IN THE

COURT OF APPEALS OF VIRGINIA

Record No. 0951-22-2

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,

Appellants,

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,

Appellees.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The School Defendants put all their dismissal chips on *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 798 S.E.2d 164 (2017). But that case could not be more different. There, the challenged school policy had never been implemented. Here, there is evidence that the School Defendants implemented their policy for years and harmed Plaintiffs—including student L.R.'s "negative" views of his own mixed race, student V.I.'s classroom instruction that she cannot succeed in life because she is Latina, and Plaintiff parents being forced to withdraw children from Albemarle public schools because of the schools' inculcation of divisive critical race theory. This Court should reverse and remand with instructions to enter a temporary injunction to stop the School Defendants from causing further irreparable harm to Plaintiffs.

ARGUMENT IN REPLY

I. Plaintiffs have standing to challenge a school policy that has already been implemented and is causing harm.

A. The School Defendants' brief concedes that they have implemented the Policy, which is harming Plaintiffs.

The School Defendants' standing arguments rely almost exclusively on *Lafferty*, as they eagerly admit. Br. 19 ("[T]he School Board did so for good reason."); *see also* Appellants' Br. 31–34. But *Lafferty*'s narrow holding doesn't apply here. It did not even "reach the question of what must be pled to establish an actual controversy." *Lafferty*, 293 Va. at 361–62, 798 S.E.2d at 168. All it held was "the injury pled [t]here

[wa]s insufficient because *general distress over a general policy* does not *alone* allege injury sufficient for standing." *Id.* at 362, 798 S.E.2d at 168 (emphasis added). Plaintiffs here have alleged far more.

The School Defendants themselves conceded that point below: "[I]t is true that Plaintiffs here do not attempt to solely make general objections to a general policy of the School Board." R.1248. Although the School Defendants now back away from that concession, *see* Br. 21–22, their brief to this Court shows it was correct. Defendants repeatedly admit "that the Policy is being implemented throughout ACPS." Br. 22. Defendants even devote a whole fact section to: "The School Board implemented Regulations for the Policy." Br. 5. Aside from references to Plaintiffs' arguments, the School Defendants refer to the Policy's "implementation" a dozen times.[1] Contrast *Lafferty*, where the plaintiff challenged a bathroom policy for transgender students but did not allege "what, if any, bathroom policies [we]re being implemented, or even that [he] attend[ed] school with a single transgender student." 293 Va. at 361, 798 S.E.2d at 168.

The School Defendants buttress their reliance on *Lafferty* using superficial similarities between the complaint in *Lafferty* and Plaintiffs' complaint here—mainly, that they both use the word "distressed." Br. 20–21. But a side-by-side comparison of the two complaints illustrates

[1] *See* Br. 1; Br. 5 (three separate references); Br. 6; Br. 7 (two separate references); Br. 8; Br. 12; Br. 27; Br. 50; Br. 51.

how different they are. The *Lafferty* complaint's factual allegations ran for less than 15 pages. V. Compl. at 1–15, *Lafferty v. Sch. Bd. of Fairfax Cnty.*, No. 2015-17327 (Va. Cir. Fairfax Cnty. Dec. 21, 2015).[2] Lafferty herself sought to assert standing simply as a Fairfax County taxpayer. *Id.* at 3. And the allegations regarding Jack Doe and his parents occupied about a page and only described how he was "distressed" or "nervous" about the policy's mere existence, not any effects of that policy on him in particular. *Id.* at 14–15.

Here, by contrast, Plaintiffs have alleged detailed effects of the Policy's implementation on them. *See, e.g.*, R.11–15, 29, 35, 38–42. The Ibañezes, Melissa Riley, and the Mierzejewskis all have a child who participated in Henley Middle School's Pilot Program implementing the Policy. R.29. But the Mierzejewskis withdrew their son from the eighth-grade Pilot Program, "[b]ecause of the racial discrimination in [the] pilot program and the hostile environment it created." R.29, 35, 41. Separate from the Pilot Program, the Ibañezes' two children and Melissa Riley's son "are seeing instruction in multiple classes that raise 'anti-racist' themes." R.38; *see* R.11, 15.

Plaintiffs have also alleged how harmful those effects of the Policy have been on them. It has "created a hostile educational environment"

[2] For the Court's convenience, a copy of this complaint obtained from the office of the Clerk of Court for the Supreme Court of Virginia is attached as an Addendum to this brief.

that "has adversely impacted Plaintiffs' ability to participate in and benefit from the [School Defendants'] programs and activities." R.40–41. The Ibañezes' daughter, for example, was taught during the Policy's implementation "that her achievement in life will turn on her racial background" as a Latina, rather than on her accomplishments. R.40. Since the Policy was implemented, the Mierzejewskis' son "has experienced increased hostility from other students because of his Catholic faith." *Id.* And Melissa Riley's son, who is mixed race, "is uncomfortable with how the Policy and implementing curriculum draws attention to his race and the race of his classmates." *Id.* Worse, it has led him to "discuss his race in a negative way that [Melissa] never observed him doing before the School [Defendants] started implementing the Policy." R.15.

Plaintiffs have also alleged specifics about how the School Defendants have implemented the Policy "in 'all grades,'" to the student plaintiffs, "and in multiple subject areas." R.38. These allegations are supported by hundreds of pages of exhibits—much more than "two slides presented during classroom instruction." Br. 11; *see* R.60–191, 312–18, 322–35, 336–63, 405–637, 640–805, 806–26. The Policy itself requires "implement[ing] an anti-racist curriculum and provid[ing] educational resources for students *at every grade level*." R.64 (emphasis added). And parents were told that "the curriculum would be 'woven through *all the classes* in Albemarle County.'" R.39 (emphasis added).

These factual allegations—including allegations based on the School Defendants' own documents—show Plaintiffs have "specific adverse claim[s]" against the School Defendants, "based upon existing facts" about the Policy's implementation. *Bd. of Supervisors v. Southland Corp.*, 224 Va. 514, 520–21, 297 S.E.2d 718, 720 (1982). In sum, they have standing to challenge the Policy, regardless of any fear of discipline. *See* Appellants' Br. 24–34.

Accordingly, the School Defendants are wrong to characterize this as a case "seek[ing] a declaration of whether . . . generalized activity complies with a statute or the Constitution." Br. 22. Consider *Daniels v. Mobley*, 737 S.E.2d 895 (2013). There, the plaintiff sought two different judgments. One requested a "declar[ation] that Texas Hold 'Em is not illegal gambling under Code § 18.2-325." *Id.* at 899 (cleaned up). The other requested a declaration that a different code section was "constitutionally void for vagueness." *Id.* at 901. The Court held only that the plaintiff lacked standing for the first request. The second, by contrast, was "a challenge to the constitutionality of a statute based upon United States law or self-executing provisions of the Virginia Constitution." *Id.* And "such a request for declaratory judgment presents a justiciable controversy." *Id.* Plaintiffs' well-pled claims here mirror the justiciable claim in *Daniels*.

