a position as an elective office. *See* Md. Att'y Gen. Op. No. 80-030, 1980 WL 127893, at *1 ("It has been suggested that the statute's use of the term 'elect' to describe the selection process of the student member is significant. It is our view, however, that the terminology used by the statute is not dispositive of the fundamental question of whether, from a

constitutional point of view, that selection process is more properly regarded as an election or an appointment.").

Because the Howard County electorate as a whole does not select the Student Member, Plaintiffs' equal-protection claims should be dismissed.

II. Plaintiffs' equal-protection claims fail even if the Student Member position were deemed elective.

In its Motion, the Board identifies several equal-protection theories that Counts I and II of the Complaint might implicate: (1) the one-person, one-vote principle; (2) vote denial; and (3) franchise expansion. Def.'s Mot. 8. Plaintiffs disavow any intention to allege a vote-denial or franchise-expansion claim. Pls.' Opp'n 20–21. Instead, Plaintiffs unpersuasively attempt to proceed under the one-person, one-vote principle by misconstruing that theory as focusing on the electorate rather than the *total population* that an elected official serves. Plaintiffs also attempt to manufacture a claim under *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), despite never mentioning that case in their Complaint. Plaintiffs' equal-protection claims fail under any theory.

A. The one-person, one-vote principle concerns a jurisdiction's total population, not its "electorate."

Plaintiffs concede that the total population of voting districts, not their voting population, is the relevant comparator for the purpose of detecting deviations from the one-person, one-vote principle. Pls.' Opp'n at 16–17. Yet they argue that the Student Member position violates the one-person, one-vote principle because the Student Member represents a smaller "electorate" than do the at-large Elected

Members. Pls.' Opp'n 18 (arguing that the Student Member represents an electorate of 57,000 HCPSS students, while the at-large Elected Members represent all 300,000 Howard County residents).

At the outset, the Board rejects Plaintiffs' completely unsubstantiated assertion that the Student Member represents only HCPSS students. As the Board previously explained, Plaintiffs' insistence that the Student Member represents only HCPSS students is contradicted by HCPSS policy that is incorporated by reference into the Complaint. Defs.' Mot. 19; Compl. Ex. A, at 4. Plaintiffs insist that "no policy written by HCPSS can change" the Student Member's supposed representation of only HCPSS students. Pls.' Opp'n 18. But they cite nothing in support of their narrow view of who the Student Member represents.

In any event, Plaintiffs' electorate-focused approach to the one-person, one-vote principle is precisely what the Supreme Court rejected in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). In that case, voters alleged that Texas's legislative map violated the one-person, one-vote principle because its districts were "unequal . . . when measured by voter-eligible population" as opposed to "total population." *Id.* at 1123. To use Plaintiffs' terminology, the *Evenwel* plaintiffs objected that Texas's legislative districts had "electorates" of significantly different sizes. The Supreme Court rejected the Texas voters' claim, holding that "constitutional history" and case law "reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations." *Id.* at 1130.

That is what the General Assembly did when it created the Student Member position. As Plaintiffs concede, the Student Member "is elected at-large." Pls.' Opp'n 18. Both the Student Member and the at-large Elected Members therefore hail from the very same voting district, which encompasses Howard County's total population. Accordingly, even under Plaintiffs' own framing, the Student Member position does not violate the one-person, one-vote principle.

B. *Bush v. Gore* is of limited precedential value and is irrelevant to Plaintiffs' allegations.

Although the Complaint does not once mention *Bush v. Gore*, Plaintiffs now assert that their equal-protection claims rely on that decision.[4] Pls.' Opp'n 5–6. In *Bush*, the Supreme Court held that the procedures governing Florida's recount in the 2000 election failed to provide a uniform standard for the acceptance or rejection of voters' ballots. 531 U.S. at 106. According to the Court, that lack of uniformity violated the Equal Protection Clause. *Id.* at 105. Like Plaintiffs' other equal-protection theories, *Bush* has no application to non-elective offices. In addition, Plaintiffs' claims differ drastically from those asserted in *Bush*.

