IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

CARLOS and TATIANA IBAÑEZ; R.I. and V.I., minors, by and through their parents, Carlos and Tatiana Ibañez, as the minors' next friends; MATTHEW and MARIE MIERZEJEWSKI; P.M., a minor, by and through the minor's parents, Matthew and Marie Mierzejewski, as the minor's next friends; KEMAL and MARGARET GOKTURK; T.G. and N.G., minors, by and through their parents, Kemal and Margaret Gokturk, as the minors' next friends; ERIN and TRENT D. TALIAFERRO; D.T. and H.T., minors, by and through their parents, Erin and Daniel Taliaferro, as the minors' next friends; MELISSA RILEY; and L.R., a minor, by and through the minor's parent, Melissa Riley, as the minor's next friend,

Plaintiffs-Petitioners,

v.

ALBEMARLE COUNTY SCHOOL BOARD; MATTHEW S. HAAS, Superintendent, in his official capacity; and BERNARD HAIRSTON, Assistant Superintendent for School Community Empowerment, in his official capacity,

Defendants-Respondents.

PETITION FOR APPEAL

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INTRODUCTION

Last year, the U.S. Supreme Court denounced school policies that treat students "as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by … the constitution." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 221 (2023) (*SFFA*) (citation omitted). With its so-called "Anti-Racism Policy," the Albemarle County School Board has repeated that error.

The School Board told students to view life as rigged by those in the "[d]ominant culture"—"white, middle class, Protestants"—because those who "chose the game and the rules" win every time. R.148–49. It labeled minorities as the "subordinate culture." R.156. It told students to change how they "look," "think," "sound," and "act" to be "more anti-racist." R.174–77. Being "Not Racist" is not enough. R.170. Students must "BREAK THE BOX" of the dominant white culture. R.150–57.

Plaintiffs' stories demonstrate the "hurt and injury" that such stereotyping causes. *SFFA*, 600 U.S. at 221 (citation omitted). Consider L.R., a multi-racial student who began viewing his race negatively after exposure to the School Board's Policy. R.15–16, 1095–96. Plaintiffs are likely to prove the School Board created a racially hostile educational environment and violated their free-speech rights. So the Court should grant the Petition, reverse the judgment below, and preliminarily enjoin the Policy.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In 2019, the Albemarle County School Board adopted an "Anti-Racism Policy," which the Board soon began implementing in all its schools. R.6–7, 19–21, 61–65. Almost two years later, five Albemarle County families—eight students and nine parents—sued the Board, the superintendent (Dr. Matthew Haas), and the assistant superintendent (Dr. Bernard Hairston) for implementing the Policy. R.4, 17–18.

Relevant to this appeal, the Plaintiff families claimed that the Policy's implementation violated students' state constitutional right to be free from race discrimination, R.48–49 (Claim One); that it violated their state constitutional right to be free from viewpoint discrimination, R.49–51 (Claim Two); and that it violated their state constitutional right to be free from compelled speech, R.51–53 (Claim Three).[1] Along with their complaint, the Plaintiff families attached 11 separate exhibits—totaling roughly 130 pages of evidence. R.60–191.

The complaint exhibits included the Policy and implementing regulations, R.60–65; materials explaining the Policy to the public, R.68–126; training documents for implementing the Policy in teachers' classrooms, R.66–67, 127–46, 178–87; and materials showing presentations and classroom exercises that already had been used to implement the Policy with students, R.147–77, 188–91.

[1] To streamline the issues for this appeal, Plaintiffs have decided not to challenge the dismissal of the other three claims they asserted below.

The School Board filed a demurrer and a plea in bar. R.232–56. Rather than introduce new evidence or a contested factual issue, the Board argued that Plaintiffs lacked standing, and that the state constitutional provisions Plaintiffs invoke are not self-executing. R.250–54, 1113–25, 1248–60. Along with opposing the demurrer and plea in bar, Plaintiffs moved for a preliminary injunction, R.268–302, attaching additional evidence to their motion, including a declaration from each Plaintiff family, R.1063–98, and Policy-related videos, documents, and book excerpts, R.829–1062, 1288–1328.[2]

After a motions hearing and without making any factual findings, R.1391–1459, the trial court granted Defendants' plea in bar on the three claims relevant here, holding that "Plaintiffs lack standing to bring their claims, and that Plaintiffs have not stated a cause of action arising under Virginia law because their claims under the Constitution of Virginia are not self-executing." R.1373. The court denied Plaintiffs' preliminary-injunction motion as moot. R.1374. Plaintiffs appealed.

A divided Court of Appeals panel affirmed, "generat[ing] three separate opinions." Op. 2. The panel unanimously rejected part of the trial court's rationale, holding that the relevant provisions of the Virginia Constitution *are* self-executing. *See* Op. 13 & n.8; Op. 45

[2] Defendants filed a motion craving oyer, R.257–61, which was granted after Plaintiffs filed complete copies of Exhibits 2 (R.312–18), 4 (R.322–35), 5 (R.336–63), 7 (R.405–637), 8 (R.640–805), and 9 (R.806–26).

(Humphreys, J., partially dissenting); Op. 59–63 (Beales, J., partially dissenting). But a majority held that Plaintiffs "failed to adequately plead cognizable constitutional injuries" or "otherwise lack standing to pursue their claims for declaratory relief." Op. 2.

Relevant here, the Court of Appeals acknowledged that "Virginia courts have yet to consider what is required to state a claim that a 'hostile educational environment' violates equal protection rights." Op. 26. Yet it provided only a brief analysis of this issue, stating that the School Board merely "teaches the existence of racial … distinctions," *id.*, which it deemed not actionable, Op. 27. Judge Beales disagreed because the Policy "treats students differently based on their race." Op. 85 (Beales, J., partially dissenting).