B. The School Defendants' arguments show they and Plaintiffs are actual adversaries.

Given their repeated admissions about the Policy's implementation, the School Defendants dispute Plaintiffs' "***depiction*** of the . . . Policy" and its implementation. Br. 21. But they can't defeat Plaintiffs' standing by claiming a factual dispute about implementation details. That gets the applicable standard of review wrong. *See* Br. 17 (arguing for both "plainly wrong" and de novo standards of review for plea in bar). Because the trial court took no "evidence on the plea [in bar] ore tenus," *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010), this Court "accept[s] the plaintiff's allegations in the complaint as true," *Plofchan v. Plofchan*, 299 Va. 534, 547–48, 855 S.E.2d 857, 865 (2021); *see* Appellants' Br. 23–24 & n.6.

Moreover, a dispute over implementation details demonstrates that Plaintiffs and the School Defendants are "actual adversaries." *Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 154, 726 S.E.2d 264, 272 (2012) (cleaned up). The School Defendants' brief makes this clear.

For example, discussing L.R.—who is part white and Native American, part black—the School Defendants highlight his allegation that he "is 'uncomfortable' with how the Policy *and its implementing curriculum* draws attention to his race and the race of his classmates." Br. 23 (emphasis added). And they note that "R.I. and V.I. *describe their encounters with instruction* on race and identity related to the Policy as

'confusing and at times disturbing' and 'uncomfortable.'" Br. 23 (emphasis added). This is a case about the *effects* of an unconstitutional Policy's implementation. It is the exact opposite of *Lafferty*, where it was "not clear what . . . policies [we]re being implemented." 293 Va. at 361, 798 S.E.2d at 168.

Similarly, the School Defendants discount the Plaintiff parents' "'concerns' about the Policy's implementation," thus conceding that the Policy *is in fact being implemented*. Br. 23. The School Defendants even characterize those concerns as a "disagreement with the implementation of the School Board's curriculum." Br. 27. Again, this admits that this case is outside *Lafferty*'s narrow holding and the parties are "actual adversaries." *Livingston*, 284 Va. at 154, 726 S.E.2d at 272 (cleaned up).

The School Defendants' other cited standing decisions are inapposite. *See* Br. 26–27 & n.3. The court in *Stevenson ex rel. Stevenson v. Martin County Board of Education* did not address standing but affirmed a merits dismissal. 3 F. App'x 25, 35 (4th Cir. 2001) (per curiam). And contrary to the School Defendants' characterization, *Anders Larsen Trust v. Board of Supervisors* held "that the allegation of diminished property values in th[at] case" were "sufficient to survive dismissal on the basis of lack of standing." 301 Va. 116, 122 n.2, 872 S.E.2d 449, 452 n.2 (2022). In the end, *Stevenson* and *Anders Larsen* support the Plaintiff parents' standing here.

The School Defendants' citation (Br. 26) to *Lafferty* on this point misunderstands the basis for the Plaintiff parents' standing. The Plaintiff parents here assert violations of their own rights. *See* R.56–57; *Lafferty*, 293 Va. at 362, 798 S.E.2d at 169 (discussing "next friend[ ]" standing). And "school children and their parents" have standing to challenge practices that "directly affect[ ]" them. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963); *see Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 217 n.2 (3d Cir. 2003). Additionally, forcing the Plaintiff parents to make a "decision" about whether to subject their children to the Policy's objectionable practices "is itself a confrontation with" the Policy. *Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941, 949–50 (5th Cir. 2022). The School Defendants don't explain why these allegations—which would grant Plaintiffs standing in federal court—do not suffice here.

The School Defendants' final argument confuses the Plaintiff parents' standing with the merits. Br. 27–28. Defendants cite a series of federal decisions considering and rejecting claims on the merits—not for lack of standing. *E.g.*, *Parker v. Hurley*, 514 F.3d 87, 95–107 (1st Cir. 2008); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203–11 (9th Cir. 2005), *opinion amended on denial of reh'g*, 447 F.3d 1187 (9th Cir. 2006); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387, 395–96 (6th Cir. 2005). (And the School Defendants are wrong to suggest that the federal courts are unified on this issue. *E.g.*, *C.N. v. Ridgewood Bd.*

of Educ., 430 F.3d 159, 185 n.26 (3d Cir. 2005) (expressly rejecting the Ninth Circuit's analysis in *Fields*); *Tatel v. Mt. Lebanon Sch. Dist.*, No. 22-837, 2022 WL 15523185, at *13–16 (W.D. Pa. Oct. 27, 2022) (relying on *Ridgewood* to deny motion to dismiss parental-rights claims).) The School Defendants' cases do not undermine Plaintiff parents' standing.

II. The School Defendants fail to apply the self-execution test.

A. Under the proper test, the constitutional provisions relevant here are self-executing.

Despite extensively quoting the self-execution test, the School Defendants do not apply it. As they acknowledge, "provisions in the Bill of Rights and those 'merely declaratory' of common law are 'usually' self-executing"; and, "provisions that 'specifically prohibit[ ] particular conduct' are 'generally, *if not universally*[,]' self-executing." Br. 32 (quoting *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681, 324 S.E.2d 674, 676 (1985)) (emphasis added) (first alteration in original). But the School Defendants never explain why, given that general rule, the three constitutional provisions at issue here—all of which are in the Bill of Rights and specifically prohibit particular conduct—are not self-executing. *See* Appellants' Br. 34–36; Br. of *Amicus Curiae* The Family Found. (Family Found. Br.) 8–19 & n.6. Notably, although they spend a quarter of their brief on self-execution, *see* Br. 28–41, the School Defendants do not cite a single appellate decision holding that a Bill of Rights provision or constitutional prohibition is not self-executing.

The School Defendants also fail to mention a third reason these provisions are self-executing. Each "provide[s] a clear rule"; *i.e.*, "a sufficient rule by which the duty imposed may be enforced." *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 105–06, 662 S.E.2d 66, 73 (2008). Virginia's courts have applied these provisions and their predecessors for nearly two centuries. *See, e.g.*, *Bacon v. Commonwealth*, 48 Va. (7 Gratt.) 602, 607–12 (1850) (freedom of speech); *Dew v. Sweet Springs Dist. Ct. Judges*, 13 Va. (3 Hen. & M.) 1, 28 (1808) (opinion of Tucker, J.) (due process). The regular adjudication of the merits of claims under these provisions is evidence that they provide a clear rule. *See* Appellants' Br. 38–39 (collecting modern citations).

The Court need not determine whether any "single factor is dispositive" in this case, Br. 33, because all three factors point to the same conclusion: Article I, Sections 11 and 12, are each self-executing.

B. The School Defendants' cited authorities do not apply the proper test.

In briefing below, Plaintiffs explained the flaws in the trial-court decisions the School Defendants cite. *See* R.1180–83. And the School Defendants offer no response on appeal. *See* Br. 33–37. For example, *Young v. City of Norfolk* did not even cite the Supreme Court's self-execution test, let alone apply it. 62 Va. Cir. 307, 2003 WL 21730724, at *4 (2003); *see* Br. 35 (citing other Virginia circuit court decisions that rely on *Young* or commit the same errors). And contrary to *Gray v.*

Rhoads, the Supreme Court has never said that provisions must "expressly provide[ ] a remedy" to be self-executing. 55 Va. Cir. 362, 2001 WL 34037320, at *5 (2001).

