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.

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INTRODUCTION

Especially for "children in grade and high schools," separating students "solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The days of state-sponsored school segregation are long gone. But more recently, some schools have adopted race-based policies that—while claiming to combat the lingering effects of segregation and present-day racism—require classifying and dividing students along racial lines. Not surprisingly, these misguided policies generate "feeling[s] of inferiority" among students, causing parents to fear the resulting harm is "unlikely ever to be undone." *Id.*

The Albemarle County School Board's "Anti-Racism Policy" is one such misguided policy. As implemented, the Policy discriminates against students based on their race and religion, compels them to speak ideological messages they disagree with, and infringes on their parents' fundamental right to direct their upbringing and education. Students are already suffering the consequences.

For example, Plaintiff L.R.'s father is black and his mother is half-white, half-Native American. R.15, 1092. After being exposed to Policy-related curriculum in seventh and eighth grade, L.R. started viewing his race negatively and seeing himself as "different" from his white classmates. R.15–16, 1095–96. When L.R.'s mother, Plaintiff Melissa

Riley, had voiced concerns about the Policy, school officials told her the school would create a "safe space" for students of color like L.R. to receive Policy-related instruction segregated from their white classmates. R.35, 1094–95.

Another student, Plaintiff V.I., was disturbed by Policy-related materials and a video shown to her class that suggested to her that she cannot succeed in life because she is Latina—and thus underprivileged. R.11, 829 ("Intersectionality 101" video), 1066. Meanwhile, other Plaintiff parents had withdrawn or were considering withdrawing their children from Albemarle County public schools because of their concerns about the harmful effects of the Policy's implementation when they filed this lawsuit. R.12–14. That implementation, parents were told, would be "woven through [in] all [of their children's] classes in Albemarle County." R.39 (complaint), 841 (transcript), 829 ("Coffee w Costa" video at 40:25–41:03).

Despite all that, the School Defendants argued below that Plaintiffs did not have standing to challenge the implementation of the Policy, and the trial court agreed and dismissed. R.1373. That was error, as was the trial court's holding that the state constitutional provisions Plaintiffs invoke are not self-executing, *id.*, meaning the Virginia Constitution's protections against discrimination, compelled speech, and due-process violations are somehow unenforceable absent enabling legislation. This Court should reverse.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On February 28, 2019, the Albemarle County School Board adopted a new "Anti-Racism Policy," which the School Defendants soon began implementing—along with a set of implementing regulations—in schools throughout the County. R.6–7, 19–21, 61–65. Almost two years later, five Albemarle County families—eight Albemarle County students and nine parents—filed a lawsuit against the School Board, the superintendent (Dr. Matthew Haas), and the assistant superintendent (Dr. Bernard Hairston), for their separate roles in adopting and implementing the Policy in the students' schools. R.4, 17–18.

The Plaintiff families brought six claims under Virginia law, asserting that the Policy and its implementation violated the Plaintiff students' state constitutional right to be free from government discrimination based on race, R.48–49 (Claim One); and religion, R.53–54 (Claim Four); their state constitutional right to be free from viewpoint discrimination, R.49–51 (Claim Two); their state constitutional right to be free from compelled speech, R.51–53 (Claim Three); and their state constitutional right to due process, R.54–55 (Claim Five); as well as the Plaintiff parents' state constitutional, statutory, and common-law right to direct the upbringing, education, and care of their children, R.56–57 (Claim Six). Along with their complaint, the Plaintiff families attached 11 separate exhibits, roughly 130 pages of evidence. R.60–191.

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

The School Defendants filed a demurrer and a plea in bar. R.232–56. Rather than introduce new evidence or a contested factual issue, the School Defendants argued Plaintiffs lacked standing and that the state constitutional provisions Plaintiffs invoke are not self-executing. R.250–54, 1113–25, 1248–60. In their demurrer, the School Defendants also argued Claim Six should be dismissed because Virginia's parental-rights statute lacks a cause of action. R.236, 1119–20.

To support their standing arguments, the School Defendants relied almost exclusively on *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 798 S.E.2d 164 (2017), with one major caveat. R.253, 1120–23, 1248–52. In *Lafferty*, the Supreme Court of Virginia held that the "injury pled" there was "insufficient because general distress over a general policy does not alone allege injury sufficient for standing." 293 Va. at 361–62, 798 S.E.2d at 168. Despite relying heavily on that holding, the School Defendants conceded that "Plaintiffs here do *not* attempt to solely make general objections to a general policy of the School Board." R.1248 (emphasis added).

The School Defendants also did not deny Plaintiffs' allegation that, unlike the challenged policy in *Lafferty*, the challenged "Policy [here] is being implemented throughout" the County. R.1249. Instead, they argued Plaintiffs had not satisfied their obligation to show that they each had been personally injured by the Policy. *Id.*

The Plaintiff families also moved for a preliminary injunction, R.268–302, attaching additional evidence to their motion, including a declaration from each Plaintiff family, R.1063–98, and Policy-related videos, documents, and book excerpts, R.829–1062, 1288–1328. In opposition, the School Defendants offered two affidavits. R.1239–44.[1]

After a motions hearing and without making any factual findings, R.1391–1459, the trial court granted Defendants' plea in bar on Claims One through Five and their demurrer on Claim Six, holding that "Plaintiffs lack standing to bring their claims, and that Plaintiffs have not stated a cause of action arising under Virginia law because their claims under the Constitution of Virginia are not self-executing and the statute on which they rely does not create a private cause of action." R.1373. The trial court denied Plaintiffs' preliminary-injunction motion as moot. R.1374. Plaintiffs now appeal.

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[1] Responding to Defendants' motion craving oyer, R.257–60, which the trial court later granted, R.1373, Plaintiffs attached complete copies of Exhibits 2, 4, 5, 7, 8, and 9 to their preliminary-injunction motion. R.312–18 (Ex. 2), 322–35 (Ex. 4), 336–63 (Ex. 5), 405–637 (Ex. 7), 640–805 (Ex. 8), 806–26 (Ex. 9). Defendants attached the same versions of Exhibits 2 and 5 to their demurrer and plea in bar. R.1127–61.

ASSIGNMENTS OF ERROR

1. The circuit court erred by dismissing all the claims in the complaint based on sovereign immunity because Article I, Sections 11 and 12 of the Virginia Constitution are self-executing, and because Virginia Code § 1-240.1 codifies a preexisting constitutional and common-law cause of action. [R.48–58, 1178–85, 1200–01, 1274, 1375, 1415:23–1419:1]

2. The circuit court erred by dismissing all the claims in the complaint based on standing where Appellants alleged actual harm from in-classroom exposure to Appellees' implementation of the challenged policy. [R.10–17, 35–47, 1063–98, 1185–89, 1200, 1274, 1364–72, 1375, 1414:5–1415:12, 1423:20–1426:16, 1429:4–1430:8, 1437:4–18, 1438:1–3, 1438:21–1439:2, 1439:17–24, 1441:16–1442:25, 1456:8–1457:5]

3. The circuit court erred by sustaining Appellees' demurrer as to Claim Six because Appellants alleged facts sufficient to state a cause of action under the Virginia Constitution, Virginia Code, and Virginia common law for interference with parents' fundamental right to direct the upbringing, education, and control of their children. [R.56–58, 1183–85, 1198–99, 1375–76, 1414:20–25, 1415:23–1419:1, 1431:8–1436:6]

4. The circuit court erred by failing to preliminarily enjoin the challenged policy because Appellants are likely to show the policy discriminates based on race and religion, impermissibly compels students to endorse viewpoints they disagree with, and infringes parents' fundamental rights. [R.57–58, 268–74, 290–300, 1274–85, 1376, 1412:10–19, 1414:8–1415:6, 1420:18–1422:12, 1423:20–1426:16, 1428:17–1430:8, 1440:6–14, 1441:16–1442:25, 1443:12–1457:5]

STATEMENT OF FACTS

A. Albemarle County School Board adopts system-wide "Anti-Racism" Policy and implementing regulations

On February 28, 2019, the Albemarle County School Board adopted a new "Anti-Racism Policy" with the ostensible purpose of "eliminat[ing] all forms of racism from the Division in conjunction with related Board policies." R.6–7, 19, 61–62. Specifically, the Policy identified three forms of racism the School Board said created "significant disparities between racial groups" in academic performance, achievement, and participation:

- "Individual racism," which the Policy defined as "pre-judgment, bias, or discrimination by an individual based on race," including "conscious and unconscious" "privately held beliefs,"
- "Institutional racism," which the Policy defined as racism that occurs within institutions like schools "that adopt and maintain policies, practices, and procedures that often unintentionally produce inequitable outcomes for people of color and advantages for white people," and
- "Structural (or systemic) racism," which the Policy defined as "encompass[ing] the history and current reality of institutional racism across all institutions and society," resulting in "a system of inequity that is detrimental to communities of color."

