No. 22-2294

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LISA M.F. KIM, Individually and as Parent and Next Friend of J.K., a minor; and WILLIAM F. HOLLAND,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF HOWARD COUNTY,

Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Maryland
(Civil Action No. 1:21-cv-655-DKC)

RESPONSE BRIEF OF DEFENDANT-APPELLEE BOARD OF EDUCATION OF HOWARD COUNTY

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RULE 26.1 DISCLOSURE STATEMENT

The Board of Education of Howard County is a governmental entity with no parent corporation and no stock.

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INTRODUCTION

The Maryland General Assembly has created county boards of education to govern public schools across the state. In many counties, the legislature has provided for a student board member position, through which a student enrolled in public school has a voice on policies that govern their education.

Howard County Board of Education is one of these boards. By statute, seven of the eight board members are adults, elected by the voters of the County. The legislature has reserved one seat on the Board for a student member selected by students enrolled in the Howard County Public School System (HCPSS). Unlike the elected board members, the student board member serves only a one-year term and has limited voting power.

Displeased with votes cast by a student board member years ago, Plaintiffs seek to dismantle this system. They argue that the First and Fourteenth Amendments to the United States Constitution prohibit states from allowing public school students even this limited say in their education. Their novel theories, if accepted, not only would upend Maryland's system of public school governance, but would reverberate

across other governmental structures that give voice to affected constituencies both in Maryland and elsewhere. Fortunately, as the District Court found, settled precedent forecloses Plaintiffs' claims.

First, invoking the Fourteenth Amendment's Equal Protection Clause, Plaintiffs argue that the selection process for the student board member violates the principle of "one person, one vote" because the electorate for the student board member differs in size from the electorate for other members. But the Supreme Court has long made clear that the one-person, one-vote rule applies only in the context of "popular elections." Student elections—run in schools by school officials and involving a population consisting almost entirely of children who are not qualified voters in any other sense—are not "popular elections" to which the Equal Protection Clause's voting protections apply.

Second, Plaintiffs argue that the First Amendment's Free Exercise Clause prohibits the State from allowing only students enrolled in public schools the opportunity to participate in the governance of those schools. They complain that some students might choose a religious private school or to be homeschooled for religious reasons. Maryland's student board member selection law, however, is neutral and generally

applicable: People who are not enrolled in Howard County public schools for *whatever reason* are not part of the process for choosing the student member. The student board member selection process therefore does not violate the Free Exercise Clause.

Howard County's student board member gives students a voice on some of the policies that affect their school lives and provides students civic experience by involving them in the actual process of governance. Maryland's decision to empower students in this way transgresses no constitutional boundary. The district court correctly rejected Plaintiffs' legal theories, and this Court should affirm.

STATEMENT OF THE ISSUES

1. Does the Equal Protection Clause prohibit a State from creating a position on an otherwise-elected county school board for a student member with limited voting power who is selected not by a popular election but through a process that involves students enrolled in public schools?

2. Does the First Amendment's Free Exercise Clause prohibit a State from allowing only students enrolled in public school to select a student member to sit on a public board of education, neutrally

excluding all non-public school students regardless of their reason for not enrolling in public schools?

STATEMENT OF THE CASE

A. Maryland Statutory Regime

The Maryland constitution directs the Maryland General Assembly to "establish throughout the State a thorough and efficient System of Free Public Schools." Md. Const. art. VIII, § 1. Pursuant to this provision, the General Assembly has created boards of education in each county to govern the local system of public schools. Md. Code, Educ. §§ 3-103, 4-101, 4-108.

"[T]he General Assembly has broad discretion to control and modify the composition of local boards of education," *Spiegel v. Bd. of Educ. of Howard County*, 480 Md. 631, 649, 281 A.3d 663, 673 (2022), and has enacted separate statutes staffing each county's board with a mix of elective and non-elective processes. *See* Md. Code, Educ. § 3-114 (setting out the general composition of the adult members of each county's board). *Compare*, *e.g.,* Md. Code, Educ. § 3-1002(b) (Prince George's County Board has nine elected members, four appointed members, and a voting student member), *with* Md. Code, Educ. § 3-

1401(a) ("The Worcester County Board consists of seven voting members and one nonvoting student member from each public high school in the county.").

Recognizing the importance of student voices in their education, the General Assembly has also reserved one or more school board seats for high-school students on nearly all boards within the state, and made many of these voting positions. *E.g.*, Md. Code, Educ. § 3-6A-01(b) (voting membership on Harford County Board consists of six elected members, three appointed members, and one student member). The choice to give students a vote dates back nearly 50 years, when the General Assembly created a voting student member on the Anne Arundel Board of Education in 1975. 1975 Md. Laws Ch. 872. Over the decades that have followed, the General Assembly has consistently increased student voice, including recently expanding the voting authority of the Baltimore County Board student member to include budgetary matters, 2023 Md. Laws Ch. 785 (to be codified at Md. Code, Educ. 3–2B–05(c)(3)), and converting the nonvoting Charles County Board student member into a voting member, 2021 Md. Laws Ch. 405 (codified at Md. Code, Educ. § 3-501(h)).

Plaintiffs challenge § 3-701(f) of the Maryland Education Article, which establishes a Student Member position with limited voting power on the Howard County Board of Education. Section 3-701(f) is the product of a 20-year, student-led effort and has been on the books for over 15 years. 2007 Md. Laws 3887 (codified at Md. Code, Educ. § 3-701). In 1987, an HCPSS student unsuccessfully advocated for the creation of a student position on the Board. JA 41. The Board created a nonvoting student position as a compromise. JA 41. Two decades later, a former student member of the State Board of Education and a former nonvoting student member of the Howard County Board spearheaded a renewed legislative push for a voting position. JA 41. During this push, Board members expressed their support for the legislation, urging that it would increase students' voices in their education.[1] At the first public hearing on the topic, nearly all community members who spoke expressed their support for student member voting rights.[2] The students' advocacy resulted in the enactment of § 3-701(f) by a

[1] *See* Larry Carson, *Student Vote on Board Likely*, THE BALTIMORE SUN (Feb. 2, 2007, 12:00 AM), https://perma.cc/6T2A-TZBZ.
[2] *See* Oct. 27, 2005 Minutes of the Board of Education of Howard County, at 11-17, available at: https://perma.cc/YS37-N9YU.

unanimous vote in the House of Delegates and a 42-4 vote in the Senate.[3] 2007 Md. Laws 3887 (codified as amended at Md. Code, Educ. § 3-701).