It is also incorrect to say that Virginia's federal district courts "have universally adopted" the School Defendants' analysis. Br. 35. *Contra Coleman v. Jones*, No. 1:18-CV-931, 2020 WL 5077735, at *7 n.10 (E.D. Va. Aug. 26, 2020) (concluding antidiscrimination provision is self-executing but granting qualified immunity), *rev'd*, No. 20-7382, 2022 WL 2188402, at *7–8 (4th Cir. June 17, 2022) (unpub.) (reversing grant of qualified immunity without mentioning self-execution); *see Draego v. City of Charlottesville*, No. 3:16-CV-00057, 2016 WL 6834025, at *22 (W.D. Va. Nov. 18, 2016) (free-speech provision is self-executing).

More broadly, the School Defendants argue that each of the constitutional provisions at issue here is "only self-executing as to the Commonwealth." Br. 37, 39 (citing *Va. Student Power Network v. City of Richmond*, 107 Va. Cir. 137, 2021 WL 6550451, at *2 (2021)). Textually, however, these provisions are not limited to the General Assembly. *See, e.g.*, Va. Const. art. I, § 11 ("no person shall be deprived of his life, liberty, or property without due process of law"); *id.* (prohibiting "governmental discrimination"); *id.* § 12 ("the freedoms of speech and of the press . . . can never be restrained"). The School Defendants cite no appellate decisions holding that Virginia's Bill of Rights binds the General Assembly but not local school boards.

The School Defendants close by analogizing to the federal Bill of Rights. *See* Br. 37, 40–41. But as Plaintiffs explained in their opening brief, "the provisions of the Bill of Rights" in the U.S. Constitution, too, "are self-executing." Appellants' Br. 39 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997)). Predating 42 U.S.C. § 1983, federal courts' power "to enjoin unconstitutional actions by state and federal officers" has "a long history," dating "back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). Whether based on the federal or state Bill of Rights, therefore, "equity has jurisdiction to enjoin illegal acts of an officer attempted to be done, *colore officii*." *Blanton v. S. Fertilizing Co.*, 77 Va. 335, 337 (1883).

III. The School Defendants do not contend with the long history supporting a cause of action under the parental-rights statute.

Virginia's due-process provision, like its federal counterpart, protects a parent's "right to make decisions about the education of one's children." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022); *see L.F. v. Breit*, 285 Va. 163, 182 n.7, 736 S.E.2d 711, 721 n.7 (2013); *see also Williams v. Williams*, 24 Va. App. 778, 783–84, 485 S.E.2d 651, 654 (1997) (applying strict scrutiny to parental-rights claims). Virginia Code § 1-240.1, therefore, "implicate[s] [a] protected right under the Constitution of Virginia." *Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 315–16, 787 S.E.2d 855, 857–58 (2016). And there is

no legislative language suggesting an "inten[t] to exclude a private right of action." *Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, 298 Va. 616, 619, 842 S.E.2d 200, 203 (2020).[3]

Section 1-240.1 also implicates a "historically recognized common-law right of action." *Cherrie*, 292 Va. at 315, 787 S.E.2d at 857. The General Assembly has adopted "[t]he common law of England," which "shall continue in full force." Va. Code § 1-200. And at common law—both in England and the colonies—"the right of parents to control the education of their children" was "practically absolute." Eric A. DeGroff, *Parental Rights & Public School Curricula: Revisiting Mozert after 20 Years*, 38 J.L. & Educ. 83, 112 (2009) (cleaned up). As of "the date of the Commonwealth's adoption of English common law," (whether 1776 or 1792), *see White v. United States*, 300 Va. 269, 277 n.5, 863 S.E.2d 483, 486 n.5 (2021), parents' common-law right to direct their children's education was clear, *see* DeGroff, *supra*, 38 J.L. & Educ. at 109–10.

Virginia precedent supports this view. Having acknowledged parents' common-law rights in *Wyatt v. McDermott*, the Supreme Court recognized a common-law cause of action for tortious interference with parental rights, because the Court refused "to recognize a right without a remedy." 283 Va. 685, 693, 725 S.E.2d 555, 559 (2012) (cleaned up);

[3] In fact, the Supreme Court has already rejected the argument (Br. 43) that Virginia Code § 22.1-87 is parents' sole remedy against school boards. *See Lafferty*, 293 Va. at 362, 798 S.E.2d at 168–69.

see Appellants' Br. 42 (discussing *Wyatt*). That insistence on giving a remedy for every common-law right also explains why sovereign immunity doesn't immunize the School Defendants' violations of Section 1-240.1. *See* Br. 39. Allowing Plaintiffs to sue under Section 1-240.1 is consistent with the principle that they may bring a cause of action "to restrain an individual from the exercise of unlawful acts, under color and cover of an executive office." *Blanton*, 77 Va. at 338. Because Plaintiffs alleged that the School Defendants' discriminatory Policy is unlawful under Section 1-240.1, they may bring a claim to stop it.

IV. Like the trial court's preliminary injunction ruling, the School Defendants' arguments are rife with legal errors.

To stop the ongoing harm caused by the Policy's implementation, Plaintiffs filed a preliminary injunction motion. That motion already "defin[ed] the parameters of th[e] injunction." Br. 44; *see* R.268–74. And the School Defendants' cited authorities make clear that, "[o]n 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." *Commonwealth ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *2 (Va. June 9, 2015) (unpub.). So "[t]he facts before" the Court are "such as to enable the court to attain the ends of justice," and it should "enter here the decree which the circuit court should have entered." *Patterson's Ex'rs v. Patterson*, 144 Va. 113, 124, 131 S.E. 217, 220 (1926).

A. Plaintiffs are likely to succeed on the merits.

The School Defendants devote four pages to Plaintiffs' likelihood of success on their claims under (1) the antidiscrimination provision, (2) the free-speech provision, and (3) fundamental rights. Br. 46–50. This scant treatment betrays the flaws in Defendants' arguments.

1. The School Defendants overtly discriminate based on race and religion.

The School Defendants continue to argue that the Court must look at the "intention[s]" or "motivat[ions]" underlying the Policy. *Compare* Br. 46–48, *with* R.1224–27. But "the racial"—and in this case, religious—"classification[s] appear[ ] on the face of the" Policy. *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *see* Appellants' Br. 11–16, 46 (recounting race classifications in Policy's implementation with students). For example, the Policy labeled white, Christian students as "dominant," and other students as "subordinate." R.704–12. It also targeted "white dominant culture." R.769. Statements like these come from "materials created by the School Board and its staff." Br. 47. Because of these and other overt racial and religious classifications, "[n]o inquiry into legislative purpose is necessary." *Shaw*, 509 U.S. at 642.

The Policy's implementation can thus be "upheld only upon an extraordinary justification." *Id.* at 643–44 (cleaned up). Yet the School Defendants assert only a generic interest in "[a]ddressing racism." Br. 48; *see* Appellants' Br. 47. They make no effort to explain how a policy

that fosters racism is a proper way to "address racism," nor how the Policy 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). Worse, they don't even acknowledge the requirement that they show narrow tailoring. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007). As a result, the Policy fails strict scrutiny.

