

**IN THE
COURT OF APPEALS OF MARYLAND**

Petition No. _____
September Term 2021
(CSA No. 0117, September Term 2021)

**TRACI SPIEGEL, ON BEHALF OF HERSELF AND HER MINOR CHILDREN,
S.L.S. AND S.F.S., AND KIMBERLY FORD, ON BEHALF OF HERSELF AND
HER MINOR CHILDREN, A.M.F. AND E.L.F.,**

Petitioners,

v.

BOARD OF EDUCATION OF HOWARD COUNTY,

Respondent.

PETITION FOR WRIT OF *CERTIORARI*

Anthony M. Conti
CONTI FENN LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201
Phone (410) 837-6999
Facsimile (410) 510-1647
tony@contifenn.com

Counsel for the Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
(A) A reference to the action in the lower court by name and docket number.....	1
(B) A statement whether the case has been decided by the Court of Special Appeals...	1
(C) If the case is then pending in the Court of Special Appeals, a statement whether briefs have been filed in that Court or the date briefs are due, if known.....	2
(D) A statement whether the judgment of the circuit court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action...	2
(E) The date of the judgment sought to be reviewed and the date of any mandate of the Court of Special Appeals.....	2
(F) The questions presented for review.....	3
(G) A particularized statement of why review of those issues by the Court of Appeals is desirable and in the public interest.....	3
(H) A reference to pertinent constitutional provisions, statutes, ordinances, or regulations.....	4
(I) A concise statement of the facts material to the consideration of the questions presented.....	4
(J) A concise argument in support of the petition.....	6
<u>The Election by Minors Violates Maryland's Constitution.....</u>	<u>7</u>
<u>It is Unconstitutional for a Minor to Hold an Office in Government.....</u>	<u>10</u>
CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112.....	13
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

MD. CODE ANN., Educ. §3-701	5,7
Md. Const. Art. I, § 1	6
<i>Maryland Green Party v. Maryland Bd. of Elections</i> , 377 Md. 127, 141 (2003).....	6
Maryland Ann. Code, <i>Education</i> , §3-114	7
Md. Const., Art I, § 12.....	10,11
<i>Broadwater v. State</i> , 306 Md. 597 (1986).....	11,12

EXHIBITS REQUIRED BY RULE 8-303

- A. Docket Entry Evidencing Judgment of the Circuit Court
- B. Opinion of the Circuit Court

PETITION FOR WRIT OF CERTIORARI

Appellants Traci Spiegel and Kimberly Ford, on their own behalf and on behalf of their minor children, in accordance with Maryland Rule 8-303, hereby submit this Petition for Writ of Certiorari. The Appellants are requesting that the Court of Appeals of Maryland grant this petition to address two novel Maryland Constitutional issues that were recently decided by the Circuit Court for Howard County. The Court's decision on these issues will have a substantial and immediate impact on school reopening during the ongoing pandemic for approximately 56,000 students enrolled in Howard County's public school system. The Appellants submit the following information in accordance with Maryland Rule 8-303(b)(1):

(A) A reference to the action in the lower court by name and docket number.

This matter originated in the Circuit Court for Howard County, Maryland. The case was captioned *Traci Spiegel, on behalf of herself and her minor children, S.L.S. and S.F.S., and Kimberly Ford, on behalf of herself and her minor children, A.M.F. and E.L.F., Plaintiffs v. Board of Education of Howard County, Defendant*, Case Number C-13-CV-20-000954. The case was decided on March 25, 2021.

(B) A statement whether the case has been decided by the Court of Special Appeals.

This matter remains pending with the Court of Special Appeals of Maryland and has been assigned Case Number CSA-REG-0117-2021.

(C) If the case is then pending in the Court of Special Appeals, a statement whether briefs have been filed in that Court or the date briefs are due, if known.

This case was recently appealed on March 26, 2021, to the Court of Special Appeals of Maryland, and to date, no briefing schedule has been established by that Court and no briefs or motions have been filed by the parties with the Court of Special Appeals.

(D) A statement whether the judgment of the circuit court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action.

On March 25, 2021, Judge Richard S. Bernhardt of the Circuit Court for Howard County, Maryland entered a final and dispositive order on the plaintiffs' Complaint, entering summary judgment and final declaratory relief in favor of the Defendant Board of Education of Howard County that fully and finally adjudicated all claims in this action in their entirety and fully and finally adjudicated the rights and liabilities of all parties to the action.

(E) The date of the judgment sought to be reviewed and the date of any mandate of the Court of Special Appeals.

