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IN THE
COURT OF APPEALS OF MARYLAND

September Term 2021

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No. 18

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TRACI SPIEGEL, et al.,

Appellants,

v.

BOARD OF EDUCATION OF HOWARD COUNTY,

Appellee.

_____

On Appeal from the Circuit Court for Howard County
(Richard S. Bernhard, Judge)
Pursuant to a Writ of Certiorari while before Court of Special Appeals of Maryland

_____

BRIEF OF APPELLEE BOARD OF EDUCATION OF HOWARD COUNTY

_____

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INTRODUCTION

The Maryland General Assembly has determined that the goals of its public-education system are best served by establishing a student board member seat with voting power on various county boards of education throughout the State. These seats vary in their selection methods and in the extent of the student member's voting power. But they share common features: they give students a meaningful voice in the policies that affect their school lives, and they involve students in the actual process of governance. For over a decade, Appellee Board of Education of Howard County (the "Board") has benefited from the General Assembly's decision to create a voting student member position for Howard County.

This lawsuit is an attempt by Appellants Traci Spiegel and Kimberly Ford, parents of children who attend Howard County Public School System ("HCPSS") schools, to accomplish through litigation what they were unable to achieve through the democratic process. Appellants disagree with the Board's decision not to reopen HCPSS schools for in-person learning at the height of the COVID-19 pandemic. Unable to attack the Board's undisputed authority to decide whether in-person learning is consistent with student safety and the best available public-health guidance, Appellants seek to eliminate the Board's Student Member—who, along with three adult elected members, voted against reopening HCPSS schools—by challenging the constitutionality of that position.

Appellants primarily contend that the Student Member position violates Article I, sections 1 and 12 of the Maryland Constitution, which respectively prohibit minors from voting in popular elections or from serving in government offices filled through popular

elections. The circuit court correctly rejected Appellants' meritless claims because the Student Member position is not filled through a popular election but, rather, through a multi-step selection process overseen by HCPSS employees and the Board itself, in which few if any registered voters participate. Because the General Assembly acted well within its ample authority in creating this position and establishing its selection method, this Court should affirm the circuit court's well-reasoned opinion.

QUESTIONS PRESENTED

(1) Does Education Article § 3-701(f) violate Article I, section 1 of the Maryland Constitution?

(2) Does Education Article § 3-701(f) violate Article I, section 12 of the Maryland Constitution?

STATEMENT OF FACTS

A. Statutory and Factual Background

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

Since 2007, the Howard County Board has been an eight-member body. Md. Code Ann., Educ. § 3-701(a)(1). 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. *Id.* § 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 elected members, the Student Member represents all Howard County residents. Howard County Public School System, *Policy 2010 – Student Representation*, at IV.B.7 (July 1, 2017), https://perma.cc/7SY4-LJVE (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 Board matters, including substantial topics such as appointment and salary of the county superintendent; staff and student discipline; and budgetary matters. Md. Code Ann., Educ. § 3-701(f)(7). For matters on which the Student Member may vote, the affirmative vote of five members of the Board are required to pass a motion; otherwise, four members' affirmative votes are required. *Id.* § 3-701(g).

A multi-step process governs the selection of the Student Member of the Howard County Board. In January of each year, HCPSS high-school 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. Howard County Public School System, *Policy 2010 Implementation Procedures – Student Representation*, at III.B (July 1, 2017), https://perma.cc/4HG9-6RLN; *see also* Md. Code Ann., Educ. § 3-701(f)(3)(i) (directing the Board to approve the selection process for the Student Member). Then, each HCPSS middle school and high school forms a committee composed of the school's principal, a student-government advisor or a counselor, and three students chosen by the principal. *Id.* at III.C. Those committees select students to serve as delegates to a convention, where the delegates select two candidates for the Student Member position and an alternate from among the student applicants. *Id.* at III.C–D. 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 III.E.1–2. The Superintendent or his designee certifies 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.* at III.E.3; *see also* Board of Education of Howard County, *Meeting Agenda Item* (June 11, 2020), https://perma.cc/C6XJ-P6PD (confirming the Student Member who was in office at the time Appellants filed suit).

B. Procedural Background

Section 3-701(f) and its implementing procedures have been on the books for over a decade. 2007 Md. Laws 3887 (codified at Md. Code Ann., Educ. § 3-701). Yet Appellants did not file this lawsuit until December 16, 2020, months into the then-serving Student Member's tenure. Appellants filed this case not in response to any change to the Student Member position or the process through which the position is filled. Rather, Appellants filed this lawsuit because they did not like how the Student Member voted: During the 2020-2021 school year, the Student Member voted along with three elected members against reopening HCPSS schools for in-person learning during the height of the COVID-19 pandemic. Appellants' Br. 5–6; (E11–16, E18–19).

After failing to achieve their desired outcome politically, Appellants filed suit to challenge § 3-701(f). Specifically, Appellants alleged that § 3-701(f)'s procedure for filling the student seat on the Board violates certain provisions of Maryland's Constitution. (E21–23). Appellants sought a declaratory judgment holding that certain provisions of § 3-701 are unconstitutional, as well as an injunction that would strip the current Student Member of all voting power. (E24).

In the circuit court, Appellants moved for summary judgment shortly after filing suit. (E26). They did not submit any evidence in support of their motion, relying exclusively on the allegations in their verified complaint. The Board opposed Appellants' motion and moved to dismiss or, in the alternative, for summary judgment. (E36).

The circuit court denied Appellants' motion and entered judgment for the Board. The court concluded that § 3-701 does not violate Article I, section 1 because the General

Assembly deliberately established a non-elective selection process for the Student Member. (E49). Noting that elections are not required for school-board positions, the court observed the many ways in which the student selection process does not resemble a popular election and concluded that "the General Assembly explicitly set apart the student member of the board position and the selection process for the same" from the elected members of the Board. (E46-48). The "General Assembly used the words 'election' and 'vote' in a non-technical manner" in § 3-701, the court further reasoned, "as a way to efficiently describe the process whereby the student stakeholders express their opinion and select their representative." (E49). The court also held that § 3-701 does not violate Article I, section 12 because that provision "does not set an age or voter registration requirement on non-elective officials," and the Maryland Constitution nowhere imposes "an age requirement to exercise general governmental power" for non-elective officials. (E55). The court therefore upheld § 3-701(f) as a valid exercise of the General Assembly's authority. (E55). Appellants appealed and sought immediate review in this Court, which the Court granted.

STANDARD OF REVIEW

This Court reviews de novo the circuit court's "interpretation[ ] and application[ ] of Maryland constitutional[ ] [and] statutory . . . law." *Peterson v. State*, 467 Md. 713, 725 (2020). "The rules governing the construction of statutes and constitutional provisions are the same." *Luppino v. Gray*, 336 Md. 194, 204 n.8 (1994). Among those rules is the maxim that "enactments of the [General Assembly] are presumed to be constitutionally valid." *In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 579

(2015) (alteration in original) (quoting *Dep't of Nat. Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 218 (1975)). That "presumption prevails until it appears that the [statute] is invalid or obnoxious to the expressed terms of the Constitution or to the necessary implication afforded by, or flowing from, such expressed provisions." *Id.* (alteration in original) (quoting *Linchester Sand & Gravel*, 274 Md. at 218); *see also State's Attorney of Balt. City v. City of Baltimore*, 274 Md. 597, 605 (1975) ("[T]here is a strong presumption that acts of the General Assembly are constitutional, and . . . this Court will not declare a statute invalid unless its invalidity is absolutely clear . . . .").