2. The School Defendants compel speech from one viewpoint.

The School Defendants' implementation of the Policy "requires affirmation of a belief and an attitude of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *see* Appellants' Br. 49 (discussing beliefs Policy required students to declare). The School Defendants' own statements make clear that Plaintiffs had no choice; they could not opt out of the Policy's ideological implementation. *See* R.841. And 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. In fact, the Policy itself threatens to handle any "racist act" according to "other explicit policies"—*e.g.*, "JFC, *Student Conduct*." R.62, 64.

The School Defendants' classroom materials illustrated for students what were "racist acts" under the Policy. Included among those "acts" was speech from a particular viewpoint. One diagram of "racism"

included statements like "Politics doesn't affect me"; specific political positions on topics like immigration and school funding; and even a simple desire to "Remain[ ] Apolitical." R.165. Elsewhere, the classroom materials instructed students that, to be "Anti-Racist," they must say things like: "My school has inequitable systems that disadvantage[ ] the students of color, and I advocate for the equitable distribution of resources for all!" R.170. Materials like these explained to students what speech the Policy expected of them. Given the School Defendants' own statements about enforcing the Policy, it is neither "imaginary" nor "wholly speculative" for Plaintiffs to think they must comply with the Policy's compelled-speech requirements. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (cleaned up).

Such compelled speech violates the free-speech provision. For "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); *see* Br. of *Amicus Curiae* Melissa Moschella 18–26 (exploring difference between education and indoctrination). And the government-speech doctrine does not save the Policy. *See* Br. 50; *see also* R.1192–93 (distinguishing cases cited by the School Defendants). Plaintiffs' free-speech claims challenge only what the School Defendants, in implementing the Policy, require Plaintiffs to say—not what the School Defendants themselves choose to say.

3. The School Defendants violate parents' fundamental rights.

The School Defendants offer no argument on the merits of the Plaintiff parents' parental-rights claim. Br. 50. Their single sentence amounts to the incorrect claim that "parents do not have any right to control how or what a public school chooses to teach their children." *Tatel*, 2022 WL 15523185, at *1. In fact, parents have a "fundamental constitutional right to control the inculcation of values in their children." *Id.* at *23.

Plaintiffs here wish to exercise that right by "prevent[ing] the school from imposing views upon their *own* children that contradict the parents' religious or moral views," *id.* at *21, and ensuring that Defendants are not discriminating against their *own* children based on race and religion. "When fundamental parental rights are involved, the school at least may need to provide (absent compelling need) realistic notice and the practical ability for parents to shield their young children from sensitive topics the parents believe to be inappropriate." *Id.* at *20. The School Defendants do not make that showing.

B. An injunction would stop the irreparable harm to Plaintiffs.

The School Defendants argue that Plaintiffs can obtain no injunction because "the Pilot Program was voluntary and ended in June of 2021." Br. 51. But this dispute isn't limited to the Pilot Program. The School Defendants have implemented the curriculum throughout all

grades and have already dictated that participation is not voluntary. When parents asked whether they were "allowed to opt their children out of the curriculum," one of the Policy's architects replied that an opt out was impossible. R.840. The Policy is "woven through in all of their classes in Albemarle County." R.841. And the Policy's implementation did not end in June 2021. The School Defendants gave a presentation *while this case was pending in the trial court* discussing their "[c]ontinued implementation of the anti-racism policy." R.1305. Plaintiffs have also alleged continued harm from the Policy's implementation after June 2021. *See* R.11, 15, 38–40.

A temporary injunction is necessary to stop the ongoing, irreparable harm to students like L.R., who has come to view his identity and his family negatively by the Policy's ongoing implementation. *See* R.1095–96. And because the Policy is "likely to be found unconstitutional," the School Defendants are "in no way harmed by issuance of a preliminary injunction which prevents" them from implementing it. *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc) (cleaned up). "Finally, it is well-established that the public interest favors protecting constitutional rights." *Id.*

CONCLUSION

Appellants ask this Court to reverse the order sustaining Appellees' plea in bar, partially sustaining their demurrer, and dismissing the complaint with prejudice; and to remand this case with instructions to enter Appellants' requested temporary injunction.

Respectfully submitted,

CARLOS IBAÑEZ, *et al.*,
Appellants

By: */s/ Tyson C. Langhofer*

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that, on December 22, 2022, an electronic version of this document was filed with the Clerk of the Court of Appeals of Virginia via the Court's VACES system and a copy was served on Appellees' counsel by email.

I further certify this document complies with the length requirement of Rule 5A:19(a), because it does not exceed 20 pages in length, excluding the cover page, table of contents, table of authorities, signature blocks, certificate, and addendum.[4]

Appellants desire to present oral argument in this case.

/s/ Tyson C. Langhofer

TYSON C. LANGHOFER
Counsel for Appellants

[4] 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.

ADDENDUM

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ANDREA LAFFERTY, JACK DOE, a minor, by and through JOHN and JANE DOE, his parents and next friends, JOHN DOE, individually and JANE DOE, individually, Plaintiffs	)	
v.	)	CASE NO.
SCHOOL BOARD OF FAIRFAX COUNTY, Defendant.	)	2015 17327
Serve: John Foster Division Counsel 8115 Gatehouse Road, Suite 5400 Falls Church, VA 22042 John.Foster@fcps.edu	)	

VERIFIED COMPLAINT

1. Plaintiffs, Andrea Lafferty, Jack Doe, a minor, by and through John and Jane Doe, his parents and next friends, John Doe, individually and Jane Doe, individually (collectively "the Plaintiffs"), by counsel, pursuant to Va. Code §8.01-184, et seq., request this Court to issue declaratory judgments and award temporary and permanent injunctive relief against the Defendant, the School Board of Fairfax County, Virginia ("the Board") and in support thereof state as follows:

2. Plaintiffs ask this Court to award preliminary injunctive relief to prevent the Board from violating Plaintiffs' rights during the pendency of this case, and for declaratory and permanent injunctive relief to prevent the Board from implementing its unlawful expansion of its non-

discrimination policy and student code of conduet to include "sexual orientation" and "gender identity" in violation of Dillon's Rule.

Nature of this Aetion

3. Plaintiffs are asking this Court to halt Defendant's atteınpt to introduce a new, undefined, experimental elassification into the non-discrimination poliey and student handbook of Fairfax County Public Schools ("FCPS") in excess of Defendant's authority.

4. Despite overwhelming opposition froın taxpayers, residents and parents of FCPS students, and without authority under the Virginia Constitution or froın the General Asseınbly, on May 7, 2015 Defendant voted to add the undefined terın "gender identity" to its non-discrimination policy and the terıns "gender identity" and "gender expression" discrimination to the student handbook list of offcnses for whieh students can be suspended froın sehool.