More to the point, the Fourth Circuit has observed that *Bush* is of "limited precedential value." *Wise v. Circosta*, 978 F.3d 93, 100 n.7 (4th Cir. 2020) (en banc).

[4] Plaintiffs identify paragraphs 11 and 12 of the Complaint as the locus of their *Bush* claim. Pls.' Opp'n 5–6. Those paragraphs, however, merely identify the statutory provisions that govern Board Member term lengths and the qualifications for the Student Member position. Compl. ¶¶ 11–12.

That is because, in rendering its decision in *Bush*, the Supreme Court conspicuously "limited" its "consideration . . . to the present circumstances." 531 U.S. at 109; *see also* Linda Greenhouse, *Thinking About the Supreme Court After* Bush v. Gore, 35 Ind. L. Rev. 435, 436 (2002) ("Anyone who tries to cite Bush v. Gore will quickly find out that it was a ticket for one train only." (footnote omitted)). In fact, the only time when a district court in this Circuit has actually granted relief under *Bush*, the Fourth Circuit promptly overruled the court on appeal. *Wise*, 978 F.3d at 99–101 (cautioning against relying on *Bush* outside of instances where "arbitrary and disparate standards" govern whether and individual's vote counts).

But even if *Bush* were binding on this Court, it is irrelevant to Plaintiffs' allegations. Plaintiffs now characterize Counts I and II of the Complaint as alleging that § 3-701 establishes "two entirely different standards for electing individuals to the same body." Pls.' Opp'n 5. But Counts I and II are framed in terms of distribution of political power, not lack of procedural uniformity. *See, e.g.*, Compl. ¶ 37 ("The notion that one group can be granted greater voting strength than another is hostile to standards for representative government under the Fourteenth Amendment . . . ."); *id.* ¶ 55 ("[G]overnmental powers over an entire geographic area cannot be apportioned unequally."). Plaintiffs' fundamental objection to the Student Member position therefore is not that different procedures govern the process for filling that position than those that govern the selection of the Elected Members. Instead, their

objection is that they think § 3-701(f) grants undue political power to HCPSS students.

To the extent, however, that Plaintiffs seek uniform procedures to govern the selection of the Student and Elected Members, they have failed to name as defendants the parties charged with administering elections in Maryland—the State and County Boards of Election. *See* Md. Code, Elec. Law § 2-102(a) ("The State Board [of Election] shall manage and supervise elections in the State . . . ."); *id.* § 2-202(b)(1) ("Each local board [of election] . . . shall . . . oversee the conduct of all elections held in its county . . . ."); *id.* § 8-801 (requiring school-board elections to be administered in the same manner as all other general elections); *cf.* Docket, *Bush v. Gore*, No. 00-949, https://perma.cc/54EF-G59E (identifying state and local election administrators as defendants). Joinder of the State and County Boards of Election would therefore be necessary before Plaintiffs could pursue their newly disclosed and meritless *Bush* claim. Fed. R. Civ. P. 19(a)(1)(A) (requiring joinder of any party without whom "the court cannot accord complete relief").

C. Plaintiffs mistake an alternative argument for a concession.

Plaintiffs make much ado about the Board's alternative argument regarding 18-year-olds who hypothetically are permitted to vote for the Student Member. Pls.' Opp'n 1, 5, 19–20; Def.'s Mot. 20–21. To state the obvious, the Board does not "concede[]" that § 3-701(f) confers "excessive voting power" to any 18-year-old students who might be enrolled in grades 6 through 11 in HCPSS schools. *Id.* at 5.

On the contrary, the Board's primary argument is that the Equal Protection Clause's voting doctrines simply *do not apply* to the Student Member position because it is not an elective office. Def.'s Mot. 9–18. That legal conclusion, if accepted by this Court, forecloses Counts I and II in their entirety.