Since 2007, the Howard County Board has been an eight-member body that consists of "[s]even elected members" and "[o]ne student member." Md. Code, Educ. § 3-701(a)(1). The elected members 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 eighth position on the Board is the "student member," a high-school junior or senior enrolled in a HCPSS school. *Id.* § 3-701(a)(1)(ii), (f)(1).

The student member is selected through a multi-step process established by the Board. Md. Code, Educ. § 3-701(f)(3); JA 33-38 (Howard County Public School System Policy 2010 Implementation

[3] *See* Md. Senate Roll Call Vote, 2007 Sess. H.B. 513 (Apr. 6, 2007); Md. House of Delegates Roll Call Vote, 2007 Sess. H.B. 513 (Mar. 8, 2007).

Procedures, Student Representation (effective July 1, 2017)). In January of each year, HCPSS students who are interested in representing their peers on the Board may apply to serve as the student member, and those applications are reviewed for completeness and accuracy by the Howard County Association of Student Councils advisor, a HCPSS employee. JA 34. 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. JA 34. Those committees interview and select students to serve as delegates to a convention, where the delegates choose two candidates for the Board seat and an alternate from among the student applicants. JA 35-36.[4] After a campaign period, HCPSS students in grades six through eleven cast 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. JA 35-

[4] As Plaintiffs note, Appellants' Br. 9, the Board has since revised its implementation procedures. Now, two alternates (instead of one) are selected along with the two candidates for the student member position. *See* HCPSS, Policy 2010 Implementation Procedures – Student Representation II.C.1 (effective Jan. 13, 2022), https://policy.hcpss.org/2000/2010/implementation/.

36. The Superintendent or her designee must certify the results of the vote in June, and the Student Member begins their term at the first meeting in July, after receiving approval of the Board. JA 35-36; Md. Code, Educ. § 3-701(f)(3)(i).

The Howard County Board of Education's mandate is to ensure a quality *public* education. *See* Md. Code, Educ. § 4-108 (charging each county board with (a) "[m]aintain[ing] throughout its county a reasonably uniform system of public schools"; (b) "determin[ing] . . . the educational policies of the county school system"; and (c) "[a]dopt[ing], codify[ing], and mak[ing] available to the public bylaws, rules, and regulations . . . for the conduct and management of the county public schools"). With limited exceptions, the Board does not set policy for students who attend private schools.

Unlike the Board's elected members, the student member exercises limited voting power. The student member is prohibited from voting on matters relating to fourteen different categories, including the appointment and salary of the county superintendent, employee and student discipline, staff appointment and promotion, matters relating to acquisition or disposition of real property, and budgetary matters. Md.

Code, Educ. § 3-701(f)(7). When the student member votes, five votes are needed to pass a measure. *Id.* § 3-701(g)(1). On matters on which the student member is not authorized to vote, four votes are required. *Id.* § 3-701(g)(2).

B. Maryland Supreme Court's Interpretation of State Law

In a similar challenge recently brought under the Maryland constitution, the Maryland Supreme Court authoritatively resolved the status of the Howard County Board's student member under state law. *Spiegel v. Bd. of Ed. of Howard County*, 281 A.3d 663 (Md. 2022).[5]

As in the instant challenge, the plaintiffs in *Spiegel* were parents unhappy with votes cast by the student member of the Howard County Board. *See id.* at 664–65. The *Spiegel* plaintiffs claimed that the process for selecting the student member violates various provisions of the Maryland constitution. The "dispositive issue" before the Maryland Supreme Court in *Spiegel* was whether the selection process for the Student Member is a general election subject to Maryland's

[5] In 2022, Maryland amended its constitution to rename its highest court as the Maryland Supreme Court. *See* 2021 Md. Laws Ch. 82 (approved by voters, November 8, 2022). This brief refers to the court by its current name.

constitutional protections for voting and elections. *Id.* at 667.

The Maryland Supreme Court determined that, as a matter of state law, the Student Member is not "an elected position subject to the Maryland Constitution's electoral requirements." *Id.* at 666, 669. As a matter of statutory interpretation, the court reasoned, the General Assembly created two classes of school board members on the Howard County Board: "elected members" and "student members." *Id.* at 669 (quoting § 3-701(a)). Although the relevant statute uses the word "election" in the student selection process in a few instances, the court concluded that this usage does not transform the process into an election for constitutional purposes, particularly in light of the overall statutory context, which distinguishes student members from elected members. *Id.* at 669–70. Instead, the "plain language" of the statute demonstrates the legislature's intent to treat student members on the Howard County board differently from elected members and to prescribe a non-elective selection process. *Id.* The court explained that these are legislative "policy preferences . . . [that] must be respected" by the courts, especially in light of the General Assembly's "broad discretion" to create and select "student board members as it sees fit."

Id. at 670, 673.

For similar reasons, the Maryland Supreme Court rejected the *Spiegel* plaintiffs' reliance on precedent under the Fourteenth Amendment to the U.S. Constitution, emphasizing that, "as expressly permitted by [the Supreme Court in *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970),] the General Assembly [chose] not to use the general election process to select the student member." *Spiegel*, 281 A.3d at 671. The Court concluded that opting for a selection process other than a general election was a choice that the state constitution allowed the General Assembly to make. *Id.*

The Maryland Supreme Court thus concluded that the selection process for the Howard County School Board's student member is not an "election" for purposes of state law, and the General Assembly acted within its discretion to establish a process other than an election to fill the seat.