5. On November 6, 2014, Defendant voted to add "sexual orientation" to the non-discrıinination policy for FCPS.

6. Defendant's actions were void *ab initio* under Virginia Code §§1-248, 15.2-965 and under Dillon's Rule, which prohibits local governing bodies, including school boards, from expanding the universe of protected classes beyond what has been defined as a protected class by the General Assembly. The General Asseınbly has not included either sexual orientation or "gender identity" as protected classes under the laws of the Commonwealth. Therefore, Defendant wholly lacks authority to add those classes to its non-discrimination policy and concoınitantly, to add those categories to its student handhook as potential grounds for suspension.

7. Plaintiffs are asking this Court, pursuant to Va. Code §8.01-184, to issue a deelaratory judgment deelaring that 1) Defendant's action in adding sexual orientation to the non-

discrimination policy is *ultra vires* and void *ab initio*; 2) Defendant's action in adding "gender identity" to the FCPS non-discrimination policy is *ultra vires* and void *ab initio*; 3) Defendant's action in adding "gender identity" and "gender expression" to the FCPS student handbook listing of prohibited discrimination is *ultra vires* and void *ab initio*.

8. Plaintiffs are also asking this Court for preliminary and permanent injunctions, enjoining Defendant from implementing the changes to its non-discrimination policy and student handbook inserting sexual orientation, "gender identity" and "gender expression" as protected categories and subjects of instruction, and from taking any other actions in furtherance of granting protected status to sexual orientation, "gender identity" or "gender expression" in the FCPS.

Parties

9. Plaintiff Andrea Lafferty is a citizen, taxpayer and resident of Fairfax County, Virginia.

10. Mrs. Lafferty is President of the Traditional Values Coalition, an organization that speaks on behalf of over 43,000 churches nationwide on pro-family issues. Mrs. Lafferty has served in presidential administrations and has extensive experience in researching and speaking on legislative issues.

11. Mrs. Lafferty has thoroughly researched non-discrimination laws at the state and federal levels and the detrimental consequences to local citizens when protected categories are inserted into such policies without the benefit of definition or of legislative authorization, thereby subjecting the locality, and its taxpayers, to potential liability.

12. Mrs. Lafferty, as a taxpayer and resident of Fairfax County, has researched and analyzed Defendant's policymaking, federal and state laws, and the societal costs of expanding non-discrimination laws without sufficiently defining terms and evaluating consequences.

13. Mrs. Lafferty has provided to Defendant board members the results of her research, including the deleterious consequences of acting without legislative authorization to insert a new, experimental and undefined protected class into Defendant's non-discrimination policy and regulations.

14. Mrs. Lafferty has worked on issues related to school board policy for many years and is familiar with the scope of authority of the school board and of its policies and proccdures for making revisions to district regulations.

15. Plaintiff, Jack Doe, is a minor and is a high school student in the Fairfax County Public Schools and resides in Fairfax County. Jack Doe is appearing through his parents and next friends, John and Jane Doe, and is utilizing a pseudonym to protect his identity as a minor, and pursuant to Va. Code §8.01-15.1 is seeking to protect his and his family's identity because of the sensitive subject matter of the proceeding and the likelihood of adverse repercussions to him as a continuing student resulting from his family's challenge to the Board's actions.

16. John Doe is Jack Doe's father and is a citizen, taxpaycr and resident of Fairfax County. John Doe is utilizing a pseudonym to protect his son's identity as a minor, and pursuant to Va. Code §8.01-15.1 is seeking to protect his son's and his family's identity because of the sensitive subject matter of the proccccding and the likelihood of repercussions to his son as a continuing student resulting from his family's challenge to the Board's actions.

17. Jane Doe is Jack Doe's mother and is a citizen, taxpayer and resident of Fairfax County. Jane Doe is utilizing a pseudonym to protect her son's identity as a minor, and pursuant to Va. Code §8.01-15.1 is seeking to protect her son's and her family's idcntity because of the sensitive subject matter of the proceeding and the likelihood of repercussions to her son as a continuing student resulting from his family's challenge to the Board's actions.

18. Defendant Fairfax County School Board is the public body that governs the Fairfax County Public Schools, Va. Code §22.1-1 & Va. Const. Art. VIII §7, and can sue or be sued. Va. Code §22.1-71.

Jnrisdiction and Vcnuc

19. This Court has subject matter jurisdiction pursuant to Va. Code §§8.01-184, 8.01-620 and 17.1-513.

20. Venue is proper in this judicial district pursuant to Va. Code §8.01-261 because the petition is brought in the Circuit Court of the county in which the School Board sits and in which it enacted the policies and regulations at issue in this matter.

Backgronnd Facts

Virginia Constitutional and Statutory Provisions

21. Defendant is a school board formed under the authority of Article VIII, §7 of the Virginia Constitution, which provides: "The supervision of schools in each school division shall he vested in a school board, to be coınposed of ineınhers selected in the ınauner, for the term, possessing the qualifications, and to the nuınber provided by law."

22. Pursuant to Virginia Code §22.1-28, Defendant is vested with the supervision of the public schools in Fairfax County.

23. Pursuant to Virginia Code §§22.1-78 and 22.1-79, Defendant has the authority to supervise, operate and maintain public schools in Fairfax County, including through the adoption of policies and regulations, but those policies and regulations must be consistent with state statutes and regnlations of the Board of Education.

24. The Virginia Human Rights Act, Virginia Code §§2.2-3900 *et. seq.*, prohibits unlawful discrimination because of racc, color, religion, national origin, sex, pregnancy, childbirth or

related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions and employment. The General Assembly has defined "unlawful discrimination" as: "Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

25. The General Assembly has specifically limited the power of local governing boards, including Defendant, regarding anti-discrimination regulations in Virginia Code §15.2-965, which provides:

> Any locality may enact an ordinance, not inconsistent with nor more stringent than any applicable state law, prohibiting discrimination in housing, employment, public accommodations, credit, and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.

26. Neither "sexual orientation" nor "gender identity" have been granted protected status by the General Assembly.

Attorney General's Interpretation of School Board Authority

27. On March 4, 2015, Attorney General Mark Herring issued an opinion addressed to State Senator Adam P. Ebbin regarding whether school boards have the authority to add sexual orientation and gender identity to non-discrimination policies in light of the Virginia Supreme Court's determination that school boards do not have such authority. A true and correct copy of General Herring's opinion letter is attached to this Complaint, marked as Exhibit A and incorporated herein by reference.

28. General Herring opined that school boards have the authority to add sexual orientation and gender identity to non-discrimination policies because of a purported broad grant of authority from the Constitution of Virginia and the General Assembly. (Exhibit A).

29. Gencral Herring based his opinion that school boards are given a broad grant of authority by the General Assembly, in part, by saying that in Virginia Code §22.1-78, "[t]he Gcneral Assembly has further authorized school boards to 'adopt bylaws and regulations ... for the management of its official business and for the supervision of schools.'" (Exhibit A).

30. Gencral Herring failed to quote the entirety of Virginia Code §22.1-78, and in particular omitted the General Assembly's express limitation upon school board authority provided in the italicizcd statement below:

> A school board may adopt bylaws and regulations, *not inconsistent with state statutes and regulations of the Board of Education,* for its own government, for the management of its official business and for the supervision of schools, including but not limited to the proper discipline of students, including their conduct going to and returning from school. (Emphasis added).

