E-FILED
Gregory Hilton, Clerk,
Supreme Court of Maryland
8/7/2024 5:09 PM

In The

Supreme Court of Maryland

No. 10, September Term, 2024
SCM-REG-0010-2024

BOARD OF EDUCATION OF HARFORD COUNTY,
Appellant,

v.

JOHN DOE,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI from the Circuit Court for Harford County, Civil Case Number C-12-CV-23-767
(The Honorable Alex M. Allman)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

QUESTION PRESENTED 2

STATEMENT OF FACTS 2

STANDARD OF REVIEW 2

ARGUMENT 3

I. THE BOARD LACKS STANDING TO CHALLENGE THE CVA 3

A. The "Dilemma" Exception Does Not Apply 4

B. No "Unique Governmental Entity" Exception Exists 7

C. There Is No "Public and Private Entities" Exception 11

D. There Is No Such Thing As A "Public Interest and Concern" Exception 14

CONCLUSION 17

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CASES:

Arizona Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) ... 14

Baltimore County v. Churchill, Ltd.,
271 Md. 1 (1974) ... 3, 15

Bennet v. Harford County,
485 Md. 461 (2023) ... 8, 9

Board of Educ. v. Prince George's Cnty. Educator's Ass'n, Inc.,
309 Md. 85 (1987) ... 3

Board of Educ. v. Secretary of Personnel,
317 Md. 34 (1989) ... 2, 3, 8

City of Baltimore v. Concord Baptist Church,
257 Md. 132 (1970) ... 6, 14, 15

City of Baltimore v. Gill,
31 Md. 375 (1869) ... 16

Cooper v. Wicomico Cnty., Dep't of Pub. Works,
278 Md. 596 (1976) ... 14

Cooper v. Wicomico Cnty., Dep't of Pub. Works,
284 Md. 576 (1979) ... 13, 14

Donlon v. Montgomery Cnty. Pub. Schs.,
460 Md. 62 (2018) ... 8

Green v. Commission on Jud. Disabilities,
247 Md. App. 591 (2020) ... 2

Hagans v. Lavine,
415 U.S. 528 (1974) ... 11, 14

Hammond v. Lancaster,
194 Md. 462 (1950) ... 14

TABLE OF AUTHORITIES—Continued

Page

Herbert v. State,
136 Md. App. 458 (2001) 3

HNS Dev., LLC v. People's Couns. for Balt. Cnty.,
425 Md. 436 (2012) 10

Horace Mann League of U.S., Inc. v. Board of Pub. Works,
242 Md. 645 (1966) 14

Hornbeck v. Somerset Cnty. Bd. of Educ.,
295 Md. 597 (1983) 10, 11

Kendall v. Howard County,
431 Md. 590 (2013) 9

Maryland State Bd. of Educ. v. Bradford,
387 Md. 353 (2005) 10, 11

People's Couns. for Balt. Cnty. v. Crown Dev. Corp.,
328 Md. 303 (1982) 7

Pressman v. State Tax Comm'n,
204 Md. 78 (1954) 4

Robinson v. Board of Educ.,
No. 1:22-cv-01102-ELH, 2023 WL 2499854 (D. Md. 2023) 9

State ex rel. Att'y Gen. v. Burning Tree Club, Inc.,
301 Md. 9 (1984) 4, 5, 6, 12

State's Att'y v. City of Baltimore,
274 Md. 597 (1975) 4, 7

Strauss v. Strauss,
101 Md. App. 490 (1994) 8, 9

Williams v. Morgan State Univ.,
484 Md. 534 (2023) 2

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

Md. Code Ann., Cts. & Jud. Proc. § 5-518 9

Md. Code Ann., Educ. § 4-105 9

Md. Code Ann., Educ. § 6-113.1 9

Md. Code Ann., Educ. § 6-113.2 9

OTHER AUTHORITY:

Board of Education of Harford County: Member Handbook (May 8, 2017), https://perma.cc/9P3J-N829 3

INTRODUCTION

After the Maryland Legislature enacted the Child Victims Act (CVA), Plaintiff John Doe brought civil claims against the Board of Education of Harford County (the Board) and several employees related to multiple sexual assaults he experienced as a child at the hands of his fifth grade teacher and a custodian. The Board moved to dismiss, arguing that the CVA was unconstitutional.