C. District Court Proceedings

Disgruntled with votes cast by a student board member in 2020,[6]

[6] *See* Appellants' Br. 12–13 (complaining about votes cast by student member).

Plaintiffs brought this lawsuit to dismantle the student board member seat. Plaintiffs Lisa Kim and William Holland, two adult residents of Howard County, and Kim's son, J.K., filed this putative class action against the Board on March 16, 2021, arguing that the student member selection process is unconstitutional. Mr. Holland and Ms. Kim are both Howard County residents and are permitted to vote for three of the eight Board members: two "at large members" and one district member. Ms. Kim is also suing on behalf of her minor son, J.K., who attends a private Catholic middle school in Howard County.

Plaintiffs seek a declaration that the selection process for the student member position on Howard County's school board is unconstitutional. Plaintiffs allege that § 3-701(f) violates the Fourteenth Amendment's Equal Protection Clause, arguing that the student member selection process qualifies as a popular election. According to Plaintiffs' argument, this election by the student electorate violates the one-person, one-vote principle, resulting in malapportionment and vote dilution on the Howard County Board. Plaintiffs Kim and J.K. also argue that the statute violates the First Amendment's Free Exercise Clause by precluding students like J.K.,

who attend private religious schools, and others who are educated at home for religious reasons, from participating in the selection of the student member. JA 19–21.

The Board moved to dismiss Plaintiffs' complaint, arguing that the selection process for the student board member is consistent with both the First and Fourteenth Amendments. ECF No. 18. The District Court agreed and entered judgment for the Board. Because the student member is "not popularly elected," the court concluded, § 3-701(f) does not violate the Fourteenth Amendment's Equal Protection Clause. JA 60–65. The court reasoned that the student member selection process is not a direct popular election because "the Student Member is not chosen through a vote 'open to all . . . qualified voter[s]' in Howard County . . . or to 'all' such voters 'with some exceptions," but rather by "middle and high school students—nearly all of whom are *not* qualified voters"—in a Board-controlled process. JA 60 (alterations in original) (quoting *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54-55 (1970), and *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973)). And, the court further explained, the selection process is "not an indirect popular election because the students 'need not cast their votes in

accord with the expressed preferences' of Howard County's qualified voter base." JA 60 (quoting *Sailors v. Bd. of Ed.*, 387 U.S. 105, 109 n.6 (1967)). Because there is no popular election, Plaintiffs' Equal Protection claim fails. JA 60.[7]

The court also held that § 3-701(f) does not violate the First Amendment's Free Exercise Clause because it does not "burden religion," and "even if it did, the law is neutral and generally applicable." JA 72. The court first found that § 3-701(f) does not burden religion because it "does not prohibit or penalize religious conduct" or "encourage a religious student to choose public school over private school." JA 73. The court further concluded that § 3-701(f) operates "'without regard' for any student's religious motivations" and limits participation in the student election to public school students, excluding *all* private school students—religious and secular alike. JA 75. In reaching this conclusion, the court noted that "the Supreme Court has never said that a state must treat public and private schools identically." JA 77. The court therefore upheld § 3-701(f) as a neutral

[7] The court also rejected Plaintiffs' argument based on *Bush v. Gore*, 531 U.S. 98 (2000), which the Plaintiffs have abandoned on appeal, and denied their motion for class certification as moot. JA 69–72, 52 & n.1.

and generally applicable law consistent with the Free Exercise Clause. JA 77. Plaintiffs appealed.

SUMMARY OF ARGUMENT

1. The district court correctly rejected Plaintiffs' "one person, one vote" claim because the student board member is not popularly elected. *See Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967). The parties agree that the touchstone for whether "one person, one vote" applies is the existence of a popular election. Here, no significant part of the electorate is charged with choosing the student member, who instead is selected by children who are largely *not* qualified voters. State law does not require that the membership of local school boards be chosen through a popular election, and state law does not consider the selection process for the student board member to be an election. The informal, school-based procedures employed in the selection process differ significantly from those used for popular elections in Maryland, confirming that this process is not a popular election.

Plaintiffs' alternative tests are unsupported by precedent. First, Plaintiffs argue that the existence of a popular election is a factual

allegation contained in the complaint to which the court must defer. But whether a selection process qualifies as a popular election is a legal conclusion, which is not entitled to deference under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Second, relying primarily on *ARC Students for Liberty Campaign v. Los Rios Community College District,* 732 F. Supp. 2d 1051 (E.D. Cal. 2010), Plaintiffs argue that any time a class of people is empowered by the legislature to choose a representative, the result is a popular election. But that case dealt with an entirely different legal issue, and it never doubted the constitutionality of allowing enrolled students to select a school board member. Third, invoking the whites-only primary cases, Plaintiffs suggest that the Board is attempting to "evade" constitutional scrutiny, but constitutional protections outside of the "one person, one vote" rule continue to apply even though the student board member selection process is not a popular election. The remainder of Plaintiffs' argument is based on policy concerns, which are both misguided and provide no basis for this Court to displace the judgment of the Maryland legislature.

2. The district court also correctly rejected Plaintiffs' Free Exercise Clause challenge because Maryland law's limitation of the

student board member selection process to students enrolled in public schools is the quintessential example of a neutral and generally applicable law. State law does not exclude non-students for attending a religious school; it is entirely indifferent to the reasons why a student is not enrolled in public school. The Supreme Court has repeatedly said that states may limit the benefits of public school to students enrolled in public school. *Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987, 2000 (2022); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020). That is fatal to Plaintiffs' First Amendment case.

STANDARD OF REVIEW

This Court "review[s] a district court's grant of a motion to dismiss *de novo*." *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). Courts reviewing a motion to dismiss for failure to state a claim are to accept all well-pleaded factual allegations in the complaint as true, but may disregard legal conclusions. *Iqbal*, 556 U.S. at 679 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."). The court then asks whether the legal claim is "plausible": that is, whether the complaint contains

enough "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," which requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678; *see also McCleary-Evans v. Md. Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 587 (4th Cir. 2015) (noting that the plausibility standard "explicitly overruled the earlier standard . . . that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'").