31. Gencral Herring further opined that because a three-judge panel of the United States Court of Appeals for the Fourth Circuit opined that Virginia's Constitutional provision and statutes defining marriage as the union of one man and one woman discriminated on the basis of "sexual orientation" in violation of the United States Constitution,[1] school boards could not discriminate against same-sex "spouses." (Exhibit A).

32. General Herring said that the Fourth Circuit panel opinion not only prohibited discrimination against same-sex "spouses," but also granted school boards the power to add "sexual oricntation" to non-discrimination policies without General Assembly authorization.

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1 *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014*), cert. denied sub nom., Rainey v. Bostic*, 135 S. Ct. 286 (2014), *Schaefer v. Bostie*, 135 S. Ct. 308 (2014), *MeQuigg v. Bostie*, 135 S. Ct. 314 (2014).

33. General Herring went further to assert that the Fourth Circuit panel opinion, whieh did not address "gender identity" nevertheless conferred upon school boards the authority to add "gender identity" to their non-diserimination polieies. (Exhibit A).

34. General Herring opined that sehool boards eould ereate new eategories of proteeted elasses for non-discrimination notwithstanding the faet that the General Assembly has not enacted legislation creating sueh eategories and notwithstanding the Commonwealth's continuing adherence to Dillon's Rule of state law pre-emption.[2] (Exhibit A).

35. General Herring's opinion eontradicts a 2002 opinion from the same offiee, whieh coneluded that sehool boards do not have the authority to prohibit discrimination based upon sexual orientation or gender identity because the General Assembly has not enaeted legislation that would make explieit school boards' authority to do so. (Exhibit A, n. 13).

Revision of Defendant's Non-diserimination Poliey

36. On the day after General Herring's opinion was released, Board Member Ryan McElveen made a written request that the Board eonsider adding "gender identity" to its non-discrimination policy. Mr. McElveen said that he wanted the Board's eonsensus to add "gender identity" as a protected class beeause:

> When the board adopted a new non-diserimination poliey on Novemher 6, 2014 to protect against diserimination based on sexual orientation, it failed to offer proteetion based on "gender identity." Further, on Mareh 4, 2015, Virginia Attorney General Mark Herring released an opinion stating that school boards in Virginia have the authority to expand their anti-discrimination policies to encompass both sexual orientation and gendcr identity.

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2 *Commonwealth v. County Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977).

37. Mr. McElveen did not define the term "gender identity." A true and correct copy of Mr. McElvecn's written request is attached to this Complaint, marked as Exhibit B and incorporated herein by reference.

38. The non-discrimination policy to which Mr. McElveen referred was first adopted by Defendant on July 1, 1986 as Policy 1450 (the "Policy"). A true and correct copy of the Policy is attached hereto, marked as Exhibit C and incorporated herein by reference.

39. Defendant revised the Policy over the course of time, renumbering the Policy with each revision. (Exhibit C).

40. On November 6, 2014, Defendant revised the Policy to add "sexual orientation" as a protected class and renumbered the Policy as Policy 1450.5. (Exhibit C).

41. On May 7, 2015, Defendant further revised the Policy, relabeling it Policy 1450.6, to add "gender identity" as a protccted class. "Gender identity" is not defined in the Policy. (Exhibit C).

42. As revised on May 7, 2015, the Policy states:

> No student, employee, or applicant for employment in the Fairfax County Public Schools shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, or disability, be excluded from participation in, be denied the bcnefits of, or be subjected to discrimination under any education program or activity, as required by law. It is the exprcss intent of the School Board that every policy, practice, and procedurc shall conform to all applicable requircmcnts of federal and state law. (Exhibit C).

43. Prior to the May 7, 2015 vote, Board members considered the proposed revision and presented questions to staff members regarding thc necessity and consequences of revising the policy. A true and correct copy of Deputy Superintendcnt Steven Lockard's memorandum to the Board regarding the questions is attached to this Complaint, marked as Exhibit D and incorporatcd hcrein by reference.

44. Mr. Lockard told the Board that the Fairfax County Public Schools ("FCPS") division was already making accommodations for "transgender" students. (Exhibit D).

45. Despite the fact that FCPS was already making accommodations for "transgender" students, Mr. Lockard said that the Policy must be revised to comply with a directive from the United States Department of Education ("DOE"), Office of Civil Rights. (Exhibit D).

46. According to Mr. Lockard, the DOE has interpretcd Title IX, which prohibits discrimination on the basis of sex, to also prohibit discrimination on the basis of "gender identity." (Exhibit D).

47. Neither Mr. Lockard nor Defendant's counsel referenced any federal laws or judicial dccisions detcrmining that Title IX's protections include sexual orientation, perceived sexual orientation, "gcndcr idcntity" or "gender cxpression."

48. In fact, Defendant was informed that fcderal courts have specifically hcld that Title IX's protections do not include "gendcr identity" or "gcnder exprcssion."[3]

49. Mr. Lockard said that he undcrstood that the DOE requires that all school boards revise their non-discrimination policics to include "gender identity." (Exhibit D).

50. Mr. Lockard opined that if thc Board failed to revisc the Policy, then DOE would have the right to recommend the termination of federal funding to FCPS. (Exhibit D).

51. Mr. Lockard did not cite any statutcs or court dccisions to support his statement about the withdrawal of federal funding. (Exhibit D).

52. Instead Mr. Lockard citcd recent administrativc rcsolutions of DOE investigations of school districts following complaints of unequal treatment of students identifying as "transgender." (Exhibit D).

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[3] *See e.g., Johnston v. University of Pittsburgh,* 97 F.Supp.3d 657 (W.D. Penn. 2015); *G.G. ex rel. Grimm v. Glouccstcr County School Bd.*, 2015 WL 5560190 (E.D. Va. 2015).

53. Neither Mr. Lockard nor any other member of the FCPS staff or school board reported that any complaints had been filed against FCPS related to a failure to accommodate "transgender" students. To the contrary, Mr. Lockard stated that FCPS was already accommodating requests from "transgender" students. (Exhibit D).

54. Nevertheless, Mr. Lockard opined that FCPS was required to revise its non-discrimination policy because "we could see no reason to conclude" that DOE would treat FCPS any differently than it did when it resolved complaints against other school districts by, *inter alia,* requiring that the districts revise their non-discrimination policies to include "gender identity." (Exhibit D).

55. Mr. Lockard acknowledged that in the administrative decisions cited by the DOE the agency did not rule that the school districts had violated federal law and did not require that the districts adopt a policy requiring that all transgender students be required to use the bathroom of their choice, but permitted school districts to handle issues on a case by case basis. (Exhibit D).

56. Nevertheless, Mr. Lockard stated that the administrative resolutions of DOE complaints compelled the Board to revise the FCPS non-discrimination policy to include "gender identity" or face the loss of federal funding. (Exhibit D).

57. Citizens, including parents of FCPS students, presented oral and written testimony to the Board at the May 7, 2015 meeting. A true and correct copy of the written citizen testimony is attached to this Complaint, marked as Exhibit E and incorporated herein by reference.