R.19, 61–62. Finally, the Policy defined the term "Anti-racism" as "the practice of identifying, challenging, and changing the values, structures, and behaviors that perpetuate systemic racism." R.19, 62.

To implement the Policy, the Board adopted a set of regulations "to dismantle the individual, institutional, and structural racism" in the Division. R.20, 63. The regulations described how the Policy would be communicated; how "systemic racism" would be addressed; how "[c]urriculum and instructional materials" would be updated; how all staff would be trained; and how the Policy would be enforced. R.63–65.

For example, the regulations state that "[a]ll teachers and administrators shall be trained in cultural awareness and/or culturally responsive teaching practices." R.64. There would be "various, including anonymous, means for students and staff to report racism and other forms of discrimination." R.65.[2] And when students commit a "racist act"—which could include supporting certain political positions on immigration and school governance and funding, R.165—they would "learn about the impact of their actions" through "restorative justice, mediation, role play or other explicit policies or training resources," R.64. Those other policies include the Student Conduct Policy, *see* R.62 (cross-referencing Policy "JFC, *Student Conduct*"), R.1035 (referencing "Policy ACC, *Anti-Racism*"), and the "Behavioral Management Handbook," R.101–02 (describing new abbreviation for "behavior infractions that appear to violate the Anti-Racism Policy").

[2] Students later were told to use an app called "Anonymous Alerts" to report "racial incidents" and "acts of racism." R.114, 118.

The School Defendants also incorporated outside resources to assist staff in their anti-racism training. *See, e.g.*, R.73–80. One such linked resource instructed district staff that dominant cultures (whites) "make and enforce the rules" and "[h]ave access to resources" while subordinate cultures (non-whites) are "rendered invisible." R.78. And it said "white people" should daily earn their "white ally badge" from a person of color. R.80.

B. School Defendants train teachers to implement new Anti-Racism Policy in their classrooms

To train administrators, teachers, and other staff about the new Policy, the School Defendants launched a mandatory online orientation in November 2020. R.23–24, 82–84, 336–63. The program reminded staff of the Policy's anti-racism definition, which includes "challenging" and "changing the values . . . that perpetuate systemic racism." R.62, 83, 343–44. In a video message, Defendant Assistant Superintendent Bernard Hairston told staff that identifying "forms of racism" and doing "nothing about it" makes one a "practitioner of racism." R.24 (complaint with video link), 84 (slide with video link), 356 (same), 829 (video), 834 (video transcript).[3] Hairston told staff to "consider" the "controversial statement" they were "either a racist or an anti-racist." R.24, 834.

For his "white colleagues," Hairston explained that being anti-racist requires "acknowledging that you don't know what you don't

[3] The complaint provided the following video link: bit.ly/3yOpvKE.

know about race." R.832. And for his "colleagues of color," including "teachers," Hairston added that implementing the Policy requires "pushing just hard enough" on "different points of view about race," but "not so hard [they] close doors." R.832. Hairston finished by telling staff to ask themselves whether they were on the "anti-racism school bus," or if they needed "help finding [their] seat and keeping [their] seat," or if it was "time for [them] to just get off the bus." R.24, 835.

In March 2021, the School Defendants held a mandatory Division-wide webinar with Glenn Singleton, the author of *Courageous Conversations About Race: A Field Guide for Achieving Equity in Schools*, followed by a monthly book study and trainings. R.24–27, 111 (describing trainings), 405–637 (all training slides).

The *Courageous Conversations* trainings directed Albemarle County teachers and staff to focus on race. R.129. One slide said the goal was to "put[] race on the table and keep[] the spotlight on it." R.456 (capitalization altered). Another directed teachers to reject the position "I don't see color. I was raised to treat everyone with respect" and become people who "want to be better equipped at identifying and implementing policies and programs that are anti-racist." R.131. Another slide told staff to share "key steps" they would take in their schools "to ensure racial equity transformation." R.145. And another told staff the "[l]evel of connectedness" they brought to "racial equity work" must be "[t]ranslated to transform beliefs." R.429.

That "racial equity work" included embracing racial stereotypes. For example, one slide explained "white talk" versus "color commentary" characterizing the former as "verbal," "impersonal," "intellectual," and "task oriented" while the latter was "nonverbal," "personal," "emotional," and "process oriented." R.134 (capitalization altered). Another described "White culture" as focused on "individualism" and private-property ownership instead of collectivism and group success. R.141. Slides throughout the training painted white people as dominant and other people as subordinate, and suggested that "racial consciousness" requires a person to work against that system. R.129; *see, e.g.*, R.139–143.

Finally, one presentation ended with the following quote: "To be anti racist is a radical choice in the face of history, requiring a radical reorientation of our consciousness." R.144 (quoting Ibram X. Kendi, *How to be an Antiracist* 23 (2019)). Staff were to ask themselves if they were "ready to make [that] choice to be an anti-racist." *Id.*

C. Pilot program at Henley Middle School exposes Plaintiff students to Policy implementation

In spring 2021, the School Defendants conducted a Pilot Program at Henley Middle School that exemplifies the Policy implementation in classrooms across Albemarle County. R.29. Plaintiffs Carlos and Tatiana Ibañez's daughter, V.I., and Melissa Riley's son, L.R., participated in the seventh-grade version of the program. R.29. And

Plaintiffs Matt and Marie Mierzejewski's son, P.M., participated in a portion of the eighth-grade version of the program before Matt and Marie withdrew him from it because they did "not want their son to be taught to focus on his race or the race of his classmates, and they did not want him to be instructed that the dominant culture is White and Christian and therefore responsible for racism." R.29, 35.[4]

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

A subsequent lesson drove home the point. R.150–57. Students were told that the "[d]ominant [c]ulture" in the United States is "people who are white, middle class, Christian, and cisgender." R.153. And to show they had internalized the message, students were shown an empty on-screen box with various identifying characteristics and told to place the "dominant" characteristics inside and "[s]ubordinate" ones

[4] Plaintiffs attached excerpts from the slide deck used in the eighth-grade version of the Pilot Program to their complaint. R.147–77. And to resolve Defendants' motion craving oyer, they attached the entire slide deck as an exhibit to their preliminary-injunction motion. R.640–805.

outside the box. R.154–56. Traits they were expected to place inside the box included "[w]hite," "upper-middle class," "cisgender," and "male." R.156. And traits they were to place outside the box included "[b]lack, brown, indigenous people of color," "queer, transgendered, non-binary folx," "cisgender women," "Muslim, Jewish, Buddhist, atheist, [and] non-Christian folx." *Id.* Finally, students were shown a slide asking, "Do we need the box?" R.157. The same slide included an image of a box labeled with the expected answer: "BREAK THE BOX." *Id.*

Another classroom activity required students to watch a video showing a black man and a white woman "check[ing] [their] privilege" by holding up both hands and putting individual fingers down in response to a series of statements, some of which were explicitly about race. R.720 (slide with video and link), R.829 (flash drive containing Holker video). After the video, students were required to repeat the exercise themselves, "start[ing] with both hands up," and "put[ting] a finger down" for each scenario that was true about them to "see how many fingers folx have left at the end." R.158, 721.

After completing the finger-down activity, students were expected to share whether they were "aware of [their] privilege or lack of privilege," and explain why it is "challenging for white people to think about (and do something about) white privilege." R.34, 159, 722. They were also expected to discuss "the cost of white privilege for persons of color" and "the cost of white privilege for white people." R.34, 159, 722.

Students in the Pilot Program were also expected to adopt the Policy's ideological view of racism. For example, one slide gave this one-way definition of racism: "The marginalization and/or oppression of people of color based on a socially constructed racial hierarchy that privileges white people." R.29–30, 163, 760. According to another slide, members of the racial majority who claim to have been discriminated against by members of a racial minority—often called reverse racism—are themselves engaging in "Veiled Racism." R.165, 762.

"Veiled Racism" also appears on a pyramid diagram the Pilot Program uses to show that "[r]acism is not just the big things," it is "the little things, too," and that "inaction toward racism can uphold a racist system." R.32–33, 165, 762. The pyramid labels "Colorblindness," "Remaining Apolitical," using phrases like, "Politics doesn't affect me," and "It doesn't matter who you vote for," and taking certain positions on political issues like immigration and school funding as forms of racism that lay the foundation for and "uphold" more serious forms of racism like "Genocide" and "Violence" up the pyramid. R.32–33, 165, 762.