The Board, however, has no standing to constitutionally challenge the CVA. In Maryland, state agencies and political subdivisions, as creatures of the State, are not in a position to question the constitutionality of state law. Courts routinely apply this rule to hold that a state agency or political subdivision lacks standing to bring such a constitutional challenge.

The Board cannot evade this straightforward conclusion by claiming an exception applies. The Board does not fit within the "dilemma" exception, which allows state officers to seek a declaratory judgment when forced to choose between declining to administer a law that the officer believes is unconstitutional or carrying it out and potentially facing liability as a result. Nor can the Board shoehorn this case into an invented exception. There is no "unique governmental entity" exception to the standing bar. There is no exception to the standing bar merely because a law applies to both "public and private entities." And there is no exception to the standing bar for otherwise ineligible state agencies because the case involves issues

of "great public interest and concern." To the extent these are even recognized exceptions, the Board's reasoning for applying them here is baseless.

For all these reasons, the Board fails to meet its burden to show standing.

QUESTION PRESENTED

As a subdivision of the State, *see Bd. of Educ. v. Sec'y of Personnel*, 317 Md. 34, 44-45 (1989), does the petitioner have standing to challenge the constitutionality of the Maryland Child Victims Act of 2023, 2023 Md. Laws ch. 5 (S.B. 686), (codified at Md. Code Ann., Cts. & Jud. Proc. § 5-117)?[1]

STATEMENT OF FACTS

Appellee adopts and incorporates by reference the Statement of Facts set forth in the CVA Response Brief.

STANDARD OF REVIEW

Standing is reviewed *de novo*. *Green v. Commission on Jud. Disabilities*, 247 Md. App. 591, 601 (2020); *see also, e.g.*, *Williams v. Morgan State Univ.*, 484 Md. 534, 541 (2023) ("[W]hen a case comes to this Court on a certified question without an opinion below, review is likewise *de novo*.").

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[1] Per this Court's June 23, 2024 Order, Appellee addresses the constitutional question presented in *Board of Education of Harford County v. John Doe*, No. 10, in separate briefing (the "CVA Response Brief").

ARGUMENT

I. THE BOARD LACKS STANDING TO CHALLENGE THE CVA.

The Board has the burden of showing that it has standing to challenge the CVA's constitutionality. *See Herbert v. State*, 136 Md. App. 458, 483 (2001). It cannot carry that burden.

Maryland courts have long held that state agencies and political subdivisions, "as creatures of the State, share the interest of the State," and thus generally do not have standing to challenge the constitutionality of a state law.[2] *Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 6 (1974); *see, e.g.*, *Sec'y of Personnel*, 317 Md. at 44-45. This includes county boards of education. *E.g.*, *Sec'y of Personnel*, 317 Md. at 44 n.5; *Board of Educ. v. Prince George's Cnty. Educator's Ass'n, Inc.*, 309 Md. 85, 96 n.3 (1987).

These principles apply to the Board here, as even it admits. Standing Opening Br. 2 & n.2; *see also, e.g.*, Board of Education of Harford County: Member Handbook (May 8, 2017), https://perma.cc/9P3J-N829 ("The Board of Education of Harford County, and other local school boards in Maryland, are generally considered state agencies for legal purposes."). The Board accordingly lacks standing to challenge the constitutionality of the CVA.

[2] This principle does not apply to the Board employees, who are sued in their individual capacity. *See* Standing Opening Br. 11. The employees' constitutional challenge fails for all the reasons stated in the CVA Response Brief.

The Board tries to avoid that conclusion by claiming that four "exceptions" to this rule apply. Standing Opening Br. 2-6. One exception is straightforwardly inapplicable here. The remaining three exceptions the Board invokes are made up from whole cloth.