58. The written citizen testimony included a petition signed by more than 200 FCPS parents opposing the revision to the Policy, informing the Board that the change would create confusion in the minds of young children, disrespect the privacy rights of most of the student population,

and would prematurely add a category to the non-discrimination policy without clearly defining the category or examining the consequences of the revision. (Exhibit E).

59. Parents who signed the petition informed the Board that the policy change would have severe negative impacts on children and would jeopardize their safety and privacy. (Exhibit E).

60. Parents also informed the Board that the policy change would negatively affect the respect between students and fellow students and students and teachers. (Exhibit E).

61. Dr. Melinda Kelly, an obstetrician-gynecologist and parent of two children attending FCPS informed the Board that there is no medical consensus on "gender identity," and cautioned against prematurely instituting a policy without fully understanding what is being implemented. Dr. Kelly quoted from the American College of Obstetricians and Gynecologists' ("ACOG") recent committee report regarding "transgender" health care, which stated that "there is no universally accepted definition of the word 'transgender' because of the lack of agreement regarding what groups of people are considered 'transgender.' In addition, definitions often vary by geographic region and by individual." (Exhibit E).

62. Other parents testified that the proposed revision would be a distraction to children's learning processes and would create conflicts for many students who belong to minority groups. (Exhibit E).

63. Former Board Member Stephen Hunt told the Board that there are already students attending FCPS who identify as "transgender," and who are being accommodated in "common sense ways that respect the dignity of all students" so that revision of the Policy to add "gender identity" is not necessary. (Exhibit E).

64. Nevertheless, the Board voted overwhelmingly to amend the Policy without adding any definitions, and after denying a motion to postpone consideration until additional study could be done.

Defendant's Revision of Student Handbook

65. On May 7, 2015, Defendant also approved Regulation 2601.29P, which established a revised Student Rights and Responsibilities Booklet ("Booklet" herein). A true and correct copy of Regulation 2601.29P is attached hereto, marked as Exhibit F and incorporated by referenee as if set forth in full.

66. In Chapter II, Rules of Conduct, Interventions, and Disciplinary Proeedures, Paragraph 2b(3) provides that "disruptive behavior" for which a student can be suspended includes: "discriminatory harassment (which is harassment based on a person's race, color, religion, national origin, disability, personal or physieal attributes or matters pertaining to sexuality, including sexual orientation, gender identity or gender expression). "Discriminatory harassment" is further defined in the glossary section as encompassing:

> Verbal, electronic, or physical action that denigrate or show hostility toward an individual because of his or her race, color, religion, national origin, gender, disability, sexual orientation, gender identification, genetic information, or any other charaeteristic protected by federal and/or state law. Harassment may create an intimidating, hostile, or offensive learning environment, and/or interfere with an individual's academic performance. (Exhibit F).

67. In Chapter II, Rules of Conduct, Interventions, and Disciplinary Procedures, Paragraph 2b(4) provides that "disruptive behavior" for which a student ean be suspended includes: "sexual harassment (which includes unwelcome sexual advances regardless of sexual orientation; requests for sexual favors; and other inappropriate verbal, eleetronie, or physical conduet of a sexual nature that creates an intimidating, hostile or offensive environment)." (Exhibit F).

68. On May 7, 2015 "gender identity" and "gender expression" were added to the Booklet as grounds for student discipline, but Defendant did not define "gender identity" or "gender expression" anywhere in the Booklet. (Exhibit F).

69. Neither "gender identity" nor "gender expression" are defined in the Virginia Constitution or Code of Virginia, including Section 22.1-279.3 which Defendant cites as the authority for drafting and revising the Booklet.

70. Jack Doe is particularly distressed about the Board's decision to add "gender identity" to the non-discrimination policy and to the student code of conduct because "gender identity" is not defined in either the policy or the code, so Jack Doe has no idea what words or conduct might be interpreted as discriminating on the basis of "gender identity," and therefore does not know what speech or conduct might subject him to discipline, including suspension.

71. Jack Doe is distressed about the Board's decision to add "gender identity" to the non-discrimination policy and student code of conduct because he understands that the decision will mean that the restrooms, locker rooms and other intimate spaces set apart, respectively, for boys and girls, will now be open to students who might have the physical features of one sex but are permitted to use the bathroom of the opposite sex which the student "identifies" as, whatever that means.

72. Because the new policy and code of conduct are not sufficiently defined, Jack Doe has no way of knowing whether he can, for example, question someone who appears to be a girl using the boys' restroom or locker room, refer to someone by a certain pronoun or even compliment someone on his/her attire without being subject to discipline for "discrimination."

73. Jack Doe is nervous about having to think about every statement or action and its potential sexual connotations to third parties before interacting with students and teachers, and

the prospect of having to interact in such an uncertain environment creates significant distress to the point that it adversely affects his ability to participate in and benefit from the educational program.

74. Jack Doe is terrified of the thought of having to share intimate spaces with students who have the physical features of a girl, seeing such conduct as an invasion of his privacy, invasion of fellow students' privacy and a violation of the thought patterns and understanding about male and female relationships which are part of his cultural values.

75. Because of Defendant's actions, Jack Doe cannot regard school as a safe place where he can learn what he needs to be a productive and well-educated adult without fear of harassment, being charged with harassment, and having his speech and conduct chilled by the fear of reprisals or of discipline for unknowingly violating the ambignous eode of conduct.

76. Jack Doe's ability to fully and freely participate in and benefit from the school's educational program has been significantly diminished by the Defendant's aetions in adding the undefined terms "gender identity" and "gender expression" to the non-discrimination policy and student code of conduct.

COUNT I

Defendant's Inclusion of Sexnal Orientation and Gender Identity in its Non-Discrimination Policy and Student Handbook Are *Ultra Vires* Acts In Violation of Virginia Law and Dillon's Rule

77. Plaintiffs re-allege the facts in Paragraphs 1-76 and ineorporate the same herein by reference as if sct forth in full.

78. Pursuant to Virginia Code §15.2-965, no local governing board, including Defendant, ean enact a non-discrimination policy that is more stringent than the laws enacted by the General Assembly.

79. Pursuant to the Dillon Rule of strict construction, which Virginia adhercs to, school boards such as Defendant exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.

80. Under the Dillon Rule, any doubts as to the existence of a power must be resolved against the locality.

81. The General Assembly has not included "sexual orientation" and "gender identity" or "transgender" as protected classes for purposes of anti-discrimination laws in the Commonwealth of Virginia.

82. Neither does the Constitution of the Commonwealth of Virginia provide protection against discrimination for "sexual orientation," "gender identity" or "transgender."

83. Absent enabling legislation from the General Assembly or the Constitution, local governing bodies, mcluding Defendant, cannot enact ordinances or policies that are more stringent, *i.e.,* protect more classes of people, than do state statutes.

84. Neither state law nor the Virginia Constitution permit school boards to prohibit discrimination based on sexual orientation.

85. Neither state law nor the Virginia Constitution permit school boards to prohibit discrimination based on the undefined concept of "gender identity."

86. Prohibiting discrimination based on sexual orientation is not necessarily implied from state laws prohibiting unlawful diserimination because of "raee, eolor, religion, national origin, sex, pregnaney, ehildbirth or related medieal eonditions, age, marital status, or disability."