But assuming arguendo that the Student Member position is an elective office, Plaintiffs' equal-protection claims would still generally be meritless because § 3-701(f) does not confer undue power to HCPSS students. The statute instead marginally mitigates the otherwise total exclusion of HCPSS students from the political decisions that affect their school lives. To the extent that the Student Member position is deemed an elective office, however, § 3-701(f) arguably might allow an 18-year-old HCPSS student enrolled in grades 6 through 11 to participate in the selection of more Board members than other adult residents of Howard County. That is the only narrow sense in which § 3-701(f) could ever raise "a potential constitutional problem"—and, again, only if the Student Member position were deemed an elective office. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

But the minor potential issue Plaintiffs identify does not justify invalidation of § 3-701(f). Rather than vitiate the General Assembly's carefully designed scheme, this Court can avoid the potential constitutional problem identified by Plaintiffs (to the extent it even exists) by construing § 3-701(f) to preclude 18-year-old HCPSS students from participating in the selection of the Student Member. Contrary to what Plaintiffs argue, Pls.' Opp'n 5 n.1, 20, such constitutional avoidance is precisely

the sort employed in *Gregory*. In that case, state judges challenged Missouri's mandatory-retirement rule under the Age Discrimination in Employment Act of 1967 (ADEA). *Gregory*, 501 U.S. at 455–56. Although the ADEA defines "employer" to include "a State or political subdivision of a State," 29 U.S.C. §§ 623(a), 630(b)(2), the Court construed the statute to "not apply to state judges" to avoid "a potential constitutional problem" under the Tenth Amendment. 501 U.S. at 464. The Court reasoned that such a reading was permissible because the statute did not explicitly include judges, even though it also did not explicitly exclude them. *Id.* at 467. Similar to the ADEA, the text of § 3-701(f) does not "ma[k]e clear that" 18-year-olds "are *included*" within the student voting population intended by the General Assembly, and excising that narrow population would avoid any "potential constitutional problem." *Id.* (emphasis in original). Accordingly, if this Court were to deem the Student Member position an elective office, it should construe § 3-701(f) to exclude 18-year-old students from the selection process.

III. The Free Exercise Clause is inapplicable to § 3-701(f).

Plaintiffs cite several cases to argue that § 3-701(f) is not a neutral, generally applicable law to which the Free Exercise Clause does not apply. Each is inapposite. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990).

Two of the cases cited by Plaintiffs involve laws that by their plain text targeted religious entities for unfavorable treatment. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court held that a Missouri policy

violated the Free Exercise Clause by "categorically disqualifying churches and other religious organizations" from receiving state grants available to public schools, secular private schools, and other secular nonprofits. 137 S. Ct. at 2017, 2025. The Court held that the policy "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit *solely because of their religious character*." *Id.* at 2021 (emphasis added). Similarly, in *Espinoza v. Montana Department of Revenue*, the Supreme Court held that a Montana regulation violated the Free Exercise Clause by denying tuition assistance available to students attending secular private schools to those attending religious schools. 140 S. Ct. 2246, 2252, 2261 (2020).

Other cases on which Plaintiffs rely also involve targeted unfavorable treatment of religious entities and people, albeit in more subtle ways. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court struck down animal-cruelty ordinances that did not explicitly target religious practice but effectively constituted a religious "gerrymander" by prohibiting "few if any killings of animals . . . other than Santaria [ritual animal] sacrifice." *Id.* at 533–34, 536. And in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Court held that a government agency violated the Free Exercise Clause by enforcing a public-accommodations law in a manner that revealed a "negative normative evaluation" of religious objections to the law. *Id.* at 1731 (internal quotation marks omitted).

Section 3-701(f) is unlike the laws invalidated in *Trinity Lutheran* and *Espinoza* because it does not single out religious private schools for unfavorable treatment.