A. The "Dilemma" Exception Does Not Apply.

The "dilemma" exception offers a limited exception for state officers to constitutionally challenge a state law. Under this exception, state officers have standing to seek a declaratory judgment on a law's constitutionality when they are faced with a dilemma: They can either "refus[e] to act under a statute [they] believe[] to be unconstitutional or . . . carry[ ] it out and later find[] that it was unconstitutional." *State ex rel. Att'y Gen. v. Burning Tree Club, Inc.*, 301 Md. 9, 19 (1984) (quotation marks omitted); *see, e.g.*, *State's Att'y v. City of Baltimore*, 274 Md. 597, 602 (1975); *Pressman v. State Tax Comm'n*, 204 Md. 78, 85 (1954). In this circumstance, if the state officer refuses to act, "he may expose himself to an action in tort, removal from office, fine, or even greater penalty"; if he enforces the law, "he may be exposed to an action for damages or disciplinary measures." *Burning Tree Club, Inc.*, 301 Md. at 19 (citation omitted); *see also City of Baltimore*, 274 Md. at 602. Hence the dilemma. That leaves a state officer with no choice but to seek relief for a declaratory judgment.

This exception does not apply here for multiple reasons, any one of which is enough to dispose of the Board's argument. To start, the Board is a state agency, not a state officer, and so cannot be removed from office. *See Burning Tree Club*, 301 Md. at 19. Perhaps for that reason, we have been unable to find a single case applying the dilemma exception to a state agency (as opposed to an individual). Even assuming the dilemma exception could apply to a state agency, however, the Board did not seek a declaratory judgment; it is being sued for civil liability related to child sexual abuse and has asserted the constitutional argument in defense. *See id.*; E.393-422 (complaint); E.437-473 (Board's motion to dismiss). Moreover, the Board is not charged with administering the CVA. *See Burning Tree Club*, 301 Md. at 22-26 (holding the Attorney General did not meet the dilemma exception criteria because he did not administer the challenged statute). For all these reasons, finding that the Board lacks standing would not put it "in an impossible dilemma" within the meaning of this exception. *Contra* Standing Opening Br. 11 (capitalization altered).

The Board does not meaningfully dispute any of this. In fact, it concedes that the dilemma exception only applies in the limited circumstances described. *See id.* at 4-5. Instead, the Board asks the Court to expand this exception to circumstances when a state agency is "obligated to defend" its employees. *Id.* at 11-14. But the entire point of the dilemma exception is that it does not apply to just *any* burden on a state actor—it applies only to a state officer facing a *specific* dilemma between

refusing to enforce a law she believes is unconstitutional or carrying out the law and later finding out it was unconstitutional. *See Burning Tree Club*, 301 Md. at 22-26.

Expanding this limited exception to include the fact pattern here would defeat the exception entirely. Any law affecting a county board could arguably create the kind of "dilemma" the Board claims here. *See* Standing Opening Br. 8-9 (explaining that county school boards are "required to join in any suit against board employees sued for alleged conduct committed within the scope of their employment"). The same could be said of any state subdivision with employees.

The Board's alleged dilemma also rests on a logical fallacy. The Board argues that it will face a "dilemma" because it is statutorily required to defend those employees. *Id.* at 11-12. But what the Board cannot do under Maryland law is challenge the constitutionality of the CVA *as applied to the Board*. Nothing prevents the Board from "zealously defend[ing] the Board Employees" by raising the constitutional argument in *their* defense. *See id.* at 12; *cf. City of Baltimore v. Concord Baptist Church*, 257 Md. 132, 139 (1970) (city's director of finance and comptroller had standing under the dilemma exception to seek declaratory relief in their individual and official capacities, even though "the City, as a creature of the

State, possesses no power which it may invoke against the State, even on constitutional grounds") (citation omitted).[3]

Perhaps recognizing the futility of its dilemma exception argument, the Board pivots to arguing that because the individual Board employees have "standing in their own right to challenge the constitutionality of the CVA[] . . . the Board has standing as well." Standing Opening Br. 14. That is not the law. As the Board elsewhere notes, when one plaintiff has standing, it is typically "unnecessary" to determine whether other plaintiffs likewise have standing. *Id.* at 13-14 (quoting *City of Baltimore*, 274 Md. at 602, and *People's Couns. for Balt. Cnty. v. Crown Dev. Corp.*, 328 Md. 303, 317 (1982)). That does not mean the Board can bootstrap itself into having standing in its own right. For the reasons explained, it does not.

