IN THE
COURT OF APPEALS OF MARYLAND

Petition No. 18
September Term 2021
(COA-REG-0018-2021)

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

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

Appellants,

v.

BOARD OF EDUCATION OF HOWARD COUNTY,

Appellee.

REPLY BRIEF OF APPELLANTS

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Appellants Traci Spiegel, on behalf of herself and her minor children, S.L.S. and S.F.S., and Kimberly Ford, on behalf of herself and her minor children, A.M.F. and E.L.F. ("Spiegel and Ford") submit this Reply to the Brief of Appellee Board of Education of Howard County ("Board"). Appellants respond to the arguments raised by Appellee in its brief as follows:

I. MINORS LACK POLITICAL ACCOUNTABILITY

The Board suggests in its brief that since the General Assembly has passed laws for other county school boards employing a combination of elections and appointments to fill their board seats, this fact somehow supports the argument that the student position in Howard County is either an "appointment" or an otherwise permissible selection. Appellee Br. 10. However, the statutes that use a traditional appointment process use the word "appoint" and vest the appointment in an elected official. For example, in Baltimore City, a panel is convened to "select nominees to be recommended to the Mayor as qualified candidates for appointment to the board." Md. Code, Educ. § 3-108.1(b)(2). This precise language regarding a group convened specifically to nominate an appointee stands in stark contrast to the statute regarding the Howard County student member, which refers repeatedly to the procedure as an "election," and never as an "appointment." Md. Code, Educ. §3-701(f).

Even if the Board is found to be correct in its assertion that the Howard County student member is an appointed position, there are Constitutional issues to be considered that the Board never addresses. The purported "appointment" is made by children as young as eleven. Aside from being unqualified to make an appointment by their minor status, the fundamental Constitutional concept of political accountability is absent. For example, in Baltimore City, there is accountability for the board members appointed by the Mayor. The panel is convened by the Mayor to select the nominees, and the Mayor

approves the appointment and is directly accountable to the residents of Baltimore City.

No such accountability exists for the student member "selection" because the position is not a political appointment, it is one carried out by middle school and high school children outside of any political process. The statute at issue requires the Howard County student member to be chosen through an election by votes cast by children in sixth grade through eleventh grade and charges the Board of Education of Howard County with merely approving the "nomination and election process for the student member." Md. Code, Edu. § 3-701(f)(3). The Board of Education of Howard County is limited to approving the process of electing the student member but cannot approve or disapprove the member chosen by these children. Id. The student member, as well as the children who elected the student member, are hardly a constituency that any rational person would expect to be able to hold accountable. Certainly, the student member of the Board has no direct accountability to the voters and residents in the County who pay the property taxes that fund the Board and Howard County's school system.

This can also further explain the crucial difference between the appointment of a teacher to the State Board of Education and the student member of Howard County's Board of Education. First, the teacher is appointed by the Governor to the State Board of Education after being elected by a group of his or her peers. Md. Code Ann., Educ. § 2-202(a). Second, this is not an association whose members are minor children. In contrast, this is a group of adults who ordinarily have the right to vote in an election who choose a representative who is then appointed by the Governor.

Although the Board points out several legislative offices with similar structures—a group electing a nominee who is then appointed by another official—the Board fails to address the fact that none of these offices are constitutionally mandated. Appellee Br. 11; 21. The Board points out that members of the State Retirement and Pension System, the Maryland Deposit Insurance Fund Corporation, Baltimore City's Public Watershed Association, the Baltimore City Police Department Death Relief Fund, and the Advisory Council on Health and Physical Education are all appointed in the manner described above. Id. at 21 & fn. 10. However, not a single one of these boards are mandated by the Maryland Constitution. There is no Constitutional mandate regarding the need for a Retirement and Pension System or for a Watershed Association.

The boards or associations cited are in many cases advisory boards, hardly on the same footing as a constitutionally mandated State agency. The existence of these boards or associations, unlike the various school boards in the State, are subject to the exclusive power of the General Assembly to create or abolish them. If the legislature were so inclined, these boards or associations could be eliminated. However, local boards of education are required by the Maryland Constitution, and they are a necessity in carrying out the constitutional mandate for a free public education. Md. Const. Art. 8 § 1, Art. 17 § 7. The fact that the legislature gave each of these discretionary boards or associations an appointment process is clearly distinguishable from the issue before this Court.