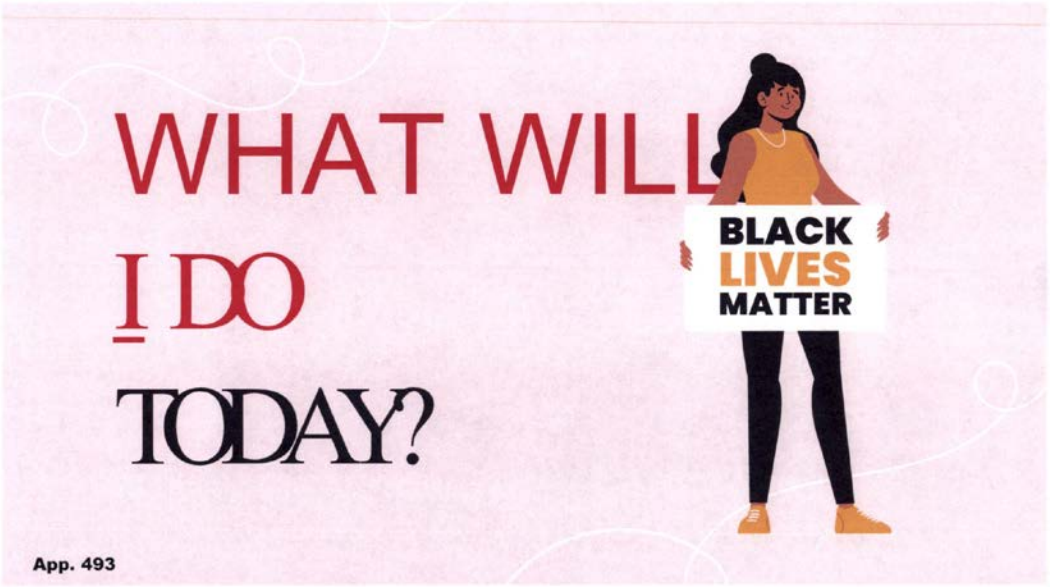
Finally, the Pilot Program's presentation materials repeatedly tell students they're expected to change the way they look, think, speak, and act to comply with the Policy. One slide showing a girl holding a rainbow flag asks how students can "make a space that uplifts [all] communities to fight against racism and [bias]," adding that many of

the "ways to promote equity . . . require you to be a person who believes in Anti-Racism and Anti-Bias practices." R.755.

R.755. On the next slide, students are told to "brainstorm" what they "can do TODAY to promote equity." R.756.

Other slides told students "we MUST be anti-racist, instead of simply NOT racist," R.166, 763, and that statements like, "I treat others with respect, and that is enough," are merely "Not Racist," whereas statements like, "My school has inequitable systems that disadvantage[] the students of color," are "Anti-Racist." R.170, 770.

Near the end of the Pilot Program, the slides showed students an image of a woman holding a "Black Lives Matter" sign asking students to answer, "What will I do today?" R.175, 801.



R.175, 801.

The Pilot Program culminated by having students create an anti-racism "Vision Statement," identifying specific ways they would change how they "look," "think," "sound," and "act" to be "more anti-racist." R.46, 174–77, 789–803. Then students were to use language from their new mission statement to complete the following sentences: "Today I will help our community . . ."

- "look anti-racist by"
- "sound anti-racist by"
- "think anti-racist by" and
- "act anti-racist by"

R.177, 803.

D. Resources and reports designed to ensure Policy enforcement confirm widespread implementation

The School Defendants produced annual reports documenting progress toward systemwide implementation. R.24, 38, 86–126, 937–63. In their November 2020 report, Defendant Haas shared that he was proud of the "students, employees, families," and school officials who had committed to "doing and overseeing the work it takes to transform our Anti-Racism Policy from words on paper to a life of its own in our hearts, minds and actions." R.88. Haas was "proud and humbled that [he] was [there] when [they] started this work, and [he] promise[d] to stay with it." R.89.

The November 2020 report aimed to provide "a status update about the numerous regulations outlined in the Anti-Racism Policy," taking a "qualitative approach" to assess their "first full year of implementation." R.91. To take a few examples, the report described changes to school disciplinary policies, R.101–02, the creation of an "Anti-Racist Vetting Tool" and a "Culturally Responsive and Anti-Racist Curriculum Assessment Tool," R.106, ongoing efforts to develop "an anti-racism curriculum specifically in K–12 social studies and secondary English/language arts," R.106, *accord* R.119, and the development of new materials that were being used in three history classes, R.109, and past and ongoing "division-wide" staff trainings and books studies using *Courageous Conversations about Race*, R.110–11.

The "Anti-Racist Vetting Tool" described in the report was used "to vet all curriculum units for Social Studies in Albemarle County." R.167, 312. Among several goals, the tool aimed to help teachers transform their curriculum from one in which "[l]earning and teaching about social studies appear to be ideologically neutral acts," to one in which "[s]tudents reflect on and identify ways in which learning and teaching about social studies are inherently ideological acts." R.315.

The November 2020 report explained how school officials had drafted an "ELA Equity Toolkit to support secondary ELA educators." R.106, 179–87 (excerpts of Toolkit), 806–26 (entire Toolkit); *accord* R.36–37. Targeting "6–12 ELA teachers, librarians, interventionists, school administrators, and others," R.180, the Toolkit told staff to "Expose Whiteness" in their "commonly taught texts" and to explore "environments where silence about racism is recognized as a form of complicity," R.183–84; *accord* R.37.

To that end, the Toolkit relied on a "common text" entitled *Letting Go of Literary Whiteness: Antiracist Literature Instruction for White Students*. R.36–37, 184–85. As the subtitle implies, *Literary Whiteness* teaches teachers that "all literature curriculum is racialized," and that "teaching about race or racism through literature study is not optional; there is no way to remain neutral." R.37, 973. The book instructs teachers to focus on students' racial identity, use literature as a means to require "considering one's own racial identity," R.977, "help students

work through the shame, guilt, and confusion that often go along with racial identity work," R.987, and tie "learning goals and even grades to racial literacy growth," R.982; *see* R.184 (citing R.982).

Like the November 2020 report, the 2020–2021 report described additional progress toward "full implementation of the Anti-Racism Policy" during the "2020–2021 school year," the "second year of implementation" of the Policy. R.938. Defendant Haas again included a note celebrating the "life-changing" nature of the Policy. R.937. And the report includes summaries and updates on 15 different "Key Project[s]" different teams tasked with implementing different aspects of the Policy had been working on during the previous school year. R.940–58.

E. Policy implementation negatively impacts Plaintiff students and parents

Plaintiffs Carlos and Tatiana Ibañez immigrated to the United States from Panama to pursue their education. R.10, 1063–70. "[I]n search of a better life for their family," they settled in Albemarle County, and "[t]hrough hard work and dedication, they built a successful business and successful careers." R.10. As part of their Catholic faith, they believe that "each person is made in the image of God" and must be treated "with dignity, love, and care" regardless of the "person's race, color, or creed." R.16. They have instilled those beliefs in their children, R.I. and V.I. R.11. As the School Defendants have implemented the Policy, however, R.I. and V.I. have "received

classroom instruction in several classes that focuses on race and identity through an 'anti-racism' lens"—instruction that contradicts Carlos and Tatiana's teaching. R.11, 38–42.

For example, "V.I. was shown a video as part of classroom instruction" that suggested to her that "people of color could not live in big houses." R.40. She understood the video as "instruct[ing] her that her achievement in life will turn on her racial background, not her hard work." *Id.* On a separate occasion, V.I. was shown another video that she and her parents understood to "denigrate[] her Catholic faith" by associating Catholic imagery with a father's refusal to affirm his son's homosexual lifestyle. R.1067; *see* R.829 ("Bibi" video). V.I.'s teacher "dismissed [Carlos's] concerns" when he raised them with her. R.1067.