B. No "Unique Governmental Entity" Exception Exists.

The Board claims that county school boards "are unique governmental entities" at risk of "suffering substantial losses" if they cannot challenge the constitutionality of state laws. Standing Opening Br. 3, 7-11. There is no support for a "unique governmental entity" exception in the case law; this is an argument of the Board's own creation.

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[3] Nor, for that matter, has the Board offered any reason why it could not discharge its statutory duty by retaining separate counsel to raise this defense on behalf of the former employees, insofar as the Board truly believes that a dilemma exists.

More to the point, it is unclear what ground the Board hopes to gain from this argument. State agencies may differ from each other in certain respects. Those differences have never prevented this Court from applying the usual rule that state agencies generally lack standing to challenge the constitutionality of Maryland law. And as this Court explained in *Secretary of Personnel*, "[i]t is settled that county boards of education are State agencies." 317 Md. at 44 n.5.

This Court recently applied a more context-specific inquiry to determine if a county school board qualifies as a state agency, including in a case involving the same school board as this one—the Board of Education of Harford County. *Bennet v. Harford County*, 485 Md. 461, 483 (2023); *see Donlon v. Montgomery Cnty. Pub. Schs.*, 460 Md. 62, 79 (2018). Under this analysis, courts consider a county board's character as it relates to the issue in dispute, weighing factors such as whether the relevant oversight and funding of the board occur at the state or local level. *See Bennet*, 485 Md. at 479-483. Despite citing *Donlon* in its brief (at 7), the Board never once says it should *not* be considered a state agency for these purposes. It has therefore forfeited any claim to the contrary. *See* Standing Opening Br. 2 (conceding the no-standing-for-state-agencies rule applies here absent an exception); *see Strauss*

v. Strauss, 101 Md. App. 490, 509 n.4 (1994) (argument raised for the first time on reply is waived).[4]

The Board elsewhere argues that it has a "cognizable stake" in the outcome of this case because, if the CVA is upheld, it might be forced to compensate students for the abuse they suffered while the Board looked the other way. *See* Standing Opening Br. 3. On its telling, the risk of that "adverse financial impact . . . is sufficient to confer standing upon the Board in this case." *Id.* at 10-11.

That puts the cart before the horse. Whether a cognizable interest exists is part of the typical standing inquiry. *See, e.g.*, *Kendall v. Howard County*, 431 Md. 590, 603 (2013) ("The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable

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[4] Regardless, the Board qualifies as a state agency under *Bennett* and *Donlon*. The State has significant oversight and funding over county school boards, rendering the Board more state than local in character. *See Bennet*, 485 Md. at 479-483; *see also* Md. Code Ann., Educ. §§ 6-113.1, 6-113.2 (school board receiving state funds must adopt state abuse-pretention practices and comply with state screening requirements focused on sexual misconduct for hiring employees); Md. Code Ann., Educ. § 4-105; Md. Code Ann., Cts. & Jud. Proc. § 5-518 (state law governing liability insurance requirements and immunity). Furthermore, a suit seeking to impose liability on a county school board for a student's sexual abuse is "rooted in the Board's performance of its core State functions, duties, and responsibilities: providing an education to students." *Robinson v. Board of Educ.*, No. 1:22-cv-01102-ELH, 2023 WL 2499854, at *13 (D. Md. 2023) (finding a county school board was a state agency for a § 1983 suit involving a school board's response to a student's sexual assault).

of judicial resolution.") (quotation marks omitted). That is immaterial here, however, as the Board lacks standing under this Court's general rule prohibiting a state agency from challenging a law as unconstitutional, regardless of whether its interest in challenging that law is cognizable or not. And for the reasons explained elsewhere in this brief, no exception to those rules applies.

Perhaps the Board is arguing this Court should craft a new exception when the law would result in a "loss of revenue" that "adversely affects" the state agency. *See* Standing Opening Br. 11 n.14. The Board says as much, though only in a parenthetical, in a footnote, appended to a citation to an Alabama case. *Id.* That is nowhere near enough to develop and preserve the argument for this Court's review. *See HNS Dev., LLC v. People's Couns. for Balt. Cnty.*, 425 Md. 436, 459 (2012). Even if it was, recognizing that exception would devour the rule: Many school boards face the risk of revenue loss in challenges against them and their employees. That can hardly serve as a reason for recognizing an exception from the usual standing rule.