Similarly, two judges rejected Plaintiffs' free-speech claims. But the panel divided three ways over how to analyze them. Judge Lorish thought the Board had not "threatened" any student "with discipline[] for failing to speak or for expressing a contrary viewpoint." Op. 35. Judges Humphreys and Beales disagreed. Op. 48 & n.32 (Humphreys, J., partially dissenting); Op. 79 (Beales, J., partially dissenting). But they also disagreed over which speech claim should have survived: Judge Humphreys approved only the viewpoint-discrimination claim, while Judge Beales allowed only the compelled-speech claim. *See* Op. 50–51 (Humphreys, J., partially dissenting); Op. 80–82 (Beales, J., partially dissenting).

As a result of these three opinions, the Court of Appeals affirmed the dismissal of all the claims and did not rule on Plaintiffs' motion for a preliminary injunction. Plaintiffs now appeal to this Court.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by affirming the dismissal of Plaintiffs' claim under Article I, Section 11, of the Virginia Constitution because the complaint alleges facts sufficient to state a claim for a racially hostile educational environment. [Op. 20–27; R.6–9, 14, 34, 39–42, 48–49, 271–73, 289–90, 298, 1232–33, 1272–74, 1285, 1375–76, 1412:10–19, 1414:8–1415:6, 1420:18–1422:12, 1423:20–1426:16, 1428:17–1430:8]

2. The Court of Appeals erred by affirming the dismissal of Plaintiffs' claims under Article I, Section 12, of the Virginia Constitution because the complaint alleges facts sufficient to state claims for compelled speech and viewpoint discrimination. [Op. 27–37; R.42–47, 49–53, 272–73, 292–94, 298–300, 1278–80, 1375–76, 1440:6–14, 1441:16–1442:25, 1443:12–1457:5]

3. The Court of Appeals erred by failing to preliminarily enjoin the challenged policy, to direct the trial court to preliminarily enjoin it, or even to rule on the preliminary-injunction request because Plaintiffs are likely to show it creates a racially hostile educational environment and violates their free-speech rights, and because the other preliminary-injunction factors also favor relief. [R.57–58, 268–74, 290–300, 1063–98, 1274–85, 1364–72, 1375–76, 1412:10–19, 1414:8–1415:6, 1420:18–1422:12, 1423:20–1426:16, 1428:17–1430:8, 1440:6–14, 1441:16–1442:25, 1443:12–1457:5]

STATEMENT OF FACTS

A. Racial Stereotypes in the School Board's New Policy

The School Board's "Anti-Racism Policy" professed to "eliminate all forms of racism." R.61–62. Instead, the Policy defined students by their race, sought to "expose whiteness," and taught students that endorsing a concept like "colorblindness" or taking the wrong position on school funding is racist and leads to lynching and genocide. Unsurprisingly, the Policy had deleterious effects on students.

The School Board adopted regulations to implement the Policy. R.20, 63. The regulations required updates to "[c]urriculum and instructional materials." R.64. Exemplifying these updates, the School Board conducted a Pilot Program at Henley Middle School in spring 2021. R.29; *see* Op. 7 (crediting Plaintiffs' allegation that the Pilot Program exemplifies the Policy's curriculum); Op. 68 (Beales, J., partially dissenting) (same). Plaintiffs Carlos and Tatiana Ibañez's daughter, V.I., and Melissa Riley's son, L.R., participated in the seventh-grade version of the Pilot Program. R.29. And Plaintiffs Matt and Marie Mierzejewski's son, P.M., participated in a portion of the eighth-grade version of the program. But they withdrew him when they saw how it "taught [him] to focus on his race [and] the race of his classmates." R.29, 35; *see* R.147–77 (excerpts of eighth-grade slide deck); R.640–805 (entire slide deck).

One classroom activity told eighth-grade students the United States has a "[d]ominant culture" made up of "white, middle class, Protestants," and asked them to "[i]magine" if "one person chose the game and the rules" for the class daily, and "that person also won the game each time." R.148–49. It then asked students whether they had "ever benefited from the scenario mentioned" and how "some people or groups have more control than others." R.700.

A subsequent lesson drove home the point. R.150–57. Students were told that the "[d]ominant [c]ulture" in the United States is "people who are white, middle class, Christian, and cisgender." R.153. And to demonstrate they had internalized the message, students were shown an empty on-screen box with various identifying characteristics and told to place the "dominant" characteristics inside and the "subordinate" ones outside the box. R.154–56. Traits they were expected to place inside the box included "[w]hite," "upper-middle class," "cisgender," and "male." R.156. And traits they were to place outside the box—the "subordinate culture"—included "[b]lack, brown, indigenous people of color" and "cisgender women." *Id.* Finally, students were asked what they needed to do with the box and shown a slide with the expected answer: "BREAK THE BOX." R.157.

Another classroom activity required students to watch a video showing a black man and a white woman "check[ing] [their] privilege" by holding up both hands and putting individual fingers down in

response to a series of statements, some of which were explicitly about race. R.720 (slide with video and link), R.829 (flash drive containing video). After the video, students were required to repeat the exercise themselves, "start[ing] with both hands up," and "put[ting] a finger down" for each scenario that was true about them. R.158, 721. After completing the activity, students were expected to review whether they were "aware of [their] privilege or lack of privilege" and ask why it is "challenging for white people to think about (and do something about) white privilege." R.34, 159, 722.

A Pilot Program slide offered a one-way definition of racism: "The marginalization and/or oppression of people of color based on a socially constructed racial hierarchy that privileges white people." R.29–30, 163, 760. According to another slide, when members of a racial majority claim to have been discriminated against by members of a racial minority, it is the members of the majority who engage in "Veiled Racism." R.165, 762.