Plaintiff Melissa Riley had a similar experience. R.15–16, 35, R.1090–98. Her son, L.R., has a mixed racial heritage: Native American and white on his mother's side, and black on his father's. R.15, 1092. When Melissa learned about the Policy, "she was concerned" about how it "instruct[ed] L.R. and his classmates to focus on his skin color," particularly "in a classroom with mostly white students." R.35. Like Carlos, Melissa "spoke with her son's teacher" about her concerns. *Id.* L.R.'s teacher responded "that the school planned to create a 'safe space' for students of color separate from white students" during the time when the Policy's materials where presented. *Id.* Melissa "observed that this proposed action sounded like segregation." *Id.*

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

Plaintiffs Matt and Marie Mierzejewski have one son, P.M., who experienced the Policy's implementation, but they chose to withdraw their younger children from Albemarle County schools before they could be fully exposed to the Policy. R.12, 41, 1071–76. Since the School Board began implementing the Policy, "P.M. has experienced increased hostility from other students because of his Catholic faith." R.40, 1034, 1075–76. When the Mierzejewskis raised their concerns about the bullying and the Anti-Racism Policy instruction that Christianity is part of the "dominant" culture that should be dismantled, the school's principal "said that the school would need to investigate P.M. for what *he* did to trigger such a response." R.1076 (emphasis added).

By the time they filed this lawsuit, other Plaintiff parents had withdrawn or were considering withdrawing their children from Albemarle County public schools because of their own concerns about the Policy's implementation. R.12–14.

SUMMARY OF ARGUMENT

This Court should reverse the trial court's dismissal and remand with instructions to enter a preliminary injunction. First, the trial court erred in holding Plaintiffs lack standing. The Anti-Racism Policy is being implemented in every school in the County, including Plaintiffs' children's schools. And Plaintiffs have alleged specific harm they have suffered and will continue to suffer due to the Policy's implementation. That satisfies their standing to challenge it.

Second, the trial court's conclusion that Article I, Sections 11 and 12, are not self-executing is contrary to Virginia Supreme Court precedent which holds that constitutional provisions in the Bill of Rights are generally self-executing. That is decisive. Moreover, our Supreme Court also has said that provisions framed as prohibitions that state a clear rule are self-executing, even outside the Bill of Rights. The relevant provisions here are in the Bill of Rights, stated as prohibitions, and announce clear rules.

Third and relatedly, Virginia Code Section 1-240.1, which guarantees parents' fundamental rights, codifies constitutional and common-law causes of action to vindicate those rights. So the trial court erred in ruling Plaintiff parents had no parental-rights cause of action.

Finally, rather than dismissing this lawsuit, the trial court should have preliminarily enjoined the Policy because Plaintiffs are likely to succeed. This Court should reverse and grant a preliminary injunction.

STANDARD OF REVIEW

This Court "review[s] a circuit court's judgment sustaining a demurrer de novo." *Eubank v. Thomas*, 300 Va. 201, 206, 861 S.E.2d 397, 401 (2021). It "accept[s] as true all factual allegations expressly pleaded in the complaint" and does the same for reasonable "unstated inferences" from the facts alleged "in the light most favorable to the claimant." *Doe ex rel. Doe v. Baker*, 299 Va. 628, 641, 857 S.E.2d 573, 581 (2021) (cleaned up). The Court does "not evaluate the merits of the allegations, but only whether the factual allegations sufficiently plead a cause of action." *Eubank*, 300 Va. at 206, 861 S.E.2d at 401. And where, as here, the circuit court grants a motion craving oyer, it "may properly consider the facts alleged as amplified by any written documents added to the record as a result of the motion." *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 276 Va. 1, 5, 661 S.E.2d 801, 803 (2008).

"[T]he party asserting a plea in bar bears the burden of production and persuasion." *Cal. Condo. Ass'n v. Peterson*, 869 S.E.2d 893, 896 n.4 (Va. 2022). Where, as here, the circuit court "takes no evidence on the plea in bar," 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).[5] And the standard of review is "functionally de novo." *Id.* at 547, 855 S.E.2d at 865 (cleaned up).

[5] *Accord Weichert Co. of Va. v. First Com. Bank*, 246 Va. 108, 108 & n.*, 431 S.E.2d 308, 309 & n.* (1993) (relying "solely on the pleadings" because "no evidence was taken" on plea in bar challenging standing).

Finally, while whether to grant an injunction is "discretionary," a court "abuses its discretion," when its refusal is "based on erroneous legal conclusions." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18, 822 S.E.2d 358, 367 (2019) (cleaned up). And a "court by definition abuses its discretion when it makes an error of law." *Porter v. Commonwealth*, 276 Va. 203, 260, 661 S.E.2d 415, 445 (2008) (cleaned up).

ARGUMENT

I. Plaintiffs have alleged a sufficient interest in the Policy's implementation to give them standing to challenge it.

A. Under Virginia law, Plaintiffs have alleged enough of an interest to ensure a fully adversarial process and proper issue development.

In Virginia, "[s]tanding concerns itself with the characteristics of the individuals who file suit and their interest in the subject matter of the case." *Howell v. McAuliffe*, 292 Va. 320, 330, 788 S.E.2d 706, 712 (2016). "Broadly speaking, standing can be established if a party *alleges* he or she has a 'legal interest' that has been harmed by another's actions." *Id.* (emphasis added) (cleaned up).[6]

[6] Because the trial court resolved the standing issue without taking any evidence on the School Defendants' plea in bar, this Court's review is limited to the pleadings, and Plaintiffs' complaint allegations must be taken as true. *Plofchan*, 299 Va. at 547–48, 855 S.E.2d at 865; *Weichert*, 246 Va. at 108 & n.*, 431 S.E.2d at 309 & n.*. Accordingly, in support of their standing arguments, Plaintiffs rely only on the allegations in their complaint and the evidence attached to it, R.4–191, including the more complete versions of Exhibits 2, 4, 5, 7, 8, and 9 produced in response to Defendants' motion craving oyer, R.312–18, 322–35, 336–63, 405–637, 640–805, 806–26.

To decide whether plaintiffs have standing, Virginia courts ask, "whether [they have] a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 154, 726 S.E.2d 264, 272 (2012) (cleaned up). "Thus, a party claiming standing must demonstrate a personal stake in the outcome of the controversy." *Goldman v. Landsidle*, 262 Va. 364, 371, 552 S.E.2d 67, 71 (2001). And the stake must be strong enough "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Cupp v. Bd. of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984) (cleaned up).

Plaintiffs have sufficiently alleged that much and more. *All* the Plaintiff parents and students have alleged the Policy's implementation in their schools has directly affected them. The Ibañezes' daughter, V.I., and Melissa Riley's son, L.R., both participated in the seventh-grade version of the anti-racism Pilot Program. R.29. The Ibañezes' son, R.I., "has received classroom instruction in several classes" that they object to because it "focuses on race and identity through an 'anti-racism' lens." R.11, 38–42. And the Mierzejewskis son, P.M., participated in the eighth-grade version of the Pilot Program until his parents withdrew him "[b]ecause of the racial discrimination in [the] program and the hostile environment it created." R.29, 35, 41.

The remaining Plaintiff parents—Erin and Daniel Taliaferro and Kemal and Margaret Gokturk—were considering withdrawing their four children—D.T., H.T., T.G., and N.G.—from Albemarle County schools when they filed this lawsuit based on similar concerns about the Policy's implementation. R.12–14, 41. The Taliaferros had pulled both of their older children out of Henley Middle School "during the 2020-21 school year largely because they were concerned about the Policy and its implementation through the 'anti-racist' curriculum," costing them "about $30,000 a year" for tuition at a private school. R.14. And the Gokturks were considering withdrawing their children even though they uprooted their family and "moved to Albemarle County precisely" so they could attend the highly rated public schools. R.13. Similarly, while the Mierzejewskis were hoping to keep P.M. at Western Albemarle High School, they withdrew their younger children from Albemarle County Public Schools because of the Policy's racial discrimination. R.12, 41.

Parents and students whose rights are sufficiently harmed by their school's policies that they would consider withdrawing and paying the substantial costs of private tuition or homeschooling have a strong enough "personal stake" in the outcome of a case challenging those policies "to assure that concrete adverseness which sharpens the presentation of [the] issues" to be litigated. *Cupp*, 227 Va. at 589, 318 S.E.2d at 411 (cleaned up).

