In The

Court of Appeals of Virginia

RECORD NO. 0951-22-2

CARLOS IBANEZ, *ET AL.*,

***Appellants*,**

v.

ALBEMARLE COUNTY SCHOOL BOARD, *ET AL.*,

***Appellees*.**

BRIEF OF *AMICUS CURIAE* THE FAMILY FOUNDATION IN SUPPORT OF APPELLANTS

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INTERESTS OF *AMICUS*

The Family Foundation (the "Family Foundation") is a Virginia non-stock corporation that is non-partisan and faith-based, and advocates at the state and local level for Biblically-based policies that enable families to flourish. Among those policies are (i) protecting religious liberty, including religious liberty in the schools, and (ii) protecting the rights of parents to direct the upbringing of their children, especially in matters of religious faith.

We submit this amicus brief because we are deeply troubled by the teaching of the tenets of critical race theory in the public schools, and, in particular, the anti-Christian religious discrimination that is part of that theory. We are also deeply troubled by the trial court's dismissal of the lawsuit brought by parents who oppose efforts in the Albemarle County Public Schools to teach their children critical race theory and its discriminatory components. Moreover, by ruling that the rights found in the Virginia Bill of Rights are "not self-executing," the trial court's decision threatens to undermine over two centuries of constitutional doctrine protecting fundamental human rights.

Motivated by these concerns, the Family Foundation submits this amicus brief for consideration by the Court of Appeals. Consistent with Rule 5A:23(a)(2) of the Rules of the Supreme Court of Virginia, Family Foundation has obtained the written

consent for the filing of this brief from all counsel and submit such consent as Exhibit A.

INTRODUCTION

If a public school teacher were to stand before her class and encourage her students to become Christians, swift and strong objections would be sure to follow. Parents of other faiths – Jews, Muslims, and others – would complain loud and long about such classroom instruction. They would say that, by purposefully encouraging Christianity, the public school was undermining an array of constitutional rights, including their right to direct the religious upbringing of their children, a right that implicates both their rights as parents and their free exercise of religion. They would also say that the public school was engaged in an unconstitutional establishment of religion. In the face of the advancement of Christianity over other faiths, they would say that the public schools were violating equal protection. And, given the compulsion for students to lend their own voices to the schools' religious message (even though they might oppose it), the parents would say that their students' freedom of speech and free exercise rights were being violated. All of this, they would say, violates the Bill of Rights found in the Virginia Constitution. And they would be right.

As alleged by the Complaint, that is exactly what is happening in Albemarle County, except in reverse. Yet, the same principles apply. In Albemarle County,

the public schools are not encouraging students to become Christians. On the contrary, they are discouraging faith in Christianity. They tell the students that Christianity is part of the dominant culture in the United States, and then they tell them that the dominant culture oppresses racial and religious minorities and should be opposed. A student does not need formal training in logic to understand the rest of the syllogism: as part of the dominant culture, Christianity oppresses racial and religious minorities and should be opposed – and rejected. Moreover, as described by the Complaint, the bias against Christianity is taught by more direct means as well. *See infra* at 7.

Such teachings are highly troubling for Christians of all races, and for non-Christians who simply support the guarantees of the Virginia Bill of Rights. Among those whose faith is offended are African-American Christians, whose churches have been a mainstay of their communities and whose ministers have been prominent and effective voices for racial justice. To teach these children that their churches – their Christianity – oppresses them, is patently false and reminiscent of the Marxist trope that religion is "the opium of the people."[1] Other historical fallacies can be found in the curriculum as well. But the Plaintiffs' appeal does not turn on the testimony of historians. It turns on the facts that are alleged in the

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[1] Marx, Karl. [1843] 1970. "Introduction." A Contribution to the Critique of Hegel's Philosophy of Right, translated by A. Jolin and J. O'Malley, edited by J. O'Malley. Cambridge University Press.

Complaint and on the array of constitutional violations that those allegations describe.

Faced with those violations, a group of parents filed suit on behalf of their children, students in the Albemarle County Public Schools. The curriculum is problematic for a number of reasons – not just its anti-Christian religious hostility – and their six-count Complaint alleges a variety of constitutional violations. Given those detailed allegations – covering 337 paragraphs – it is troubling that the trial court thought the parents had failed to state a cause of action anywhere among them, and therefore dismissed their Complaint with prejudice, leaving no opportunity to cure by amendment whatever shortfalls the trial court may have perceived. More troubling still is the trial court's reason for ordering such final dismissal, finding that the constitutional rights the parents sought to vindicate under the Virginia Bill of Rights are not self-executing.