On this slide, "Veiled Racism" appeared on a pyramid diagram used to show that "[r]acism is not just the big things" but "the little things, too," and that "inaction toward racism can uphold a racist system." R.33, 165, 762. The pyramid labels many ideas as forms of racism—such as "Colorblindness," "Remaining Apolitical," and taking certain positions on political issues like immigration and school

funding. *Id.* According to the School Board, these ideas lay the foundation for and "uphold" evils like "Lynching" and "Genocide." *Id.*

Finally, the Pilot Program's presentation materials repeatedly instructed students to change the way they look, think, speak, and act to comply with the Policy. One slide showing a girl holding a rainbow flag told students that many of the "ways to promote equity … require you to be a person who believes in Anti-Racism and Anti-Bias practices." R.755. Other slides told students that they "MUST be anti-racist, instead of simply NOT racist," R.166, 763, and that statements like "I treat others with respect, and that is enough" are merely "Not Racist," whereas statements like "My school has inequitable systems that disadvantage[] the students of color" are "Anti-Racist," R.170, 770. Activities like these are consistent with the School Board's aim to create "environments where silence about racism is recognized as a form of complicity." R.184, 186; *accord* R.811, 813.

Near the end of the Pilot Program, the slides showed an image of a woman holding a "Black Lives Matter" sign asking students to consider "What will I do today?" R.175, 801 (capitalization altered). The Program culminated with students creating an anti-racism "Vision Statement" that identified specific ways they would change how they "look," "think," "sound," and "act" to be "more anti-racist." R.46, 174–77, 789–803.

B. The Pervasive Implementation of the Policy

The Policy's implementation went beyond the Pilot Program. Similar content and activities are "woven through all the classes in Albemarle County." R.39; *see* R.841. The Policy "will impact *all* curriculum subject areas." R.39. And the record here shows it has, including annual reports celebrating the School Board's progress toward system-wide implementation. *See* R.24, 38, 86–126, 937–63.

In the November 2020 report, Superintendent Haas boasted that school officials had begun "to transform our Anti-Racism Policy from words on paper to a life of its own in our hearts, minds and actions." R.88. That report described an "Anti-Racist Vetting Tool," R.106, which was used "to vet all curriculum units for Social Studies in Albemarle County," R. 67, 312. It also described an "ELA [English Language Arts] Equity Toolkit." R.36–37, 106; *see* R.179–87 (excerpts of Toolkit); R.806–26 (entire Toolkit). The Toolkit told teachers to "Expose Whiteness," treating "silence about racism" as "complicity." R.37, 183–84. The Toolkit relied on a book titled *Letting Go of Literary Whiteness: Antiracist Literature Instruction for White Students*, R.36–37, 184–85, which instructed teachers to use literature to prompt students to considering their "own racial identity," R.977; to "help students work through the shame, guilt, and confusion that often go along with racial identity work," R.987; and to tie "learning goals and even grades to racial literacy growth," R.982; *see* R.184 (citing R.982).

To enforce the Policy, the School Board mandated "various, including anonymous, means for students and staff to report racism and other forms of discrimination." R.65; *see* R.114, 118 (discussing "Anonymous Alerts," an app for reporting "acts of racism"). When students commit a "racist act"—which could include merely supporting certain political positions, R.165—they would "learn about the impact of their actions" through "restorative justice, mediation, role play or other explicit policies or training resources," R.64. Those "other explicit policies" include the Student Conduct Policy, and the "Behavioral Management Handbook." *See* R.62 (cross-referencing Policy "JFC, *Student Conduct*"); R.101–02 (describing new abbreviation for "behavior infractions that appear to violate the Anti-Racism Policy"); R.1035 (referencing "Policy ACC, *Anti-Racism*").

C. The Policy's Harms to Plaintiffs

The School Board's systemwide Policy implementation has already harmed Plaintiffs. Carlos and Tatiana Ibañez's children, R.I. and V.I., received "instruction in several classes that focuses on race and identity through an 'anti-racism' lens." R.11, 38–42; *see* R.10, 1063–70. For example, "V.I. was shown a video as part of classroom instruction" that suggested to her that "people of color could not live in big houses." R.40. She understood the video as "instruct[ing] her that her achievement in life will turn on her racial background, not her hard work." *Id.*

Plaintiff Melissa Riley has a son, L.R., with mixed racial heritage: Native American and white on his mother's side, and black on his father's. R.15, 1092. When Melissa learned about the Policy, "she was concerned" about how it "instruct[ed] L.R. and his classmates to focus on his skin color," particularly "in a classroom with mostly white students." R.35. Melissa brought her concerns to "her son's teacher," who responded "that the school planned to create a 'safe space' for students of color separate from white students," an idea that "sounded like segregation" to Melissa. *Id.*

More recently, Melissa has seen L.R.'s self-perception take a negative turn. R.1095–96. She has always taught him to take "pride in his racial heritage." R.1092. "Prior to the Policy," she had "never heard L.R. say anything negative about his biracial heritage." R.1095. After the Policy's implementation, "[f]or the first time," she has "heard him voice negative thoughts or even joke about being black." R.1096.

Plaintiffs Matt and Marie Mierzejewski's son, P.M., was also exposed to the Policy, but they chose to withdraw their younger children from Albemarle County schools before they could be. R.12, 41, 1071–76. By the time they filed this lawsuit, the other Plaintiff parents—the Gokturks and the Taliaferros—had withdrawn or were considering withdrawing their children from Albemarle County public schools because of their own concerns about the Policy. R.12–14.

D. The School Board's Directions for Implementing the Policy

All these harms flow directly from the Policy. Mandatory teacher trainings instructed teachers to use racial tropes. In one, a slide contrasted "white talk" with "color commentary," stereotyping white people as "verbal" and "intellectual" and racial minorities as "nonverbal" and "emotional." R.134 (capitalization altered). The School Board also incorporated outside resources in their training, including one instructing staff that "white people" should daily earn their "white ally badge" from people of color. R.80.

