

PETITION OF WOMEN AGAINST
PRIVATE POLICE FOR JUDICIAL
REVIEW OF THE DECISION OF THE
MARYLAND STATE BOARD OF
ELECTIONS

* IN THE CIRCUIT COURT FOR
* ANNE ARUNDEL COUNTY

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* CIVIL ACTION NO: C-02-CV-19-001327

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WOMEN AGAINST PRIVATE POLICE, *et al.*,

Plaintiffs,

v.

MARYLAND STATE BOARD OF
ELECTIONS, *et al.*,

Defendants.

**MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW AND IN
SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

On April 29, 2019, Petitioner, Women Against Private Police, and Plaintiff Jillian Aldebron (hereinafter “Plaintiffs”) filed their Petition for Judicial Review and Complaint challenging an Advance Determination made by Defendants Maryland State Board of Elections (hereinafter “SBE”) and Linda Lamone (hereinafter “Lamone”) regarding Petitioner’s referendum petition seeking to refer Senate Bill 793 of the 2019 General Assembly (hereinafter “SB 793”), 2019 Md. Laws, ch. 25, to a vote of the electorate. The April 17 2019 Advance Determination of Sufficiency and subsequent April 25 2019 Revised Advance Determination of Sufficiency erroneously concluded that the petition was insufficient on the grounds that the act was not subject to referendum. Plaintiffs now submit this Memorandum in Support of Petition for Judicial Review and in Support of Plaintiffs’ Motion for Summary Judgment, pursuant to Md. Code, Elec. L. § 6-209 and Rules 7-207(a) and 2-501(a).

I. QUESTIONS PRESENTED

- A. Whether SB 793 is a law making an appropriation within the meaning of Md. Const. Art. VI, § 2?
- B. Whether the primary purpose of SB 793 is to authorize creation of the Johns Hopkins University Police Department, rendering the act referable to the electorate under Md. Const. Art. XVI, §§ 1 and 2?
- C. Whether Sections 2 and 3 of SB 793 are severable and referable to the electorate under Md. Const. XVI, §§ 1 and 2?
- D. Whether SB 793 is an appropriation for maintaining state government within the exceptions of Md. Const, XVI, § 2?
- E. Whether SB 793 is an appropriation for maintaining or aiding a public institution that exceeds the next previous appropriations for the same purpose, and therefore is referable under Md. Const, XVI, §§ 1 and 2?
- F. Under Md. Elect. L. § 6-209(a)(2), whether the failure of SBE and Lamone to issue a timely advance determination of sufficiency of the petition for SB 793 violates the Plaintiffs' constitutional right to referendum?

II. STATEMENT OF FACTS

During the 2018 Maryland General Assembly, Johns Hopkins University (hereinafter “JHU”), a private institution of higher education with four campuses in Baltimore City, initially pursued legislation authorizing it to create a police force with all of the state’s police powers. 2018 House Bill 1803 (available at <http://mgaleg.maryland.gov/webmga/frmMain.aspx?id=hb1803&stab=01&pid=billpage&tab=subject3&ys=2018rs>) , cross-filed with 2018 Senate Bill 1241 (available at <http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&tab=subject3&id=sb1241&stab=01&ys=2018RS>), was introduced on March 5, 2018, at JHU’s request, by Delegate Cheryl Glenn and Senator Joan Carter Conway, respectively. The bills would have authorized *any* independent institution of higher education in Baltimore City to establish a campus police force whose officers would have all of the powers granted to a peace and police officer under state

law. The 2018 legislation faced significant opposition from Hopkins students, staff, and faculty, from community members in Baltimore City, and from legislators, when it came up for a hearing in the House Judiciary Committee on March 20, 2018. *See, e.g., Annapolis puts the brakes on hopkins police force*, WBAL NewsRadio, March 30, 2018, <https://www.wbal.com/article/303819/7/annapolis-puts-brakes-on-hopkins-police-force>; J. Took and E. McDonald, *Students Testify Against Campus Police Force Bill*, Johns Hopkins Newsletter (March 29, 2018), <https://www.jhunewsletter.com/article/2018/03/students-testify-against-campus-police-force-bill>; House Judiciary Hearing on HB 1893, March 20, 2018, <http://mgahouse.maryland.gov/mga/play/3b4a4f73-e9e8-41e5-b4a2-4d10f4992b98/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=1918000>. The scheduled bill hearing in the Senate Judicial Proceedings Committee on the same date was cancelled, *General Assembly of Maryland, Legislation By Session*, <http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=sb1241&tab=subject3&ys=2018RS>, and the bills died without receiving a vote in their respective committees.

During the 2019 Session, JHU came back to the General Assembly with a significantly revised bill. Senate Bill 793 (available at <http://mgaleg.maryland.gov/webmga/frmMain.aspx?id=sb0793&stab=01&pid=billpage&tab=subject3&ys=2019RS>), introduced on February 4, 2019, authorized the creation of a JHU Police Department specifically, rather than allowing any independent institution of higher education in Baltimore to create one. SB 793, 2019 Session, First Reader, 1, 9, <http://mgaleg.maryland.gov/2019RS/bills/sb/sb0793f.pdf> (Feb. 4, 2019). The bill, which as introduced was 21 pages long, also contained, in Section 2, significantly more detail about the process to be used in establishing the force, the geographic scope of its operation, limits on its

investigative authority, and required certain policies and training. *Id.* at 8-20. It further mandated a university advisory body and review by the Baltimore City Civilian Review Board, specified the manner of appointing people to the advisory body, and required certain reporting, among other provisions. *Id.* Section 3 of the bill contained uncodified language specifying the process to be used for seeking public comment on the Memorandum of Understanding that the bill required to be executed between the Baltimore Police Department and the new JHU Police Department. *Id.* at 20.