ARGUMENT

I. Section 3-701(f) is consistent with Maryland's Constitution.

Appellants' claims rest on the premise that the Student Member position is filled through a popular election in which Howard County's registered voters must be allowed to participate. That premise is wrong. Maryland constitutional provisions that regulate elective offices therefore have no application to the Student Member position, and this Court should reject Appellants' claims.

A. Article I, section 1 does not apply to the Student Member position, which is not filled through a popular election.

Article I, section 1 of the Maryland Constitution provides that "every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections." Md. Const. art. I, § 1. This Court has held that this provision both guarantees the right to vote to

Maryland's adult residents and prohibits minors and nonresidents from voting in popular elections. *See State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 60 (2013). Appellants allege that § 3-701(f) violates Article I, section 1 by "grant[ing] suffrage to minors eleven years of age and older." Appellants' Br. 7.

That argument misconstrues both § 3-701(f) and Article I, section 1. The General Assembly has broad powers to create non-elective offices—including many school-board member positions—and to fill them through any selection process that it chooses. As the circuit court recognized, the General Assembly decided that the Student Member position should be filled through a selection process completely unlike popular elections. Instead, the General Assembly created a multi-step process carefully overseen by HCPSS faculty and staff and ultimately subject to the Board's approval. Although HCPSS students vote for a candidate as part of that process, that does not render it a popular election in the constitutional sense. Because the General Assembly decided not to fill the Student Member position through a popular election, Article I, section 1 is inapplicable to that office.

1. The General Assembly has broad discretion over how school-board members are selected.

The General Assembly has broad discretion over how statutorily created government offices like the Student Member position should be filled. It is well established that where a government office is of legislative creation, the General Assembly has the power to determine "the mode of filling" that office. *Buchholtz v. Hill*, 178 Md. 280, 287-88 (1940). Indeed, this Court has long recognized that the

Legislature's power to "designate by whom and in what manner the person who is to fill the office shall be appointed" is an important part of Maryland's constitutional structure. *State v. Falcon*, 451 Md. 138, 170 (2017) (quoting *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 409 (1981)); *Scholle v. State*, 90 Md. 729, 743 (1900) (same); *Davis v. State*, 7 Md. 151, 151–52 (1854) (same). As this Court explained in *Buchholtz*, "[t]he power to select the public officials of a State resides originally in the people, who may provide in their Constitution how the power shall be exercised, or leave to the Legislature the privilege of providing for the selection of any officials." 178 Md. at 284.

The Constitution neither requires the creation of local boards of education nor sets the mode of filling the position of school-board member, leaving that authority wholly within the hands of the General Assembly. Article VIII, section 1 charges the General Assembly with "establish[ing] throughout the State a thorough and efficient system of Free Public Schools" and with "provid[ing] by taxation, or otherwise, for their maintenance." Md. Const. art. VIII, § 1. Appellants erroneously claim that "[l]ocal boards of education in Maryland are" therefore constitutionally required. Appellants' Br. 19. But this Court has already held that "[c]ounty school boards are creatures of the General Assembly." *Chesapeake Charter, Inc. v. Anne Arundel Cty. Bd. of Educ.*, 358 Md. 129, 135 (2000). As the circuit court in this case correctly observed, although the General Assembly created school boards pursuant to its constitutional authority, the Constitution does not "mandate a system of various boards of education." (E42); *see also* (Apx. 1) (letter from Richard E. Israel, Assistant Att. Gen., to the Hon. Judith Toth, dated Jan. 31, 1983, explaining, in response to a question about a student member position on

the Montgomery County Board of Education, that "[a]s *legislative*, rather than constitutional offices, the creation and abolition of these positions, the manner in which they are filled, and the duties are entirely a matter for the General Assembly" (emphasis added)).

Even if Article VIII, section 1 did require the creation of local school boards, it nonetheless says nothing about the proper method of selecting school board members, leaving that authority in the hands of the General Assembly. *See Buchholtz*, 178 Md. at 284 (explaining that, where the Constitution does not specify a method, the Legislature has "the privilege of providing for the selection of any officials"); (E42) (circuit court concluding that Article VIII, section 1 does not "specify that school officials must be elected"). The General Assembly has established a variety of school board selection processes tailored to fit each jurisdiction, creating boards with a mix of appointed, elected, and student members. *See* Md. Code Ann., Educ. Title 3 (establishing school boards and selection processes for each jurisdiction). And this Court has never suggested that the Maryland Constitution *requires* elected school boards. *Cf. Falcon*, 451 Md. at 179 (upholding the constitutionality of a wholly appointive system of school-board member selection for the Anne Arundel County School Board).

It is true, that, as Appellants note, Article XVII, section 7 provides that certain constitutional provisions regulating the timing of elections and terms of office do not "apply or refer to . . . any *elective* local board of education." Md. Const. art. XVII, § 7 (emphasis added); Appellants' Br. 19-20. But that provision does not *mandate* the creation of any local board of education. It merely exempts from certain constitutional

provisions any local boards of education that the General Assembly elects to establish and to designate for selection through popular election. And, by excluding only "elective" boards from the relevant constitutional provisions, Article XVII, section 7 reflects the drafters' intent that the General Assembly should have discretion to designate selection processes other than popular elections to fill any school-board positions that it chooses to create.

Finally, it is well established that, for legislatively created, non-elective public offices like the Student Member position, the General Assembly has broad discretion to decide *who* has the power of appointment. *Falcon*, 451 Md. at 170; Md. Const. art. II, § 10 (giving the Governor authority to 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 added)). The General Assembly may give this authority not just to government officials, but also to private associations. *See Falcon*, 451 Md. at 148-49, 179 (upholding the constitutionality of a statute conferring appointment authority on, inter alia, the county teachers' association, a county branch of the NAACP, CASA de Maryland, and a local Chamber of Commerce); *McCurdy v. Jessup*, 126 Md. 318, 323 (1915) (upholding the constitutionality of a statute requiring county commissioners to appoint as game warden an individual recommended by a private association). Although Appellants suggest that § 3-701(f) does not establish a "valid appointing authority" because it involves minors in the selection process, Appellants' Br. 40-41, they cite no constitutional provision that would constrict the General Assembly's authority in this

way.[1] Thus, because the Student Member position is non-elective, as explained below, the General Assembly had broad authority to decide to create the Student Member position and determine who should have the power to select which student will fill it.[2]

2. The General Assembly chose not to fill the Student Member position through a popular election, rendering Article I, section 1 inapplicable.

There is no doubt that the General Assembly has exercised its discretion to create a selection process for the Student Member position that is something other than a popular election. That is clear from § 3-701's plain text, case law defining the attributes of a popular election, and the numerous ways in which the process established in § 3-701(f) departs significantly from the procedures that govern popular elections in Maryland. Because Article I, section 1 applies only to popular elections, it is inapplicable to § 3-701(f). *Cf. Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397

[1] *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), which Plaintiffs cite for the concept of a "valid appointing authority," is inapposite, as it involved no process whatsoever separate from a popular election. *See id.* at 273 (explaining that elected legislators became members of local delegations "not through appointment but rather simply by virtue of their popular election to the legislature").

[2] The circuit court expressed some doubt about whether the Student Member qualifies as an "appointed position in the same way that adult members are appointed" and instead concluded that "the General Assembly intended to create a third method of selection, specific to student members." (E51). Appellants take issue with the circuit court's characterization of this "third method." *See, e.g.*, Appellants' Br. 23-24. Regardless of whether the circuit court should have categorized the position as appointed or simply non-elective, its central intuition falls squarely within the *Buchholtz* and *Falcon* line of cases: that the General Assembly has broad authority to "designate by whom and in what manner" a legislatively created position shall be filled. *Falcon*, 451 Md. at 170; (E52-53) ("Section 3-701(f) is a law creating a different mode of selection for the student member position . . . . This Court could locate no law curbing the General Assembly's creativity in divining the board member selection process.").