ARGUMENT

I. There is No Equal Protection Violation When There Is No Popular Election

Plaintiffs' equal protection claim fails for a simple reason: the Equal Protection Clause's voting safeguards do not apply to non-elective offices like the Student Member position, as the district court correctly concluded. *See* JA 57–69.

A. The Student Member Selection Process Is Not a Popular Election

The Supreme Court has long recognized that "[v]iable local governments may need many innovations, numerous combinations of

old and new devices, great flexibility in municipal arrangements to meet changing urban conditions," *Hadley*, 397 U.S. at 59 (quoting *Sailors*, 387 U.S. at 110–11) (alteration in original), and that states are entitled to "vast leeway in the management of [their] internal affairs," including the organization of their political subdivisions, *Sailors*, 387 U.S. at 109. Accordingly, the Supreme Court has held that the U.S. Constitution does not require that local officials, like county school board members, be elected. *Id.* at 108. "[A] State can appoint local officials or elect them or combine the elective and appointive systems" consistent with the Constitution. *Id.* at 111. Maryland law does not require that all members of boards of education be popularly elected. *Spiegel*, 281 A.3d at 673.

As Plaintiffs recognize, Appellants' Br. 22–23, the Equal Protection Clause's "one person, one vote" principle applies only when a state chooses to use a popular election to select local officials. *See Hadley*, 397 U.S. at 54 ("[*I*]*n situations involving elections*, the States are required to insure that each person's vote counts as much, insofar as it as practicable, as any other person's." (emphasis added)); *see also, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S.

719, 730 (1973) (commenting that "[the state] has not opened the franchise to all residents, as Missouri had in *Hadley*, . . . nor to all residents with some exceptions," so "the popular election requirements enunciated by *Reynolds* . . . and succeeding cases are inapplicable"); *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016) (emphasizing that "once that right [to vote] *is granted to the electorate*," the Equal Protection Clause requires all votes be weighted equally (emphasis added) (internal quotation marks omitted)). But "where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws." *Hadley*, 397 U.S. at 58.

In *Sailors*, the Court held that the "one person, one vote" principle had "no relevancy" to a county school board because its members were not selected by popular election. 387 U.S. at 111. The board's members were chosen through a two-step process: first, elected local (i.e., sub-county) school boards chose delegates to attend a meeting for the selection of the county school board members; second, the delegates

"cast . . . votes" for county school board members from a slate of candidates. *Id.* at 106–07, 109 n.6. The Court concluded that this two-step process rendered the board "basically appointive rather than elective." *Id.* at 109. That conclusion was "evident" because the board's "membership . . . [was] not determined, directly or indirectly, through an election in which the residents of the county participate." *Id.* at 109 n.6. Rather, the "electorate" for selecting the county school board members was composed of "the delegates from the local school boards." *Id.* As *Sailors* makes clear, the decisive factor in determining whether the Equal Protection Clause's voting safeguards apply is whether the general electorate fills the position in question.

This Court's decision in *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), applies the same principle. *Vander Linden* involved a challenge to a South Carolina law that automatically assigned elected state legislators to serve on county legislative delegations charged with undertaking a number of general governmental functions so long as their district included any portion of a county's land. *See id.* at 270–71. This structure meant that a legislator whose district included only a few constituents in a county had the same vote on the county legislative

delegation as one who represented a much larger population of county residents, which led to significant departures from equal representation in nearly all counties. *Id.* at 272.

This Court found that the legislative delegation scheme violated the "one person, one vote" requirement. *Id.* at 281. There was no dispute that the legislators were popularly elected to their state legislative positions. *Id.* at 273 (noting that the State had conceded the point). Because "individuals become delegation members . . . simply by virtue of their popular election to the legislature," the "power to determine the membership of a legislative delegation resides in the electorate." *Id.*; *see also Bd. of Estimate v. Morris*, 489 U.S. 688, 690 (1989) (striking down a similar process whereby the elected president of each New York City borough was automatically assigned to serve on a city-wide board because the residents of each borough chose their president through a popular election).

Howard County's student member selection process is not a popular election. As the district court noted, the general electorate does not select the student member. JA 64 ("Maryland has delegated selection power to a group comprised almost entirely of people who are

not otherwise qualified to vote: 6th through 11th grade students."). Virtually *no* members of the state's electorate participate in the selection of the student board member. The state's electorate consists of adult citizens over 18 years of age, Md. Const. art. I, § 1, and yet those involved in the selection of the student board member are children in public schools in grades six through eleven.[8] When no significant portion of the electorate participates in a selection process, it is not a "popular election." *Hadley*, 397 U.S. at 54 (limiting "one person, one vote" rule to the "election[s] open to all"); *Avery v. Midland County*, 390 U.S. 474, 476 (1968) (popular election by county residents). And whereas the general voting population selected the state legislators in

[8] Plaintiffs emphasize the possibility that a small number of students might be 18 and therefore eligible voters *and* also participate in the student selection process as a junior or lower-grade student in high school. Appellants' Br. 58–59. As the district court noted, JA 64, a selection process does not become a popular election simply because a few members of the electorate are part of the group that makes an appointment. The *Sailors* Court ratified a process where delegates from local boards of education selected the county board members, without expressing any concern that these delegates likely also were members of the general electorate. *See* JA 65 (explaining that, as in *Sailors*, "a delegate's status as a qualified voter is not relevant in deciding whether one-person, one-vote applies").

Vander Linden, the voters in Howard County do not in any way select the student board member.

That students cast a vote as part of the selection process does not alter this conclusion. As the district court noted, "That a selection process might be called an 'election' in common parlance does not mean that it is a 'popular election' subject to one-person, one-vote, as defined by Supreme Court precedent." JA 62-63. And in *Sailors*, the Supreme Court stated that local school board delegates "elect[ed]" the county school board members, 387 U.S. at 106, yet the Court nonetheless held that the process was "basically appointive," *id.* at 109; *see also Rosenthal v. Bd. of Educ.*, 385 F. Supp. 223, 225 (E.D.N.Y. 1974) (three-judge court), *summarily aff'd*, 420 U.S. 985 (1975) (making this point).