Section 1 of SB 793 contained a series of legislative spending measures, authorized by Md. Const., Art. III, §§ 52(11) and (12), directing the Governor to include specified sums of money, greater than current appropriations, in future year budgets with respect to four programs. *Id.* at 4-8. First, the Governor is directed to budget specified amounts to the Seed Community Development Anchor Institution Fund, authorized by Md. Code, Housing & Comm. Dev., § 4-509, which makes grants to so-called “anchor institutions,” which are defined to include JHU and Johns Hopkins Hospital, for community development projects in blighted areas of the state. *Id.* at 4-5. Second, the Governor is directed to budget specified amounts to the Local Management Board for Baltimore City, required to be created by Md. Code, Hum. Serv.’s § 8-301, *et seq.*, to be used for the Baltimore Children and Youth Fund. *Id.* at 5. Third, the Governor is directed to budget specified amounts for the Baltimore City YouthWorks Summer Jobs Program, a project of the Baltimore City Mayor’s Office of Economic Development. *Id.* Fourth, the Governor is directed to budget a specified amount for a new Law Enforcement Cadet Apprenticeship Program created by the bill, located in the State Department of Labor, Licensing, and Regulation, Division of Employment and Training. *Id.* at 6-8. The program will make grants, in specified circumstances, to those state and local law enforcement agencies, and the

new JHU Police Department, which operate an apprenticeship program authorized by Md. Code, Labor & Empl. § 11-405(b). *Id.* at 6. Section 4 of the bill also expresses the General Assembly’s intent that the Governor budget a specified amount for the East Baltimore Historical Library if JHU provides matching funds. *Id.* at 20-21. None of the spending measures has any connection to the JHU Police Department, which the bill primarily concerns.

Section 5 of the bill specifies that the Act will take effect on July 1, 2019. 2019 Md. Laws, ch. 25, p. 27. SB 793 does not contain any provision stating that the Act is not severable, and Md. Code, Gen. Prov. § 1-210(a) states that “[e]xcept as otherwise provided, the provisions of all statutes enacted after July 1, 1973 are severable.”

Like the 2018 legislation, SB 793 also generated significant and passionate opposition from students, staff, and faculty at JHU, and from members of the Baltimore community. C. Rentz, *Johns Hopkins' latest plan for police force prompts protest from students, faculty, neighbors*, The Baltimore Sun (February 13, 2019), <https://www.baltimoresun.com/news/maryland/education/higher-ed/bs-md-students-against-jhu-police-20190213-story.html>; M. Peoples, *Over 100 professors oppose private police*, Johns Hopkins News-Letter (February 21, 2019), <https://www.jhunewsletter.com/article/2019/02/over-100-professors-oppose-private-police>. The opposition was focused exclusively on the provisions creating a JHU police force, and not at all on the spending measures in the bill. A poll of undergraduate students at JHU, conducted by the student government in 2018, found that approximately 75 percent opposed creation of a JHU police force. R. Arora, *SGA votes in opposition of Hopkins police force*, Johns Hopkins News-Letter (April 11, 2019), <https://www.jhunewsletter.com/article/2019/04/sga-votes-in-opposition-of-hopkins-police-force>. The Johns Hopkins University African Student Association voted to oppose the creation of a

JHU police force, *id.*, as did the Johns Hopkins University Teachers & Researchers United, the graduate student union at JHU. R. Malcom and S. Abrams, *Governor Hogan signs Hopkins police bill into law*, Johns Hopkins News-Letter (April 11, 2019), <https://www.jhunewsletter.com/article/2019/04/governor-hogan-signs-hopkins-police-bill-into-law>. A petition opposing the police force received approximately 2,600 on-campus signatures, Rentz, *Johns Hopkins' latest plan*, and more than 100 JHU professors signed a statement of opposition. Peoples, *Over 100 professors*. In addition, the JHU Homewood Faculty Assembly passed a resolution on April 9, 2019, urging the University President to withdraw the plans to create a JHU police force. F. Shen, *Citing school officials' campaign contributions to Pugh, Hopkins students protest private police plan*, Baltimore Brew (April 9, 2019), <https://www.baltimorebrew.com/2019/04/09/citing-school-officials-campaign-contributions-to-pugh-hopkins-students-protest-private-police-plan/>.

Several community associations from neighborhoods surrounding JHU's campuses also voted to oppose the creation of a JHU police force, including the Abell Community Association, Ex. 4B, pp. 123, 173, Harwood Community Association, *id.* at 172; Ex. 4D, p. 331, Remington Community Association, Ex. 4B p. 168, and Old Goucher Community Association. R. Elliot, *Why I oppose the JHU private police force*, DMVDaily (March 28, 2019), <https://dmvdaily.news/why-i-oppose-the-jhu-private-police-force/>. The Unite Here! Local 7 Food Service Workers Union, which represents JHU food service workers, also opposed SB 793. UniteHere Statement (February 13, 2019), <https://twitter.com/coreyrypayne/status/1095500903803691009>. Students Against Private Police, a coalition of 15 JHU student groups, and community members, formed to oppose SB 793. J. Scharf, *Legislators further amend private police force bill*, Johns Hopkins News-Letter (March

28, 2019), <https://www.jhunewsletter.com/article/2019/03/legislators-further-amend-private-police-force-bill>. On April 3, 2019, JHU students began a sit-in at Garland Hall, the administration building on JHU's Homewood Campus, to demand an end to the plan to create a JHU police force with the state's police powers, among other issues. C. Rentz, *Hopkins students sit-in to 'fight' against new campus police, ICE contracts*, The Washington Post (April 4, 2019), https://www.washingtonpost.com/local/education/hopkins-students-sit-in-to-fight-against-new-campus-police-ice-contracts/2019/04/04/ec225540-571e-11e9-9136-f8e636f1f6df_story.html?utm_term=.354a588a8f3d. Baltimore police removed the students on May 8, 2019, via arrest or threat of arrest. C. Campbell and T. Richman, *7 Johns Hopkins protesters arrested after monthlong sit-in at Garland Hall over private police, ICE contracts*, The Baltimore Sun (May 8, 2019), https://www.baltimoresun.com/news/maryland/education/higher-ed/bs-md-jhu-sit-in-wednesday-20190508-story.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+baltimoresun%2Ffeatures%2Fbooksmags%2Frss2+%28Books+%26+Magazines%29.