U.S. 50, 58 (1970) (explaining that the U.S. Constitution's voting-rights protections do not apply "where a State chooses to select members of an official body by appointment rather than election" (citing *Sailors v. Bd. of Educ. of Kent Cty.*, 387 U.S. 105 (1967)).

Text. The plain text of § 3-701 makes clear that the General Assembly has established a selection process for the Student Member position that is not a popular election governed by Article I, section 1. 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 Ann., Educ. § 3-701(a)(1) (emphases added); *compare, e.g.*, *id.* § 3-701(b)(1) ("A candidate who becomes an elected member of the county board shall be a resident and registered voter of Howard County."), *with id.* § 3-701(f)(1) ("The student member shall be a bona fide resident of Howard County and a regularly enrolled junior or senior year student from a Howard County public high school."). That distinction reflects a clear choice by the General Assembly to employ a different selection process and different qualifications for the "student member" than for the "elected members."[3]

Appellants argue that the selection process established by § 3-701(f) must be considered a popular election because the word "election" is used at certain points in the statute. Appellants' Br. 15–16 (citing Md. Code Ann., Educ. § 3-701(f)(2), (3)). But the circuit court correctly concluded that the statute uses "the words 'election' and 'vote' in a

[3] Appellants seek to dismiss this statutory distinction as "purely . . . semantic[]." Appellants' Br. 17. But the General Assembly could have used other terms to distinguish the nonstudent Board seats—like "adult" or "full" members—and the General Assembly's choice of language should be understood to be intentional.

non-technical manner as a way to efficiently describe the process whereby the student stakeholders express their opinion and select their representative." (E49). That analysis is consistent with the U.S. Supreme Court's conclusion in *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967), that a process for selecting school-board members was non-elective, despite explaining that the convention delegates in the scheme at issue there "cast . . . votes" for the candidates as the relevant "electorate." *Id.* at 109 n.6 (1967); *see also infra* at 17-18 (discussing *Sailors*). "Election" is simply the most convenient shorthand to describe a vote taken by the student body, even if that process does not amount to a popular election in a constitutional sense.

Not surprisingly, Attorney General Stephen H. Sachs reached the exact same conclusion when he opined on the constitutionality of a bill creating a student seat with voting power on the school board in Prince George's County. *See* Md. Att'y Gen. Op. No. 80-030, 1980 WL 127893 (Mar. 12, 1980) (unpublished). The bill provided that the Student Member would be "elect[ed]" by a group of student delegates. Finding the use of the term "elect" in the statute "not dispositive of the fundamental" constitutional question, the Attorney General concluded that the selection process was "more properly regarded as appointive rather than elective." *Id.* at *1. In reaching that conclusion, Attorney General Sachs rejected the very theory that Appellants have raised here, stating: "If, as we conclude, the selection process is considered appointive from a constitutional point of view, then the question you raise of enfranchising students in possible violation

of Article I, § 1 of the State Constitution is not an issue." [4] *Id.* at *2; *see also id.* at *1 n.1 (noting that the bill "expressly distinguishes between the nine 'elected members,' as there defined, and the one student member—thus evidencing an intent not to consider the student member as one who is 'elected'").

In addition to attempting to distinguish Attorney General Sachs's opinion on erroneous and irrelevant factual differences,[5] Appellants seek to support their position by quoting a passage from a letter attached to the Attorney General's opinion in which Assistant Attorney General Richard E. Israel suggested that the bill could run afoul of the Fourteenth Amendment's voting doctrines *if* it had "enfranchised students who were not yet eighteen years old." Appellants' Br. 22 (quoting Md. Att'y Gen. Op. No. 80-030, 1980 WL 127893, at *4). But Attorney General Sachs *expressly disagreed* with that

[4] The Attorney General's opinion is particularly valuable here because it shows a long-running understanding of the General Assembly's intent to create non-elected student member positions on similarly structured boards of education. As this Court has explained, although "courts are not bound by an Attorney General's Opinion, . . . 'when the meaning of legislative language is not entirely clear, such legal interpretation should be given great consideration in determining the legislative intention.'" *Chesek v. Jones*, 406 Md. 446, 463 (2008) (quoting *State v. Crescent Cities Jaycees*, 330 Md. 460, 470 (1993)).

[5] Appellants argue that the Attorney General's opinion is inapposite because the Prince George's County Board of Education includes both elected and appointed members. Appellants' Br. 21-22. At the time, however, the Prince George's County Board did not have any appointed, adult members, so it is in fact analogous to the Howard County Board's composition here. *See* 1980 WL 127893, at *3. Moreover, Appellants note that the selection process in the proposed bill involved an election among student delegates, not the whole student body. But, as the Attorney General's opinion makes clear, it is irrelevant from a constitutional perspective whether the student selection process is undertaken by an association, in the case of Prince George's County, or the students themselves, in the case of Howard County. *See id.* at 2 n.3. In neither case does the statute create a popular election.

conclusion, recognizing that a selection process in which only minor students and virtually no registered voters participate simply is not a popular election subject to constitutional voting protections. Md. Att'y Gen. Op. No. 80-030, 1980 WL 127893, at *2 n.3.[6]

Confronted with the tension between § 3-701(a)'s plain language and their claim, Appellants argue that the Student Member position must be an elective office because § 3-114 of the Education Article lists Howard County among the counties that have only elected members on their boards of education. Appellants' Br. 14–15. But § 3-114 refers only to the non-student positions on the various county boards. That is clear because the subtitle under which § 3-114 is housed creates seven board positions for a jurisdiction of Howard County's size—the same number as the number of the elected members of the Board. *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—who enjoys full voting privileges—is clearly appointed, *id.* § 3-2A-05(a)(2); *see also id.* § 3-2A-06.[7] And just this year, the

[6] In response to a later request regarding the Montgomery County student board member, Assistant Attorney General Israel clarified: "there is no constitutional objection to providing for the selection of a student member by student representatives *or even the students themselves* and for the election of the remaining members of the qualified voters of the county." (Apx. 2) (emphasis added).

[7] Board of Education Handbook: The Board of Education of Anne Arundel County 5 (last updated Dec. 20, 2017), https://perma.cc/6FD8-2YBW ("The Student Board Member is elected for a one-year term each year by the Chesapeake Regional Association of Student Councils (CRASC). The student's term of office begins on July 1 after the election upon confirmation and *appointment by the Governor*, and shall continue until a successor is appointed and qualifies." (emphasis added)).

General Assembly created in Charles County a student-member position with limited voting power who is appointed by the Charles County Association of Student Councils. 2021 Md. Laws ch. 405 (codified at Md. Code Ann., Educ. § 3-501(h)). This was done even though Charles County is another jurisdiction whose adult board members all are elected. Md. Code Ann., Educ. § 3-114(a)(6). Section 3-114 therefore does not indicate the General Assembly's intent to create a popular election to select the Student Member for the Howard County Board.

Case law. The very fact that minors who are ineligible to vote in Maryland elections select the Student Member is further evidence that the General Assembly did not intend to create a popular election through the selection process it established in § 3-701(f). As the U.S. Supreme Court has held in delineating which offices are governed by the Fourteenth Amendment's voting doctrines, an office is "elective" in a legal sense only if it is filled "directly or indirectly through an election in which the residents of the [relevant jurisdiction] participate."[8] *Sailors*, 387 U.S. at 109 & n.6; *see also Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 55, 59 (1970) (explaining that the one-person, one-vote principle of the Fourteenth Amendment applies only once "a State has decided to use the process of popular election" that is "open[] to all qualified voters"). Because delegates at a convention voted for the school-board members in

[8] Although *Sailors* and its progeny concern the Fourteenth Amendment's voting doctrines and not Article I, section 1, provisions of the Maryland Constitution that have "counterparts in the United States Constitution . . . are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or *generally* should be interpreted in the same manner as federal provisions." *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 619 (2002) (emphasis in original).