In a November 2020 online orientation, Assistant Superintendent Hairston recorded a video that drove home the Policy's racial stereotypes. R.24 (complaint with video link, bit.ly/3yOpvKE); R.84, 356 (slide with link); R.829 (video); R.834 (transcript). In the video, Hairston gave different instructions to his "white colleagues" and his "colleagues of color." R.832. And he closed by telling staff to ask themselves whether they were on the "anti-racism school bus," or if they needed "help finding [their] seat and keeping [their] seat," or if it was "time for [them] to just get off the bus." R.24, 835.

SUMMARY OF ARGUMENT

The Court of Appeals should have reversed the judgment dismissing Plaintiffs' claims and preliminarily enjoined the Policy or directed the trial court to do so. First, the School Board's "Anti-Racism Policy"

intentionally discriminates based on race by creating a hostile educational environment. Rather than throwing up its hands because the claim is not yet well-developed in Virginia caselaw, the Court of Appeals should have followed federal statutory and constitutional precedent. Under that precedent, the Policy's hostile racial stereotypes are objectively severe or pervasive. According to the School Board's own employees, those stereotypes are "woven through" every subject in every grade in every school in Albemarle County. And those stereotypes have concretely and negatively affected Plaintiffs' education. The Ibañezes and Melissa Riley have attested to the harm the Policy has caused their children. And the other Plaintiff families have withdrawn their children from public school to avoid similar harm, which further shows the hostile environment.

The Court of Appeals also should have held that the Policy's implementation discriminates against certain speech based on its viewpoint and compels Plaintiffs to speak messages to which they object. This Court should reverse the dismissal of all these claims.

Notably, the record shows that the Schools Board's hostile environment, speech discrimination, and compelled speech are so apparent that Plaintiffs are likely to succeed on the merits. Because the equitable injunction factors also favor Plaintiffs, this Court should preliminarily enjoin the Policy.

STANDARD OF REVIEW

This Court "review[s] a circuit court's judgment sustaining a demurrer de novo." *Eubank v. Thomas*, 300 Va. 201, 206, 861 S.E.2d 397, 401 (2021). It "accept[s] as true all factual allegations expressly pleaded in the complaint" and does the same for reasonable "unstated inferences" from the facts alleged "in the light most favorable to the claimant." *Doe ex rel. Doe v. Baker*, 299 Va. 628, 641, 857 S.E.2d 573, 581 (2021) (cleaned up). And because the trial court granted a motion craving oyer, this Court may consider "any written documents added to the record as a result of the motion." *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 276 Va. 1, 5, 661 S.E.2d 801, 803 (2008). Additionally, because the trial court took "no evidence on the plea in bar," this Court applies "functionally" the same standard of review as on appeal of a demurrer. *Plofchan v. Plofchan*, 299 Va. 534, 547–48, 855 S.E.2d 857, 865 (2021).

Although an injunction decision is "discretionary," a court "abuses its discretion" when its decision is "based on erroneous legal conclusions." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18, 822 S.E.2d 358, 367 (2019) (cleaned up).

ARGUMENT

I. The School Board discriminates based on race by creating a racially hostile educational environment.

The Court of Appeals correctly acknowledged that racially hostile educational environment claims "are typically advanced and analyzed under Title VI of the Civil Rights Act." Op. 26 n.16. But it did not discuss whether that statute should inform an analysis of Virginia's Antidiscrimination Clause. Instead, it characterized the Policy's racially stereotyped materials as "teach[ing] the existence of racial … distinctions," which it held does not offend the Virginia Constitution *per se*. Op. 26–27. The Court of Appeals should have applied a test like the one federal courts apply to hostile-environment claims under Title VI and held not only that Plaintiffs have stated a race-discrimination claim but also that they are likely to succeed on the merits of that claim.

A. Because the Virginia Constitution prohibits intentional discrimination, it also prohibits racially hostile educational environments.

Unlike the U.S. Constitution, the Virginia Constitution contains an express prohibition on discrimination based on particular protected characteristics. It provides "that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." Va. Const. art. I, § 11; *see Taylor v. Northam*, 300 Va. 230, 256, 862 S.E.2d 458, 471 (2021) ("[I]n

1971, the Commonwealth replaced the 1902 Constitution with a Constitution that expressly forbids racial discrimination.").

Generally speaking, this provision "perform[s] functions analogous to those of the federal equal protection clause." Comm'n on Const. Rev., *The Constitution of Virginia: Report of the Commission on Constitutional Revision* 96 (1969). So this Court has typically "appl[ied] the standards and nomenclature developed under the equal protection clause of the United States Constitution to claims involving … discrimination under Article I, § 11 of the state constitution." *Wilkins v. West*, 264 Va. 447, 467, 571 S.E.2d 100, 111 (2002); *accord King v. Va. Birth-Related Neurological Injury Comp. Program*, 242 Va. 404, 412 n.4, 410 S.E.2d 656, 661 n.4 (1991); *Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

Textually, the Virginia Antidiscrimination Clause closely mirrors Title VI, even more so than it resembles the Equal Protection Clause. *Compare* 42 U.S.C. § 2000d, *with* U.S. Const. amend. XIV, § 1. Regardless, Title VI and the Fourteenth Amendment both prohibit the same conduct. *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). At the very least, then, this Court should "hold that the protections of Article I, Section 11 are *at least as strong* as the existing understanding" of the analogous rights under Title VI and the U.S. Constitution. *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 743 (Va. 2023) (emphasis added).

Both federal provisions prohibit *intentional* racial discrimination. *See Washington v. Davis*, 426 U.S. 229, 238–41 (1976) (discussing both the Equal Protection Clause and the "equal protection component" of the Fifth Amendment); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (discussing Title VI); *see also Fordice*, 505 U.S. at 732 n.7 ("[T]he reach of Title VI's protection extends no further than the Fourteenth Amendment."). In fact, Title VI "prohibits *only* intentional discrimination." *Alexander*, 532 U.S. at 280 (emphasis added).