On March 25, 2021, Judge Richard S. Bernhardt of the Circuit Court for Howard County, Maryland, entered a final and dispositive order which is the judgment sought to be reviewed. No mandate has been entered by the Court of Special Appeals.

(F) The questions presented for review.

Does the Maryland Constitution prevent minors 11 years of age and older from selecting a member holding a binding voting position on the Howard County Board of Education, whether by election, appointment or any other means?

Does the Maryland Constitution prevent minors from holding the office of a binding voting position on the Board of Education of Howard County, a board which possesses general governmental power?

(G) A particularized statement of why review of those issues by the Court of Appeals is desirable and in the public interest.

Maryland's practice of allowing minors to serve in a binding voting capacity on school boards is largely unique and unprecedented. While only a minority of Maryland counties permit the student members of their respective boards to cast a binding vote on any issues, Howard County permits a binding vote by the student member. The student member is elected to this position of general governmental power by middle school and high school students enrolled in Howard County public schools aged 11 and older. No Maryland appellate court has ruled on the constitutionality of minors holding an office of general governmental power, nor has any Maryland appellate court ever decided whether minor children aged 11 and older can validly elect or appoint a member to a governmental board possessing general governmental powers. The issue is of heightened

importance during the current pandemic where the student member is entitled to vote on preventing the return of children in Howard County to full in-person instruction.

(H) A reference to pertinent constitutional provisions, statutes, ordinances, or regulations.

Maryland Constitution, Declaration of Rights, Articles 7 and 24; Maryland Constitution Article 1 §§ 1, 4, 5, 7, 9, 11, 12, 10; Maryland Constitution Article 8 §1; Maryland Constitution Article 17 §§1, 2, 3, 5, 7, 9; Maryland Ann. Code, *Education*, §§ 3-104, 3-114; 3-701; 4-108; Maryland Ann. Code, *Election Law*, §§3-102; 8-801.

(I) A concise statement of the facts material to the consideration of the questions presented.

The Board of Education of Howard County (“Board”) is considered a state agency that holds general governmental powers. The Board consists of seven members elected by registered voters who are adult citizens of Howard County and one student member of the Board elected by the local students in grades 6 through 11, aged 11 and older. The only qualifications for the Board’s student member are that the student member must be a *bona fide* resident of Howard County and a regularly enrolled junior or senior year student from a Howard county public high school.

To be chosen as a student member, students must be nominated by their principals and attend the Howard County Association of Student Counsels’ Convention. From the delegates attending the convention, two students are chosen to run for the student member position. Then, there is an election among all students from grades 6 to 11 who

attend a Howard County public school. The winner of the student election joins the Howard County Board of Education for one year, starting July 1st following the election.

With a few exceptions, in Howard County “the student member has the same rights and privileges as an elected member,” MD. CODE ANN., Educ. §3-701(f)(5) (2020). The student member is contemplated to be a minor who has not yet reached the age of 18. The student member is voted into a specially elected position by middle and high school students aged 11 and older, only a small percentage of whom would be the legal age to vote for an adult candidate in a regular school board election. The student member (as well as the election process for the student member) is uniquely exempt from the State’s election laws.

The student member is entitled to an equally weighted vote on significant and substantial matters affecting the entire county-wide school system, such as the return of students to receiving appropriate and necessary in person instruction during the pandemic. In the three Board votes leading up to the filing of this case that related to returning Howard County’s children to in-person instruction, the student member cast a vote and the overall Board vote resulted in a four to four tie vote, preventing a majority needed for passage of the vote. Specifically, on November 16, 2020, a Board motion on a decision relating to considering returning students through a hybrid model in the second semester failed by a four to four vote. On November 16, 2020, a Board motion to direct the Superintendent to look at other options for the hybrid model failed by a four to four vote. Finally, on December 7, 2020, a Board motion to direct the superintendent to make

a reopening decision based on metrics and operational capacity failed by a four to four vote. The student member cast a vote against each of these motions.

These stalemate votes and the involvement of a student member voting on reopening decisions will continue to plague the Board and render it incapable of securing meaningful and appropriate in person education for the 56,000 students in Howard County. This is evidenced by the fact that Howard County leads the metropolitan area in the percentage of residents inoculated from COVID-19, yet also leads the State and the nation by having one of the lowest percentage of students receiving an in-person education.

(J) A concise argument in support of the petition.