And that's true even though D.T., H.T., T.G., and N.G. were still attending Albemarle County schools when they sued. *See Citizens for Clean Air v. Commonwealth ex rel. State Air Pollution Control Bd.*, 13 Va. App. 430, 435, 412 S.E.2d 715, 718 (1991) (a mere "prospect of a decline in property value" gave property owners standing to sue), *partially overruled on other grounds as stated in Pearsall v. Va. Racing Comm'n*, 26 Va. App. 376, 382, 494 S.E.2d 879, 882 (1998).[7]

Moreover, the Ibañezes, Rileys, and Mierzejewskis all alleged that their rights had been directly infringed by the Policy. R.11–12, 15–16, 29, 35, 38–42. Even under Article III, that would be enough. Plaintiffs "are school children and their parents, who are directly affected by the [Policy] and practices against which their complaints are directed." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). "These interests surely suffice to give the parties standing to complain." *Id.*; *see also Allen v. Wright*, 468 U.S. 737, 755 (1984) (the "stigmatizing injury often caused by racial discrimination" can be basis for standing); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 217 n.2 (3d Cir. 2003) ("[P]arents independently have standing to bring constitutional challenges to the conditions in their children's schools.").

[7] After the trial court dismissed their lawsuit—too late to be included in the record below—the Taliaferros, Gokturks, and Mierzejewskis felt compelled to withdraw all their children from Albemarle County Public Schools due to the Policy's continuing enforcement. The Ibañezes' two children, V.I. and R.I., and Melissa Riley's son, L.R., are all still enrolled in their schools and remain subject to the Policy.

"Whether a plaintiff chooses to endure or avoid the psychological harm he complains of, he feels its effects." *Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941, 950 (5th Cir. 2022). In *Mack*, the Fifth Circuit held that an attorney had standing to challenge prayers in a judge's courtroom even though "his decision not to appear before" the judge meant he "no longer [heard] the prayers." *Id.* at 949. The attorney said he "regularly is asked to take cases in [Judge] Mack's court, and he always declines." *Id.* "That decision," the Fifth Circuit reasoned, "is itself a confrontation with Mack's ceremony." *Id.* at 949–50. So too here for the decision by some Plaintiff parents to withdraw their children from Albemarle County Public Schools to avoid the constitutional harms caused by the Policy's implementation. "That decision," which has been costly for Plaintiffs who have felt forced to make it, "is itself a confrontation with" the challenged Policy. *Id.*

B. Plaintiffs also had standing to sue for declaratory and injunctive relief based on a record full of "present facts" showing the potential for future injury.

Under Virginia's declaratory judgment statute, "it must appear that there is an 'actual controversy' existing between the parties based upon an 'actual antagonistic assertion and denial of right.'" *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 98, 737 S.E.2d 1, 6 (2013) (quoting VA. CODE § 8.01-184). Plaintiffs made that showing here.

"The purpose of the declaratory judgment statutes is to provide a mechanism for resolving uncertainty in controversies over legal rights, without requiring one party to invade the asserted rights of another." *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 548, 650 S.E.2d 527, 531 (2007). Plaintiffs did not have to wait for their "claims and rights asserted [to] have fully matured" to file suit. *Bd. of Cnty. Supervisors. v. Hylton Enters., Inc.*, 216 Va. 582, 585, 221 S.E.2d 534, 537 (1976). A declaratory judgment proceeding "is intended to permit the declaration of rights *before* they mature," *before* all the "alleged wrongs have already been suffered." *Id.* (emphasis added); *accord Bd. of Supervisors v. Southland Corp.*, 224 Va. 514, 519–20, 297 S.E.2d 718, 720–21 (1982) (holding plaintiff had standing "simply by being compelled to go through [a] special exception *process*" even though that plaintiff had "neither alleged nor proved that it had ever applied for or been denied a special exception").

What is more, as explained in Part II, below, this is "a challenge to the constitutionality" of a government policy based on "self-executing provisions of the Virginia Constitution," and "such a request for declaratory judgment presents a justiciable controversy." *Daniels v. Mobley*, 285 Va. 402, 737 S.E.2d 895, 901 (2013). In these circumstances, only two things are required. First, the complaint must "allege actual *or potential* injury in fact based on 'present rather than future or speculative facts.'" *Lafferty*, 293 Va. at 361, 798 S.E.2d at 168 (emphasis

added) (quoting *Charlottesville Area Fitness*, 285 Va. at 98, 737 S.E.2d at 6). And second, the complaint must "seek a declaration of a specifically identified or actionable right" belonging to the plaintiff. *Id.* at 362, 798 S.E.2d at 168 (cleaned up). Plaintiffs have sufficiently alleged both here.

First, Plaintiffs filed a more-than-50-page complaint, R.4–59, containing dozens of specific factual allegations about how the School Defendants already had begun implementing and planned to continue implementing the Policy and its "anti-racist" curriculum in "all grades," in "multiple subject areas," and across all Albemarle County Public Schools, R.38–39. And Plaintiffs attached hundreds of pages of evidence showing how that implementation looks and affects teachers and students—and by extension their parents—in the classroom. R.60–191, 312–18, 322–35, 336–63, 405–637, 640–805, 806–26.

Second, Plaintiffs "assert[ed] specific adverse claims of right" in their complaint. *Lafferty*, 293 Va. at 362, 798 S.E.2d at 168 (cleaned up). And the School Defendants' repeated denials that the Policy's implementation violates Plaintiffs' rights only proves that this case *does* involve "actual antagonistic assertion[s] and denial[s] of right[s]." VA. CODE § 8.01-184.

C. As the School Defendants effectively conceded below, *Lafferty*'s narrow holding is distinguishable, and its reasoning bolsters Plaintiffs' standing arguments.

Below, the School Defendants relied almost exclusively on *Lafferty* to resist standing. R.250, 253, 1120–23, 1248–52. But *Lafferty*'s narrow holding is distinguishable, as the School Defendants effectively conceded in their briefing below. R.1248. Indeed, Lafferty's reasoning supports Plaintiffs' standing to assert their constitutional, statutory, and common-law claims for relief. *Lafferty*, 293 Va. at 361–62, 798 S.E.2d at 168–69.

The student plaintiff in *Lafferty* filed a declaratory judgment action challenging the Fairfax County School Board's decision to update its "non-discrimination and student code of conduct policies" to add "sexual orientation," "gender identity," and "gender expression" as protected categories. *Id.* at 358, 798 S.E.2d at 166. Rather than asserting that the changes had infringed on any of his rights, the student plaintiff argued the changes were "ultra vires and void ab initio" under two Virginia code sections and Dillon's Rule. *Id.* And while the student alleged general "fears that the policy *might* involve" further policy changes that might negatively affect him, it was "not clear what, if any, [such policy changes were] being implemented." *Id.* at 361, 98 S.E.2d at 168 (emphasis added). Under those unique circumstances, the Supreme Court issued a narrow holding: "While we *do not reach* the question of what must be pled to establish an actual controversy, the

injury pled here is insufficient because general distress over a general policy does not alone allege injury sufficient for standing, even in a declaratory judgment action." *Id.* at 361–62, 798 S.E.2d at 168.

Plaintiffs here have alleged far more than that, as the School Defendants conceded in their briefing 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 (emphasis added). As a result, *Lafferty*'s holding that such general objections are not enough is not controlling on the facts alleged here.

And *Lafferty*'s reasoning cements that conclusion. The *Lafferty* Court listed two reasons why the student plaintiff there did not have standing. 293 Va. at 361–62, 798 S.E.2d at 168–69. "First, the complaint fail[ed] to allege actual or potential injury in fact based on present rather than future or speculative facts." *Id.* at 361, 798 S.E.2d at 168 (cleaned up). That's because the student hadn't alleged any *present* facts showing whether or how the policy changes would be implemented. *Id.* Instead, his "distress" over the policy changes appeared to be due to the mere "existence of the policy." *Id.*

Second, the *Lafferty* Court reasoned that "the complaint fail[ed] to assert specific adverse claims of right" because "[n]one of the cited education statutes" the student invoked "provide[d] a private right of action." *Id.* at 362, 798 S.E.2d at 168 (cleaned up). Importantly, the Court made clear that, "[i]n cases of actual controversy, a declaratory

judgment action could challenge a school board policy when there is an antagonistic assertion and denial of right—whether that right be derived from statutes, common law, or constitutional law." *Id.* at 362, 798 S.E.2d at 168–69 (cleaned up). But there was no such assertion.

Contrast that with the facts alleged and claims asserted here. In their briefing below, Defendants did not deny Plaintiffs' allegation that, unlike the challenged policy changes in *Lafferty*, the "Policy [here] is being implemented throughout" Albemarle County. R.1249. Nor could they considering all the evidence Plaintiffs submitted.