At the bill hearings on SB 793 before the City House and Senate delegations, and in the House Judiciary Committee and Senate Judicial Proceedings Committee, many opponents delivered testimony opposing the creation of a JHU police force. SB 793 was jointly referred to the Senate Budget and Taxation Committee, but that committee did not hold any hearings on the bill and did not take a committee vote on the bill. Neither SB 793, nor its cross-file HB 1094, was referred to the House Appropriations Committee.

The written testimony on SB 793 overwhelmingly focused on the merits of allowing JHU to establish its own police force with state police powers, a force that will patrol and act in

communities surrounding the JHU campuses. *See, generally*, Affidavit of Amy Cruice, attached hereto as Exhibit 1, and Exhibits 4A-4H, and 5 (SB 793 Bill File, Parts 1-8, and Compilation of Written Unique Testimony Regarding Spending Measures, respectively), attached hereto. The spending measures were barely mentioned, and what mention there was came overwhelmingly from opponents of the police force and focused on the funding source of the spending measures. Ex. 1, ¶¶ 13-14; Ex. 4A-4H; Ex. 5. The bill file for SB 793 contains testimony from 246 persons and institutions or organizations, comprising 584 pages. Ex. 1, ¶ 12; Ex. 4A-4H. Of that, 67 opponents submitted testimony that is clearly based on a template (because of significant similarities among the testimony). Ex. 1, ¶ 13; Ex. 4G, pp. 521-585; Ex. 4H, pp. 586-664. Each of those opponents included the following four-sentence paragraph related to the spending measures in the bill:

Fifth, it is a cynical political move to pair state authorization for a Johns Hopkins private police force with funding for youth programs. This is not even money that would be directly going to programs but to “anchor institutions” (such as Johns Hopkins) to then be disbursed as these institutions see fit. This goes against consistent demands by students and community members that Hopkins begin using its own resources to invest in its surrounding communities. This funding would also only go till 2024, while a JHU Police Department is basically permanent, with no measures in this bill for revisiting the issue or sunseting that department. Essentially, Johns Hopkins is not only asking for the massive expansion in power that comes with a private police force, but also for the state government to subsidize proactive anti-crime measures, like funding for youth programs, that Hopkins should be carrying out itself.

Id.

Outside of those 67 submissions in which the testimony concerning the spending measures was identical, of the remaining 179 pieces of testimony, only 13 even mentioned the spending measures, and the mentions took up a total of 39 sentences. Ex. 1, ¶ 14; Ex. 5 (identifying particular testimony). Of those, eight persons or organizations were opposed to including the funding, and to the bill, and their discussion of the issue took up 30 of the 39

sentences. *Id.* Of the remaining five proponents, including the testimony from JHU, the Mayor, and BPD, the spending measures occupied 9 sentences out of 13 pages of supportive testimony (which does not include JHU's 160 pages of attachments to their testimony). *Id.*

Similarly, there were over 15 hours of testimony and debate about SB 793 and the cross-filed HB 1094 before the Baltimore City House Delegation, Baltimore City Senate Delegation, House Judiciary Committee, Senate Judicial Proceedings Committee, and on the floors of the House and Senate. Ex. 1, ¶¶ 3-8; Ex. 2 (Links to Hearings and Floor Debate for HB 793 and HB 1094). Of those 15 hours of testimony and debate, approximately 44 minutes were spent discussing the spending measures. Ex. 3 (Compilation of Verbal Testimony Regarding Spending Measures). And much of what discussion there was about the spending measures came from opponents of the private police force who thought the spending measures should be severed from SB 793 and introduced separately. *Id.* In short, as with the written testimony, the discussion about the bill was overwhelmingly about the merits, or lack thereof, of allowing JHU to create a police force.

In order to try to address the concerns raised about the police force, those sections of the bill were the sole focus of numerous revisions during the delegation and committee processes. The revised bill, which is 27 pages long, requires a specified percentage of JHU Police Department officers to be City residents, requires the JHU Police Department to make certain records available to the public, limits application of state law governmental immunity doctrines to the officers and employees of the department, the department itself, and JHU, and mandates future legislative review, among other provisions. *See, generally*, 2019 Md. Laws, ch. 25, pp. 8-26. The spending measures were not altered in any way. *Compare* SB 793, First Reader, 4-8, 20-21 with Md. Laws, ch. 25, pp. 5-8, 27.

SB 793 passed on April 1, 2019, and was signed by the Governor on April 18, 2019.
2019 Md. Laws, ch. 25.

WAPP was formed on April 3, 2019, by residents living in the contemplated patrol zones of a JHU police force who had opposed the bill during session and were involved in community education and lobbying against it. The decision to seek a referendum vote on the legislation was taken for purposes of exhausting the last remaining avenue to prevent its implementation under Maryland law. *See* Affidavit of Jillian Aldebron, attached hereto as Exhibit 6, ¶¶ 3-4 .

Md. Code, Elec. L. § 6-202(a) allows a Ballot Issue Committee that intends to seek to petition an act of the General Assembly to referendum to obtain an advance determination of sufficiency of the petition, including its required description of the legislation, to ensure that the committee’s efforts at gathering signatures will not be a wasted effort due to the State Board of Elections determining after-the-fact that the petition was improper for some reason.