NATURE OF THE CASE

The Family Foundation relies on the Appellants' statement with respect to the nature of the case, but will highlight the trial court's erroneous conclusion. Dismissing the case on the functional equivalent of a demurrer, the court ruled 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...." Order, June 1, 2022.

ASSIGNMENTS OF ERROR

The Family Foundation relies on the Appellants' statement with respect to the assignments of error, but will focus on the assignments dealing with (1) the trial court's erroneous decision that their claims under the Constitution of Virginia are not self-executing, and (2) the constitutional violations alleged by the Complaint insofar as they touch on religion.

STATEMENT OF FACTS

The Family Foundation relies on the Appellants' statement of facts, but will highlight those facts most pertinent to the arguments advanced in this brief. At this early stage of proceedings, the trial court was obligated to "accept[] as true all facts properly pled, as well as reasonable inferences from those facts." *Steward v. Holland Family Props., LLC*, 284 Va. 282, 286 (2012).

To begin, the Plaintiffs are Albemarle County parents and school children from five families of varying racial and ethnic backgrounds. Compl. ¶¶ 18-56. Plaintiffs are practicing Christians, some Catholic and some Protestant. Compl. ¶¶ 57, 58. Their Christian faith governs the way they think about all of human life, including human nature, morality, and identity, and it causes them to have sincerely held religious beliefs in these areas. Compl. ¶ 59. As the Complaint explains, those beliefs are under attack in the Albemarle County Public Schools.

Plaintiffs' Christian faith teaches them that each person is made in the image of God, possesses inherent dignity, and must be treated accordingly. Consistent with their faith, Plaintiffs' endeavor to treat every person – no matter the person's race, color, or creed – with dignity, love and care. Compl. ¶ 61. Likewise, Plaintiffs' Christian faith teaches them that God creates all people equal, and that a person's race has no relation to that person's inherent dignity as a child of God. Accordingly, Plaintiffs believe that all people should receive equal and loving treatment, and that a person's race should not determine how they are treated. Compl. ¶¶ 62, 63. Plaintiffs oppose racism in every form because it contradicts their deeply held beliefs, including their religious beliefs. Compl. ¶ 64. Given that the Plaintiffs' opposition to racism is rooted in their Christian faith, it is perverse to combat racism by disparaging Christianity, as the Complaint alleges is now happening in the Albemarle County Public Schools.

Moreover, the Plaintiffs' faith teaches them that parents are the primary educators of their children in all matters, and that parents have the duty to educate their children and the fundamental right to control their children's education. Compl. ¶ 65, 66. Given the sharp conflict between the teachings of their Christian faith and the teachings of the Albemarle County Public Schools, Plaintiffs have

standing to come to court and ask that their constitutional concerns be adjudicated on the merits.[2]

As discussed in the Complaint, the curriculum being taught by the Albemarle County Public Schools violates a broad array of Virginia constitutional rights. Central to the Plaintiffs' concern for religious rights is the violation of equal protection guaranteed by Article I, § 11 ("the right to be free from any governmental discrimination upon the basis of religious conviction . . . shall not be abridged."). In its Fourth Cause of Action (¶¶ 299-309), the Complaint explains why the curriculum at issue violates this right to equal protection:

- The curriculum discriminates on the basis of religion by teaching that Christianity is a "dominant" "identity" that has ***oppressed*** "subordinate" "identities" such as Islam, Buddhism, Judaism, other non-Christian religions and atheism. Compl. ¶ 302.
- The curriculum instructs students to make daily choices to ***work against*** "dominant" "identities" such as Christianity. Compl. ¶ 303.
- In other words, the curriculum discriminates against Christians by identifying them as "dominant" and an "identity" for others to ***work against***. Compl. ¶ 304.

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[2] The Family Foundation anticipates that the Appellants will address their standing to sue in their brief.

- Thus, the curriculum divides students, on the basis of their religion, with those adhering to Christianity being labeled as dominant and oppressive, and those adhering to other faiths being labeled as subordinate and oppressed. *See* Compl. ¶ 304, 305.

STANDARD OF REVIEW

The case below was decided on a plea in bar without taking any evidence. As the Supreme Court of Virginia stated last year in *Plofchan v. Plofchan*, 299 Va. 534, 547-48 (2021):

> The standard of review on appeal when considering a plea in bar is "functionally de novo" when the appellate court must consider solely the pleadings to resolve the issue presented. *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019). When the circuit court takes no evidence on the plea in bar, we accept the plaintiff's allegations in the complaint as true. *Station #2, LLC v. Lynch*, 280 Va. 166, 169, (2010).