The Board's citations (at 3-4) to *Hornbeck v. Somerset County Board of Education*, 295 Md. 597 (1983), and *Maryland State Board of Education v. Bradford*, 387 Md. 353 (2005), do not shed much light on its theory, either. The Board cites those cases for the proposition that this Court "did not question the standing of a local board of education in a suit against the State to challenge the

constitutionality of the State's statutory funding mechanism for public education." Standing Opening Br. 3-4. In both *Horneck* and *Bradford*, the county school boards and individual taxpayers sought declaratory judgments to challenge Maryland's public education funding for failing to provide schools the necessary resources to offer adequate educational opportunities for students, especially for at-risk students. *See Hornbeck*, 295 Md. at 608; *Bradford*, 387 Md. at 361-362. That is nothing like the dispute here. And notably, neither *Horneck* nor *Bradford* discussed standing. *See, e.g.*, *Hagans v. Lavine*, 415 U.S. 528, 533, n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

C. There Is No "Public and Private Entities" Exception.

The Board next argues that it has standing to challenge the CVA's constitutionality merely because the law applies to both private and public entities. Standing Opening Br. 16-18. This, again, is not a recognized exception in Maryland, and the Board does not cite any case law saying otherwise.

The total lack of support for the Board's argument is unsurprising, as this supposed exception makes no practical sense. Many Maryland laws apply to both private and public entities. That can hardly serve as a valid reason for finding standing for a state agency to constitutionally challenge a state law. Indeed,

recognizing an exception where the law applies to both private *and* public entities makes little sense, since the private entity can independently challenge the law's constitutionality. Allowing the public entity to also file suit serves no independent public value.

The Board's proposed exception rests on the theory that it should have "the same opportunity as all other defendants to challenge the constitutionality of the CVA as an impermissible retroactive abrogation of its vested right." *Id.* at 18; *see id.* at 16 (describing this result as incongruous). That overlooks the entire point of the standing bar. This Court's precedents make clear that, except in unusual circumstances not satisfied here, state agencies like the Board *should* be treated differently from "other defendants" and *should not* have the same ability to "challenge the constitutionality" of a state law as a private entity. *See id.* at 16; *see supra* pp. 3-7. The Board's proposed exception would swallow that default rule.

The Board also cannot shoehorn this supposed public-and-private-parties rule into an "exception" for when a state agency is "exposed to an action for damages." Standing Opening Br. 5 (citing *Burning Tree Club*, 301 Md. at 25-26). That is not a separate exception, either. As the Board's own citation makes clear (and the Board's description of it confirms), the potential exposure to damages is a component of the dilemma exception. *Id.* (describing *Burning Tree Club* as articulating this theory "in determining that the dilemma doctrine did not apply"); *see Burning Tree Club*, 301

Md. at 25-26 (explaining that a "dilemma" may arise if the individual officer charged with defending the law's constitutionality is "exposed to an action for damages" for administering the contested statute). Because the dilemma exception is inapplicable here, so too is the Board's made-up, derivative exception.

Cooper v. Wicomico County, Department of Public Works, 284 Md. 576 (1979), the only other case the Board cites in support of this supposed exception, does not teach otherwise. *See* Standing Opening Br. 5-6, 16-18. *Cooper* involved a law retroactively increasing the amount of a workers' compensation award; because of the retroactive increase, the State Accident Fund fell below a designated level, triggering increased contributions from insurers. 284 Md. at 577, 584. An insurer and employer appealed Cooper's supplemental benefits award, and the Court held the statute unconstitutionally impinged the insurer's vested rights.[5] The Board says that *Cooper* "illustrates" that it would be "incongruous if a public entity such as the Board were denied standing to assert the same constitutional challenge" as a private