II. VOTER DILUTION CLAIMS ARE VIABLE UNDER MARYLAND'S CONSTITUTION

The Board claims in its brief that Spiegel and Ford fail to raise a voter dilution claim because they conceded they are not pressing their claims under the Fourteenth Amendment. Appellee Br. 31. The Board is correct that Spiegel and Ford are not pressing claims under the Fourteenth Amendment to the United States Constitution but ignore that they are asking this Court for a voter dilution ruling under parallel provisions to Maryland's Constitution. In its zeal to avoid a ruling on the voter dilution claims, the Board forgets its own citation and argument: "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 the federal provisions.'" Appellee Br. 17, fn. 8 (quoting *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 619 (2002) (emphasis in original)). While the claim in this case places its focus on the limitations and requirements under Maryland's Constitution, the voter dilution cases under the Fourteenth Amendment are helpful in the analysis.

Thus, while the Board previously relied on the *Hadley* decision to assert no voter dilution claim exists in this case, a careful reading of *Hadley* demonstrates the opposite. Now, the only substantive argument the Board raises against the voter dilution claim on this appeal is that the student members represent "students, staff parents and others in the community," therefore, the county-wide electorate has had its rights preserved. Appellee

Br. 33. The Board's arguments in this respect are circular. The Board suggests that even though representatives on a board can be voted into their position by almost no adult registered voter in the County, a vote dilution claim cannot be maintained because the Board's decisions impact the entire county. This circular reasoning would prevent any voter dilution claim from being successful.

All state boards possessing general governmental power vote on issues affecting the population to which they serve. It is not their service on the Board that violates the expectations of the Howard County residents' voting rights. The issue of voter dilution is one of the representation in the electoral process. The student voters by in large do not serve to represent the adult registered voters in Howard County, and the position placed on the Board by these student voters dilutes Howard County registered voters' right to one person, one vote. The Board's suggestion that voters often vote for multiple county Board seats (district and at large seats) or that some boards are both appointed and elected ignores the fact that in each scenario the Board presents, the adult registered voting population has the same voting rights. *See* Appellee Br. 28. The student position alters the voting rights and voting power of adult registered voters in Howard County in a way that offends Maryland's Constitution.

The Board implicitly admits (by raising largely technical defenses to the constitutional claims) that if the student member position in Howard County is an elected position, then it violates Article 1 Section of Maryland's Constitution. In this regard, the Board's arguments are most telling. Rather than focusing on the substance of the issue, The Board argues that despite not being an election, the authorities governing elections

were required parties in this case. The Board then attempts to convince this Court that a statute that touches on voting rights and violates the Maryland Constitution can never be challenged unless a challenge is made as soon as it is enacted.

III. APPELLANTS' CLAIM IS NOT BARRED BY § 12-202(B) OF THE ELECTION ARTICLE

After dedicating countless pages of argument to convince this Court that the student member position was appointed and not elected, the Board has no qualms about arguing to the Court that the process is nonetheless governed by the *Election Article*. The Board's argument ignores the fact that the *Election Article* specifically exempts from its coverage the student member election. The *Election Article* states that "except as otherwise provided in this subtitle and in Title 3 of the *Education Article*, the provisions of this article relating to the nomination and election of candidates to public office shall govern the nomination and election of members to an elected county board of education." Md. Code Ann., Election Law Article ("Elec. Law), § 8-801.

Instead of holding student member elections under the *Election Article*, Title 3 specifically lays out the process that governs the nomination and election of the student member to the Howard County Board of Education. *See* Educ.§ 3-701(1)(f) (providing that the nomination and election process for the student member shall be approved by the Howard County Board of Education). As a result, Section 12-202(b) of the *Election Article* that the Board claims bars Spiegel & Ford's appeal is not even applicable to the

case. This section alone demonstrates that the General Assembly knew that the student position in Howard County was an elected office, otherwise, it would have had no reason to exempt this so-called "appointment" from the election law requirements.