ARGUMENT

I. The Provisions of the Virginia Bill of Rights Are Self-Executing.

To say that a provision of the Constitution is "self-executing" is to say that it derives its legal power directly from that foundational document and, thus, the people need not await some statutory enactment by the General Assembly to give that provision force and effect. *Gray v. Va. Secy. of Transp.*, 276 Va. 93, 103 (2008) ("If a constitutional provision is self-executing, no further legislation is required to make it operative."). Moreover, the Supreme Court of Virginia has laid out three principles that are to guide courts in determining whether a constitutional provision

is self- executing. In *Robb v. Shockoe Slip Foundation*, 228 Va. 678, 681 (1985), the Court said:

> [1] "A constitutional provision is self-executing when it expressly so declares."
>
> [2] "Even without benefit of such a declaration, constitutional provisions in ***bills of rights*** and those merely declaratory of common law are usually considered self-executing."
>
> [3] "The same is true of provisions which specifically prohibit particular conduct. 'Provisions of a Constitution of a ***negative character*** are generally, if not universally, construed to be self-executing.'" (quoting *Robertson v. Staunton*, 104 Va. 73, 77 (1905).

See also Gray, 276 Va. at 103-04 (reaffirming the *Robb* categories of self-executing constitutional provisions).

While the individual constitutional provisions invoked by the Complaint do not expressly declare that they are self-executing, there is no reason for them to do so. They are all found within the Virginia Bill of Rights, and that is sufficient to make them self-executing. How could it be otherwise? A bill of rights is a command, not a suggestion. Whether adopted at the federal or state level, its very purpose is to place limits on the government that none in the government may transcend. The history of Virginia and the United States leaves no room for debate on this point.

In 1776, when Virginia broke from the British Crown after a long train of abuses, its leaders wrote a constitution for the new Commonwealth. Wanting to

ensure that their new government did not adopt the abuses of the old, they took pains to introduce their new charter with these words: "***A DECLARATION OF RIGHTS*** made by the representatives of the good people of Virginia, assembled in full and free convention, which ***rights*** do pertain to them and their posterity, as the ***basis and foundation of government***." Va. Const. of 1776 (emphasis added). It is axiomatic that rights that are the "basis and foundation of government" do not need the consent of the government to be enforceable against the government. Today, the same words that introduced the Constitution of 1776 appear in the Constitution of 1971, with little change in text and no change in their essential meaning.[3]

In 1788, when Virginia was considering whether to ratify the federal constitution, there was great concern that the newly proposed document had no bill of rights. Virginia had its Declaration of Rights to place limits on state government, but the federal constitution contained no comparable provisions to place restraints on the federal government. So great was the concern that Virginia coupled its ratification resolution with a call to Congress "[t]hat there be a Declaration or Bill of Rights asserting and ***securing from encroachment*** the essential and unalienable Rights of the People" and setting forth in detail the rights that Virginians thought

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[3] In the Constitution of 1971, the opening words read: "A DECLARATION OF RIGHTS made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government."

essential. *See* https://avalon.law.yale.edu/18th_century/ratva.asp (emphasis added). A right would hardly be "secure from encroachment" if its existence depended on the willingness of the legislature to recognize it. And, Virginia, along with other states demanding a federal bill of rights,[4] would hardly have been so insistent if they thought that a bill of rights, written into the federal constitution, would be so weak and ineffectual as the trial court now believes the Virginia Declaration of Rights to be. No one doubts that the federal Bill of Rights is self-executing; there should be no such doubt about Virginia's Bill of Rights, either.

In the foundational case of *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice John Marshall wrote:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

Marbury, 5 U.S. at 176-177. In other words, the constitution establishes the paramount law, which cannot be neutered by legislative action. Much less, then, can that paramount law be neutered by legislative ***inaction***, which would be the result of

[4] *See* https://billofrightsinstitute.org/essays/the-bill-of-rights.

the trial court's theory that constitutional guarantees must await legislative endorsement to make them operational.

The status of our Virginia constitution – including our Bill of Rights – as the paramount law of the Commonwealth seems too obvious to need citation. But citations are not lacking. *See Baker v. Wise*, 57 Va. 139, 190 (1861) (citing *Crenshaw v. The Slate River Co*., 6 Rand. 245, 276 [27 Va. 245] (1828) where "this court held that the Bill of Rights is a part of the constitution of Virginia, which bound the legislature..."); *Griffin's Ex'r v. Cunningham*, 61 Va. 31, 82 (1870) ("in this State the Legislature is restrained by a written constitution, with clear and well-defined boundaries"). And, while the paramount status of the constitution is most often discussed in terms of binding the *legislature*, it cannot be imagined that inferior governmental bodies – such as local schools boards – were somehow left free to trample on fundamental rights unless the legislature bestirred itself to rein them in.