Plaintiffs next place particular weight on the use of the word "election" in Md. Code, Educ. §§ 3-114 and 3-701 to support their assertion that the student member selection process is a popular election for purposes of the Fourteenth Amendment. Appellants' Br. 32–34. But the Maryland Supreme Court rejected this same reasoning in *Spiegel* in concluding that the student member selection process is *not* an election under the state constitution. *Spiegel*, 281 A.3d at 669.

Although it acknowledged that plaintiffs "might have a valid point" regarding the statutory use of the word "election" "if there wasn't more" to §§ 3-114 and 3-701, "there *is* more." *Id.* When "consider[ing] [§§ 3-701 and 3-114] in their entirety," the *Spiegel* court held, the statutes point decisively against the student board member selection process being an election. *Id.* For example, the first clause of § 3-701 explicitly distinguishes between the Board's "[s]even *elected* members" and the "[o]ne *student* member"—a distinction maintained consistently throughout the statute. Md. Code, Educ. § 3-701(a)(1) (emphases added); *compare, e.g.*, *id.* § 3-701(b)(1) (establishing qualifications for "[a] candidate who becomes an elected member of the county board"), *with id.* § 3-701(f)(1) (establishing separate qualifications for "[t]he student member").

Moreover, in upholding the student board member position, the *Spiegel* court made clear that the Maryland constitution places "responsibility for the public school system [in] the General Assembly," but that "[t]he details were left to the General Assembly." *Spiegel*, 281 A.3d at 673. Looking to "the plain text of [Maryland's constitution], the historical context in which it was adopted, and almost a century of

precedent from this Court," the Maryland Supreme Court concluded "the General Assembly has broad discretion to control and modify the composition of local boards of education, which includes the creation and selection process of student board members as it sees fit." *Id.* Consistent with this authority, the court rejected the *Spiegel* plaintiffs' argument that *Hadley* required that the Howard County student member must be "elected," concluding that, "as expressly permitted by *Hadley*, the General Assembly chose not to use the general election process to select the student member." *Id.* at 671.

Plaintiffs argue "*Spiegel* never held that the selection of the Student Member was not an election." Appellants' Br. 31. This is wrong. The "dispositive issue," the court stated, was whether "the student member is an elected position subject to the Maryland Constitution's electoral requirements." *Spiegel*, 281 A.3d at 666–67. The court concluded that the answer to this question was no: student members are not elected officials subject to Maryland's electoral law. *Id.* at 670.

The Maryland Supreme Court is "unquestionably 'the ultimate exposito[r] of state law,'" *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (alteration in original) (citation omitted), and its determination in

Spiegel that the student board member is not elected as a matter of state law forecloses Plaintiffs' reliance on state law to argue the opposite. Although the *Spiegel* court's determination is not dispositive of the question whether the student member selection process is an election under federal law, Appellants' Br. 27–29, its careful analysis in the face of analogous arguments should be given persuasive weight. *See, e.g., Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.").

Plaintiffs' position, if adopted, would threaten not only the Howard County student member, but student members on other boards across the state. *See supra* p. 5. It would also jeopardize numerous other statutes, as the student member is not unique among Maryland governmental officials in being selected to serve through a vote of his or her peers. For instance, the General Assembly created a seat on the State Board of Education for a "certified teacher who is actively teaching," and explicitly provided that the seat be filled by the person "who received the highest number of votes after an election by teachers in the State." Md. Code, Educ. § 2-202(b)(4). Several members of the

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

Finally, as the district court concluded, the process by which students choose the student member confirms that the student member selection process is not a popular election. *See* JA 60–61. As acknowledged in the Complaint, *see* JA 11–12, the student member is selected through a multi-step process in which school administrators and employees are heavily involved. Principals, counselors, and student government advisors take an active role in choosing who may serve as a delegate to the nominating convention and be eligible to serve as a student member; campaign materials are distributed through school principals and advisors, who then allow student voters "to view the materials"; and high-school students and middle-school student council advisors tabulate student votes. JA 34–35. None of these processes

resemble the formal procedures of a popular election. *See* JA 17 (noting that the procedures governing the selection of the Student Member do not include, among other things, "registration, government administered secret ballots, polling place notices under the Help America Vote Act of 2002, deadlines to certify, observer rights, and myriad of other standard procedures and safeguards that characterize Maryland elections"); Press Release, Pub. Int. Legal Found., PILF Clients Demand End to Howard County, MD School Board's Election Scheme That Lets Children Vote for School Board (Mar. 16, 2021), https://perma.cc/R7LM-YMR6 (Plaintiffs' press release claiming that the process for selecting the student member does not resemble "a real government election").

In sum, the general electorate of Howard County does not select the student member, the relevant statutes do not provide for a general election, and the selection procedures do not resemble that of a popular election. By no measure does the student member selection process

resemble a popular election, so the Equal Protection Clause's voting protections are simply inapplicable.[9]

B. Plaintiffs' Alternative Arguments Are Unavailing

Plaintiffs offer several alternative theories for determining whether a selection process constitutes a popular election. None of them alter the fundamental legal conclusion that the student board selection process is not a popular election.

First, Plaintiffs argue that because the complaint alleges that the student board member selection process is a popular election, the district court was required to accept the pleading's characterization. Appellants' Br. 22 ("The court strayed beyond the Complaint's allegations and created its own facts in finding the Student Member is not chosen via 'popular election.'"). Although the court must (and did) accept all plausible *factual* allegations in the Complaint as true for purposes of the motion to dismiss, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678; *see also, e.g.*, *Walters v.*

[9] If this Court holds that the student member selection process is not a popular election, it need not consider whether the student board member exercises governmental authority. *See* Appellants' Br. 48–51.