WAPP submitted its proposed petition form to the State Board of Elections on April 8, 2019, seeking an advance determination, both as to the sufficiency of the petition’s description of the legislation, and as to whether the part of SB 793 creating the JHU Police Department could be referred to the electorate. AR¹-3; AR-4-5; Ex. 6, ¶ 5. After being advised in a telephone call with Mary Wagner, Director of the Voter Registration and Petitions Division of the State Board of Elections, on April 15, 2019, of the substance of the Advance Determination that would be formally issued on April 17, 2019, Plaintiff Aldebron immediately sought a response to WAPP’s request for an advance determination of the sufficiency of the petition’s bill summary but was told that the Advance Determination had already been issued and that there was no provision in the law for a “reconsideration.” Ex. 6, ¶ 6.

¹ AR-[#] refers to the Administrative Record filed by SBE pursuant to Rule 7-206.

On April 17, 2019, Defendant Linda Lamone sent WAPP her Advance Determination concerning the sufficiency of WAPP's proposed petition. AR-15-16; Ex. 6, ¶ 6. That Advance Determination concluded the petition was not sufficient, on the theory that the act sought to be referred was an appropriation prohibited from referral pursuant to Md. Const., Art. XVI, § 2. The Advance Determination enclosed, as legal justification, a memorandum dated April 12, 2019, from Assistant Attorney General Andrea W. Trento to Defendant Linda Lamone. AR-7-13; Ex. 6, ¶¶ 6-7. Despite Plaintiff WAPP's explicit request for an advance determination of the sufficiency of the petition's bill summary, the April 17 2019 Advance Determination did not address that issue. AR-16; Ex. 6, ¶ 7.

Plaintiff Aldebron made an additional written request for an Advance Determination regarding the petition bill summary via email to Mary Wagner on April 17, 2019. AR-14, Ex. 6, ¶ 8. Plaintiff Aldebron again submitted a formal written request for the Advance Determination on the bill summary text on April 22, 2019, AR-17-18, Ex. 6, ¶ 9, leading Defendant Linda Lamone to issue a Revised Advance Determination on April 25, 2019. AR-19, AR-20-22; Ex. 6, ¶ 9. That document was given to WAPP on April 26, 2019, only because Ms. Aldebron went to the SBE offices looking for it. Ex. 6, ¶ 10. The Revised Advance Determination concluded that the bill summary was insufficient for specified reasons. AR-20-22. It also reaffirmed the April 17 Determination that the Act was not subject to referendum. *Id.*

III. STANDARD OF REVIEW

In this action for judicial review of an administrative agency decision, the Court determines questions of law *de novo*. *Howard County Citizens for Open Gov't v. Howard County Bd. of Elections*, 201 Md. App. 605, 615–16 (2011) (citing *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 66 (2008)). The Court is

authorized to grant any relief that it considers appropriate to ensure the integrity of the electoral process. Md. Elec. L. § 6-209(a)(2).

“A court may grant summary judgment in the moving party’s favor if the motion and response demonstrate that there is no genuine dispute regarding any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” *Kennedy Krieger Inst., Inc., v. Partlow*, 460 Md. 607, 632 (2018); Rule 2-501(f).

IV. ARGUMENT & AUTHORITIES

A. The legislative spending measures present in SB 793 are not appropriations within the meaning of Art. XVI, § 2.

In accordance with the Maryland Constitution, Article XVI, § 1, the people reserve the power of The Referendum. The people may “by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act, or part of any Act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor.” The Court of Appeals has historically construed the right to referendum “in light of its origin, the purpose it was intended to serve, as well as the evils it was intended or supposed to remedy.” *Kelly v. Marylanders for Sports Sanity, Inc.*, 310 Md. at 451, 530 (1987) (citing *Beall v. State*, 131 Md. 669, 676 (1917)). The Attorney General has opined that Article XVI should be construed in favor of the solemn right of referendum. 63 Op. Att’y. Gen. Md. 157, 1978 Md AG LEXIS 41, *12-13.

The right to referendum is subject to constitutional limitations. Specifically, “no law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this Section.” Md. Const. Art. XVI, § 2. The Court has made clear that these exceptions have a constitutional purpose of insulating “revenue raising and

spending measures from suspension under Art. XVI's provisions.” *Kelly*, 310 Md. at 461. The framers’ intention regarding § 2 was to prevent the possibility that the state government would be embarrassed in the performing of its functions. *Winebrenner v. Salmon*, 155 Md. 563, 142 A. 723, 726 (1928). In other words, if the state’s appropriations were subject to referendum, the state could be forced into bankruptcy, or essential state functions disrupted, because there would be no authority to spend state money to meet state obligations (whether fiscal or human). But the type of spending measure that is at issue in this litigation does not pose that danger at all.

There is no controlling authority directly on point regarding the type of spending measures at issue in this case. The type of spending measures in SB 793, namely binding mandates to the Governor to include certain funds in the budget, were not possible until the General Assembly passed, and the voters approved, a constitutional amendment in 1978 overturning *Maryland Action for Foster Children, Inc. v. State*, 279 Md. 133 (1977). In that case, the plaintiffs sought an order mandating the governor to comply with legislation that required the governor to increase funds provided for family foster care payments. The Court found that the judiciary had no authority under Md. Const., Art. III, § 52 to require the governor to increase funds in the budget bill to implement the legislative mandate. In the following year, Md. Const., Art. III, §§ 52(11) and (12), were amended by 1978 Md. Laws, ch. 971 to require the governor to include in the budget any funds for a program that are prescribed by the legislature for that fiscal year. It is this type of spending measure that is at issue in the present case.