Even if the Court attempted to apply Section 12-202(b) to this Appeal, it would realize the Board's arguments have no merit. The Board admits that Section 12-202 applies to all suits challenging a candidates' qualifications for office or alleging an infringement of voting rights under Maryland law. *See* Appellee's Br. 34 (citing *Lamone v. Schlakman*, 451 Md. 468, 482 (2017)). The Board, however, has misconstrued Spiegel & Ford's claims and is asserting defenses to claims that have not been made. Spiegel and Ford are not challenging a current or past candidate or member's qualifications, nor alleging an infringement of student voting rights from a particular student election. Rather, Spiegel and Ford contend that the student member position itself and the process for electing the position, authorized and governed by Title 3 in the *Education Article*, conflicts with the Maryland Constitution.

The Board incorrectly suggests that the case involves a challenge to the student member candidate's eligibility for the 2020 student member election. Appellee Br. 35. The Board's deliberate oversimplification of the issue ignores the fact that the student member meets all statutory eligibility requirements. This appeal does not challenge whether these eligibility requirements were met. This appeal concedes that the stated statutory eligibility requirements were met for the student member, and instead

challenges the statutory authority to establish the position and the chosen mechanism for filling the position under the Maryland Constitution.

Even if Spiegel & Ford's suit was construed as specifically challenging a candidate's qualifications or an election, Section 12-202(b) of the *Election Article* would not be a bar to relief. The student member is elected and then seated on July 1 every year. Educ. 3-701(f)(2). The Board argues that under § 12-202(b), the limitations period for filing this lawsuit would have expired, at the very latest, in August 2020. *See* Appellee Br. 35 (noting that Plaintiffs' did not file suit until four months after the 2021 student member was elected and seated). However, even if the underlying lawsuit was barred with respect to the current 2020 student member and election, Educ. § 3-701(f)(2) provides that the student member shall serve for a term of one year. When the underlying lawsuit was filed, the election process had already commenced for the new student member who was then elected and seated in July 2021. As a result, even if the underlying case were construed to be challenging a particular student member election (which it was not), it would not have been barred with respect to the 2021 student member election.

IV. APPELLANTS' CLAIM IS NOT BARRED BY THE DOCTRINE OF LACHES

The Board argues that "independent of Elec. Law § 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." *See* Appellee Br. 37 (citing

Ademiluyi v. State Bd. of Elections, 458 Md. 1, 9 (2018)). The Board goes on to argue that "Maryland courts have found election-related claims to be barred by laches even when they are not barred by § 12-202(b)." *See id.* (citing *Baker v. O'Malley*, 217 Md. App. 288, 297 (2014)). The cases that the Board relies upon are not constitutional challenges. Instead, each case the Board relies upon involves claims central to a candidate's qualifications for office or claims deriving from an alleged wrong in an election that had already concluded.

For example, in *Baker*, a woman was elected as an orphan's court judge, however, during the same election, a ratification to a constitutional amendment was passed requiring judges to be attorneys, which she was not. As a result of the ratification, the Governor refused to appoint her because she was not an attorney, but she waited to sue the Governor until nearly two years later. The Court found that her lawsuit was not barred by §12-202 because in her complaint, she did not assert a claim for judicial relief pursuant to §12-202. Rather, she sought a common law *writ of mandamus* and monetary damages for the salary she did not receive.

The Court explained that §12-202 provides a statutory cause of action for registered voters "if no other timely and adequate remedy is provided by the Election Law Article." *Baker*, 217 Md. App. at 297. The Court went on to say that "in other words, the statutory remedy provided by EL § 12-202 is supplemental to – rather than pre-emptive of – other remedies that might be available to a candidate." *Id.* Although the Court found that §12-202(b) did not bar her lawsuit, because of her delay in bringing suit,

the Court found that her lawsuit was barred by the doctrine of laches because "such a delay in pursuing a challenge to the Governor's decision not to issue a commission is patently unreasonable and prejudicial to the Governor, the electorate, and the other candidates." *Baker*, 217 Md. App. at 298.