McMahen, 684 F.3d 435, 439 (4th Cir. 2012) ("[A]lthough a court must accept as true all factual allegations contained in a complaint, such deference is not accorded to legal conclusions stated therein."). Whether something is a "popular election" for purposes of Equal Protection Clause doctrine is not a question of fact to be pleaded or proven, but of law for courts to decide based on precedent.

The Plaintiffs' argument that the district court erroneously "substituted its own facts" by reading the Board's policy rather than simply accepting Plaintiffs' conclusions is similarly mistaken. Appellants' Br. 19, 39–41. Plaintiffs attached the Board policy specifying election procedures to the complaint, JA 25–37, and cited it repeatedly in the complaint, JA 10–12. Courts may properly consider exhibits that Plaintiffs themselves attach to the complaint and incorporate by reference when resolving a Rule 12(b)(6) motion to dismiss. *E.g.*, *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015); *see also* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes"). The district court did not err in basing its decision on what the Board's policy actually provides, rather than the Plaintiffs'

characterization of it. *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1327 (4th ed.) ("It appears to be well settled that when a disparity exists between the written instrument annexed to the pleadings and the allegations in the pleadings, the terms of the written instrument will control, particularly when it is the instrument being relied upon by the party who made it an exhibit.").

Second, Plaintiffs rely on a single decision from the Eastern District of California, *ARC Students for Liberty Campaign v. Los Rios Cmty. Coll. Dist.*, 732 F. Supp. 2d 1051 (E.D. Cal. 2010), to posit that any time a state provides for a selection process using any class of voters—even if, in Plaintiffs' view, the class primarily consists of people who are *not* qualified voters in any other sense—that creates a popular election triggering one-person, one-vote rules. Appellants' Br. 23–24. *ARC Students* does not help Plaintiffs.

In *ARC Students*, state law provided for a student board member on the governing board of each community college district to be chosen in an "election" by students enrolled in community colleges within that district. *ARC Students*, 732 F. Supp. 2d at 1056–57. The remaining members of each board were elected at-large from residents of the

district. Cal. Educ. Code § 72023. After concluding that there were irregularities in the student member selection, the community college board threw out the results and chose the student member through other means. *ARC Students*, 732 F. Supp. 2d at 1053. The district court concluded that refusing to honor the election results violated due process. *Id*. at 1058–59. The district court rejected the board's argument that the selection process was beyond constitutional scrutiny and concluded that due process rights apply even when the class of voters who can participate is limited. *Id.* at 1060.

ARC Students is fully consistent with the Maryland law challenged here. Notably, the *ARC Students* district court did not consider the election-specific one-person, one-vote theory advanced by Plaintiffs here. Nor was there a constitutional challenge to the state law criteria that specified *who* could participate in the selection process. *See id.* at 1061 (distinguishing a different case because it did not address "a claim based on the District's failure to follow a statute"). *ARC Students*

simply resolved a challenge to the decision to *deviate* from state law's *procedural* mandates in a particular instance.[10]

Indeed, the decision in *ARC Students* did not doubt the constitutional validity of the state law that gave enhanced selection power to community college students. The court found no constitutional infirmity even though, unlike the situation in the present case, the vast majority of the community college students in *ARC Students* were also likely members of the state's general electorate. Yet under Plaintiffs' theory in this case, the *ARC Students* student board member selection process would have violated the Equal Protection Clause. Presumably, the total population of the relevant geographic area for the community college differed from the population of community college students, as Plaintiffs claim here in their malapportionment theory. *See* Appellants' Br. 55. And community college students who resided in the district (and were otherwise qualified as voters) could participate in *both* the student board member selection process *and* the popular election of the regular

[10] Arguably, the application of *Hadley* in *ARC Students* was unnecessary to its holding. As *Sailors* makes clear, other constitutional protections, presumably including due process concerns, may still apply regardless of whether a selection process is a popular election. *See* 387 U.S. at 108 & n.5.

board members, as Plaintiffs claim here in their vote dilution theory. *See id.* at 58–59. Yet *ARC Students* identified no constitutional defect with allowing students a say in the governance of their schools, which is the same result reached by the district court in this case.

Third, seeking to distance themselves from the decision in *Spiegel*, Plaintiffs argue that "the labels a state applies to its election practices in trying to evade Equal Protection are irrelevant." Appellants' Br. 29. In support, Plaintiffs invoke the whites-only primary cases involving attempts to limit primary voting to white voters. *Id.* (citing *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944)). The analogy is both legally and factually inapt. As an initial matter, unlike the private organizations involved in the whites-only primary cases, the Howard County Board is indisputably a governmental entity and cannot "evade" constitutional scrutiny regardless of the processes used to select its members.

Even more importantly, as the district court emphasized, "[t]he popular election requirement is merely a prerequisite for a one-person, one-vote claim—it is not a hurdle to *other* constitutional claims." JA 68

(emphasis in original). Discrimination on the basis of race or other protected classes would not pass constitutional scrutiny, regardless of whether the one-person, one-vote theory is available. JA 68-69 (citing *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989)). Plaintiffs have not pleaded or argued that allowing students a limited say constitutes racial or other invidious discrimination. Rejecting Plaintiffs' case does nothing to foreclose challenges based on the Fifteenth Amendment or other constitutional theories. All it means is that Maryland's General Assembly was free to choose to select the student board member through a process other than a "popular election" without running afoul of the Constitution's one-person, one-vote mandate.

Fourth, Plaintiffs argue that general principles of "political accountability" should preclude the student member from being selected by anyone other than elected officials or the general class of voters. Appellants' Br. 35–38. Seeking support for this argument, Plaintiffs cite cases involving *federal* separation of powers. *Id.* at 37–38 (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020)). Of course, decisions

interpreting Article II of the U.S. Constitution have no relevance to how the state chooses to govern its school system. Federal separation of powers principles do not apply to states at all. *E.g.*, *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) (collecting cases).