So whether based on textual similarities to Title VI or this Court's precedent analogizing to the Equal Protection Clause, this Court should hold that Virginia's Antidiscrimination Clause prohibits, at a minimum, intentional discrimination. *Cf.* Op. 21 (holding based on federal precedent that intent is a necessary element of a race-discrimination claim under the Virginia Constitution).

One type of intentional discrimination is the creation of a hostile environment. Although the question has arisen in a variety of constitutional and statutory contexts, federal courts apply a mostly uniform standard for determining whether a defendant has created a hostile environment. The U.S. Supreme Court first announced that standard in the context of a hostile-work-environment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993). Since then, courts have applied that standard to claims under the U.S. Constitution, Title VI, and other

federal laws, like Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. *See, e.g.*, Op. 26 (citing *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 744 (2d Cir. 2003), which considered constitutional and Title IX claims); *Hayut*, 352 F.3d at 745, 750; *Adams v. Demopolis City Schs.*, 80 F.4th 1259, 1273 (11th Cir. 2023) (collecting citations to decisions considering Title VI claims).

In other contexts, Title VI, Title VII, Title IX, and the Equal Protection Clause may have important differences. *See Vlaming*, 895 S.E.2d at 745 (discussing some differences between Title VII and Title IX). But when it comes to hostile-environment claims, courts interpret each of those provisions consistently. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc) (Title VII and Title IX); *Mercer v. Duke Univ.*, 401 F.3d 199, 202 (4th Cir. 2005) (Title VI and Title IX); *Hayut*, 352 F.3d at 744 (Title VII and U.S. Constitution). Because of the similarities between the Virginia Antidiscrimination Clause and those federal provisions, this Court should hold that the federal provisions inform Virginia's hostile-environment analysis. *Cf. Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 858 S.E.2d 788, 794 (N.C. 2021) (applying federal standards to newly recognized hostile-environment cause of action under North Carolina constitutional provisions guaranteeing right to an education).

B. The Policy creates an unconstitutional hostile environment based on race.

A race-based hostile-educational-environment claim alleges that "students, and possibly teachers, intentionally acted in a racially discriminatory way toward other students." *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okla.*, 334 F.3d 928, 932 (10th Cir. 2003). When the claim is that teachers' actions created the hostile environment, a plaintiff can show intentional discrimination by the school (1) if the teacher acted pursuant to an official policy; or (2) if the school acted with deliberate indifference. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *see, e.g.*, *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1104–05 (9th Cir. 2020) (discussing institutional liability under Title IX in both the presence and absence of an "official policy").

The Fourth Circuit has boiled the hostile-environment test down to four elements: (1) the plaintiff is "a student at an educational institution receiving federal funds"; (2) the plaintiff "was subjected to harassment based on" a protected characteristic; (3) "the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity"; and (4) "there is a basis for imputing liability to the institution." *Jennings*, 482 F.3d at 695.

Only the third element is in dispute here. As to the first element, the analogous question is whether the Virginia Constitution applies to the defendant. Here, because Defendants are a public-school board and

its employees, this element is met. *Cf. Vlaming*, 895 S.E.2d at 743–46 (holding that due-process claim against school board under Article I, Section 11, survived demurrer). As to the second element, "racial classification[s] appear[] on the face of the" School Board's documents. *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *see, e.g.*, R.40 ("Plaintiff L.R. is uncomfortable with how the Policy and implementing curriculum draws attention to his race and the race of his classmates."); R.707–10 (labeling white students "dominant" and black students "subordinate"). And as to the fourth element, Plaintiffs challenge an "official policy," so they need not show deliberate indifference. *Gebser*, 524 U.S. at 290–91.

The key question then is the third element, which has objective and subjective components: (1) whether the alleged harassment is "severe or pervasive enough to create an objectively hostile" educational environment, and (2) whether Plaintiffs themselves "subjectively perceive[d] the environment to be abusive." *Harris*, 510 U.S. at 21. Both components are sufficiently alleged here.

1. The Policy's racial stereotypes are objectively severe or pervasive.

The question whether harassment is so severe or pervasive that it creates a hostile environment "can be determined only by looking at all the circumstances." *Harris*, 510 U.S. at 23. Courts thus often repeat the principle that this question is at least a fact question for a jury. *E.g.*, *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir.

2018) (collecting citations); *see* Op. 53 (Beales, J., partially dissenting) (underscoring concern that Plaintiffs "deserve at least an *ore tenus* hearing on the merits").

Here, the School Board's Policy is shot through with hostile racial stereotypes. Students are branded "dominant" if they are white; "subordinate" if they are not. R.704–12. Students are told to "Break the Box" of the dominant group, which includes white students. R.712. The School Board expects white students—but not members of other racial groups—"to dismantle oppression from which [they] benefit[]." R.320; *see, e.g.*, R.722 (teaching that white students have "privilege" and minority students do not); R.769 (defining "anti-racism" as working against "white dominant culture"). And white students who promote "[c]olorblindness" or deny their "[w]hite [p]rivilege" are guilty of "racism." *See* R.762. Explicit racial classifications like these, which are woven throughout the Policy's in-classroom implementation, "further stereotypes that treat individuals as the product of their race." *SFFA*, 600 U.S. at 221 (cleaned up). Full stop.

The severity of the School Board's racial hostility is heightened because it comes from school employees themselves rather than other students. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653 (1999); *see Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 166 (5th Cir. 2011) ("Peer harassment is less likely to support liability than is teacher-student harassment."). This is

not a case where a student called another "racist"; here *teachers* told students that they "uphold a racist system," for example, just by trying to "remain[] apolitical." R.762; *see* R.32–33. A School Board employee even offered to racially segregate one Plaintiff as part of implementing the Policy. R.35. Such racial stereotyping from a child's own teachers is sufficiently severe to demonstrate a hostile environment.