Sailors—and not the county's electorate as a whole (i.e., its registered voters)—the Court considered the position non-elective and "basically appointive." *Id.* at 110. Howard County's electorate is similarly excluded from participating in the selection of the Student Member. The process established in § 3-701(f) therefore is not a popular election in the constitutional sense.

Appellants resist that conclusion by citing *ARC Students for Liberty Campaign v. Los Rios Cmty. Coll. Dist.*, 732 F. Supp. 2d 1051 (E.D. Cal. 2010). Appellants' Br. 26–27. In that case, a federal district court held that a nonvoting student trustee of a community college district was popularly elected, even though the college's student body selected the trustee without participation from the rest of the jurisdiction's electorate. *ARC Students*, 732 F. Supp. 2d at 1061. But *ARC Students* does not reach as far as Appellants claim. There, *students* who should have been allowed to vote under state law challenged the district's decision not to count their votes; they did not argue, as here, that the exclusion of *others* from the statutory scheme was unlawful. *Id.* at 1061 (distinguishing another case because it did not address "a claim based on the District's failure to follow a statute"). *ARC Students* simply did not address the question whether and when all registered voters have a constitutional entitlement to vote outside of the scope of a state's statutory scheme.

What is more, *ARC Students'* analysis of the popular election question was flawed: That court misunderstood *Hadley* to hold that the constitutional concept of a popular election includes those limited "to a particular group or class of people." *Id.* (alteration in original) (quoting *Hadley*, 397 U.S. at 59). But that language in *Hadley* merely left open

the possibility that an otherwise open election can still be considered a popular election when a jurisdiction adds additional voting qualifications besides traditional age and residency requirements.

Here, the selection process established by § 3-701(f) so far departs from the constitutional concept of a popular election that it would be absurd to assume that the General Assembly intended for the Student Member to be an elective office. As the circuit court concluded, "[t]he General Assembly knows how to establish an elective office and has chosen a different method of selection . . . ." (E49.) Section 3-701(f) excludes nearly every otherwise eligible voter in Howard County from participating in the selecting the Student Member, making it wholly unlike cases like *Hadley* in which the state chose to select an official in an election "opened to all qualified voters." *Hadley*, 397 U.S. at 56. As the Supreme Court recognized in *Sailors* and reiterated in *Hadley*, "viable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." *Id.* at 59 (quoting *Sailors*, 387 U.S. at 110-11).

The same is true of the Maryland Constitution. Appellants incorrectly argue that this Court in *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30 (2013), implicitly construed Article I, section 1 in a way that is broad enough to encompass the selection process established in § 3-701(f). Appellants' Br. 12–14. *Snyder* held that Article I, section 1's age and residency requirements apply to nonpartisan primary elections for boards of education, such that 17-year-olds who will turn 18 by the next

general election must be allowed to vote in the primary election. 435 Md. at 61-62. From this holding, Appellants extrapolate that Article I, section 1 must also apply to the Student Member position because it is filled through an "election[ ] that can have the result and effect of placing someone into a democratically-elected position with binding voting power." Appellants' Br. 13–14.

That reading of *Snyder* grossly overstates its holding in at least two respects.[9] First, school-board primaries and the Student Member selection process established in § 3-701(f) differ completely. All eligible voters can participate in a jurisdiction's nonpartisan school-board primaries. Md. Code Ann., Elec. Law § 8-802(a)(1)(ii). And although partisan primaries (which were not at issue in *Snyder*) may be open only to eligible voters who are members of the relevant party, *see* Md. Code Ann., Elec. Law § 8-202(c) (giving party chairs discretion "to permit voters not affiliated with the party to vote in the party's primary election"), they are open to all qualified voters who fall within the "particular group or class of people." *Hadley*, 397 U.S. at 59. It is therefore logical that this Court has concluded that primary elections qualify as elections under Article I, section 1. *See Lamone v. Capozzi*, 396 Md. 53, 89 (2006) (reaching this conclusion). Section 3-701(f), by contrast, is closed to nearly all eligible voters in Howard County,

[9] Appellants also mischaracterize *Snyder* as suggesting that it would be undemocratic to permit minors to vote in popular elections. But there, this Court construed Article I, section 1 in favor of *more*, not *less* participation, explaining that to do otherwise (i.e., to prohibit 17-year-olds from voting in primary elections) would unnecessarily "impute an anti-democratic meaning upon" Article I, section 1. *Snyder*, 435 Md. at 60.

demonstrating that the General Assembly wanted to create a position by and for HCPSS students.

The rule Appellants extrapolate from *Snyder* also is overbroad because it would apply with equal force to many other government offices in Maryland that are not filled through popular elections. 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 Ann., Educ. § 2-202(b)(4) (emphasis added).[10] Under Appellants' rendering of *Snyder*, the teacher position and other positions filled through peer-based elections would run afoul of Article I, section 1, because, in the same non-technical sense as the Student Member, the winners of those elections are put "into a democratically-elected position with binding voting power."

[10] *See also, e.g.*, Md. Code Ann., Hum. Servs. § 9-503(b)(1) (reserving one seat on the Juvenile Services Education Board for "[t]he candidate who receives the highest number of votes in an election by the educators employed by the Department [of Human Services]" (emphasis added)); Md. Code Ann., State Pers. & Pens. § 21-104(b) (providing that certain trustees of the State Retirement and Pension System "shall be elected by the members and the retirees of that State system"); Md. Code Ann., Fin. Inst. § 10-103 (providing that three members of the Maryland Deposit Insurance Fund Corporation be "elected by the member associations, subject to the approval of the Secretary of Labor"); Md. Code Ann., Local Gov't § 25-302–303 (providing that "[e]ach landowner is entitled to one vote in the election of the board of directors" of Baltimore City's Public Watershed Association); Md. Code Ann., Local Gov't § 30-104(b) (providing that certain trustees of the Baltimore City Police Department Death Relief Fund "shall be elected at large by the officers and civilian employees of the Department"); Md. Code Ann., Educ. § 7-409(f) (providing that the Advisory Council on Health and Physical Education "shall elect a chair, vice chair, and any other officers necessary to carry out the Advisory Council's functions").

Appellants' Br. 13-14. Neither these offices nor the Student Member position violate Article I, section 1.

Maryland election procedures. What the statutory text and underlying case law indicate, the surrounding structures of Maryland election law confirm. As Appellants themselves acknowledge, the Student Member position stands apart from all Maryland offices filled through popular elections because "*only* the student member on the Board [is] exempt from the rules, regulations, and requirements of Maryland's election laws." Appellants' Br. 11 (emphasis in original). That is no accident. What Appellants view as a legal deficiency is in fact prime evidence that the General Assembly had no intention of filling the Student Member position through a popular election.

The selection process for the Student Member is not overseen by the State and County Boards of Election, which manage and supervise all popular elections within their respective jurisdictions. *See* Md. Code Ann., Elec. Law §§ 2-102(a) (charging the State Board of Elections with "manag[ing] and supervis[ing] elections in the State"), 2-202(b)(1) (charging each County Board of Election with "oversee[ing] the conduct of *all elections* held in its county" (emphasis added)). Instead, HCPSS faculty and staff oversee every step of the multi-stage process developed by the Board that results in the selection of the Student Member. Howard County Public School System, *Policy 2010 Implementation Procedures*, *supra*, at 4.