Plaintiffs recognize that the Court has held that the definition of “appropriation” in Md. Const., Art. XVI, § 2 is broader than the definition of appropriation in Art. III, § 52. *Doe v. Md. State Bd. of Elections*, 428 Md. 596, 609-10 (2012). Nevertheless, each of the cases recognizing that a spending measure, other than an actual appropriation defined in Art. III, § 52 (a budget bill

or a supplemental appropriation), is prohibited from being referred to the electorate has involved measures that are materially different from those at issue in this case.

Kelly does not provide support for the notion that SB 793 is an appropriation within the meaning Art. XVI, § 2, and is thus not referable. In *Kelly*, the issue before the Court was whether two stadium bills, 1987 Md. Laws, chs. 122 and 124, which authorized the construction and financing of a sports stadium, were referable. Chapters 122 and 124 provided approval for the stadium at Camden Yards and financed the construction of the stadium, respectively. Chapter 123, which the petitioners did not seek to refer, provided authorization for the Maryland Stadium Authority to acquire property in Camden Yards. After describing the history of the referendum amendment and case precedent, the Court found that Chapter 124 was a law making an appropriation because it contained an “intricate financing mechanism to permit the state to receive and expend public monies” required for the stadium site’s acquisition and construction. Because the three stadium bills were introduced and considered as part of a package by the legislature, the Court reasoned that it was the legislature’s intent that the bills would operate together. “Considered apart, the stadium bills would not be workable to achieve the objective of the appropriation.” Chapter 124, though it was not an appropriation, was found by the Court to be not severable and referable.

In contrast to *Kelly*, SB 793 contains no “intricate financing mechanism” that is tied to the JHU Police Department. Whether JHU contributes funds referenced in the act for the East Baltimore Historical Library and whether the monies allocated for the state matching those funds for that same purpose are not conditioned upon or related in any way to the provisions of the Act concerning the JHU Police Department. Additionally, the spending measures in *Kelly* for the Maryland Stadium Authority relied on the legislative dedication of certain revenues to pay the

bond servicing costs for the bonds authorized in the act. Here, none of the programs for which SB 793 directs future funding would be prevented from operating if the spending measures were subject to referendum, because the governor would retain the authority to allocate such funds to these measures in future budgets in any event. Md. Const. Art. III, § 52 (establishing the governor's broad authority to set the budget each year). *Kelly's* holding has no application to SB 793 as the acts are immensely different in design.

SB 793 is also distinguishable from the law at issue in *Winebrenner*, which involved a tax increase on gasoline, and dedicated the revenue from that tax to create a special fund for road maintenance and construction. 142 A. at 724-25. Supporting the finding that the act was an appropriation, the Court explained that the act fulfilled requirements of a supplemental appropriation act that was authorized by a budget amendment, except as to timing, because it was passed before the budget bill. *Id.* at 725. The act dedicated a particular (increased) tax revenue stream in the budget to a particular purpose, as a result essentially rendering the act and the budget act as one act. *Id.* Here, SB 793 does not operate as one with the budget bill because there is no tax increase or other specific revenue stream created or earmarked for the spending measures, and the spending measures in SB 793 do not even begin until Fiscal Year 2021.

Even if a spending measure like the one at issue here were petitioned to referendum, it would not upset any state planning, or any current obligations, because it would not be effective in the current fiscal year, and because the governor would remain free to budget the relevant funds regardless of the possibility of or outcome of the referendum (unlike a current year appropriation). Additionally, subjecting the spending measures in SB 793 to referendum would not impact the functioning of state government in meeting any of its obligations in the current fiscal year because the act is not set to appropriate money to the spending measures until the next

fiscal year, 2021. And it would not impair the state's ability to meet its obligations in any future year, because the Governor would remain free to appropriate funds for any of the purposes identified in the legislation.

B. SB 793 is referable to the electorate as the primary purpose of the act is to create and implement the JHU Police Department.

Even if the spending measures in SB 793 are properly considered to be appropriations covered by Art. XVI, § 2, that does not necessarily mean that the legislation, or part of it, cannot be referred. To ascertain whether an act is an appropriation barred from referendum by Md. Const. Art. XVI, § 2, Maryland courts have looked to whether the law in question's *primary* purpose is to appropriate monies for a specific purpose. *Doe v. Md. State Bd. of Elections*, 428 Md. 596, 611 (2012). In *Doe*, the Court of Appeals reviewed a challenge on the referability of the Maryland Dream Act. *Id.* The act established new eligibility categories for in-state tuition at Maryland community colleges and public four-year colleges and universities. The plaintiffs argued that the act was an appropriation because it had to be read in conjunction with the Cade Funding Formula that mandated certain per capita funding levels. They reasoned that because the act necessarily increased the number of students who would be counted in the funding formula, it effectively mandated certain additional funding in future years, and was thus an appropriation. As the Court found that the act was neither a budget bill, supplemental appropriation bill, nor a revenue-raising measure, all of which are clearly not subject to referendum, the Court analyzed whether the act was a "spending measure appropriation." *Id.* at 610. "To meet the appropriation exception in Article XVI, § 2, a law that includes merely assigning public monies to some incidental purpose is not enough; rather that law's primary purpose must be to assign the monies for a specified purpose." *Id.* See *Kelly*, 310 Md. at 459 (citing *Dorsey v. Petrott*, 178 Md. 230, 251 (1940)).

In *Dorsey*, the Court of Appeals similarly looked to the “primary purpose” of the legislation. *Id.* at 235. That case considered whether legislation revising the state’s structure for regulating commercial fishing, and creating a new Commission of Fisheries, could be considered an “appropriation” because among its provisions was a legislative specification of the new commissioners’ salaries. *Id.* The Court concluded that the act at issue was a general law, not an appropriation, because its primary purpose was to create and abolish offices, and change the terms, duties and salaries of public officers. *Id.* at 249. As a general principle for distinguishing an appropriation law from a general law, the Court stated the following:

The term 'appropriation act' obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation. An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident.