After one full year of implementation, Defendants already had instigated enough changes across the school system to fill a 40-page report, R.86–126, championing progress they'd made in "transform[ing] [their] Anti-Racism Policy from words on paper to a life of its own" in the "hearts, minds, and actions" of those affected by it, R.88. By the time Plaintiffs filed their complaint more than a year later, they had even more evidence of implementation, including in some of their own classrooms through the Pilot Program three of them participated in at Henley. R.29–35, 147–77, 640–805.[8] So Defendants' concession is well taken: Plaintiffs here did "*not* attempt to solely make general objections to a general policy of the School Board." R.1248 (emphasis added).

[8] Because it is "clear from the record" that the Ibañezes and Rileys have standing to seek declaratory and injunctive relief, the Court "need not" decide whether the other Plaintiffs do, too. *Blanton v. Amelia Cnty.*, 261 Va. 55, 59 n.*, 540 S.E.2d 869, 871 n.* (2001).

Finally, unlike the plaintiff in *Lafferty*, Plaintiffs here *did* make an actual assertion of rights—rights "derived from statutes, common law, [and] constitutional law." 293 Va. at 362, 798 S.E.2d at 168–69. Defendants repeatedly have denied that they violated those rights. *E.g.*, R.1124 n.5, 1252–53. But at this stage, that only shows Plaintiffs have sufficiently alleged an "actual antagonistic assertion *and denial* of right," VA. CODE § 8.01-184 (emphasis added), giving them standing to seek declaratory and injunctive relief. This Court should reverse the trial court's judgment to the contrary.

II. The constitutional provisions under which these families' claims arise appear in the Virginia Bill of Rights and state a clear rule prohibiting government action, which makes them self-executing.

Plaintiffs' constitutional claims arise under Article 1, Sections 11 and 12, of the Virginia Constitution. *See* R.48–57. As relevant here, these sections prohibit the government from: depriving "life, liberty, or property without due process of law," VA. CONST. art. I, § 11; discriminating "upon the basis of religious conviction" or "race," *id.*; and "abridging the freedom of speech," *id.* § 12. The trial court ruled that these constitutional provisions are not self-executing. R.1373. Allowing that ruling to stand would mean that schools in Virginia could violate students' and parents' individual rights with impunity. With the Virginia Supreme Court's test properly applied, each provision here is self-executing, and this Court should reverse.

When a provision of the Virginia Constitution is self-executing, it waives sovereign immunity. *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 102, 662 S.E.2d 66, 71 (2008). A self-executing "provision is enforceable in a common law action." *Id.* at 106, 662 S.E.2d at 73. A constitutional provision is generally self-executing if it meets one of these conditions: (1) "it expressly so declares"; (2) it appears in the Bill of Rights; (3) it is "merely declaratory of common law"; (4) it "specifically prohibit[s] particular conduct"; or (5) it is "of a negative character." *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681, 324 S.E.2d 674, 676 (1985) (cleaned up).

The Supreme Court demonstrated how to apply this test in *Gray*. There, it considered three "separation of powers provisions." *See* 276 Va. at 105–06, 662 S.E.2d at 72–73. First, the Court considered Article I, Section 5, which requires each branch of government to "be separate and distinct." That provision "is contained in the Bill of Rights, and such constitutional provisions are generally considered to be self-executing." *Id.* at 105, 662 S.E.2d at 72. "Furthermore, no additional legislation is needed to carry into effect [its] clear mandate." *Id.* Thus, it is self-executing. *Id.*

All three provisions at issue here also appear in the Bill of Rights. So treating them as self-executing is consistent with *Gray*'s analysis, *see id.*, and with "[t]he prime object of the Bill of Rights," which "is to place the life, liberty, and property of the citizen beyond the control of legis-

lation," *Swift & Co. v. City of Newport News*, 105 Va. 108, 115, 52 S.E. 821, 824 (1906) (quoting *People ex re. Decatur & S.L. Ry. Co. v. McRoberts*, 62 Ill. 38, 41 (1871)). Treating these individual rights as self-executing insulates them from legislative control.

Second, *Gray* turned to Article III, Section 1, which does *not* appear in the Bill of Rights. It contains "the prohibition 'that none [of the departments can] exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time.'" *Gray*, 276 Va. at 105, 662 S.E.2d at 72–73 (alteration in original). It is thus "of a negative character and specifically prohibits certain conduct." *Id.* That renders it self-executing. *Id.*

Similarly here, each provision in this case "specifically prohibits certain conduct." *Id.* Article I, Section 11, prohibits deprivations of due process and discrimination based on race, religion, or other characteristics, and Section 12 prohibits "abridging the freedom of speech." Provisions like these, which are "of a negative character," have been "generally, if not universally, construed to be self-executing." *Id.* at 103, 662 S.E.2d at 71 (quoting *Robb*, 228 Va. at 681–82, 324 S.E.2d at 676); *see Draego v. City of Charlottesville*, No. 3:16-CV-00057, 2016 WL 6834025, at *22 (W.D. Va. Nov. 18, 2016) (ruling free-speech provision is self-executing based on this rationale).

Third, *Gray* considered Article IV, Section 1, which "is neither contained in the Bill of Rights nor cast in a negative character." *Gray*,

276 Va. at 105, 662 S.E.2d at 73. That provision vests the legislative power in the General Assembly. Its text "provide[s] a clear rule," because it "needs no further legislation to make it operative" and "provides a sufficient rule by which the duty imposed may be enforced." *Id.* at 105–06, 662 S.E.2d at 73. Finally, the Court remarked on the "anomaly" of holding "that a constitutional provision vesting the legislative power . . . requires further legislation to make it operative." *Id.* Thus it held that even this provision was self-executing, despite not meeting the first two factors it considered. *Id.*

Each constitutional provision in this case also "provide[s] a clear rule" that "needs no further legislation to make it operative." *Id.* at 105–06, 662 S.E.2d at 73. Contrast these with the provision at issue in *Robb*, which established competing policies of the Commonwealth to "utilize its natural resources" but "protect its atmosphere, lands, and waters from pollution." *See Robb*, 228 Va. at 676 & n.2, 324 S.E.2d at 681 (quoting VA. CONST. art. XI, § 1). By laying out competing policies, that provision "invites crucial questions of both substance and procedure." *Id.* at 676, 324 S.E.2d at 682. In fact, "the very next section" empowers the General Assembly to legislate "'[i]n furtherance of such policy.'" *Id.* at 677, 324 S.E.2d at 682 (quoting VA. CONST. art. XI, § 2).

The due-process, antidiscrimination, and free-speech provisions do not lay out competing policy goals that "beg statutory definition." *Id.* And far from extending the General Assembly's power, they act as

limitations on it. These three provisions fall within the "well recognized" rule that, as long as "the nature and extent of the right conferred by a constitutional provision is fixed by the provision itself, . . . and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing." *City of Newport News v. Woodward*, 104 Va. 58, 61, 51 S.E. 193, 194 (1905).

The clarity of the rule established by these three provisions is demonstrated by the many decisions adjudicating the merits of claims and defenses under them. Courts have applied the due-process provision, *see, e.g.*, *L.F. v. Breit*, 285 Va. 163, 180–84, 736 S.E.2d 711, 720–22 (2013) (substantive due process); *Lively v. Smith*, 72 Va. App. 429, 439–46, 848 S.E.2d 620, 625–28 (2020) (procedural due process); the antidiscrimination provision, *see, e.g.*, *Wilkins v. West*, 264 Va. 447, 466–80, 571 S.E.2d 100, 111–19 (2002) (race discrimination); *Remington v. Commonwealth*, 262 Va. 333, 345–49, 551 S.E.2d 620, 628–30 (2001) (religious discrimination); and the free-speech provision, *see, e.g.*, *Padula-Wilson v. Landry*, 298 Va. 565, 579, 841 S.E.2d 864, 871–72 (2020) (defense to defamation); *Globe Newspaper Co. v. Commonwealth*, 264 Va. 622, 627–30, 570 S.E.2d 809, 811–13 (2002) (newspaper access to DNA evidence); *Adams Outdoor Advert. v. City of Newport News*, 236 Va. 370, 372, 381–88, 373 S.E.2d 917, 918, 922–27 (1988) (content-based sign ordinance). As these and other decisions show, each of these

provisions "provides a sufficient rule by which the duty imposed may be enforced." *Gray*, 276 Va. at 106, 662 S.E.2d at 73. Therefore, each is self-executing.