Baker is easily distinguishable from the instant case. While it is true that the doctrine of laches may bar election-related claims even when they are not barred by Elec. Law § 12-202, the claims before this Court are not election-related in the same sense. The plaintiff's claim in *Baker* derived from the Governor's failure to appoint her as a judge after she obtained the necessary votes. It is understandable why the Court barred her claims as the election had taken place two years earlier and the relief she sought would be highly disruptive if provided. Spiegel & Ford, however, are challenging a statute as unconstitutional and their claims do not derive from a particular election, as was the case in *Baker*. In addition, the plaintiffs in this case, unlike in Baker, do not seek retroactive relief that would be disruptive and difficult to administer, only prospective relief.

The Board also suggests that the failure to challenge the validity of *Education Article* §3-701 at some earlier point in time, as it was enacted more than a decade ago, only compounds the unreasonableness of a delay appropriate for the doctrine of laches to be applied. *See* Appellee Br. 37-38 (noting that this delay is comparable to or greater than delays in other election cases that Maryland courts have dismissed under the doctrine of laches). The cases that the Board relies upon, however, do not involve constitutional

claims that were found to be barred by the doctrine of laches. Rather, the cases that the Board relies upon involve claims regarding an individual candidate's qualifications or some alleged infringement of rights in an election that were found to be unreasonably delayed and barred by the doctrine of laches.[1] The Defendant fails to cite a single case that found a delay unreasonable for claims that a statute was unconstitutional.

The Board is arguing that a constitutional claim can be time-barred, even in the absence of an applicable limitations period. There are several archaic laws that have been found unconstitutional well after their enactment. One of the most notable decisions by the Supreme Court of the United States, *Loving et ux. v. Commonwealth of Virginia*, 87 S.Ct. 1817 (1967), is a prime example. In *Loving*, the plaintiffs filed suit over 30 years after the enactment of The Racial Integrity Act of 1924 that established the anti-miscegenation laws the plaintiffs challenged as unconstitutional. *See Loving*. Clearly, in cases such as *Loving* where constitutional claims are raised a court cannot ignore the violations and refuse to issue a ruling based on the time that had lapsed between the statute's enactment and when the plaintiffs sued.

The Board cited the *Hendon* decision to the lower court in an effort to support its contention that the failure to bring this claim at some earlier point in time is comparable

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[1] *See* Appellee Br. 37 (Appellee cites *Ademiluyi*, 458 Md. at 49 (claims brought more than six months after the election constituted an unreasonable delay that challenged a candidate's eligibility for judicial office); *Schlakman*, 451 Md. at 490 (A delay of roughly one month after discovering the facts underlying the complaint constituted an unreasonable delay for claims challenging a candidate's qualifications to appear on a ballot); *Baker*, 217 Md. App. at 298 (A delay of five and a half months was found to constitute an unreasonable delay in challenging a governor's failure to issue a commission after an election)).

to other delays that Maryland courts have found unreasonable. *See* Mot. to Dismiss, 24 (*Cf. Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) ("The regulations which the appellants challenged have been in effect since 1955. The appellants introduced no evidence of any reason why they could not have challenged the constitutionality of these laws before the 1982 general election.")). The Board, however, failed to provide the lower Court with the outcome in *Hendon*, which lends strong support to conclusion that Spiegel & Ford's claims were not untimely.

In *Hendon*, the plaintiffs claimed that voting procedures and a statute providing how ballots were cast and counted, enacted in 1955, were unconstitutional. Included in the plaintiffs' complaint was a request for a recount of the 1982 North Carolina general election. The Court found the statute was unconstitutional but would only apply its declaration prospectively and not issue a recount. The Court explained that even though it determined the law was unconstitutional, it found no reason to depart from the general rule that denies relief with respect to past elections. The Court explained that "Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would "permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action."" *Hendon*, 710 F.2d at 182.

The outcome in *Hendon* is precisely what Spiegel & Ford are seeking from this Court; to declare the provisions for the student member position and election unconstitutional. The *Hendon* Court found no issue with the period that had elapsed from the enactment of the statute at issue and when the suit was brought with respect to the plaintiffs' constitutional claims. The Court only found issue with respect to the plaintiffs' claim for relief, which was a recount after the election had taken place, holding it was delayed and therefore unreasonable. Spiegel & Ford are not seeking a vote recount or anything that could be similarly disruptive or impossible to implement after an election. Spiegel & Ford seek to invalidate the student member position and election process that placed the student member in this position, and to prevent prospective votes for this position and prospective elections.