Id. at 251.

Like the legislation in *Dorsey*, SB 793 is a general law with a clear primary purpose. As evidenced by its extensive legislative history, the primary purpose of SB 793 is the authorization of the JHU Police Department. The fact that it has “engrafted upon it” several small, unrelated spending measures does not change that fact.² Within the 22 pages of bill text (excluding title,

² Though Plaintiffs seek to refer only Sections 2 and 3 of SB 793, they note that SB 793 combines disparate subject matters in one act and as a result, violates the one-subject rule. “Every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title.” Md. Const. Art. III, § 29. The purpose of this provision, as the Court of Appeals described in *Delmarva Power & Light Co. v. PSC of Md.*, 371 Md. 356, 368 (2002), is to “deal with the practice of engrafting onto subjects of great public importance ‘foreign and often pernicious matter’ of local or selfish purposes, thereby inducing legislators to vote for such provisions ‘which, if they were offered as independent subjects, would never have received their support,’ in order not to endanger the main objective. SB 793 contains two clearly unrelated subjects: funding for community programs and the creation of a private police force for JHU.

summary, and listing of statutes affected), 18 pages (almost all in Section 2 of the bill) are devoted to exquisitely detailed provisions specifying the process to be used in establishing the JHU Police Department, the geographic scope of its operation, limits on its investigative authority, and requiring specified policies and training. The legislation further contains detailed provisions mandating a university advisory body for the Department, and review by the Baltimore City Civilian Review Board, specifies the manner of appointing people to the advisory body, and requires certain reporting, among other provisions. Additional provisions, added via amendments during the bill's consideration, require a specified percentage of JHU Police Department officers to be City residents, require the JHU Police Department to make certain records available to the public, limit application of state law governmental immunity doctrines to the officers and employees of the department, the department itself, and JHU, and mandate future legislative review, among other provisions. And § 3 of the bill contains uncodified language specifying the process to be used for seeking public comment on the Memorandum of Understanding that the bill required to be executed between the Baltimore Police Department and the new JHU Police Department.

As noted above, the testimony on the SB 793 was also overwhelmingly focused on the merits of authorizing the JHU Police Department. Three-fourths of its undergraduate students, more than 100 JHU professors and numerous other community members opposed its creation. JHU students staged a sit-in lasting five weeks (until ended by police action) in opposition to the police force. Approximately 2,600 on-campus signatures were obtained in opposition. The near-exclusive focus of this opposition was the JHU Police Department and not the spending measures.

Similarly, the legislative debate on the bill focused overwhelmingly on the JHU police provisions, and barely mentioned the spending provisions. Of the 15 hours of oral testimony and debate on SB 793, less than 1 hour of this time was spent discussing the spending measures. The opposing testimony challenged not only the procedures that the bill details for creating and implementing the police force, but it also challenged the crime data that JHU cited to support its argument for a police force and scope of the police powers provided to the university in the bill. Most of the written and oral testimony also focused on the misconception that a private armed police force would improve safety in the community surrounding the university. It appeared from the debate that community members, including proponents of SB 793, identified the JHU Police Department as the primary purpose of the bill.

In other words, both in structure and in public and legislative focus, this bill is the exact situation that the *Dorsey* court envisioned in saying that an act may not be categorized as an appropriation simply because it “has had engrafted upon it a section making an appropriation.” Indeed, the case is even stronger than the one in *Dorsey*, because the spending provisions at issue there were directly related to the overall purpose of the bill (they specified the salaries of the new fisheries commissioners created by the bill). Here, the spending measures have nothing whatever to do with the JHU Police Department. SBE cannot point to a single witness, or legislator, who said that they were opposed to the JHU police provisions but supported or voted in favor of authorizing the police force because of the spending measures. The Defendants appear to believe that the spending measures can be linked to the JHU police provisions under the general rubric of “community safety and enhancement.” SB 793 p. 3. But that ostensible subject is so broad and amorphous that almost any activity of government could fit within it. Indeed, it is difficult, if not impossible, to conceive of any activity of government that could not

be said to “enhance” the community (since that is almost by definition what the government seeks generally to do). *See, e.g., Delmarva*, 371 Md. at 369 (“The notion that two entirely disparate provisions may be regarded as a ‘single subject’ because they each relate in some way to corporations or because they amend the same Article of the Code is, of course, preposterous, for, if that were the case, there would be little meaning to the Constitutional mandate.”) (citations omitted).

If the SBE’s position is allowed to stand, the constitutional right to a referendum will be rendered a dead letter, because the legislature will be free to make any piece of legislation referendum-proof by engrafting on to it any spending measure, whether related or not. This Court should not countenance such a broad reading of Art. XVI, § 2. It would truly allow the exception to swallow the rule.

C. Even if SB 793 contains spending measures, the provisions related to the JHU Police Department are severable and referable.

Md. Const. Art. XVI, § 2 provides that the people have the right to submit “any law or *part of a law* capable of referendum” to the electorate (emphasis added). The Court of Appeals has interpreted the Constitution’s purpose, by vesting in the people the power to submit part of a law to referendum, as preventing “the stoppage of the State’s established functions pending a vote upon some question of policy.” *Winebrenner*, 155 Md. at 571.

SBE relies on two cases, *Berlin v. Shockley*, 174 Md. 442 (1938), and *Bayne v. Secretary of State*, 283 Md. 560 (1978), for the proposition that the spending measures in SB 793 cannot be severed from the substantive provisions regarding the JHU police force. One case stands for the opposite proposition, and other is clearly distinguishable.