Section 3-701(f) of the *Education Article* violates Article 1, Section 1 of the Maryland Constitution because it permits persons under 18 years old to vote in a general election by allowing minors from grades 6 to 11 in Howard County public schools to vote for a voting member of the Board, and it allows a minor to hold an otherwise adult-elected position, which in turn dilutes the voting rights of adult voters in Maryland. Article I, Section 1 of the Maryland Constitution provides that “every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State.” Md. Const. Art. I, § 1 (emphasis added). This Constitutional age requirement for voting has been acknowledged by this Court. *See Maryland Green Party v. Maryland Bd.*

of Elections, 377 Md. 127, 141 (2003) (“The right to vote is conferred upon any United States citizen, age eighteen or older, who is a Maryland resident, and who is not disqualified by a criminal conviction or mental disability.”).

The Election by Minors Violates Maryland’s Constitution

Both parties to the case and the trial court agreed that if the student member of the Board held an “elected” office, the statute would violate Maryland’s Constitution. *See* Memo Decision at 8, attached as Exhibit B. The legislation establishing the student member position referenced the process by which the student member obtains a seat on the Board as an “election” or as “elected” five times and never once used the word appointment. *See* Maryland Ann. Code, *Education*, §3-701(f). Even with this plain language, the Appellees argued that the position was an “appointed” position. The Maryland *Education Article* expressly created boards of education that are appointed, elected or a combination of appointed and elected boards, yet Howard County’s Board was explicitly designated as an “elected” board. *See* Maryland Ann. Code, *Education*, §3-114. Remarkably, Judge Richard Bernhardt of the Circuit Court for Howard County disagreed with both litigants and instead concluded that the student member position on the Board was neither elected nor appointed. *See* Memo Decision at 13.

Judge Bernhardt identified that the central issue of “whether the selection process is violative of the Maryland Constitution turns on whether the student member is an elected member of the Board.” Memo Decision at 8. Judge Bernhardt rejected the Appellant’s contention that the student member was an elected position, citing the “oft-

quoted definition” of an election as “‘the ‘combined actions of voters and officials meant to make a final selection of an office holder.’”” Memo at 9 (quoting *Capozzi*, 396 Md. at 78 (quoting *Foster v. Love*, 522 U.S. 67, 71 (1997))). Later in Judge Bernhardt’s decision, he curiously explained that “the Court believes the General Assembly used the words ‘election’ and ‘vote’ in a non-technical manner as a way to efficiently describe the process whereby the student stakeholders express their opinion and select their representative.” Memo Decision at 11. As Judge Bernhardt also acknowledged, this process of selection by the stakeholders was supervised by the Board, which was responsible for the “confirmation of election results.” See Memo Decision at 5 (citing Md. Code Ann., Education, 3-701(f)(2)). There is simply no way to reconcile how Judge Bernhardt concluded that the process he was reviewing was different from “oft quoted” definition of “election,” so as to make it something other than an election.

Judge Bernhardt also expressly ruled that he was “not finding that the student member position meets the statutory definition of an ‘appointment’ as it relates to boards of education . . .”. Judge Bernhardt explained his belief that the student member of the Board is “selected neither through traditional appointment nor by popular election.” Memo at 13. Ultimately, Judge Bernhardt ruled that it must have been the General Assembly’s intent 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.” Memo at 13. Judge Bernhardt’s creative solution to justify the student election statute was compelled by his belief that he could not “conclude that the legislature intended to

create a student member position that was elected and yet wholly incapable of complying with constitutional law.”

There are several fundamental flaws in the lower Court’s reasoning that rejected the Appellant’s challenge of the student member election. First, Judge Bernhardt repeatedly disregarded the plain meaning of both the Constitution’s requirement of being 18 years of age to vote in an election, as well as the statutory language that repeatedly references the “election” of the student member. Judge Bernhardt’s review of Maryland’s Constitution ignored the fact that it references “elections” and “appointments” repeatedly, yet never once expresses that there is a third method of placing a person in an office that holds general governmental power. Judge Bernhardt’s decision never addressed the fact that even if it the student member came into power through an appointment or other method, the appointing or nominating authority is now vested in minor children.

Judge Bernhardt never once addressed in his opinion the principal contention raised by the Appellants that regardless of the label placed on the electing or appointing authority, they are minors and ineligible to vote or place individuals into a position of general governmental power. Judge Bernhardt did not address why a group of minors would be unquestionably disqualified from formally electing a student member to office, yet the same group of minors would have the qualifications necessary to elect the same person to office through a less than formal election process.