The pervasiveness of the School Board's Policy reduces the level of severity needed to allege a hostile environment. "[T]he test—whether the harassment is severe or pervasive—is stated in the disjunctive." *Lauderdale v. Tex. Dep't of Crim. Justice*, 512 F.3d 157, 163 (5th Cir. 2007) (analyzing Title VII and Equal Protection Clause); *see Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) ("Harassment need not be severe *and* pervasive to impose liability; one or the other will do."); *accord, e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009); *Harris v. Mayor & City Council of Balt.*, 429 F. App'x 195, 202 n.7 (4th Cir. 2011). In *Lauderdale*, the court expressly said that "none of the incidents of alleged harassment rises to the level of severity [the court] ha[d] required." 512 F.3d at 163. But the incidents' frequency led the court to reverse the summary judgment against the plaintiff. *Id.* at 166–67. Just as "[a]n egregious, yet isolated, incident can" demonstrate a hostile environment, *id.* at 163, "[f]requent incidents of harassment" that are "not severe" can still demonstrate a hostile environment when they "reach the level of 'pervasive,'" *id.*

Here, the challenged Policy is "woven through all the classes." R.39. It "will impact *all* curriculum subject areas." *Id.* The more-than-50-page complaint contains dozens of specific factual allegations about how the School Board has already begun to implement, and plans to continue implementing, the Policy in "all grades," in "multiple subject areas," and across all Albemarle County Public Schools. R.38–39. After just one year under the Policy, the Board had instigated enough changes across the school system to fill a 40-page report. R.86–126.

Courts have held that far less frequently occurring conduct created a hostile environment. In *Hayut*, for example, a community college professor made inappropriate comments to a female student "during many periods of instruction with [the plaintiff] and even, on occasion, outside the classroom." 352 F.3d at 746. The court said this sufficed to show that the "conduct permeated the classroom atmosphere and set the tone for the whole class." *Id.* A reasonably jury, therefore, could find that the inappropriate comments were "sufficiently pervasive to create a hostile environment." *Id.*

Because the conduct challenged here is not limited to Plaintiffs' interactions with a single teacher, it is more pervasive than in *Hayut*. Plaintiffs have already experienced the hostile environment not only in the Henley Middle School Pilot Program, R.29–35, but also in "English, social studies, science, and math," R.38. As the Court of Appeals put it, Plaintiffs alleged "that the material will be so pervasive that opting out

is impossible." Op. 7. Judge Beales agreed, noting that "even if parents wish to withdraw their children from the [challenged] instruction, [it] would pervade 'all content areas' of the Albemarle Public Schools' curriculum." Op. 69 (Beales, J., partially dissenting).

In fact, a court last year denied the School Board's motion to dismiss a hostile-*work*-environment claim arising out of the School's racially charged implementation of the same Policy that Plaintiffs challenge. *Mais v. Albemarle Cnty. Sch. Bd.*, 657 F. Supp. 3d 813, 830 (W.D. Va. 2023); *see id.* at 819 (discussing same teacher-training materials in the record here at R.24–27, 127–46). Since then, at least two other federal courts have denied motions to dismiss hostile-work-environment claims based on similar policies. *See De Piero v. Pa. State Univ.*, No. 23-2281, 2024 WL 128209, at *8 (E.D. Pa. Jan. 11, 2024) (considering policy that "talk[ed] about race … with a constant drum-beat of essentialist, deterministic, and negative language" and thereby "risk[ed] liability under federal law"); *Diemert v. City of Seattle*, No. 2:22-CV-1640, 2023 WL 5530009, at *4 (W.D. Wash. Aug. 28, 2023) (finding "no legal authority" to support the idea that policies like the Policy here are exempt from hostile-environment claims).

Like those courts, two state Attorneys General have issued opinions concluding that actions like the School Board's can create a hostile environment. *See* 58 Mont. Op. Att'y Gen. 1, 2021 WL 2228845, at *1 (May 27, 2021); Ark. Op. Att'y Gen. 2021-042, 2021 WL 3727270,

at *1, 4 (Aug. 16, 2021). Through activities implementing the Policy, the School Board here has told Plaintiffs and other students that they "should feel discomfort, guilt, anguish, or any other form of psychological distress on account of [their] race." 58 Mont. Op. Att'y Gen. 1, 2021 WL 2228845, at *14. Those activities "almost certainly create[] a racially hostile environment." *Id.*

2. The Policy has concretely and negatively affected Plaintiffs' education.

The Policy has also "had a concrete, negative effect on [Plaintiffs'] ability to receive an education." *Davis*, 526 U.S. at 654.

V.I.'s and L.R.'s experiences acutely show how the Policy harms students' educational opportunities, including minority students. V.I., who is Latina, had to watch a video she understood as "instruct[ing] her that her achievement in life will turn on her racial background, not her hard work," which left her "confused and upset." R.40; *see* R.1066 (attesting that V.I., "upset and confused," called her mother from school after seeing this video). As for L.R., for the first time in his life, he has begun "discuss[ing] his [mixed] race in a negative way." R.15. The Policy has harmed these students by promoting "the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *SFFA*, 600 U.S. at 220–21 (quoting *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995)) (brackets in *SFFA*).

Based on similar concerns, Erin and Daniel Taliaferro and Kemal and Margaret Gokturk were considering withdrawing D.T., H.T., T.G., and N.G. from Albemarle County schools when they filed this suit. R.12–14, 41. In fact, before filing this suit, because of the Policy, the Taliaferros had already placed the two older of their four children in private school, which costs "about $30,000 a year." R.14. Similarly, while the Mierzejewskis were hoping to keep P.M. at Western Albemarle High School, they withdrew their younger children from public school because of the Policy's racial discrimination. R.12, 41. After the trial court dismissed the complaint, these three families felt compelled to withdraw their remaining children from Albemarle County Public Schools because of the racially hostile environment. But V.I. and her brother, R.I., along with L.R., are still enrolled in public school and subject to the Policy.