V. APPELLANTS SEEK A CLEAR AND AVAILABLE REMEDY

The Board contends that Spiegel & Ford failed to join a necessary party by failing to name the State and County Boards of Elections in this lawsuit. Appellee Br. 40. The Board's argument ignores the fact that the student member "Elections" are not authorized or in any way governed by the elections laws and are expressly exempt from the State election laws. If this Court strikes the law as unconstitutional, it could not order the election of a student member to be governed by State election laws. In order to do so, the Court would have to re-write the entire statutory structure for the student member position, which it is not empowered to do. As a result, the State and County Boards of

Elections have no interest in this litigation as they have no authority or involvement to begin with and this Court could not re-write the laws to involve them.

The Board nonetheless argues that if Spiegel & Ford are provided the relief sought, state and local election administrators would have to implement that relief, thus creating a claimed interest sufficient for them to be a "necessary party." *See* Appellee Br. 40. The Board attempts to support this argument by stating that Elec. Law § 8-801 requires school-board elections to be administered in the same manner as all other general elections. The Board argues that Spiegel & Ford cannot evade the mandatory joinder rule by arguing that the student member should simply be stripped of all voting power or the provisions granting the student member the voting power voided by this Court. Rather the Board argues that the only appropriate remedy would be to fill the student seat through an election of registered voters. Appellee Br 39-40.

The statute at issue provides that "The Howard County Board consists of: (i) seven elected members; and (ii) one student member." Educ. § 3-701(a)(1). Thus, the statute's plain language makes clear that the General Assembly's intended to create a board that at times would function only with seven elected adult members, and at other times with an eighth student member. The statute does not state that in the absence of a student member, an additional adult member is required to fill in or be elected. Rather, the statute expressly contemplates what the Board is required to do in the event the student member is not present or authorized to vote. Specifically, it provides that "Passage of a motion by the county board requires the affirmative vote of: (1) five members if the

student member is authorized to vote; or (2) four members if the student member is not authorized to vote. Educ. § 3-701(g)(1-2).

As a result, the Board's argument that State and County Boards of Elections are "necessary parties" fails for the obvious reasons based on the structure of the Board. If the student member position is removed or invalidated, as already contemplated by the statute, there is nothing to indicate the position would need to be filled by an eighth elected adult or student member. Additionally, the procedure that would follow for voting, absent the student member, is already provided for in the statute and occurs on a regular basis when the Board votes on areas the student member is prohibited from participating in. Therefore, the State and County Boards of Elections would have no involvement or authority in the event the student member position is invalidated or removed, thus having no "claimed interest" in the case before this Court.

Finally, it is well known that county boards of education are considered state agencies in Maryland. *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 136 (2000). As a result, under Maryland Rules of Procedure for the Circuit Court, when filing suit against an officer or agency of the State of Maryland, the plaintiff must serve the resident agent designated by the officer or agency or the Attorney General. Md. R. Civ. P. Cir. Ct. 2-124 (k). Further, when seeking declaratory relief, if a statute, municipal or county ordinance or franchise is alleged to be unconstitutional, the Attorney General need not be made a party, but must be served with a copy of the proceedings. Md. Code Ann., Courts and Judicial Proceedings § 3-405(c).

Spiegel & Ford satisfied both requirements, no objection has been raised by the Attorney General or the State, and thus Spiegel & Ford cannot be said to have failed to properly join or notify any necessary party to this litigation.

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4,275 words and 17 pages, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, page limit and type size requirements stated in Rule 8-112. The Font used is Times New Roman 13 point font.

Anthony M. Conti

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October 2021, a copy of the foregoing Reply Brief of Appellants 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, and in addition, 20 copies will be delivered to the Clerk of the Court of Appeals:

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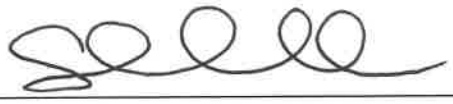

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