Under § 3-701(f), only HCPSS students may participate in the selection of the Student Board member. Md. Code, Educ. § 3-701(f)(3)(iii). The law therefore excludes students who attend private schools—whether secular or religious—from participation in the selection process. Accordingly, § 3-701(f) does not disqualify students who attend religious private schools from participating in the selection process "solely because of the[] religious character" of their schools. *Trinity Lutheran*, 137 S. Ct. at 2021. On the contrary, students who attend religious and secular private schools are excluded only because they do not attend an HCPSS school. Section § 3-701(f)'s identical treatment of students who attend secular and religious private schools also means that the law does not effect a religious "gerrymander" like the ordinances in *Hialeah*. 508 U.S. at 536. And nowhere do Plaintiffs allege that the Board selectively enforces § 3-701(f) in a manner that disfavors religious people akin to the government agency's actions in *Masterpiece Cakeshop*.[5] *See* 138 S. Ct. at 1731.

Plaintiffs also cite *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), in which the Supreme Court recently enjoined portions of California's COVID-19 restrictions that permitted three or more households to come together at certain indoor commercial venues but prohibited the same number of households from gathering for at-home

[5] Plaintiffs insist that their free-exercise claim is an "as-applied challenge to the manner Howard County has implemented" § 3-701(f). Opp'n 24 n.6. Yet Plaintiffs identify no application of the statute that—in their view—would be constitutional. And the Complaint requests a declaration that *any* procedures that allow for "the seating of a student Board member pursuant to Md. Code, ed. Art. § 3-701 [sic] violates the Free Exercise clause." Compl. 16 (Prayer for Relief).

religious exercise. *Id.* at 1297. Because the restrictions "treat[ed] some *comparable* secular activities more favorably than at-home religious exercise," the Court concluded that the plaintiffs were likely to succeed on the merits of their free exercise claim. *Id.* (emphasis added). The Court did not hold, however, that religious activities that bear any similarity whatsoever to a secular activity are entitled to identical treatment. Rather, the Court compared the treatment of at-home religious excercise and the relevant commercial activities in light of the regulatory purpose behind California's COVID-19 restrictions. *Id.* Because California did not establish that the commercial activities in question "pose a lesser risk of [COVID-19] transmission" than at-home religious exercise, the Court held that the state's stricter regulation of religious activity was not justified. *Id.*

Section § 3-701(f) does not treat students at religious private schools worse than students who attend any comparable school. Private religious schools differ completely from HCPSS schools in the only way that is relevant to the regulatory purpose behind § 3-701(f): giving students a voice on the policies that affect their school lives. With minor exceptions,[6] the Board does not set policy for students who attend private schools—secular or religious. Md. Code, Educ. § 4-108 (charging each county board with (a) "[m]aintain[ing] throughout its county a reasonably

[6] The only exception Plaintiffs identify is the provision of free busing to parochial students, an issue on which the Student Member is prohibited from voting. Compl. ¶ 64; Defs.' Mot. 4–5 n.3.

uniform system of public schools"; (b) "determin[ing] . . . the educational policies of the county school system"; and (c) "[a]dopt[ing], codify[ing], and mak[ing] available to the public bylaws, rules, and regulations . . . for the conduct and management of the county public schools"). HCPSS schools therefore are not valid comparators to private religious schools when it comes to determining which students should be included in selecting the Student Member.[7] *See Tandon*, 141 S. Ct. at 1297.

Plaintiffs' exceptionally broad interpretation of *Tandon*, if adopted, would wreak havoc for public schools throughout the country. According to Plaintiffs, any benefit provided to public schools must be matched by an equivalent outlay to private religious schools. For example, a school board that funds the construction of a soccer field at a public school would also have to financially support similar projects at all private religious schools located in the jurisdiction. Students who attend private religious schools could demand membership in groups and clubs supervised by public-school faculty or staff. The Free Exercise Clause does not allow private religious schools to reap such a windfall from taxpayers.

Because § 3-701(f) is a neutral, general applicable law, it is valid under the Free Exercise Clause. *Smith*, 494 U.S. at 878–79.

[7] By the same logic, children who are educated at home for religious reasons are not comparable in any relevant way to HCPSS students, and § 3-701(f) does not explicitly or implicitly target such students for unfavorable treatment.

CONCLUSION

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

Dated: May 25, 2021

/s/ Jonathan L. Backer

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 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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