The procedures adopted by the Board also differ markedly from popular elections overseen by the State and County Boards of Education.[11] For example, HCPSS students who participate in the selection process need not register to vote. Md. Code Ann., Elec. Law § 3-201 (voter-registration procedures). The candidates for the Student Member position are selected first by school-based committees of administrators and students and then at a convention of student delegates; they are not nominated through any of the three methods that apply to "public offices that are filled through elections"—primary, petition, or alternative procedures developed by a political party. *Id.* § 5-701; *see also id.* § 8-802(a)(1)(ii) (providing that school-board candidates be nominated through nonpartisan primaries). The final student-body vote is held every year by March 15, whereas general elections in Maryland occur only in even-numbered years in November. *Id.* § 8-301. Student-government members and advisors—not a local board of canvassers—count votes cast for Student Member candidates, and the procedures make no provision for vote-counting to be observed by Student Member candidates or any other third party. *Id.* § 11-301.

The Student Member position differs from Maryland elective offices in other ways, too. To state the obvious, candidates for the Student Member position need not

[11] Appellants argue that the Student Member selection process meets the definition of "election" in Md. Code Ann., Elec. Law § 1-101(v), indicating that the General Assembly intended to create an elected position. Appellants' Br. 18. But that definition applies only to the Election Law article of the Maryland Code, *see id.* § 1-101(a), not for purposes of the constitutional analysis. Moreover, as explained in this section, the General Assembly clearly did not incorporate the Election Law article into its selection process for the Student Member, so that article's broad definition of "election" is largely irrelevant.

comply with the age and residency requirements that apply to Maryland voters. *Compare* Md. Const. art. I, § 12, *with* Md. Code Ann. Educ. § 3-701(f)(1). Whereas voters have the final say over which candidate will assume an elective office, the Board itself must confirm the results of the Student Member selection process. *See, e.g.*, *Meeting Agenda Item* (June 11, 2020), *supra*, at 5. And in the event that the Student Member is unable to perform his or her statutory duties, the runner-up in the selection process assumes the role. *Compare* Md. Code Ann., 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).

In sum, 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 offices filled through popular elections. The Student Member position is therefore not popularly elected, so Article I, section 1 does not apply.

B. Article I, section 12 does not impose a minimum age for holding a non-elective office.

Appellants contend that, in addition to violating Article I, section 1 of the Maryland Constitution, § 3-701(f) also violates Article I, section 12. Appellants' Br. 40. That provision states that "a person is ineligible to enter upon the duties of, or to continue to serve in, an *elective office* created by or pursuant to the provisions of this Constitution if the person was not a registered voter in this State on the date of the person's election nor appointment to that term . . . ." Md. Const. art. I, § 12 (emphasis added).

The circuit court correctly concluded that Appellants' claim under Article I, section 12 fails for the same fundamental reason that their claim under Article I, section 1 fails: the General Assembly deliberately and explicitly made the Student Member position a non-elective office. *See supra* Part I.A; (E54). The position therefore is no more subject to Article I, section 12, than it is to Article I, section 1.

Appellants argue that the term "appointment" as used in Article I, section 12, shows that the drafters of the Maryland Constitution intended the provision to bar individuals who are not registered voters from serving in any sort of government office, whether elective or non-elective.[12] Appellants' Br. 39–40. But, as the circuit court correctly observed, "[w]hile 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.'" (E54). Thus, Article I, section 12 applies to appointed officials only when "duly elected officials who cannot serve their term" are replaced by appointment. *Id.*; *see also* Md. Const. art. XV, § 5 ("[T]he General Assembly may provide by law for a person to act in place of any elected or appointed officer of the State who is unavailable to perform the duties of his office because he has become unable or is or will be absent."). Any other interpretation would render superfluous the term "elective office" as used in Article I, section 12 because the provision would apply to all government offices,

[12] Appellants argue that their atextual reading of Article I, section 12 is "more consistent" with *Broadwater v. State*, 306 Md. 597 (1986). Appellants' Br. 39. But *Broadwater* merely applied Article I, section 12 to a candidate for Maryland Senate—an indisputably elective office. *Broadwater*, 306 Md. at 600, 608. Nothing in the decision even hints that Article I, section 12 is applicable to individuals seeking non-elective offices.

whether elective or non-elective. *See Kadan v. Bd. of Supervisors of Elections of Balt. Cty.*, 273 Md. 406, 415-16 (1974) (interpreting a constitutional provision to ensure that "no word, clause, sentence or phrase [is] rendered surplusage, superfluous meaningless or nugatory" (internal quotation marks omitted)).

The circuit court's interpretation of Article 1, section 12 is bolstered by the fact that the preceding three sections of Article I—which establish the qualifications and oath-taking obligations of public officials—all explicitly govern both "elected" *and* "appointed" officials. *See* Md. Const. art. I, § 9 ("Every person elected, or appointed, to any office . . . ."); *id.* art. I, § 10 ("Any officer elected or appointed . . . ."); *id.* art. I, § 11 ("Every person, hereafter elected, or appointed, to office . . . ."). Section 12's exclusive focus on "elective" office thus underscores the provision's more limited reach. Appellants' effort to extend that reach to encompass appointed school-board positions cannot be squared with the provision's text.

Furthermore, Appellants' expansive reading of Article I, section 12 would cast doubt on various other Maryland statutes, including Education Article § 2-202(c), which creates a student seat on the *State* Board of Education. The student member of the State Board—like the student seat on the Howard County Board—is selected through an appointive process that allows minors to serve in public office. *See* Md. Code Ann., Educ. § 2-202(b)(6) ("The student member shall be selected by the Governor from a list of 2 persons nominated by the Maryland Association of Student Councils."). If Appellants' reading of Article I, section 12 were correct, it could cast doubt on the constitutionality of § 2-202(c)—and all of the statutes establishing student seats (with

voting power) on local school boards. Appellants' atextual understanding of Article I, section 12 provides no basis for invalidating such a broad swath of duly enacted state statutes.

Appellants also appear to argue in favor of a broader principle, heretofore unrecognized, that the Maryland Constitution bars minors from holding a position of general governmental power, whether appointed or elected. Appellants' Br. 40. But, as the circuit court noted, it "could not find, nor could [Appellants] cite, either in the Maryland Constitution or within the Education Article, a requirement that non-elected members must be over the age of eighteen." (E54). No such requirement exists. Confirming this, Assistant Attorney General Israel commented: "As the State Constitution does not generally prescribe a minimum age for public officers, the Legislature is entirely free to provide that a minor may hold an office which the Legislature has created." (Apx. 2). Appellants have provided no reason why this Court should take that authority away from the Legislature.

C. No other Maryland law cited by Appellants conflicts with § 3-701(f).

Appellants also contend that § 3-701(f) conflicts with several other constitutional provisions and statutes besides Article I, sections 1 and 12. Those claims are meritless.