These allegations and evidence demonstrate that the School Board's racially hostile conduct has "altered the conditions" of Plaintiffs' education. *Harris*, 510 U.S. at 21–22. In one case, the Fifth Circuit considered evidence that the plaintiff suffered similar effects to Plaintiffs here. *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 585 (5th Cir. 2020). The hostile environment in that case left the plaintiff "'depressed,' 'sad,' 'isolated,' 'distraught,' and 'traumatized.'" *Id.* Those feelings resemble the feelings of L.R. and V.I. about how the School Board has treated them under the Policy. *See* R.15, 40.

Regarding the Mierzejewskis, Taliaferros, and Gokturks, multiple federal courts of appeals have said a hostile environment has a negative effect when it "ultimately result[s] in [a student] leaving the school district." *Doe v. Galster*, 768 F.3d 611, 619 (7th Cir. 2014); *see, e.g.*, *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 410 (5th Cir. 2015); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 667 (2d Cir. 2012); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000). That the Policy forced these parents to withdraw some of their children prior to filing this lawsuit, R.12–14, 41, and the rest after the trial court refused to enter a preliminary injunction, does not lessen the Policy's harm on them. To the contrary, it further establishes just how concrete and negative the Policy's effects have been.

C. The Policy fails any standard of constitutional scrutiny.

SFFA suggests the School Board could never assert an interest justifying its use of "crude racial stereotypes" in the classroom. R.34; *see* R.29–34 (surveying those stereotypes). Under the Equal Protection Clause, "race may *never* be used as a 'negative' and … it *may not* operate as a stereotype." *SFFA*, 600 U.S. at 218 (emphasis added).

Regardless of whether the School Board could theoretically assert an interest sufficient to justify its use of racial stereotypes, it has never really tried. The only interest it has ever asserted is a generalized one in "[a]ddressing racism." R.1226; *see, e.g.*, R.307. But the School Board

must show the discrimination is "a *necessary* element for achieving a *compelling* governmental interest." *Mahan v. Nat'l Conservative Pol. Action Comm.*, 227 Va. 330, 336, 315 S.E.2d 829, 832 (1984) (emphasis added). An "amorphous end" like addressing racism won't do. *SFFA*, 600 U.S. at 214 (cleaned up). In addition, the School Board has consistently "fail[ed] to articulate a meaningful connection between the means they employ and the goals they pursue." *Id.* at 215. They have implemented the Policy to impose racial stereotypes on students throughout the school day. "It is far from evident" how imposing racial tropes "furthers the educational benefits" these officials "claim to pursue." *Id.* at 216. The Policy fails constitutional review, but Virginia's muddled law in this area requires this Court's review and clarification.

II. The School Board discriminates against speech based on viewpoint and compels speech.

Two members of the Court of Appeals panel concluded Plaintiffs had adequately alleged a violation of their free-speech rights under Article I, Section 12. Judge Humphreys thought "Plaintiffs have sufficiently alleged" a violation of their "free speech rights by engaging in unconstitutional viewpoint discrimination." Op. 51 (Humphreys, J., partially dissenting). And Judge Beales would have held that Plaintiffs' "allegations that their children faced disciplinary consequences for refusing to affirm the [Policy's] ideology … 'asserts a prima facie claim' of compelled speech." Op. 82 (Beales, J., partially dissenting) (quoting

Vlaming, 895 S.E.2d at 735). They were both right: the Court of Appeals should have held that Plaintiffs are likely to succeed on the merits of their free-speech claims, too.

Both Judge Humphreys and Judge Beales rejected a central premise of Judge Lorish's free-speech analysis. In her view, the complaint did not "allege that any student has been disciplined, or threatened with discipline, for failing to speak or for expressing a contrary viewpoint." Op. 35. But Judge Humphreys recognized that Plaintiffs "have alleged that the [Policy] permits [school staff] to discipline a student for committing a racist act," including speech expressing "racist views" as defined by the Policy. Op. 50–51 (Humphreys, J., partially dissenting). Similarly, Judge Beales noted that Plaintiffs "repeatedly allege that students can be so disciplined for what the school considers to be racist behavior," which includes certain types of speech. Op. 80–81 (Beales, J., partially dissenting).

In other words, two members of the panel thought Plaintiffs had alleged a plausible threat of discipline for speech that violates the Policy's one-sided definition of racism. They just disagreed on whether the School Board had engaged in viewpoint discrimination or compelled speech. *Compare* Op. 49 n.34, 51 (Humphreys, J., partially dissenting) (viewpoint discrimination), *with* Op. 82–83 (Beales, J., partially dissenting) (compelled speech). The Court of Appeals should have held that

Plaintiffs stated compelled-speech *and* viewpoint-discrimination claims, and this Court's review is necessary to make that clear.

The School Board's own statements show that Judges Humphreys and Beales were correct about the Policy's disciplinary threat. The 2020 report describes how the "Behavioral Management Handbook" was updated to include a section on handling "behavior infractions that appear to violate the Anti-Racism Policy." R.379–80. The Policy itself threatens to handle any "racist act" according to "other explicit policies," which include "JFC, *Student Conduct*," R.62, 64; *see* R.1035—a policy that threatens Plaintiffs with "'mediation,' detention, in-school suspension with 'restorative practice,' and, ultimately, expulsion," R.44.