Judge Bernhardt's decision requires review because it has effectively granted suffrage to minors 11 years of age and older without a constitutional amendment. The decision has also created a third constitutional method of placing a person in a position of general governmental power that is not referenced in Maryland's Constitution. Finally, by allowing a position on an elected Board with voting power to be held by a person who most of the adult voters in that jurisdiction are precluded from selecting, Judge Bernhardt's ruling has improperly diluted the voting rights of Howard County registered voters.

It is Unconstitutional for a Minor to Hold an Office in Government

The second aspect of Judge Bernhardt's ruling that requires review is the acceptance of a minor, who is admittedly unqualified to vote in an election, to hold an office that exercises a binding vote and general governmental powers. The first basis this ruling was Judge Bernhardt's interpretation of Article I Section 12 of the Maryland Constitution. Judge Bernhardt held that even though this section requires a person who holds "elective office" to be 18 years of age and registered to vote, this requirement does not apply to appointments. Since the provision does not apply to appointments, Judge Bernhardt reasoned that it also does not apply to the third method of placing a person in a position of general governmental power that he believes was envisioned when the student Board position was created.

Judge Bernhardt's reasoning is flawed based on a plain reading of Article 1 Section 12, which provides:

Except as otherwise specifically provided herein, a person is ineligible to enter upon the duties of, or to continue to serve in, and elective office created by or pursuant to the provisions of this Constitution if the person was not a registered voter in his 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.

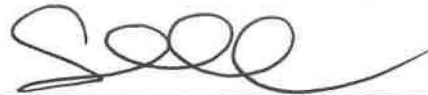
Judge Bernhardt placed emphasis on the words "elective office" and viewed this section as only applying to elected officials, not appointed officials or officials obtaining their governmental office through other means. Judge Bernhardt viewed the reference to "appointment" as merely referring to positions that were held by elected officials who were appointed after an elected official could not fulfill their elected term, requiring a temporary appointment to that term. An equally logical interpretation of this provision would be that it applies to all positions, whether elected or appointed. The phrase "or if any time thereafter, and prior to completion of the term, the person ceases to be a registered voter" suggests that the section was intended to create a continuous requirement for all public officeholders to be registered to vote. This alternate reading would be more consistent with this Court's prior acknowledgement in *Broadwater v. State*, 306 Md. 597 (1986), of a lower Court's interpretation that:

Registration manifests the fact of residency; it is indicative of the candidate's seriousness and his willingness to accept the new community as his home and involve himself meaningfully in its affairs. These are legitimate state interests. Registration also protects against fraudulent voters and candidates, **ensuring that the underage and convicted felons are disqualified from seeking office.**

306 Md. at 607 (emphasis added) (internal quotation marks and citations omitted).
Permitting minors under the age of 18 to hold a voting position on the Board would appear to circumvent and is certainly inconsistent with of Article I, Section 12.

The lower court recognized that no Maryland decision has squarely addressed whether a minor can hold a position of general governmental power. Judge Bernhardt felt constrained to give deference to the General Assembly's intent to allow minors to hold office, recognizing the need for the appellate courts to provide guidance on this issue. Judge Bernhardt explained that "[a]bsent specific guidance imposing an age requirement to exercise general governmental power, the Court will not read one into existence." This petition for certiorari seeks the guidance that would benefit the lower courts on this important constitutional issue.

WHEREFORE, the Appellants Traci Spiegel and Kimberly Ford, on their own behalf and on behalf of their minor children, request that this Court grant their Petition for Certiorari and consider this matter on appeal.



Anthony M. Conti (CPF# 9912140151)
CONTI FENN LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201
Phone (410) 837-6999
Facsimile (410) 510-1647
tony@contifenn.com

Attorney for Appellants

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This petition contains 3038 words, excluding the parts of the petition exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

Anthony M. Conti

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April 2021, a copy of the foregoing Petition for Certiorari was filed with the Clerk of the Court of Appeals via MDEC, and a copy was served upon the following via electronic and regular mail:

Mark C. Blom
General Counsel
Howard County Public School System
10910 Clarksville Pike
Ellicott City, Maryland 21042
Mark_bloom@hcpss.org

Nicolas Y. Riley
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
nr537@georgetown.edu
Attorneys for Appellee

Mitchell Y. Mirviss
Emily J. Wilson
Elizabeth A. Sines
VENABLE LLP
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
mymirviss@venable.com
ejwilson@venable.com
esasines@venable.com
Attorneys for *Amici Curiae*



Anthony M. Conti (CPF# 9912140151)
CONTI FENN LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201
Phone (410) 837-6999
Facsimile (410) 510-1647
tony@contifenn.com
Attorney for Appellants