At various points, Appellants assert that § 3-701(f) violates Article 7 of the Declaration of Rights, which guarantees "every citizen having the qualifications prescribed in by the Constitution . . . the right of suffrage," Appellants' Br. 31; Article I, section 5, which prohibits "vot[ing] in more than one election district or precinct," *id.* at n.8; Article I, section 7, which charges the General Assembly with ensuring the "purity of

Elections," *id.* at 9, 31; Section 5-202 of the Election Article, which requires a "candidate for public . . . office [to] be a registered voter at an address that satisfies any residence requirement for the office," *id.* at 18 n.5; and Section 16-201(a)(3) of the Election Article, which prohibits "vot[ing] or attempt[ing] to vote more than once in the same election, or vot[ing] in more than one election district or precinct," *id.* at 31 n.8. Assuming Appellants have properly preserved these claims, they all fail for the same reason Appellants' claims under Article I, sections 1 and 12 are unavailing: they do not apply to offices like the Student Member position that are not filled through a popular election.[13]

Appellants' putative claims under Article I, section 5 and Md. Code Ann., Elec. § 16-203(a)(3) fail for an additional reason. Those putative claims stem from the notion that some 18-year-old HCPSS students hypothetically might participate in the selection of the Student Member and also vote for one or more of the elected members. As an initial matter, despite having moved for summary judgment, Appellants have offered no evidence that this "double voting" scenario has ever manifested. But even if it has, there is nothing unlawful (or even unusual) for someone to vote for multiple members of a *multi-member* school board. In fact, most of Howard County's adult voters typically cast ballots for multiple Board members by voting for both the at-large members and their local district member. Such behavior is expressly permitted by Maryland law. *See* Md.

[13] Both the circuit court's judgment and Appellants' certiorari petition focused solely on Appellants' claims that § 3-701(f) violates Article I, sections 1 and 12. (E57); Pet. 7-12. Appellants therefore failed to properly raise their additional claims in this Court. To the extent the Court believes these claims should be addressed separately from Appellants' Article I claims, it should remand these claims to the circuit court for consideration in the first instance.

Code Ann., Elec. Law § 8-806(a) ("In a general election for board of education members, a voter may vote for a number of nominees equal to the number of members to be elected.").

Appellants' remaining arguments—which rest on their own policy preferences and unsupported scientific claims—likewise fall flat. Their blanket assertion that "minors cannot and should not be treated as adults because their minds are not fully developed," Appellants' Br. 34, ignores all of the ways in which Maryland law does, in fact, give minors significant responsibility. Most importantly, the General Assembly clearly has rejected this view. It has expressly permitted high-school students to sit on local school boards across the State, while carefully delineating their specific powers on those boards, and it has likewise expressly decided that minor students should participate in selecting that Student Member in a carefully circumscribed process. Appellants do not question that the General Assembly *intentionally* created a Student Member position for someone as young as 16 to be selected by students as young as 11. Absent a constitutional provision that prohibits these choices—which Appellants have failed to identify—they are policy decisions that the Legislature is entitled to make.

Even beyond the school board context, Maryland law recognizes the capacity of minors in myriad ways. Several jurisdictions in Maryland, for example, permit 16- and 17-year-olds to vote in local elections.[14] *See* Clara Niel, *Takoma Park Is One of Five*

[14] Appellants dismiss the relevance of these policies because municipal elections are not governed by Article I, section 1. Appellants' Br. 35 & n.9. But that is beside the point. Contrary to Appellants' preferences, some Maryland jurisdictions have concluded that minors are capable of responsibly exercising the franchise. Appellants also are wrong to

Cities Where Minors Can Vote. And Young Voters Are Turning Out, The Diamondback (Oct. 1, 2020), https://perma.cc/3VRC-6VKN. State law also empowers prosecutors to charge minors as adults; and roughly a thousand Maryland minors are prosecuted in adult court each year. *See* Governor's Office of Crime Prevention, *Youth, and Victim Services, Juveniles Charged as Adults in Maryland (1/1/2019–6/30/2019)*, at 3 (2019) https://perma.cc/JG5L-G2Q8 (showing that 490 juveniles were charged as adults in Maryland during the first six months of 2019). Thus, contrary to Appellants' simplistic understanding of Maryland law,[15] state and local lawmakers have taken a more nuanced approach to assessing young people's capacity for civic participation.

In any event, Appellants' policy preferences do not qualify as legal authority. Nor do decade-old press statements made by then-State Senator Brian Frosh.[16] *See* Appellants' Br. 28 n.6, 38 n.10 (quoting a now-defunct blog describing then-Senator Frosh's opposition, on policy grounds, to the creation of a student school-board seat in Montgomery County). As previously noted, the only time that the Attorney General's Office ever formally opined on the legality of appointing students to a local school board,

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suggest that a constitutional amendment to the U.S. Constitution is necessary to permit minors to vote in state or local elections. On the contrary, several states and the District of Columbia have considered extending the franchise to 16- and 17-year-olds for all state or District elections. *See, e.g.*, Youth Vote Amendment Act of 2018, B22-0778 (D.C. 2018).

[15] Appellants incorrectly suggest that the age of consent in Maryland is 18. *See* Appellants' Br. 35. In fact, the age of consent in Maryland (as in many other states) is 16. *See* Md. Code Ann., Crim. Law §§ 3-304–308.

[16] Of note, then-Senator Frosh voted for the enactment of § 3-701(f). *HB 513 Third Reading (HB) Calendar No. 25*, Maryland General Assembly (Apr. 6, 2007), https://perma.cc/2J37-79AB.

it expressed the unequivocal view that such appointments were lawful. *See supra* Part I.A.1.

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

Appellants argue that § 3-701(f) "has the effect of diluting the votes of legal, registered voters in Howard County." Appellants' Br. 28. Vote-dilution claims typically arise under the Fourteenth Amendment to the U.S. Constitution and rest on the principle of "one-person, one-vote," which "refers to the idea that each vote must carry equal weight." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). And, indeed, Appellants cite as the basis for their putative vote-dilution claim *Rucho* and other cases that arise under the Fourteenth Amendment. Appellants' Br. 28–29, 32. Appellants, however, have candidly conceded that they "do not raise a vote dilution claim under the Fourteenth Amendment." Pls.' Opp'n Def.'s Mot. Dismiss 18; *see also* Appellants' Br. 32 (acknowledging the same). Yet they identify no alternative cause of action under which their putative vote-dilution claim arises. References to various provisions of the Maryland Constitution—for example, Article I, section 1; Article I, section 5 (prohibiting double-voting); and Article I, section 7 (charging the General Assembly with enacting "Laws necessary for the purity of elections")—pockmark Appellants' vote-dilution discussion. But Appellants cite no authority for the proposition that a vote-dilution claim can arise under any of those provisions.

In any event, even if Appellants had properly pleaded a vote-dilution claim, it would still fail on its own terms. First, the one-person, one-vote principle has no application to government offices like the Student Member position that are not filled

through a popular election. *See Hadley*, 397 U.S. at 58 ("[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."). And, contrary to what Appellants suggest, Appellants' Br. 33, the Attorney General's Office explicitly rejected the notion that a "student 'electorate' is entitled to the one-person, one-vote protection of the Constitution that extends to the general electorate," Md. Att'y Gen. Op. 80-030, 1980 WL 127893, at *2 n.3.

Appellants also fundamentally misconceive the population that is relevant to one-person, one-vote claims. Total population—not voting population—is the relevant populace for vote-dilution claims. *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.

As Appellants concede, the Student Member represents not just HCPSS students, but also "students, staff, parents and others in the community." Appellants' Br. 29 (quoting *Policy 2010 – Student Representation*, at IV.B.7, *supra* at 4). In short, the Student Member represents the total population of Howard County, just like the Board's elected members. Appellants object that the Student Member "is expected to represent interests of other groups who cannot vote" for the Member. Appellants' Br. 29. But that feature does not distinguish the Student Member position from the Board's elected members, who represent minors and noncitizens who are ineligible to vote in Article I, section 1 elections, but who are nevertheless counted for apportionment purposes. *See Evenwel*, 136 S. Ct. at 1130. Thus, even if the Student Member position were elected, he represents the total population of Howard County, so the position "automatically" complies with the one-person, one-vote principle. *Wesberry*, 376 U.S. at 8.