Plaintiffs faced a lose–lose situation. Disagreement with the Policy's ideology is deemed "racism." *See* R.762; *see also* R.42–44. And "silence about racism is recognized as a form of complicity." R.287, 811. One exercise gave students a script of things to say to be "Anti-Racist." R.170. The Policy also required students to create a vision statement explaining how they would change the way they "look," "think," "sound," and "act" to be more "anti-racist." R.802–03. As Judge Beales concluded, the threat of discipline, in addition to the "considerable opprobrium" that Plaintiffs would face if the School Board labeled them guilty of racism, Op. 80–81 (Beales, J., partially dissenting), compels them "to declare a belief" in the School Board's ideology, *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

These same facts also show why Judge Humphreys was correct to conclude that the Policy amounts to viewpoint discrimination. The threat of discipline outlined above has chilled Plaintiffs' speech supporting "a colorblind philosophy," R.45, because the School Board defines that viewpoint as racist, R.32–33, 165, 762. Judge Humphreys correctly concluded that allegations like these show that "a person of ordinary firmness would be deterred from exercising their free speech rights to speak a contrary point of view." Op. 47 (Humphreys, J., partially dissenting). "When the government targets not subject matter, but particular views taken by speakers on a subject," it "blatant[ly]" violates free-speech rights. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Because "no legitimate pedagogical interest is served by forcing students to agree with a particular political viewpoint, or by punishing those who refuse," *Oliver v. Arnold*, 19 F.4th 843, 845 (5th Cir. 2021) (Ho, J., concurring in the denial of rehearing en banc), this Court should grant this Petition to clarify Virginia free-speech precedent, reverse, and remand with instructions to preliminarily enjoin the Policy.

III. Rather than affirming the dismissal, the Court of Appeals should have entered a preliminary injunction.

The Court of Appeals should have held that Plaintiffs are entitled to a preliminary, or temporary, injunction. *See* 2 *Friend's Virginia Pleading & Practice* § 33.02[1][b][ii] (2021) (equating "[t]emporary," "preliminary," "ancillary," and "interlocutory" injunctions). Although this Court "has not definitively delineated" the state-law test, it should do so here, consistent with the Court's past affirmance of the grant of a preliminary injunction under the four-factor federal test: (1) "likelihood of success"; (2) whether a plaintiff "would suffer irreparable harm absent an injunction"; (3) "the balance of the equities"; and (4) "the public interest." *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274, at *1, 4–5 (Va. Aug. 30, 2021) (unpub.); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Plaintiffs satisfy these factors, so this Court should reverse the trial court's judgment, preliminarily enjoin the Policy, and remand for further proceedings. *See Commonwealth ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *2 (Va. June 9, 2015) (unpub.) ("On appeal from a lower court's action regarding a temporary injunction, this Court has the authority to substantively act upon a party's motion for a temporary injunction initially filed with a lower court."); c*f. Patterson's Ex'rs v. Patterson*, 144 Va. 113, 124, 131 S.E. 217, 220 (1926) (entering "the decree which the circuit court should have entered").

As explained above, Plaintiffs have "potentially successful claim[s]" for race discrimination and free-speech violations. *Cross*, 2021 WL 9276274, at *8. The Court of Appeals thought otherwise because of the many erroneous legal conclusions leading that court to hold that Plaintiffs did not have standing and had failed to state a claim for relief. *See* Op. 17–37. And the trial court did not enter a preliminary injunction because it concluded that Plaintiffs lacked private causes action and standing to bring them. R.1373–76. Because the lower courts' failure to enter a preliminary injunction "was predicated upon" their erroneous legal conclusions regarding Plaintiffs' claims, this Court should reverse. *May*, 297 Va. at 18–19, 822 S.E.2d at 367–68.

By establishing "a likely constitutional violation," Plaintiffs have satisfied "the irreparable harm factor." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc). Likewise, the balance of the equities favors Plaintiffs, because the School Board is "in no way harmed by" an injunction that prevents it "from enforcing [a policy] likely to be found unconstitutional." *Id.* (cleaned up). "Finally, it is well-established that the public interest favors protecting constitutional rights." *Id.*

A preliminary injunction is necessary to stop the ongoing, irreparable harm to students like L.R., who has come to view his identity and family negatively because of the Policy, *see* R.1095–96, which the School Board "[c]ontinue[s]" to "implement[]," R.1305; *see* R.1364–72. Because

"[t]he facts before" the Court "enable [it] to attain the ends of justice," it should "enter here the decree which the circuit court should have entered." *Patterson*, 144 Va. at 124, 131 S.E. at 220.

CONCLUSION

The use of racial tropes and the castigating of colorblindness as the key to eliminating racism is a novel but misguided educational innovation that harms students. Regrettably, the Court of Appeals' opinion illustrates that Virginia law regarding hostile environments and free-speech rights is vague and unsettled enough for lower courts to allow that innovation to be inflicted on public-school students who have never had a problem with their race in the past. Plaintiffs ask this Court to grant this Petition, reverse the judgment below, and either preliminarily enjoin Defendants' Policy or remand with instructions that the trial court do so.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:17(*i*), I certify that Plaintiffs-Petitioners are: Carlos and Tatiana Ibañez, and their minor children, R.I. and V.I.; Matthew and Marie Mierzejewski, and their minor child, P.M.; Kemal and Margaret Gokturk, and their minor children, T.G. and N.G.; Erin and Trent D. Taliaferro, and their minor children, D.T. and H.T.; and, Melissa Riley and her minor child, L.R.

I further certify that Plaintiffs-Petitioners are represented by the following counsel:

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I further certify that Defendants-Respondents are Albemarle County School Board; Matthew S. Haas; and Bernard Hairston; and that Defendants-Respondents are represented by the following counsel:

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I further certify pursuant to Rule 5:1B(c) that, on March 21, 2024, an electronic version of this document was filed with the Clerk of the Supreme Court of Virginia via the Court's VACES system and a copy was served on Defendants-Respondents' counsel by email the same day.

Finally, I certify that this document complies with the length requirement set forth in Rule 5:17(f), because it does not exceed 35 pages, excluding the cover page, table of contents, table of authorities, signature blocks, and certificate.[3]

Plaintiffs-Petitioners desire to state orally in person, before a panel of this Court, why this Petition should be granted.

/s/ *Vincent M. Wagner*

Vincent M. Wagner
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[3] This brief uses true double-spacing, which means that because the brief is set in 14-point font, the line spacing is set to Exactly 28 points.