The very purpose of a bill of rights would be destroyed if guarantees of individual liberty depended on a decision by the legislature to implement them. Indeed, since the acts of one legislature cannot bind a later one, the acceptance of constitutional limits by one legislative session would provide no guarantee against the destruction of those limits by another. *Fletcher v. Peck*, 10 U.S. 87, 135 (1810) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass..."); *Justice v. Commonwealth*, 81 Va. 209, 213 (1885) ("[N]o one

legislature can curtail the power of its successors to make such laws as they may deem proper...”). Under such an arrangement, our most fundamental liberties would constantly be at the mercy of the General Assembly.

The self-executing nature of our fundamental constitutional liberties is so deeply rooted in American jurisprudence that it rarely becomes an issue. But when the issue has arisen, other state appellate courts have declared the rights enshrined in their respective state bills of rights to be self-executing:

- **Colorado:** “The ***Bill of Rights is self-executing***; the rights therein recognized or established by the Constitution do not depend upon legislative action in order to become operative.” *Medina v. People*, 387 P.2d 733, 763 (Colo. 1963) (citing *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. 1957); *Payne v. Lee*, 24 N.W.2d 259 (Minn. 1946)) (emphasis added).
- **Maine:** “Although the ***Bill-of-Rights provisions are self-executing***, the Legislature is not thereby precluded from enacting legislation to facilitate the exercise of these constitutional privileges and the enforcement of these protective rights. Any implementing legislation, however, may not in any way impair those rights, as the Legislature also is bound by the organic law of the State.” *State v. Bachelder*, 403 A.2d 754, 758-759 (Me. 1979) (citations omitted) (emphasis added).

- **Missouri:** "Provisions of a Bill of Rights are primarily limitations on government, declaring rights that exist without any governmental grant, that may not be taken away by government and that government has the duty to protect. As these authorities show, any governmental action in violation of these declared rights is void so that ***provisions of the Bill of Rights are self-executing*** to this extent." *Quinn v. Buchanan*, 298 S.W.2d 413, 417 (Mo. 1957) (citing 1 Cooley's Constitutional Limitations 93, 358; Am. Jur. 1092, Sec. 308; 16 C.J.S., Constitutional Law, § 199, p. 976; and *id.* at 166, note) (emphasis added).
- **New York:** "Manifestly, article I, § 12 of the State Constitution and that part of section 11 relating to equal protection are **self-executing**. They define judicially enforceable rights and provide citizens with a basis for judicial relief against the State if those rights are violated. Actions of State or local officials which violate these constitutional guarantees are void." *Brown v. State*, 674 N.E.2d 1129, 1137-38 (N.Y. 1996) (emphasis added).
- **North Carolina:** "[O]ne whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. The provision of our Constitution which protects the right of freedom of speech is **self-executing**." *Corum v. University of North Carolina*,

413 S.E.2d 276, 289-90 (N.C. 1992) (citations omitted) (emphasis added).

In addition to being self-executing because they are found in the Virginia Bill of Rights, the constitutional rights invoked by the Complaint are self-executing because they "prohibit particular conduct." *Robb*, 228 Va. at 681. A review of the various counts contained in the Complaint leaves no room for doubt.

Counts I and IV: Violation of Plaintiffs' right to freedom from government discrimination. These two Counts invoke the anti-discrimination clause of Article I, § 11 ("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***.") (emphasis added). Clearly, this provision "prohibits particular conduct" by the government – namely discrimination based on any of the enumerated characteristics. Count I focuses on the right to be free from ***racial*** discrimination at the hands of government, while Count IV focuses on discrimination on the basis of ***religion***. In both cases, the right is self-executing.

Count II and Count III: Violation of Plaintiffs' right to freedom of speech. These two Counts invoke Article I, § 12 ("the ***freedoms of speech*** and of the press are among the great bulwarks of liberty, and ***can never be restrained*** except by despotic governments; ... any citizen may freely speak, write, and publish his sentiments on all subjects...."). The statement that "freedom of speech... can never

be restrained" also "prohibits particular conduct" by government.[5] Count II focuses on viewpoint discrimination, while Count III focuses on compelled speech. In both cases, the right is self-executing.[6]

Count V: Violation of Plaintiff's right to due process. This Count invokes the due process clause of Article I, § 11 ("***no person shall be deprived*** of his life, liberty, or property without due process of law") (emphasis added). Again, this clause prohibits particular conduct and is self-executing. This Count focuses on the denial of due process arising from threats against students for vaguely defined acts made punishable by the Albemarle County Public Schools.