Berlin concerned the referability of part of an act governing the distribution of profits for a county-level liquor dispensary. Md. Const. Art. XVI, § 6 excepts laws that regulate the sale of

liquor from referendum. The Court held that the provision excepts all laws regulating liquor sales from referendum and “that the section authorizing or reserving the power of referring an act or part of an act has no application to such a law or to any part of one.” The Court explained that the intent of the section was to exempt any act concerning the subjects mentioned in the exception section from referendum:

An association in a single enactment of a referable law and one of the kinds excepted from the referendum, if that would be feasible without violation of the constitutional prohibition in article 3, section 29, against including more than one subject, might, perhaps, be found to leave part of an enactment referable, but not part of the excepted law. That law, with its incidents, still could not be referred.

Berlin, 174 Md. at 446. In other words, the Court was saying that an exception to the right of referendum should not be read to prevent severability when, as here, the provisions of that law are not so closely related or interdependent as to be inseverable (precisely the opposite of what the state contends it stands for). Judge Adkin’s dissenting opinion in *Kelly* reinforces this reading of the decision in *Berlin*:

What this means is that if an act contains both an appropriation for the maintenance of State government and substantive policy determinations, the latter, at least, may be referred. If the policy material is dominant, then the reference would be under the *Dorsey* principle.... If the appropriation material is dominant, there would be no reference under *Bayne* and *Berlin*. If neither is dominant, then art. XVI can be invoked as to the policy or general law material, if not as to the strictly appropriation material. This occurs by virtue of the “part of any Act” portion of art. XVI, 1(a), as construed early on in *Winebrenner*....

310 Md. at 448. Judge Adkins goes on to state the central holding in *Berlin*:

... [A]lthough an appropriation may not be subject to referendum, the other parts of the act are. If the legislature chooses to pass laws which combine appropriations with general, substantive legislation, with neither subject being dominant, thus making impossible to characterize them as being wholly appropriations or wholly not, the non-appropriations portions are referable.

Id. at 489.

Here the spending provisions have nothing at all to do with the substantive provision in the law regarding the JHU police force. There is thus no reason to depart from Maryland's statutory presumption that all legislation is severable. Md. Code, Gen. Prov. § 1-210(a).

Bayne is clearly distinguishable. The appellants in that case sought to refer a part of the Fiscal Year 1979 Budget Bill to referendum. 283 Md. at 560. The part of the budget bill at issue in the case was an appropriation for Medical Assistance direct payments to providers for medical and hospital care, including abortions, to eligible beneficiaries. *Id.* at 563. Upon finding that the part of the budget bill sought to be referred to the electorate was an appropriation, the Court of Appeals looked to previous jurisprudence to answer the question of whether providing medical services to indigent persons is a primary function of state government and concluded that it is. *Id.* at 571-72. In accordance with *Berlin*, the Court held that this appropriation designed to execute a primary function of state government was not referable. *Id.* at 575.

Unlike this case, *Bayne* involved non-spending measures that were included in a budget bill whereas SB 793 was not part of a budget bill. SB 793 was primarily a bill creating and implementing a private police force and had a separate section with spending provisions for programs unrelated to that police force. *Bayne* is simply irrelevant to SB 793 and does not serve as guidance for the outcome of this case.

D. Even if SB 793 is an appropriation under Art. XVI, § 2, it is an appropriation for maintaining or aiding any public institution and is referable because it exceeds the next previous appropriation for the same purpose.

Even if the spending measures in SB 793 could be considered appropriations, they are appropriations for the purpose of maintaining or aiding a public institution, rather than appropriations for maintaining state government. Art. XVI, § 2 states:

No law making any appropriation ... for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose,

shall be subject to rejection or repeal under this Section. The increase in any such appropriation for maintaining or aiding any public institution shall only take effect as in the case of other laws, and such increase or any part thereof specified in the petition, may be referred to a vote of the people upon petition.

Maryland courts have adopted the Attorney General's 1927 opinion regarding the construction of § 2 as the law of the land. *See, e.g., Bickel v. Nice*, 173 Md. 1, 192 A. 777, 781 (1937) (only appropriations for maintaining public institutions are subject to referendum); *Dorsey v. Petrott*, 178 Md. 230, 234-235 (1940) (stating that increases in appropriations for maintaining or aiding any public institution may be referred to the electorate). That opinion recognized that the public institution exception applied only to "educational and eleemosynary [i.e., charitable] institutions, sometimes designated as State-aided institutions." 32 Op. Att'y Gen. 137 (1927). The reasoning for this conclusion is based on the clear intention of the framers:

The framers intended that the people should have a check upon the amount of money expended by the legislature for the maintenance or aid of public institutions, not owned or controlled by the State. Such institutions do not necessarily perform governmental functions and are largely supported by private capital. Moreover, they are not State controlled, although the State is sometimes given a voice in their management. It is, therefore, not improper, when providing a check upon legislative power, to reserve to the people the right to control any extensions or increases of State aid to such institutions. The reference of such increases could not impair the State government in the exercise of its normal functions, whereas appropriations for the executive, legislative and judicial branches of the Government must be provided, in accordance with the financial needs of these departments, without hindrance or delay.

Id.