87. Prohibiting diserimination based on an undefined eoneept of "gender identity" or "transgender" is not neeessarily implied from state laws prohibiting unlawful diserimination

because of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

88. Prohibiting discrimination based on sexual orientation is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include sexual orientation.

89. Prohibiting discrimination based on an undefined concept of "gender identity" is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include "gender identity."

90. Defendant's action in revising its non-discrimination policy to include sexual orientation as a protected class violates Virginia Code §15.2-965 and Dillon's Rule.

91. Defendant's action in revising its non-discrimination policy to include "gender identity" as a protected class violates Virginia Code §15.2-965 and Dillon's Rule.

92. Defendant's action in revising its non-discrimination policy to include sexual orientation as a protected class is an *ultra vires* act that is void *ab initio*.

93. Defendant's action in revising its non-discrimination policy to include "gender identity" as a protected class is an *ultra vires* act that is void *ab initio*.

94. An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs assert that Defendant's actions expanding non-discrimination protection to sexual orientation, "gender identity" and "gender expression" is *ultra vires* and void *ab initio* while Defendant asserts that it has the authority to expand its non-discrimination policy to include sexual orientation and "gender identity." Plaintiffs' rights can be adjudicated through a declaration by this Court.

WHEREFORE, Plaintiffs respectfully request that the Court grant the declaratory and injunctive relief set forth herein and award such damages to Plaintiffs as are reasonable and just.

COUNT II

Defendant's Revision of Regulation 2601.29P Is Void As Au Ultra Vires Act In Violation of Virginia Law aud Dillon's Rule

95. Plaintiffs re-allege the facts in Paragraphs 1-94 and incorporate the same herein by reference as if set forth in full.

96. Pursuant to Virginia Code §15.2-965, no local governing board, including Defendant, can enact regulations such as Regulation 2601.29P that are more stringent than the laws enacted by the General Assembly.

97. Pursuant to the Dillon Rule of strict construction, to which Virginia adheres, school boards such as Defendant exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.

98. Under the Dillon Rule, any doubts as to the existence of a power must be resolved against the locality.

99. The General Assembly has not included "sexual orientation" and "gender identity" or "transgender" as protected classes in the Commonwealth of Virginia.

100. Neither does the Constitution of the Commonwealth of Virginia provide protection against discrimination for "sexual orientation," "gender identity" or "transgender."

101. Absent enabling legislation from the General Assembly or the Constitution, local governing bodies, including Defendant, cannot enact ordinances or policies that are more stringent, *i.e.,* protect more classes of people, than do state statutes.

102. Neither state law nor the Virginia Constitution permit school boards to enact regnlations that discipline students for conduct defined as unlawful discrimination based on sexual orientation.

103. Neither state law nor the Virginia Constitution permit school boards to enact regnlations that discipline students for conduct defined as unlawful discrimination based on the undefined concept of "gender identity."

104. Disciplining students for behavior deemed to be discrimination based on sexual orientation is not necessarily implied from state laws prohibiting unlawful discrimination because of "race, color, religion, national origin, sex, pregnaney, childbirth or related medical conditions, age, marital status, or disability."

105. Disciplining students for behavior deemed to be discrimination based on an undefined concept of "gender identity" or "transgender" is not necessarily implied from state laws prohibitmg unlawful discrimination because of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

106. Disciplining students for behavior dccmed to be discrimination based on sexual orientation is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include sexual orientation.

107. Disciplming students for behavior deemed to be discrimination based on an undefined concept of "gender identity" is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judieial deeision to include "gender identity."

108. Defendant's action in revising Regulation 2601.29P to include sexual orientation violates Virginia Code §15.2-965 and Dillon's Rule.

109. Defendant's action in revising Regulation 2601.29P to include "gender identity" as a protected class violates Virginia Code §15.2-965 and Dillon's Rule.

110. Defendant's action in revising Regulation 2601.29P to include sexual orientation as a protected class is an *ultra vires* act.

111. Defendant's action in revising Regulation 2601.29P to include "gender identity" as a protected class is an *ultra vires* act.

112. An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs assert that inserting undefined terms into the student handbook and thereby subjecting students to discipline without proper notice of the conduct for which they can be suspended exceeds Defendant's authority under Virginia law, while Defendant asserts that it can consistent with Virginia law insert the terms "gender identity" and "gender expression" into its student handbook and subject students to discipline. Plaintiffs' rights can be adjudicated through a declaration by this Court.

WHEREFORE, Plaintiffs respectfully request that the Court grant the declaratory and injunctive relief set forth herein and award such damages to Plaintiffs as are reasonable and just.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

A. That this Court issue a Preliminary Injunction enjoining the implementation of Policy 1450.5 insofar as it prohibits discrimination based on sexual orientation or "gender identity," and enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by enlarging the categories of protected classes under Defendant's non-discrimination policy to include sexual

orientation or "gender identity" pending the outcome of this action;

B. That this Court issue a Preliminary Injunction enjoining the implementation of Regulation 2601.29P insofar as it includes discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined, and enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by including discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined pending the outcome of this action;

C. That this Court issue a Permanent Injunction to permanently enjoin the implementation of Policy 1450.5 insofar as it prohibits discrimination based on sexual orientation or "gender identity," and permanently enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by enlarging the categories of protected classes under Defendant's non-discrimination policy to include sexual orientation or "gender identity;"

D. That this Court issue a Permanent Injunction enjoining the implementation of Regulation 2601.29P insofar as it includes discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined, and enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by including discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students ean be diseiplined;

E. That this Court render a Deelaratory Judgment:

(1) declaring Policy 1450.5 void as an *ultra vires* act under Dillon's Rule insofar as it adds sexual oricntation to Defendant's non-discrimination policy absent enabling legislation from the General Assembly;

(2) declaring Policy 1450.6 void as an *ultra vires* act under Dillon's Rule insofar as it adds "gender identity" to Defendant's non-discrimination policy absent enabling legislation from the General Asscmbly;

(3) declaring Regulation 2601.29P void as an *ultra vires* act under Dillon's Rule insofar as it subjects students to discipline for disruptive behavior defincd as discrimination based on sexual orientation;

(4) declaring Regulation 2601.29P void as an *ultra vires* act under Dillon's Rule insofar as it subjects students to discipline for disruptive behavior defined as discrimination based on "gender identity" and "gender expression;"

F. That this Court adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy, in ordcr that such dcclaration shall have the force and effcct of final judgment;

G. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's orders;

H. That this Court award Plaintiffs the reasonable costs and expenses of this action.

I. That this Court grant such other and furthcr relief as this Court deems equitable and just under the cireumstances.

DATED this 18th day of December, 2015.

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VERIFICATION

All the above statemcnts are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

ANDREA LAFFERTY

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

JOHN DOE

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

JANE DOE

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Coınplaint may subject me to penalties of perjury.

JACK DOE

VERIFICATION

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

ANDREA LAFFERTY

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

John Doe

JOHN DOE

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

Jane Doe

JANE DOE

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

Jack Doe

JACK DOE