Count VI: Violation of Plaintiffs' parental rights. This Count also invokes the Virginia Bill of Rights grounding parental rights in Article I, § 11 (and in common law and Va. Code § 1-240.1). While parental rights are not expressly identified in the due process protections of Article I, § 11, they are inherently part of

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[5] That prohibition is strengthened, not weakened, by the clause that follows: "except by despotic governments." It was hardly the intention of the Founders to allow for the development of "despotic governments," much less grant them a license to do what more benign governments could not.

[6] In the April 22, 2021 hearing, the trial court focused on that part of Article I, § 12 that was specifically directed toward the state legislature: "the General Assembly shall not pass any law abridging the freedom of speech or of the press...." But, contrary to the trial court's apparent view, that specific prohibition, aimed at one specific institution, does not detract from or limit the broader prohibition against ***any*** government entity abridging these freedoms. The Virginia Constitution was not meant to restrain just the state legislature, while leaving other institutions of government (*e.g.*, governors, boards of supervisors, city councils, and school boards) able to trample free speech however they might like.

the "liberty" that is subject to the ban on deprivation without due process. *See Copeland v. Todd*, 282 Va. 183, 198 (2011) ("[T]he interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court.") (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

Whatever the precise contours of these rights may be, they are unquestionably self-executing.[7] They need no legislative action to take effect. Yet, the trial court held, in effect, that our most basic constitutional protections are really not laws at all, that they count for naught unless the General Assembly enacts a statute of some sort to implement them. That represents a radical departure from the fundamental concept of constitutional government, where a government created by the will of the people is bound by the limitations they have imposed on that government. Unless corrected, the trial court's departure endangers not just the rights of these Plaintiffs, but the rights of future plaintiffs from all segments of the political spectrum who may assert state constitutional claims in other contexts and on other issues. These

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[7] It should also be noted that, where self-executing constitutional provisions are violated, sovereign immunity does not apply. *Gray v. Va. Secy. of Transp*., 276 Va. 93, 106 (2008). And, even if the Albemarle County School Board were somehow protected by sovereign immunity, there are two other Defendants here: (i) Matthew S. Haas, Superintendent, sued in his official capacity, and (ii) Bernard Hairston, Assistant Superintendent for School Community Empowerment, sued in his official capacity. School board employees are immune from claims for acts of simple negligence, but not for gross negligence or intentional acts. *See, e.g.*, *Linhart v. Lawson*, 261 Va. 30, 35 (2001); *Lentz v. Morris*, 236 Va. 78 (1988).

Plaintiffs and others might, of course, seek to vindicate their rights using the ***federal*** constitution (a move which would also likely lead to adjudication in a federal forum). But is Virginia so callous and grudging when it comes to fundamental, inalienable rights – including free speech and equal protection – that it refuses to vindicate those rights under its own state laws? Surely not.

The Defendants argued below – and may argue yet again – that the Virginia Bill of Rights cannot be the basis for any cause of action because Virginia has not adopted a state-law counterpart to the federal statute, 42 U.S.C. § 1983. But the analogy is false for at least two reasons. First, § 1983 (and its companion statutes) were adopted in large measure to allow awards of monetary damages (and attorneys' fees) against errant state actors sued in their ***private*** capacities. The Plaintiffs here have not sued anyone in their private capacities.

Second, § 1983 was adopted as "appropriate legislation" under § 5 of the Fourteenth Amendment. Given our system of dual sovereignty, such legislation was arguably needed to empower ***federal courts*** to hear private claims against ***state officials***. But where there is no dual sovereignty issue, such a statute is not needed. For example, there is no counterpart to §1983 expressly allowing ***federal courts*** to hear private claims against ***federal officials*** for violations of the federal Bill of Rights. Again, none is needed. Federal courts hear such claims, seeking injunctive relief against federal officials, all the time. The courts do not say that those cases

must be dismissed because the federal Bill of Rights is not self-executing. The same is true in parallel proceedings at the state level. There is no need for a state counterpart to § 1983 to seek relief from state courts for violations of the Virginia Bill of Rights.

As James Madison wrote, "[i]t is proper to take alarm at the first experiment on our liberties." *Memorial and Remonstrance Against Religious Assessments*, ¶ 3 (1785). Surely, there can be no greater experiment on our liberties than for a court to say that we have no liberties except those the legislature may allow us. The Plaintiffs and the Family Foundation are right to take alarm. This Court should as well.

II. The Complaint Alleges Causes of Action for Violation of Religious Rights.

This Court should not just reverse the trial court's erroneous view that the constitutional rights invoked by the Complaint are not self-executing. It should affirmatively rule that the Complaint states causes of action for violations of those rights and remand the case, thus allowing a decision to be rendered on the evidence the parties present. This brief will focus on the causes of action presented by the Complaint insofar as they involve alleged violations of religious rights.