III. Even if Appellants' claims had legal merit, procedural barriers preclude judicial relief.

As just explained, Appellants' claims that § 3-701(f) violates the Maryland Constitution fail because the Student Member position is not filled through a popular election. But even if it were, Appellants' claims would still fail because (1) they are untimely under both the applicable statute of limitations and the doctrine of laches and (2) Plaintiffs have failed to seek an available remedy for the harm they assert.

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

This Court has repeatedly stressed that "any claim against a state electoral procedure must be expressed expeditiously." *Lamone v. Schlakman*, 451 Md. 468, 488

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

The General Assembly addressed this concern in Election Article § 12-202. That statute imposes strict time limits on lawsuits that challenge "any act or omission relating to an election . . . on the grounds that the act or omission: (1) is inconsistent with this article or other law applicable to the elections process; and (2) may change or has changed the outcome of the election." Md. Code Ann., Elec. Law § 12-202(a). Specifically, the statute requires that such challenges be filed no more than "(1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or (2) 7 days after the election results are certified." *Id.* § 12-202(b). The provision applies to all suits challenging a candidate's qualifications for office or alleging an infringement of voting rights under Maryland law. *Schlakman*, 451 Md. at 482.

Appellants' assertions in this suit—all of which arise under the "Elective Franchise" article of Maryland's Constitution—bring it squarely within the ambit of § 12-202. *See, e.g.*, Appellants' Br. 5 (arguing that "[t]he student member is the only elected member of the Board who is exempt from the State's election laws"); *id.* at 14 (asserting

that "Section 3-701(f) circumvents the voting requirements set forth in Article I, Section 1" and "enlarge[s] the legal voting population to include minors who are constitutionally prohibited from voting" (cleaned up)).[17]

Under § 12-202(b), Appellants' deadline to challenge the qualifications of the Student Member currently in office would have elapsed several months prior to the lawsuit's filing in December 2020. Appellants acknowledge that the then-serving Student Member had been "elected" in June 2020 and seated in July 2020. (E17); *see also* Md. Code Ann., Educ. § 3-701(f)(2) (noting that the Student Member's term "begin[s] on July 1"). Thus, the limitations period for filing this suit would have expired, at the very latest, in August 2020—a full four months before this action was filed.[18]

That delay cannot be explained by Appellants' lack of knowledge of the relevant facts. Shortly after filing this suit, Appellants published a letter in the *Baltimore Sun* describing how they had "spent *months* watching meetings, emailing the school board, filing petitions, filling out surveys, [and] attending rallies," among other activities. Kim Ford & Traci Spiegel, *Howard County Parents: Lawsuit Was Needed To Prevent School*

[17] Appellants argued below that § 12-202(b) does not apply to their claims because the Student Member position is not governed by Maryland's Election Law Article. Pls.' Opp'n Def.'s Mot. Dismiss 20–21. But § 12-202(b) applies both to claims arising under the Election Law Article and to claims arising under "other law[s] applicable to the elections process." Md. Code Ann., Elec. Law § 12-202(a)(1).

[18] According to Appellants, their claims can be construed as a pre-election challenge in advance of selection of a new Student Member in 2021, which had "already commenced" by the time that they filed their opposition to the Board's motion to dismiss. Pls.' Opp'n Def.'s Mot. Dismiss 22. But their challenge was clearly to the sitting member who voted in a way they disliked, and the selection process for 2021 had not commenced when they filed their complaint. *See Policy 2010 Implementation Procedures*, *supra*, at 4, at III.A.3 (applications to serve as Student Member to be submitted by February 15 each year).

Board 'Gridlock,' Baltimore Sun (Dec. 30, 2020), https://perma.cc/2LPH-4QB9 (emphasis added). They cannot plausibly claim that they remained ignorant, throughout that whole time, of the statutory process for selecting the Student Member. Moreover, even if they truly were unaware of that process, that still would not excuse their delay. As this Court has explained, a "voter may not simply bury his or her head in the sand and, thereby, avoid the triggering of the 10-day statutory time period, prescribed by § 12-202." *Abrams v. Lamone*, 398 Md. 146, 160 n.18 (2007).

Notably, Appellants have made no attempt to explain their delay in filing this suit. To the extent that they contend that their delay is justified because they filed suit about a month after the Board's school-reopening vote last fall, that argument is unavailing. The "act or omission" that Appellants are challenging in this suit—the entire basis for their *legal* claim—is the process by which the student Board member is selected, from which they were excluded. That process occurred, with Appellants' full knowledge, months before they filed suit. The Board's subsequent actions (whether with respect to school-reopening or any other issue) cannot revive that otherwise-stale legal claim. After all, if voters could simply wait to see how their elected officials behave in office before deciding whether to challenge those officials' qualifications, then § 12-202(b) would serve little purpose. *Cf. Ross v. State Bd. of Elections*, 387 Md. 649, 672 (2005) (explaining that the plaintiff's "decision to 'wait and see' until after the election" prejudiced both the defendant official and election administrators).

B. The doctrine of laches bars this suit.

"[I]ndependent of EL § 12–202(b)'s statutory limitations period for challenging any act or omission relating to an election, a registered voter's action may be barred by the doctrine of laches." *Ademiluyi v. State Bd. of Elections*, 458 Md. 1, 9 (2018). Laches is "a defense in equity against stale claims . . . based upon grounds of sound public policy by discouraging fusty demands for the peace of society." *Parker v. Bd. of Election Supervisors*, 230 Md. 126, 130 (1962). Maryland courts have found election-related claims to be barred by laches even when they are not barred by § 12-202(b). *See, e.g.*, *Baker v. O'Malley*, 217 Md. App. 288, 297 (2014) ("[E]ven though Ms. Baker's claims were not subject to the time limits imposed by EL § 12-202(b), the circuit court's alternative ruling that Ms. Baker's claims are barred by laches was clearly correct.").

Here, laches bars Appellants from obtaining any relief. As explained above, Appellants waited several months after the Student Member was selected to challenge the statutory process underlying his selection and his qualifications to hold public office. *See supra* Part III.A. That delay is comparable to or greater than the delays in other elections cases that Maryland courts have dismissed under the doctrine of laches.[19] The fact that

[19] *See, e.g.*, *Ademiluyi*, 458 Md. at 49 ("waiting until more than six months after the election to challenge a candidate's eligibility for judicial office was unreasonable"); *Schlakman*, 451 Md. at 490 (plaintiffs' delay of "over a month" after they discovered the relevant facts was unreasonable); *Ross*, 387 Md. at 668 (dismissing challenge filed "a full three days after the election occurred" and three weeks after the plaintiff discovered the relevant facts); *Baker*, 217 Md. App. at 298 (delay of five and a half months "would constitute an unreasonable delay in challenging a governor's failure to issue a commission after an election"). *Ademiluyi* is particularly analogous because it involved a constitutional challenge to a judicial candidate's qualifications under Article IV, section 5 of the Maryland Constitution. 458 Md. at 26; *see also Liddy*, 398 Md. at 236 (holding

Appellants seek to challenge the validity of a statute that was enacted more than a decade before they filed this suit only compounds the unreasonableness of their delay.