Outside of these Article II cases, Plaintiffs identify no federal constitutional principle that would constrain the Maryland General Assembly's power to design non-elective processes as it sees fit.[11] Plaintiffs particularly fail to identify any such principle within the confines of the Equal Protection Clause, which is the sole provision on which Plaintiffs rely for this claim in their Complaint. Although Plaintiffs argue that *Sailors* and its progeny are distinguishable because the specific selection process considered in each case involved "an elected official or a body comprising them" who are "ultimately accountable to voters," Appellants' Br. 35, Plaintiffs point to nothing in any of these decisions that indicate this fact was relevant to the Court's

[11] Perhaps Plaintiffs mean to invoke "the Guarantee Clause of Article IV, § 4, which 'guarantee[s] to every State in [the] Union a Republican Form of Government.' [The Supreme] Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (quoting U.S. Const. art. IV, § 4).

holdings. Nor do Plaintiffs explain why the elected status of the people involved in a selection process would affect whether that process operates as a popular election. *Cf. Sailors*, 387 U.S. at 109 n.6 (emphasizing that "the delegates need *not* cast their votes in accord with the expressed preferences of the school electors" as further supporting the Court's conclusion that the system was not "directly or indirectly" a popular election (emphasis added)). As explained above, once a state has elected to use a non-elective process to select a government official, that is the end of the matter for the one-person, one-vote theory Plaintiffs raise here. *Hadley*, 397 U.S. at 58.

Indeed, Plaintiffs cannot identify such a principle because the allocation of political power in Maryland among different actors—including the specific question whether a public official should be elected or not—is primarily a question of *state* law. *See Whalen*, 445 U.S. at 689 n.4. The Maryland Supreme Court has authoritatively resolved this question against the position Plaintiffs take here, concluding that the student board member selection process is well within the General Assembly's ample discretion over the composition of

county school boards. *Spiegel*, 281 A.3d at 674. Plaintiffs' policy preferences for a different system are irrelevant to that legal question.

In any event, accountability concerns are misguided: regular voters in Howard County have an overwhelming say in the governance of schools by selecting seven of the eight board members. By also allowing students a limited say in school governance, Maryland law *expands* the scope and forms of political accountability to include the individuals most directly impacted by the governance of their schools.

It is ironic that Plaintiffs emphasize "political accountability" in the same breath they ask the unelected judges of this Court to displace the policy judgment of Maryland's elected representatives in the General Assembly and impose Plaintiffs' preferences instead. By overwhelming votes, the General Assembly has deemed student involvement in school governance to be a beneficial policy, both in Howard County and elsewhere in the state. *See supra* p. 5. Plaintiffs remain free to press their policy arguments in the General Assembly, but not every policy disagreement raises a constitutional issue.

* * *

"America's public schools are the nurseries of democracy," *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021), and "[t]he Nation's future depends upon leaders trained" in the skills of democracy, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quotation omitted). Like their parents and other members of the community, "children . . . have a stake in a strong public-education system." *Evenwel v. Abbott*, 578 U.S. 54, 74 (2016). But unlike many of their parents and adult neighbors, the children who attend Howard County public schools do not get to vote for any of the seven elected members on their school's governing board.

Maryland's General Assembly exercised its constitutional authority to provide Howard County's public school students a voice and to allow future voters a chance to practice their skills through a limited say in the governance of the schools that they attend. "[N]othing in the Constitution . . . prevent[s] experimentation" with different methods of choosing officials, *Sailors*, 387 U.S. at 110–11, and nothing in the Constitution prohibits Maryland's choice to combine seven elected board members chosen by adults in the community, with a single, non-elective

member chosen by students. This Court should affirm the district court's dismissal of Plaintiffs' Equal Protection Clause claim.

Should this Court disagree, however, and conclude that the student board member is popularly elected, it should remand for consideration of the remaining elements of Plaintiffs' claim because the district court did not have occasion to address these other issues in the first instance. *See United States v. Frank*, 8 F.4th 320, 333 (4th Cir. 2021) (explaining that this Court is "a 'court of review, not first view'" (citation omitted)). Among other issues, no court has yet decided whether the student board member exercises governmental power, even though the student board member may not vote on matters relating to the budget or finance or numerous other categories vital to running a school. Md. Code Educ. § 3-701(f)(7). And no court has considered whether Plaintiffs' malapportionment theory fails under *Evenwel v. Abbott*, 578 U.S. 54 (2016), which makes clear that the relevant population to compare is the total geographic population, not simply eligible voters, *id.* at 73, and under *Evenwel*'s logic the student board member here represents the same county-wide total population as the regular at-large members. *See id.* at 74 ("[R]epresentatives serve all

residents, not just those eligible or registered to vote."); JA 28 (HCPSS policy statement explaining that "[t]he Student Member of the Board of Education represents students, staff, parents and others in the community by presenting a student perspective on matters that come before the Board."). Should the Court disagree with the district court's resolution of the threshold question, these further issues should be addressed by the district court on remand.

II. There Is No Free Exercise Objection to Allowing Only Public School Students a Voice in Public Education

Plaintiffs also contend § 3-701(f) violates the First Amendment's Free Exercise Clause by limiting the student board member selection process to students enrolled in public school—thereby excluding students who attend religious private schools from participation. The district court correctly rejected this claim.

Under longstanding Supreme Court precedent, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021) (citing *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 878-82 (1990)). Neutral laws are those that "proscribe[ ]

conduct without regard to whether that conduct is religiously motivated." *Hines v. S.C. Dep't of Corr.*, 148 F.3d 353, 357 (4th Cir. 1998). Generally applicable laws "make[] no distinction between action based on religious conviction and action based on secular views." *Id.*

Section 3-701(f) is a paradigmatic example of a neutral, generally applicable law that raises no constitutional objection. The Student Board member selection process excludes *all* children who are not enrolled in HCPSS schools for *any* reason: whether they are being homeschooled, attend a religious school, attend a non-religious private school, drop out, or graduate early. Nothing in the state law or the Board's policies target, distinguish among, or otherwise punish non-students based on whatever religious (or non-religious) motivations they may have.