This is not a case where parents object to something in the curriculum that does not address religion overtly but that nevertheless runs counter to the teachings of the parents' faith. Here, the curriculum at issue addresses religion ***overtly***, and it

does so by abandoning neutrality and demonizing a religion – Christianity. By holding up Christianity as an object of opprobrium – and by encouraging all students to work against Christians and Christianity – the curriculum violates the Plaintiffs' right to be free from religious discrimination on the basis of religious conviction.

While this case is based on the *Virginia* Bill of Rights, there is no reason to imagine that Virginia's protection of religious freedom – including freedom from religious discrimination – is any less robust than the protections found in its federal counterpart. Indeed, the U.S. Supreme Court has recognized that the religious protections found in the First Amendment were modeled on those already adopted in the Virginia Statute on Religious Freedom. *Everson v. Bd. of Educ*., 330 U.S. 1, 13 (1947) ("This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.") (citing cases). That statute is likewise the basis for our state constitutional guarantees of religious liberty.

To disfavor Christianity, as the Complaint plainly alleges is happening in the Albemarle public schools, constitutes a denominational preference. As shown by a long and overwhelming chain of authority, such a preference is unconstitutional:

- "Neither a state nor the Federal Government. . . can pass laws which. . . prefer one religion over another." *Everson*, 330 U.S. at 15.

- "The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 308 (1952).

- "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects. . . and that it ***work deterrence of no religious belief***." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (emphasis added).

- "The First Amendment mandates governmental neutrality between religion and religion . . . . The State may not adopt programs or practices . . . which aid ***or oppose*** any religion. . . . This prohibition is absolute." *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968) (cleaned up) (emphasis added).

- "In our Establishment Clause cases we have often stated the principle that the First Amendment ***forbids an official purpose to disapprove of a particular religion*** or of religion in general." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (collecting cases).

Given the case law that so roundly condemns the government's disparagement of any religious faith, the question then becomes which standard to apply in determining whether the Albemarle County Public Schools can somehow save the curriculum at issue. In cases of religious discrimination, the choice of a standard depends on whether official animus is present.

First, where official ***expressions of hostility*** to religion accompany policies burdening free exercise, the U.S. Supreme Court has simply set aside such policies

without further inquiry. *See, e.g.*, *Dr. A. v. Hochul*, 142 S. Ct. 552, 555 (2021) (Gorsuch, J.) (dissenting from denial of certiorari and citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)).

Second, where such overt animus is lacking, if the law or policy at issue reflects a "denominational preference," then "our precedents demand that we treat the law [or policy] as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. 228, 246 (1982). And, where strict scrutiny applies, the burden is on the government to "show[] that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2414 (2022).

Under the facts alleged in the Complaint, the expressions of hostility toward Christianity require application of the more rigorous standard employed in *Masterpiece Cakeshop*. Indeed, there is an unmistakable similarity between the anti-Christian statements in that case and the anti-Christian statements at work here. In *Masterpiece Cakeshop*, the question presented was whether a Christian baker, whose faith would not permit him to make a cake for a same-sex marriage, was protected by the First Amendment against a Colorado law banning discrimination in places of public accommodation. But the Court never reached that issue. Instead, the Court vacated the underlying judgment of the Colorado Civil Rights Commission because of the religious hostility shown by its members:

> [S]ome of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, ***disparaged Phillips' faith as despicable*** and characterized it as merely rhetorical, and ***compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust.***

Masterpiece Cakeshop, 138 S. Ct. at 1721 (emphasis added).

Such comments are akin to what the Albemarle County Public Schools are teaching when they label those adhering to Christianity as oppressive, and when they further discriminate against Christians by classifying them as an identity that students should work against. Compl. ¶¶ 302, 304. Those teachings are such an affront to the constitutional protections of religion that the constitutional protection against them is "absolute." *Epperson*, 393 U.S. at 104. Clearly then, the Complaint has stated a cause of action, and this Court should so rule.

On remand, the Albemarle County Public Schools will, of course, be free to show, if they can, that they are not implementing a curriculum containing the anti-Christian messages alleged in the Complaint. But that is for another day. What matters now is that this Court clearly state that it is a *per se* violation of the Virginia constitution for the public schools to disparage Christianity (or any other religion) as alleged here. In the alternative, the Court should at least require these discriminatory, anti-Christian teachings to be examined under the lens of strict scrutiny, with the Albemarle County Public Schools having the burden to show that its discrimination against the Christian faith serves a compelling interest and is

narrowly tailored to that end. In other words, the issue is not whether the Complaint successfully negates the existence of a compelling interest and narrow tailoring. That burden falls on the Albemarle County Public Schools to show at trial. Again, the judgment of the trial court must be vacated and reversed.