Given the variety of other provisions the Supreme Court has held are self-executing, any other conclusion would be an "anomaly." *See id.* (separation of powers); *see also, e.g.*, *Swift*, 105 Va. at 114–15, 52 S.E. at 824 (just compensation for taking of private property); *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137–39, 704 S.E.2d 365, 370–72 (2011) ("right to uniform government"). A decision that the due-process, antidiscrimination, and free-speech provisions are not self-executing would also be out-of-step with decisions interpreting other constitutions. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (noting that "the provisions of the Bill of Rights, are self-executing"); *Bauserman v. Unemployment Ins. Agency*, — N.W.2d —, 2022 WL 2965921, at *14–15 (Mich. July 26, 2022) (same, due-process provision); *Godfrey v. State*, 898 N.W.2d 844, 871–72 (Iowa 2017) (same, due-process and equal-protection provisions); *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 413 S.E.2d 276, 290 (N.C. 1992) (same, free-speech provision).

Because neither the School Defendants, *see* R.1113–19, nor the trial court, *see* R.1436:13–20, correctly applied the test articulated in *Gray*, this Court should reverse and remand.

III. The statute protecting parents' fundamental rights codifies preexisting causes of action.

The trial court dismissed Plaintiffs' parental-rights claim based on its view that "the statute on which [Plaintiffs] rely does not create a private cause of action." R.1373; *see* VA. CODE § 1-240.1 ("A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child."). But this claim does not turn on whether Section 1-240.1 creates a private cause of action. That statute simply codifies parents' preexisting constitutional and common-law rights. Because Plaintiffs have stated a constitutional and common-law parental-rights claim, this Court should reverse the judgment partially sustaining the demurrer.

Virginia's due-process provision guarantees parents a fundamental liberty interest "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925); *see Breit*, 285 Va. at 182 & n.7, 736 S.E.2d at 721. And as already discussed, *see supra,* Part II, this provision is self-executing.

Regarding parental rights, that conclusion is strengthened by the fact that constitutional provisions "merely declaratory of common law are usually considered self-executing." *Robb*, 228 Va. at 681, 324 S.E.2d at 676. As detailed below, parents' constitutional rights are declaratory of their common-law rights. Because the due-process provision is self-executing, and because that provision protects parents' fundamental

rights, "sovereign immunity does not preclude declaratory and injunctive relief claims based on" those rights. *DiGiacinto*, 281 Va. at 137, 704 S.E.2d at 371. So, Plaintiffs can bring a constitutional cause of action to vindicate their parental rights.

As mentioned, the constitutional protection for parents' right to direct their children's education declares preexisting common-law rights. *Cf., e.g.*, *McClannan v. Chaplain*, 136 Va. 1, 12–15, 116 S.E. 495, 497–98 (1923) (demonstrating historical analysis for determining whether provision is "declaratory of the common law"). Blackstone described parents' duty to educate their children as "of far the greatest importance of any." 1 William Blackstone, *Commentaries* *438. And since Blackstone, courts considering parents' duty to educate their children have also framed it as a liberty—a right to do so without government interference. *E.g.*, *Rulison v. Post*, 79 Ill. 567, 573 (1875) ("all free countries," and even most "despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent"). Applying this right, courts have empowered parents to obtain judicial relief from actions by school officials. *See, e.g.*, *State ex rel. Sheibley v. Sch. Dist. No. 1 of Dixon Cnty.*, 48 N.W. 393, 395 (Neb. 1891) ("[N]o pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch.").

When considering other aspects of parents' common-law rights, the Virginia Supreme Court has said that the existence of these rights implies a judicial remedy for their violation. For example, when recognizing "tortious interference with parental rights as a cause of action," the Court "grounded [that] decision on the recognition by the English common law, as well as various courts throughout the United States, of 'the essential value of protecting a parent's right to form a relationship with his or her child.'" *Padula-Wilson*, 298 Va. at 574, 841 S.E.2d at 869 (quoting *Wyatt v. McDermott*, 283 Va. 685, 692, 725 S.E.2d 555, 558 (2012)). The existence of that right, the Court said, "necessarily implies a cause of action for interference with that right." *Wyatt*, 283 Va. at 693, 725 S.E.2d at 558–59.

That rationale means that parents also have a common-law cause of action for interference with their right to direct their children's education. "To hold otherwise . . . would be to recognize 'a right without a remedy—a thing unknown to the law.'" *Id.*, 725 S.E.2d at 559 (quoting *Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430, 439 (1876)).

Section 1-240.1 bolsters this analysis. The General Assembly passed a note to that section, providing "[t]hat it is the expressed intent of the General Assembly that this act codify the opinion of the Supreme Court of Virginia in *L.F. v. Breit*, issued on January 10, 2013, as it relates to parental rights." VA. CODE § 1-240.1, note. And the Supreme Court has described statutes like this one as "desirable and valuable for

the purpose of defining the right" protected by a constitutional provision "and aiding in its enforcement." *Swift*, 105 Va. at 115, 52 S.E. at 824. Nothing in that statute implies that the General Assembly, by recognizing these preexisting rights, intended to abrogate parents' constitutional and common-law causes of action to enforce them. Indeed, abrogating a constitutional cause of action is beyond its power. *See id.* ("[A]ll statutes . . . inconsistent with [a Constitution's] provisions, are nullified by such constitutional prohibition.").

That Section 1-240.1 ratifies preexisting constitutional and common-law rights distinguishes it from other statutes under which Virginia courts have not allowed private causes of action. *E.g.*, *Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 787 S.E.2d 855 (2016). There, "[t]he claimed right . . . d[id] not implicate any protected right under the Constitution of Virginia, nor d[id] the [plaintiffs] assert any historically recognized common-law right of action" that allowed them to sue. *Id.* at 315, 787 S.E.2d at 857. Here, by contrast, Plaintiffs assert a right protected by the Virginia Constitution and common law, and protected prior to Section 1-240.1's enactment.

Virginia's parental-rights statute, Section 1-240.1, gives legislative imprimatur to preexisting constitutional and common-law rights. And parents can bring causes of action to enforce those rights. The trial court was wrong to partially sustain the demurrer.

IV. The trial court should have preliminarily enjoined the Policy, which is likely unconstitutional.

Because Plaintiffs have private causes of action to vindicate their rights they assert, and standing to bring those causes of action, the trial court erred by failing to rule on their preliminary-injunction motion. R.1373–76. Its failure "was predicated upon" its erroneous legal conclusions regarding the plea in bar and demurrer, so this Court should reverse. *See May*, 297 Va. at 18–19, 822 S.E.2d at 367–68 (reversing denial of temporary injunction "predicated upon" legal errors).[9]

A temporary or preliminary injunction "allows a court to preserve the status quo between the parties while litigation is ongoing." *Id.* at 18, 822 S.E.2d at 367. The Supreme Court "has not definitively delineated the factors that guide granting the equitable relief of a temporary injunction." *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274, at *5 (Va. Aug. 30, 2021) (unpub.). But it recently affirmed the grant of a temporary injunction applying the federal, four-factored test: (1) "likelihood of success"; (2) whether a plaintiff "would suffer irreparable harm absent an injunction"; (3) "the balance of the equities"; and, (4) "the public interest." *Id.* at *1, 4; *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[9] "Temporary injunctions are also called preliminary, ancillary, or interlocutory injunctions." 2 *Friend's Virginia Pleading & Practice* § 33.02[1][b][ii] (2021).

Granting Plaintiffs' preliminary-injunction motion would preserve the status quo by pressing pause on in-classroom practices implemented under the Policy. *See* R.268–74. And Plaintiffs' claims satisfy the four factors above. So this Court should remand with instructions to enjoin the Policy. *Cf. Patterson's Ex'rs v. Patterson*, 144 Va. 113, 124, 131 S.E. 217, 220 (1926) ("The facts before us being such as to enable the court to attain the ends of justice, we will enter here the decree which the circuit court should have entered . . . .").

A. Plaintiffs are likely to prevail on the merits.

Plaintiffs have "a potentially successful claim" against the Policy for its racial and religious discrimination, its free-speech violations, and its infringement of parents' fundamental rights. *Cross*, 2021 WL 9276274, at *8.

1. The Policy overtly discriminates based on race and religion.

The Virginia Constitution provides that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." VA. CONST. art. I, § 11. This provision is "congruent with the federal equal protection clause," and courts apply "the standards and nomenclature developed under" that clause. *Wilkins*, 264 Va. at 467, 571 S.E.2d at 111.

Under this provision, racial classifications receive strict scrutiny. *Mahan v. Nat'l Conservative Pol. Action Comm.*, 227 Va. 330, 336, 315

S.E.2d 829, 832 (1984). That means "*all* racial classifications," and by extension, all religious classifications. *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). Even "benign" or "remedial" classifications are "immediately suspect" and "presumptively invalid"—"upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 642–44 (1993) (cleaned up).