These factors justify the circuit court's grant of summary judgment in the Board's favor even if Appellants' underlying legal theory were sound (which it is not). Untimely challenges to an elected official's qualifications must be dismissed without regard to the merits of the challenger's claim. In *Ademiluyi*, for instance, the Court expressly rejected the plaintiff's contention that, "if [the challenged elected official] is ineligible for judicial office, then it would actually be beneficial to the State and the voters of [the] County to remove [the official] from office." 458 Md. at 50. The Court rightly characterized that argument as "circular," noting that it "depends wholly on the validity of [the plaintiff]'s position concerning [the official]'s eligibility for judicial office." *Id.*; *see also, e.g.*, *McMahon v. Robey*, No. 1804, 2017 WL 6570728, at *4 (Md. Ct. Spec. App. Dec. 26, 2017) (rejecting challenge to sheriff's legal authority as untimely even though it was undisputed that sheriff had failed to take the required oath of office). Thus, even if Appellants have stated viable claims, their suit should be dismissed as untimely.

C. Appellants fail to seek an available remedy for their alleged harm.

Appellants' entire case rests on their theory that the Student Member is an "elected" official who should be subject to the same legal requirements as every other member of the Board. *See, e.g.*, Appellants' Br. 14 (asserting that "Article I, Section 1 must apply to the election of a student member to the Board"). To put a finer point on it,

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barred by laches a claim that a candidate for Attorney General had failed to meet the qualifications set forth in Article V, section 4 of the Maryland Constitution).

Appellants' injury would demand a remedy in which they are entitled to vote for a Student Member who is at least 18 years of age. But the remedy that Appellants actually seek—a declaration that "the student member position and election process for that position" contained in § 3-701 is inconsistent with the Maryland Constitution and an order excising the Student Member from the Board entirely, Appellants' Br. 42—ill fits the harm they have asserted and contravenes basic principles of statutory interpretation.

Maryland courts abide by the longstanding "general rule that courts try to uphold all parts of an act which can be put in force, even though other parts are invalid." *Bell v. Bd. of Comm'rs of Prince George's Cty.*, 195 Md. 21, 32 (1950). And, here, the text of § 3-701 reflects the General Assembly's clear intent to create a Board with eight members—not seven. As noted above, the very first clause of the statute states: "The Howard County Board consists of: (i) Seven elected members; and (ii) One student member." Md. Code Ann., Educ. § 3-701(a)(1). Appellants have not explained why that language—which creates eight voting members on the Board—should be excised from the statute if the procedure for filling one of those seats is invalidated.

If Appellants' legal theory is correct, there is simply no basis for eliminating the eighth seat from the Board.[20] Rather, the remedy would be to fill the student seat through

[20] In the circuit court, Appellants argued that stripping the Student Member of voting power is a sufficient remedy because § 3-701(g) (2) provides that motions for which the Student Member is not authorized to vote can pass with four votes. Pls.' Opp'n Def.'s Mot. Dismiss 28–29. But stripping the Student Member of voting power would not resolve how the Student Member mandated by § 3-701(a)(1) should be selected. Appellants now seem to abandon that theory, asking instead to excise § 3-701(a)(1) as well, Appellants' Br. 42, contrary to the General Assembly's clear intent to create an eight-member board.

an election of registered voters. But Appellants have failed to name the State and County Boards of Elections as defendants in this lawsuit in violation of Maryland Rule 2-211, which requires a plaintiff to join all necessary parties in any civil suit. *See also* Md. Code Ann., Cts. & Jud. Proc. § 3-405(a) ("If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party."). Under Rule 2-211(a), a person is a necessary party "if in the person's absence (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action." Md. Rule 2-211(a).

In this case, "complete relief" cannot be provided without the input and participation of state and local election administrators because the formal elections that would flow from Appellants' theory ultimately would have to be implemented by state and local election administrators. *See* Md. Code Ann., Elec. Law § 8-801 (requiring school-board elections to be administered in the same manner as all other general elections). Because state and local election administrators plainly have a direct interest in any matter that could impose these additional responsibilities on them, they are "ordinarily named as co-defendants" in cases challenging the constitutionality of election-related statutes. *State Admin. Bd. of Election Laws v. Talbot Cty.*, 316 Md. 332, 343–44 (1988). Indeed, almost every case Appellants cite in their brief names at least one (and often more than one) election administrator as a defendant.[21] That fact is hardly

[21] *See, e.g.*, *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30 (2013); *Lamone v. Capozzi*, 396 Md. 53 (2006); *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127

surprising: the overwhelming majority of cases arising under Article I, section 1 of the Maryland Constitution were filed against some combination of the State Board of Elections, a county board of elections, or members of such boards.

Appellants' failure to seek the appropriate remedy and to name election administrators as parties reflects their lack of interest in remedying the actual *legal* violation that they have alleged here and reaffirms that their primary goal in this litigation is to achieve a policy objective unrelated to that violation. More importantly, however, these failures provide yet another basis for affirming the circuit court's grant of summary judgment for the Board.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the circuit court's grant of summary judgment for the Board.

Respectfully submitted,

/s/ Mark Blom

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(2003); *Jackson v. Norris*, 173 Md. 579 (1937); *Southerland v. Norris*, 74 Md. 326 (1891).

Specially admitted under Rule 19-217

September 15, 2021

Counsel for Defendant-Appellee

Font: Times New Roman (size 13)

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I hereby certify that this brief contains 11,938 words, excluding the portions of the brief excluded from the word count by Rule 8-503. I further certify that this brief complies with the font, spacing, and type-size requirements of Maryland Rule 8-112.

*/s/ Mark Blom*_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2021, a copy of the foregoing Brief of Appellee was filed with the Clerk of the Court via MDEC, with copies being sent via electronic mail as well as two copies being served on counsel for the Appellants' and Amici at the addresses below:

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Appellee’s Appendix

The appended letter from Assistant Attorney General Israel was discovered in archives after the case already was on appeal and is not available online.

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January 31, 1983

The Honorable Judith C. Toth
225 Lowe House Office Building
Annapolis, Maryland 21401

Dear Delegate Toth:

This is in response to your request for advice of counsel on whether there is any constitutional objection to amending Sec. 3-701 of the Education Article to allow the student member of the Montgomery County Board of Education to vote in certain circumstances. The student member would continue to be selected by students or student representatives and the remaining members would continue to be elected by the qualified voters of the County. In my view, there is no constitutional objection to giving the student member a vote in some circumstances.

The county boards of education are established by statute, Patterson v. Ramsey, 413 F.Supp., 523, 530 (D. Md. 1977), aff'd 522 F. 2d. 1117, 118 (4th Cir. 1977), and their duties are prescribed by the Education Article. McCarthy v. Board of Education, 280 Md. 634, 646 (1977). Members of these boards are generally regarded as public officers, 58 Opinions of the Attorney General 343, 355-356. As legislative, rather than constitutional offices, the creation and abolition of these positions, the manner in which they are filled, and the duties are entirely a matter for the General Assembly. Calvert County v. Monnett, 164 Md. 101, 105 (1933). Accordingly, the Legislature may provide for a student member of a school board to exercise some of the powers of a school board member or, as in Anne Arundel County, all of those powers. See Education Article, Sec. 3-110. As the State Constitution does not generally

prescribe a minimum age for public officers, the Legislature is entirely free to provide that a minor may hold an office which the Legislature has created. Finally, for reasons which are stated in the enclosed Opinion of the Attorney General, Opinion No. 80-030, there is no constitutional objection to providing for the selection of a student member by student representatives or even the students themselves and for the election of the remaining members of the qualified voters of the county. As more fully explained in that opinion, such a selection is regarded as appointive rather than elective, appointment by private groups is permitted under the Maryland Constitution, and the one-person, one-vote principle has no application to such a selection process.

While this letter is my considered view of this matter, it is not an Opinion of the Attorney General.

Very truly yours,

Richard E. Israel

Richard E. Israel
Assistant Attorney General

REI:ss
enclosure