III. Religious Discrimination in the Public Schools Is an Especially Acute Violation of the Virginia Constitution.

The anti-Christian discrimination by government described in the Complaint would be unconstitutional in other settings, but it is especially problematic because it takes place within the public schools. As the U.S. Supreme Court recently reaffirmed: "[G]overnment ***neutrality toward religion*** is particularly important in the public school context given the role public schools play in our society." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2442 (2022). This is nothing new. As the Court explained decades ago:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. ***The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure***. Furthermore, the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. ***In no activity of the State is it more vital to keep out divisive forces than in its schools*** . . . ."

Edwards v. Aguillard, 482 U.S. 578, 583-584 (1987) (citations omitted) (emphasis added).

In *Edwards*, the Court struck down a Louisiana statute providing for the teaching of creationism in the public schools. In so doing, the Court concluded that "the Act's primary purpose was to change the science curriculum of public schools in order to provide ***persuasive advantage*** to a ***particular religious doctrine*** that rejects the factual basis of evolution in its entirety." *Id.* at 592 (emphasis added). The shoe is now on the other foot. Even without the benefit of state legislation, the Albemarle County Public Schools are seeking to change their curriculum to provide ***persuasive disadvantage*** to a particular religious doctrine, Christianity. This cannot be constitutional.

As the U.S. Supreme Court also has emphasized, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). In *Lee*, the school principal invited a rabbi to say payers at the opening and closing of a middle school graduation. Attendance at the ceremony was voluntary; and none of the students were called upon to join in the prayers, to bow their heads or to give any sign of agreement with the rabbi's prayers. They were simply expected to remain standing, after the Pledge of Allegiance, and be respectfully

silent. Even so, the Court said (rightly or wrongly) that unconstitutional coercive pressure was present.

Here, by contrast, students are ***required*** to be present in the Albemarle County Public Schools, and the religious coercion they experience while there makes any "coercion" in *Lee* pale by comparison. As alleged in Counts II and III of the Complaint, this coercion operates in two ways. First, students who may wish to express positive views about Christianity are chilled into silence by threats of punishment if they do so. This is viewpoint discrimination and unconstitutional. *See* Count II. Second, students are coerced into actively expressing negative views about Christianity, even though they may not share those views. This is compelled speech and also unconstitutional. *See* Count III. These constitutional violations are clearly alleged in the Complaint:

Viewpoint Discrimination

- "Defendants threaten to punish students who express dissent or heterodoxy, including through Defendants' unconstitutional Student Conduct Policy, which threatens punishment to students who express views at odds with Defendants' 'anti-racist' ideology." Compl. ¶281.

Compelled Speech

- "Defendants have compelled and seek to compel Plaintiffs, ***subject to the pains of discipline and lower academic ratings***, to affirm and communicate messages that conflict with their deeply held beliefs." Compl. ¶ 292 (emphasis added).

- "Specifically, Defendants have told all Albemarle School students, including Plaintiffs, that failure to embrace 'anti-racist' beliefs and take actions consistent with those beliefs constitutes racism." Compl. ¶ 293.

- The actions students are expected to take "include, inter alia, rejecting 'colorblindness'; adopting certain positions on controversial political issues like immigration, criminal justice reform, and school funding; and ***opposing*** aspects of 'white-dominant culture' ***such as Protestant Christianity***." Compl. ¶ 293 (emphasis added).

As alleged in Counts II and III, such government coercion to speak contrary to one's religious beliefs violates the free speech rights guaranteed by the Virginia Constitution. And as *Lee* teaches, *supra* at 25, this coercive pressure is especially problematic because it is being applied against school age children. Moreover, because it is ***only Christians*** who are being called upon to oppose their faith, the same compulsion violates Virginia's constitutional protection against religious-based discrimination.

This disregard for constitutional rights is especially egregious because it flies in the face of long-standing guidance given to the public schools of Virginia by the Office of the Attorney General ("Attorney General") and the Virginia State Board of Education ("State Board"). Adopted in 1995 and still maintained by the State Board on its public website,[8] this guidance is found in two related documents: Guidelines Concerning Religious Activity in the Public Schools ("Guidelines")

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[8] *See* https://doe.virginia.gov/boe/guidance/support/religious_activity.pdf

(adopted by the State Board on June 22, 1995) and Memorandum of Legal Principles Animating Guidelines ("Memorandum") (issued by the Attorney General on January 9, 1995) (adopted by and attached to Guidelines). This guidance provides two overarching principles: (i) "[P]ublic school officials, administrators and teachers, [must] steer a 'neutral course' in matters of religion," and (ii) "Students. . . do not forfeit their constitutional rights at the 'school house gate.'" Memorandum, at 4, 5. As described by the Complaint, the Albemarle County Public Schools are violating both principles.