The spending measures in SB 793, if appropriations at all, can only be characterized as appropriations for the purposes of maintaining or aiding public institutions. The Baltimore Children and Youth Fund (hereinafter "BCYF") is a city-funded grant program, administered by Associated Black Charities, a non-profit, that provides funds to private programs that serve children, youth and young adults under age 24 in Baltimore City. BYCF Home Page,

<https://bcyfund.org> (last visited May 14, 2019). Funding is available to tax-exempt entities, or to other persons or entities who apply using a charitable fiscal agent. BCYF FAQs, <https://bcyfund.org/faqs/>; expand link for “What types of organizations or individuals are eligible for funding from the Baltimore Children and Youth Fund” (last visited May 14, 2019). The fund is thus, by definition, expressly for the purpose of supporting charitable entities. The Baltimore City YouthWorks Summer Jobs Program is a grant and training program administered by the Baltimore City Mayor's Office of Employment Development. Baltimore City YouthWorks Home Page, <https://youthworks.oedworks.com> (last visited May 14, 2019). The program pays selected Baltimore City young people a \$1,600 stipend to work 25 hours per week for five weeks during the summer at City non-profit and government entities. Baltimore City Youth Works Employer Page, <http://youthworks.oedworks.com/customPage.cfm?PageId=2> (last visited May 14, 2019). The program also screens, trains, and selects young people for private employers who wish to participate. *Id.* This program is thus also a charitable and educational entity. SB 793 described the Cadet Program as a “law enforcement apprenticeship program” with purposes related to providing opportunities for youth to pursue careers in law enforcement. An apprenticeship program should be considered an “educational” program for purposes of Art. XVI, § 2. Finally, the Seed Community Development Anchor Institution Fund is designed to “provide grants and loans to anchor institutions for community development projects in blighted areas of the State.” Md. Code, Housing & Comm. Dev. § 4-509(c). State law defines “anchor institutions” as either “an institution of higher learning in the state,” *id.* § 4-509(a)(2)(i), or as hospital that has at least five physicians as medical staff, and admits two or more patients for overnight care. *Id.* § 4-509(a)(2)(ii). Such institutions are inherently educational or charitable. In short, all of the programs and funds aided by the spending measures in SB 793 are state-aided

educational and/or charitable institutions. Therefore, the allocations made to these programs and funds in SB 793 are for the purposes of maintaining or aiding public intuitions under § 2.

Further, SB 793's spending measures exceed the next previous appropriation for the same purpose, rendering SB 793 referable. *See* SB 793 Fiscal and Policy Note, pp. 1-2, http://mgaleg.maryland.gov/2019RS/fnotes/bil_0003/sb0793.pdf. The act makes four mandated increases or new permanent appropriations to public institutions as follows. It mandates at least \$1 million for the Baltimore City YouthWorks Summer Jobs Program *in addition* to any state funding otherwise available to the fund and the program, for fiscal years 2021 through 2024. *Id.* It mandates at least \$3.5 million for the local management board for the Baltimore City Children and Youth Fund *in addition* to any state funding otherwise available to the fund and the program, for fiscal years 2021 through 2024. *Id.* It increases and makes permanent an existing mandated appropriation, requiring a permanent appropriation of \$10 million each year for the Seed Community Development Anchor Institution Fund in the operating budget or capital budget beginning in fiscal year 2021. *Id.* Finally, the act establishes a permanent appropriation of at least \$750,000 each year for the Cadet Program created by the act, beginning in fiscal year 2021. The amount of funding available to the program is based on the number of apprentices within a law enforcement agency who meet all eligibility criteria. Under Art. XVI, § 2, appropriations of this nature render SB 793 generally subject to a petition for referendum (even though here Plaintiffs are not seeking to petition these provisions to referendum).

E. Defendants SBE and Lamone violated Md. Code, Elec. L. § 6-210(a)(2) and (b) by failing to issue a timely advance determination and notice regarding the sufficiency of the summary of the bill.

Finally, the Plaintiffs have lost 20% of the time to collect the first tier of signatures due to the failure of SBE and Lamone to issue a timely advance determination about sufficiency of the

bill summary. Under Md. Code, Elec. L. § 6-210(a)(2), SBE must, within five business days of receiving an advance determination request, make a determination on the request. In this case, SBE and Lamone initially issued an Advance Determination that did not include a determination of the sufficiency of the Plaintiffs' bill summary. Its Revised Advance Determination which included the determination on the bill summary was finally issued on April 25, 2019, after Plaintiffs' repeated urgent requests for it. Unless the Court's full equitable powers extend to altering the deadlines to collect petition signatures set forth in Art. XVI, § 3, the Plaintiffs, who have already been irreparably harmed, will have been irretrievably harmed by the delay. Art. 19 of the Md. Declaration of Rights demands a remedy. The provisions of the Election Law must be strictly adhered to in a pre-election challenge such as this. *Stop Slots Md 2008 v. State Bd. of Elections*, 424 Md. 163, 193 (2012). Yet SBE has failed in that duty. As a result, the constitutional right of referendum is at risk of being denied by government error or interference. The Court must extend the deadlines for submitting signatures, "to assure the integrity of the electoral process." Md. Code, Elec. L. § 6-209(a)(2). The Court should also issue a declaratory judgment that the SBE must strictly comply with § 6-210(a)(2) of the Election Law.³

³ Compelling circumstances justify deciding such an issue "where the urgency of establishing a rule of future conduct in matters of important public concern is both imperative and manifest." *State v. Ficker*, 266 Md. 500, 507 (1972). In *Lloyd v. Bd. of Supervisors of Elections*, 206 Md. 36 (1954), the Court of Appeals delineated the factors by which it tests whether to consider the merits of such an issue:

[I]f the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight.

Lloyd, 206 Md. at 43. SBE's failure here certainly meets that standard.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court vacate SBE's Advance Determinations that the Plaintiffs' petition was insufficient because the legislation at issue was not subject to referral to the electorate; order that SB 793, or Sections 2 and 3 thereof, is subject to referendum; and permanently enjoin the State Director of Elections to accept first- and second-tier petition signatures for an additional nine days each, and complete all steps related to the certification process with all necessary speed and without reference to the Advance Determinations challenged herein.

Dated May 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of May, 2019, a copy of the foregoing Memorandum, including all attachments thereto, was filed and served on counsel of record by MDEC, and sent via e-mail to the following:

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