The School Defendants have implemented the Policy to treat students differently based on race and religion. Classroom activities require students to divide themselves into "dominant" and "subordinate" groups. *See* R.704–12. Students are branded "subordinate" if they are racial or religious minorities. R.710. Students are told to "Break the Box" of the dominant group, which includes white Christians. R.712; *see* R.319 (requiring teachers and students to "dismantle structures and practices that intentionally and/or unintentionally disadvantage historically marginalized people"). And white students who promote "[c]olorblindness" or deny their "[w]hite [p]rivilege" are guilty of "racism." *See* R.762. Even the Policy's definitions of "racism" and "antiracism" classify students based on race. *See, e.g.*, R.19–21. Explicit racial and religious classifications are woven throughout the Policy's in-classroom implementation.

The Policy singles out white, Christian students as part of the "dominant" group. R.707–12. And it expects them—but not members of

other racial or religious groups—"to dismantle oppression from which [they] benefit[] ." R.320; *see, e.g.*, R.722 (teaching that white students have "privilege" and minority students do not); R.769 (defining "anti-racism" as working against "white dominant culture"). By directing comments like these towards students of only one race and religion, the Policy "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and is therefore unconstitutional. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

Because the Policy discriminates based on race and religion, it receives strict scrutiny. The School Defendants must show the discrimination is "a necessary element for achieving a compelling governmental interest." *Mahan*, 227 Va. at 336, 315 S.E.2d at 832. The only interest they have ever asserted, though, is a generalized one: "[a]ddressing racism." R.1226; *see, e.g.*, R.307. And such "assurances of good intention cannot suffice" to justify the Policy's discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The School Defendants must prove how the Policy's discriminatory implementation actually "remed[ies] the effects of past intentional discrimination." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). And they have not and cannot make that showing.

Equally fatal, the School Defendants have failed to show narrow tailoring, which in this context requires showing they "considered methods other than explicit racial classifications to achieve their stated

goals." *Id.* at 735. They have not explained which, if any, other methods they considered before adopting the Policy's racial and religious classifications. Accordingly, the Policy fails strict scrutiny.

2. The Policy compels speech from one viewpoint.

The Virginia Supreme Court generally interprets the free-speech provision of the Virginia Constitution, Article I, Section 12, in line with the federal First Amendment. *See Elliott v. Commonwealth*, 267 Va. 464, 473–74, 593 S.E.2d 263, 269 (2004). Thus, Virginia's protections include "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). And "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject," it commits a "blatant" violation of free-speech rights. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The Policy violates these basic freedoms.

A compelled-speech claim has three elements: (1) speech, (2) the government compels, (3) to which the speaker objects. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995). Although schools have some latitude, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Even schools must not "require[] affirmation of a belief and an attitude of mind." *W.V. State Bd. of Educ. v. Barnette*, 319

U.S. 624, 633 (1943). The Policy here does just that by forcing students to affirm the School Defendants' political ideology, while threatening punishment for noncompliance. *See id.* at 629, 633; *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005) (holding school engaged in compulsion if students punished for not answering survey questions).

The School Defendants compel students "to declare a belief" in their political ideology. *Barnette*, 319 U.S. at 631. Anyone who disagrees with the Policy's ideology is deemed guilty of "racism," *see* R.762—the very thing the Policy seeks to eliminate and punish, *see* R.308, 310, 379–80, 1035. Students were told, unless they are "making anti-racist choices," they "uphold aspects of white supremacy." R.769. And students were required to create a vision statement explaining how they would change how they "look," "think," "sound," and "act" to be more "anti-racist." R.802–03. Students could not even avoid the Policy's compulsion through silent disagreement because "silence about racism is recognized as a form of complicity," R.287, 811, and "Remaining Apolitical" is a form of racism, R.762.

Because the Policy requires "students to declare a belief," *Barnette*, 319 U.S. at 631, this Court must determine whether the School Defendants' "countervailing interest is sufficiently compelling," *Wooley*, 430 U.S. at 716. The only interest the School Defendants have ever put forward is their goal "to eliminate racism in the division."

R.319. Laudable as that goal is, the School Defendants' interest in disseminating their politically charged and discriminatory "anti-racism" viewpoint "cannot outweigh" students' "right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717.

Because the Policy compels students to express the School Defendants' ideological viewpoint, Plaintiffs are likely to show that it violates their free-speech rights.

3. The Policy violates parents' fundamental right to direct their children's education and upbringing.

As established in Part III, parents have a constitutional and common-law cause of action, ratified by the General Assembly in code Section 1.240-1, to enforce their right to direct their children's education and upbringing. Plaintiffs are likely to succeed on this claim.

Parents' fundamental rights include the right to set limits on what a public school could force their children to do in the classroom. At common law, parents had the right to make decisions about how a public school would educate their children. *See, e.g.*, *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1040, 1044 (Neb. 1914) (ordering public school to reinstate child it had expelled for her father's refusal to allow her participation in "domestic science" class); *see also* Eric A. DeGroff, *Parental Rights & Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L & Educ. 83, 112–16 (2009) (tracing history of parental rights in American common law). The Due Process Clause, which the

Virginia Constitution echoes, generally protects "privileges long recognized at common law," including the right "to marry, establish a home and bring up children," and "to worship God according to the dictates of [one's] own conscience." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.").

Therefore, the U.S. and Virginia Constitutions protect "the right to make decisions about the education of one's children." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022); *accord Breit*, 285 Va. at 182 & n.7, 736 S.E.2d at 721. And when the government, out of a "desire . . . to foster a homogenous people," interferes with this parental right, it violates the constitution. *Meyer*, 262 U.S. at 402.

The Policy impermissibly seeks "to foster a homogenous people," namely, a student body that uniformly affirms its political ideology. It detailed an ideological definition for the term "anti-racism." *See, e.g.*, R.763, 767, 769, 770, 1021. Then it required students to pledge to "look," "think," "sound," and "act" in accordance with that "anti-racism" ideology. *See* R.802–03. And it told parents that, if they wanted their children to remain in Albemarle County schools, they had no choice, because the Policy "is going to be woven through in all of their classes."

R.841. Most concerning, the Policy instructed students not to share details about its implementation with their parents—so parents wouldn't know their children were being racially segregated and targeted. R.646, 656, 686, 694.

Because the Policy "impinges on fundamental rights," it must undergo a "balancing process"—one which it does not survive. *Yoder*, 406 U.S. at 214. Compare it with the compulsory-attendance law in *Yoder*, which the Court invalidated as applied to Amish teenagers, because it prevented no "harm to the physical or mental health of the child or to the public safety, peace, order or welfare." *Id.* at 230. The School Defendants have never suggested that the Policy prevents harms like those. *See, e.g.*, R.61. And any interest it might assert in promoting ideological homogeneity among students, *see, e.g.*, R.762–70 (outlining Policy's ideology); R.801–03 (requiring student affirmation), could not justify its actions under *Meyer*, 262 U.S. at 402–03.

"[T]he means adopted" to implement the Policy "exceed the limitations upon the power of the state and conflict with rights assured to plaintiff[s]." *Id.* at 402. Plaintiff parents are, therefore, likely to succeed on the merits of their parental-rights claim.

B. The balance of the equities favors temporarily enjoining the Policy.

Plaintiffs "would suffer"—indeed, are suffering—"irreparable harm without the injunction," and they have "no adequate remedy at law." *May*, 297 Va. at 17–18, 822 S.E.2d at 367. They have established multiple "likely constitutional violation[s]" in the Policy's implementation, which "satisfie[s]" the "irreparable harm factor." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc). And those violations are continuing, even as this lawsuit progresses through the courts. *See, e.g.*, R.1291, 1305 (showing ongoing Policy rollout shortly before trial court's hearing).

Finally, "the balance of the equities favors preliminary relief because" the government "is in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Leaders of a Beautiful Struggle*, 2 F.4th at 346 (citation omitted). And "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,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that, on October 27, 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 contains 12,219 words according to Microsoft Word for Microsoft 365's word-count function and excluding the cover page, table of contents, table of authorities, signature blocks, certificate, and addendum, and that it complies with the length requirements set forth in Rules 5A:19(a) and 5A:20(h) because it does not exceed 12,219 words/pages, excluding the cover page, table of contents, table of authorities, signature blocks, certificate, and addendum.[10]

Appellants desire to present oral argument in this case.

/s/ Tyson C. Langhofer

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[10] 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.