It may be difficult to believe that officials in Albemarle County – once home to Thomas Jefferson – would engage in conduct so antithetical to the freedom that Mr. Jefferson so eloquently advocated. But the task here is not to judge the Complaint by the nostalgic assumption that such things simply cannot happen. If what the Plaintiffs allege is not true, then the Albemarle County Public Schools will have a chance, at a later stage in this case, to defend themselves with whatever facts may be available. But for now, the allegations in the Complaint must be taken as true, and they are more than adequate to state causes of action. This Court should so rule.

CONCLUSION

The Court should vacate the decision of the trial court and hold (i) that the rights found in the Virginia Bill of Rights and invoked by the Complaint are self-executing, and (ii) that the Complaint states causes of action with respect to the religious issues raised by the Parents, including the right to be free from viewpoint discrimination (Count II), the right to be free from compelled speech regarding religion (included within Count III), and the right to be free from governmental discrimination based on religion (Count IV). This case should then be remanded for further proceedings on these claims along with the other claims raised by the Plaintiffs.

Respectfully submitted,

THE FAMILY FOUNDATION

By:
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CERTIFICATE

I hereby certify that on this 27th day of October, 2022, pursuant to Rules 5A:1 and 5A:19, an electronic copy of the Brief of *Amicus Curiae* has been filed with the Clerk of the Court of Appeals of Virginia, via VACES. On this same day, an electronic copy of the Brief of *Amicus Curiae* was served, via email, upon:

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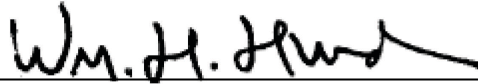
This Brief contains 6,809 words, excluding those portions that by rule do not count toward the word limit.



William H. Hurd

EXHIBIT A

From:	Vincent Wagner
To:	Annemarie DiNardo Cleary; Ali Kilmartin
Cc:	William Hurd
Subject:	[External] RE: Amicus Brief for Family Foundation
Date:	Monday, October 24, 2022 2:41:18 PM
Attachments:	image002.png image003.png image004.png image005.png image006.png image007.png image008.png image009.png image010.png logo_abdfb0ec-e06e-407a-a721-cd0e4f742400.png

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Thank you, Annemarie. I consent on behalf of appellants to your amicus brief. We appreciate your support.

Vincent

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From: Annemarie DiNardo Cleary <acleary@eckertseamans.com>
Sent: Monday, October 24, 2022 1:18 PM
To: Ali Kilmartin <akilmartin@adflegal.org>
Cc: William Hurd <whurd@eckertseamans.com>; Vincent Wagner <vwagner@adflegal.org>
Subject: Amicus Brief for Family Foundation

EXTERNAL

Good afternoon, Ali –

I am working with Bill Hurd on the amicus brief for Family Foundation in the *Ibanez v. Albemarle County School Board* case. The appellees consented to our filing an amicus brief. Would you kindly respond to this email confirming the appellants' consent to our filing an Amicus Brief on behalf of the Family Foundation? Thank you.

With best regards,
Annemarie Cleary

Annemarie DiNardo Cleary
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William Hurd

From: Jeremy Capps <jcapps@hccw.com>
Sent: Thursday, October 13, 2022 7:12 PM
To: William Hurd; David Corrigan; Missy York; Blaire O'Brien
Cc: Vincent Wagner
Subject: [External] RE: Request for Consent to File Amicus Brief

Bill,

Sorry for the delay.

We consent to you filing an amicus brief in this matter.

Let me know if you have any questions or want to discuss it.

Jeremy

JEREMY D. CAPPS
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Celebrating 30 years

From: William Hurd [mailto:whurd@eckertseamans.com]
Sent: Wednesday, October 12, 2022 2:07 PM
To: Jeremy Capps <jcapps@hccw.com>; David Corrigan <dcorrigan@hccw.com>; Missy York <myork@hccw.com>; Blaire O'Brien <bobrien@hccw.com>
Cc: Vincent Wagner <vwagner@adflegal.org>
Subject: Request for Consent to File Amicus Brief

Dear Counsel:

Our firm represents the Family Foundation of Virginia in connection with an amicus brief we plan to file in support of the Appellants in the Court of Appeals in the case of CARLOS AND TATIANA IBANEZ, et al versus ALBEMARLE COUNTY SCHOOL BOARD, et al.

As you know, the rules require that we either file a motion seeking leave to file the brief or obtain the written consent of all parties. With have the consent of Appellants. Inasmuch as you are counsel representing all Appellees, may we have your consent as well?

Your courtesy in this matter would be appreciated. Thank you.

Sincerely,

Bill Hurd

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