The total absence of any difference in treatment based on religion is fatal to Plaintiffs' Free Exercise Claim. As this court has explained, "[i]f a law has 'no object that infringes upon or restricts practices *because of their religious motivation*,' then the law is neutral." *Alive Church of the Nazarene, Inc. v. Prince William County*, 59 F.4th 92, 108 (4th Cir. 2023) (internal citations and alterations omitted; internal

emphasis added); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460–63 (2017) (contrasting "neutral and generally applicable" laws that operate "without regard to religion" from laws "that single out the religious for disfavored treatment"). Here, as the district court noted, "public school students participate and private school students do not, regardless of the type of private school they attend." JA 75.

The Supreme Court's recent decisions in *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), and *Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987, 1993 (2022), support the same basic Free Exercise Clause principles. As the Court made clear, the Constitution allows the State to deny benefits to students not enrolled in public schools so long as the State does not discriminate on the basis of religion.

Espinoza involved a free-exercise challenge to a Montana tax-credit program designed to provide scholarships for private-school students. 140 S. Ct. at 2251–52. State officials had determined that the program could not be used to fund scholarships at religious schools in light of a state constitutional provision that barred public monies from

going to institutions "controlled in whole or in part by any church, sect, or denomination." *Id.* at 2252 (quoting Mont. Const., art. X, § 6(1)). Because non-religious private schools were not subject to the same restraint, the Supreme Court held that the Montana program "exclude[d] schools from government aid solely because of religious status," in violation of the Free Exercise Clause. *Id.* at 2255.

The Court reaffirmed this approach in *Carson*. There, the Court considered Maine's program of providing tuition assistance to parents in remote regions without a public secondary school to allow them to send their children to a private school, but only so long as the private school was "nonsectarian." 142 S. Ct. at 1993. The Court found the case controlled by *Espinoza*'s anti-discrimination rationale: "While the wording of the Montana and Maine provisions is different, their effect is the same: to 'disqualify some private schools' from funding 'solely because they are religious.'" *Id.* at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261).

Although Plaintiffs cite *Carson* and *Espinoza* in their favor, *see* Appellants' Br. 60, these cases squarely reject any argument that reserving benefits to students enrolled in public schools raises

constitutional objections. As *Espinoza* explains, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. The touchstone is not whether the State has denied a benefit to any religious schools but, rather, whether that denial "single[s] out schools based on their religious character." *Id.* at 2255; *see also Carson*, 142 S. Ct. at 2000 (emphasizing that it is "wrong to say that under our decision today [a State] '*must*' fund religious education" and suggesting alternatives). In other words, *Carson* and *Espinoza* make clear that a total ban on providing benefits to students enrolled in private schools is constitutional because such a ban is neutral and generally applicable.

Plaintiffs make two additional arguments, neither of which has merit. Plaintiffs briefly suggest that Maryland's law may not be neutral and generally applicable, arguing that "even neutral laws violate the Free Exercise Clause if administered in a manner that disadvantages religious beliefs or practices. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018)." Appellants' Br. 62. What *Masterpiece Cakeshop* actually says is that the "Free Exercise Clause bars even 'subtle departures from neutrality' on matters of

religion," 138 S. Ct. at 1731 (citation omitted), and found that contemporary evidence of animus on the part of a state decisionmaker who had discretion to determine when the statute was violated was not actually neutral in practice. Similarly, in *Fulton*, the Supreme Court held that a public adoption system that excluded private providers who engaged in discrimination was not generally applicable because it vested a city commissioner with authority to grant exceptions from the rule when the commissioner deemed fit. 141 S. Ct. at 1876–77. Here, by contrast, Plaintiffs have never questioned the neutral administration of the student member selection process, which contains no exceptions or discretion is permitted. The rule limiting the selection process to students enrolled in HCPSS schools is therefore a neutral, generally applicable rule.

Finally, in a footnote, Plaintiffs argue that even a generally applicable restriction will still violate the First Amendment if it poses a substantial burden on their education or their free exercise rights. By raising it in a footnote, Plaintiffs have forfeited this argument. *See Brundle ex rel. Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 778 (4th Cir. 2019). This argument is also

foreclosed by *Carson* and *Espinoza*, which recognized that whatever burden a neutral, generally applicable restriction against funding private schools poses is constitutionally acceptable. *Carson*, 142 S. Ct. at 2000. Here, the only "burden" that non-public school students face is being denied the ability to participate in a selection process for a school board that makes decisions that do not even apply to their education, a far less weighty burden than the loss of a free education that the Court would have allowed in *Carson* and *Espinoza*. *See* JA 73–74 (rejecting Plaintiffs' claim that exclusion from the student member selection process burdens their religious exercise); *see also Goodall ex rel. Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 169 (4th Cir. 1995) (rejecting free-exercise claim in part because plaintiffs' religious exercise was not substantially burdened).[12]

[12] Plaintiffs make much of whether the student member may vote on various matters, such as providing transportation for private schools. *See* Appellants' Br. 17–18, 50. Although the complaint does not point to a single student member vote that has actually affected Plaintiffs' schooling, this issue is, in any case, irrelevant to the central Free Exercise Clause rule—that limiting the student member vote to HCPSS students is a neutral and generally applicable policy choice, regardless of the powers that the student member exercises.

The Board of Education is created for the purpose of governing the local system of *public* education. The Supreme Court has repeatedly reaffirmed that the First Amendment permits a State to distinguish between public and private education. The Maryland General Assembly logically chose to give only students enrolled in public school—the ones most directly affected by the Board's decisions—a limited say on the Board. As the District Court correctly found, that choice raises no constitutional objection.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Plaintiffs' complaint for failure to state a claim.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 9,805 words, excluding the parts of the document exempted by Rule 32(f), and was prepared in fourteen-point Century Schoolbook font, a proportionally spaced typeface, using Microsoft Word.

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