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[5] *Cooper* also does not support holding the CVA unconstitutional. *Contra* Standing Br. 17-18. The Court held that because "the basis of a [workers'] compensation award is contractual," retroactively requiring insurers to pay for supplemental allowances unconstitutionally impinged the insurers' "contractual and other vested rights." *Cooper*, 284 Md. at 579, 584 (quotation marks omitted). That fits squarely within Maryland's precedents recognizing vested rights in contract entitlements, and bears no resemblance to the situation here, where the Board claims a vested right to remain free from liability for facilitating child sexual abuse. *See* CVA Response Br. 42-67.

entity. Standing Opening Br. 16-17. But neither that case, nor the prior iteration, mentioned standing or the state-agency bar once. *See Cooper*, 284 Md. 576; *Cooper v. Wicomico Cnty., Dep't of Pub. Works*, 278 Md. 596 (1976). This Court should reject the Board's attempt to manufacture an exception out of that silence. *See, e.g.*, *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011); *Hagans*, 415 U.S. at 533, n.5.

D. There Is No Such Thing As A "Public Interest and Concern" Exception.

For its final salvo, the Board argues that this Court should recognize a new exception and find standing here because "the issues presented are of great public interest and concern." Standing Opening Br. 18-20 (quoting *Concord Baptist Church*, 257 Md. at 138). This Court has never recognized this theory as a standalone exception to the general rule that a state agency lacks standing to constitutionally challenge a state act. What it *has* said is that "where the issues presented are of great public interest and concern, *the interest necessary to sustain standing need only be slight*." *Concord Baptist Church*, 257 Md. at 138 (emphasis added). Maryland courts have traditionally applied this exception in state taxpayer standing cases, where the taxpayer's injury was small. *E.g.*, *Horace Mann League of U.S., Inc. v. Board of Pub. Works*, 242 Md. 645, 653 (1966); *Hammond v. Lancaster*, 194 Md. 462, 474 (1950).

Maryland has never applied this "public interest" theory as a freestanding exception to the usual rules governing state-agency standing. In fact, we are aware of only two cases that even used this language. In *Concord Baptist*, the Court first found the individual-official defendants had standing under the dilemma exception, and only then went on to note that "[a]dditionally, where the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight." 257 Md. at 138 (citation omitted). The Court did not provide any further discussion or analysis on that point. It did, however, find the subdivision itself—there, Baltimore City—lacked the power to challenge the State on constitutional grounds. *Id.* at 139. In the second case, *Baltimore County v. Churchill*, the Court quoted the language from *Concord Baptist Church* verbatim, before concluding that the political subdivision *lacked* standing. 271 Md. at 5.[6]

To the extent the "public interest" concept rises to the level of a freestanding exception, moreover, it does not apply here. Allowing the Board to challenge the CVA would not be in the public interest. Quite the opposite, in fact: It would be *against* the public interest to allow a state agency to constitutionally challenge a state

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[6] The *Churchill* Court "assume[d], arguendo, that the individual appellants [had] standing" before holding on the merits that the legislature did not abrogate a vested right when it retroactively altered the statute of limitations. 271 Md. at 9-14; *see id.* at 13 ("Whatever may be the rule elsewhere, Maryland does not recognize any vested right in an ability to assert limitations as a defense, under the circumstances here.").

law. *See City of Baltimore v. Gill*, 31 Md. 375, 395 (1869) ("[C]ourts have always maintained with jealous vigilance the restraints and limitations imposed by law" upon state subdivisions in order to "protect[] the citizen from the consequence of their unauthorized or illegal acts."). This is especially true here when the CVA was enacted to protect the public from institutions—like the Board—accused of failing to prevent and covering up child sexual abuse. *See* CVA Response Br. 11-13; *see also id.* at 51-52, 61-62, 67-68.

CONCLUSION

For the foregoing reasons, this Court should hold that the Board, as a subdivision of the State, does not have standing to challenge the constitutionality of the Maryland Child Victims Act of 2023, 2023 Md. Laws ch. 5 (S.B. 686), (codified at Md. Code Ann., Cts. & Jud. Proc. § 5-117).

August 7, 2024

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,850 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112.

/s/ Catherine E. Stetson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2024, a copy of the foregoing was sent by the e-filing system to :

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