SCV: Submitted on 12-05-2016 11:27:20 EST for filing on 12-05-2016

**IN THE SUPREME COURT OF VIRGINIA**

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**RECORD NO. 160777**

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**ANDREA LAFFERTY, JACK DOE, a minor, by and through JOHN DOE and JANE DOE, his parents and next friends, JOHN DOE, individually, and JANE DOE, individually**

***Plaintiffs-Petitioners,***

***v.***

**SCHOOL BOARD OF FAIRFAX COUNTY,**

***Defendant-Respondent.***

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# REPLY BRIEF OF PLAINTIFFS-PETITIONERS

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Daniel J. Schmid
VA. Bar No. 84415
Mary E. McAlister
VA. Bar No. 76057
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@LC.org

Mathew D. Staver*
Horatio G. Mihet*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (470) 875-1776
Fax: (407) 875-0770
Email: court@LC.org

*Attorneys for Plaintiffs-Appellants*

*Admitted *pro hac vice*

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## INTRODUCTION

Petitioners Jack Doe, John Doe, Jane Doe, and Andrea Lafferty challenge the Respondent Fairfax County School Board's ("Board") decision to adopt non-discrimination categories that are more stringent than, and therefore inconsistent with, Virginia law. The question is whether the circuit court should have granted declaratory and injunctive relief instead of dismissing the Complaint with prejudice, because the Board violated Virginia's long-standing Dillon Rule.

## ARGUMENT

### I. PETITIONER JACK DOE HAS ALLEGED A SUFFICIENT CONTROVERSEY TO OBTAIN DECLARATORY JUDGMENT FOR THE BOARD'S VIOLATION OF THE DILLON RULE.

The Board's position concerning the Declaratory Judgment Act can be boiled down to one sentence: "Jack Doe cannot maintain *any* challenge to *any* Board policy at *any* time unless the Board disciplines him under the challenged policy." (Brief of Appellee, "Opp.", at 10-28). The Board is wrong because the Declaratory Judgment Act allows for pre-enforcement challenges and the Board violated the Dillon Rule by adding the terms

"sexual orientation," "gender identity," and "gender expression" into its non-discrimination policy and student handbook. (Appendix, "App." at 2-3 ¶¶ 3-8). Such actions are void *ab initio*.

### A. Challenges Based Solely On The Dillon Rule May Be Brought Under The Declaratory Judgment Act.

The Board's contention that Petitioners seek a right of review they do not have is wrong. (Opp. at 18-20).[1] This Court has considered declaratory judgment challenges brought solely under the Dillon Rule, even when no statute specifically authorized such challenge. *See, e.g.*, *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 727 S.E.2d 40 (2012) (determining a declaratory judgment challenge brought solely under the Dillon Rule). Even though the statutory scheme did not authorize the challenge, *id.* at 574, 727 S.E.2d at 44, this Court authorized the challenge under the Declaratory Judgment Act and held the government's action violated the Dillon Rule. *Id.* at 584, 727 S.E.2d at 49.

[1] The Virginia School Board Association's amicus brief is based entirely upon this erroneous assertion. (Brief Amicus Curiae of Virginia School Board Association,

*Sinclair* is consistent with numerous other decisions determining claims brought under the Declaratory Judgment Act alleging violations of the Dillon Rule. *See, e.g.*, *Advanced Towing Co., LLC v. Fairfax Cnty. Bd. of Supervisors*, 280 Va. 187, 694 S.E.2d 621 (2010) (considering declaratory judgment challenge based solely on the allegations that the government's action violated the Dillon Rule); *Arlington Cnty. v. White*, 259 Va. 708, 528 S.E.2d 706 (2000) (same); *City of Virginia Beach v. Hay*, 258 Va. 217, 518 S.E.2d 314 (1999) (same); *Ticondergoga Farms, Inc. v. Cnty. of Loudoun*, 242 Va. 170, 409 S.E.2d 446 (1991) (same); *Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988) (same); *Tabler v. Bd. of Supervisors of Fairfax Cnty.*, 221 Va. 200, 269 S.E.2d 358 (1980) (same).

In none of these cases did this Court find a jurisdictional problem arising from the lack of a statute authorizing the challenges. The cases are legion that follow this same pattern. As *Sinclair* demonstrates, the lack of a statutory right of action

was explicitly mentioned in some cases. Despite the Board's protestations, this Court plainly considers and determines challenges brought under the Declaratory Judgment Act arising solely under the Dillon Rule.

This abundant precedent reveals that, even under the Board's authorities, Petitioners' challenge under the Declaratory Judgment Act is authorized. The Board relies principally on *Cherrie v. Va. Health Servs., Inc.*, 787 S.E.2d 855 (2016) to assert that Petitioners have no right of action to bring their claims. (Opp. at 19-22); (Amicus at 3-4). There, this Court noted that substantive law "determines whether a private claimant has a right to bring a judicial action." *Cherrie*, 787 S.E.2d at 857. Substantive law, this Court noted, arises from the Constitution of Virginia, statutory law, and common-law principles [2] recognized by the Virginia courts. *Id.*

Under this Court's decision in *Cherrie*, Petitioners' claims are authorized by two different

[2] Common law is defined as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." *Black's Law Dictionary* 313 (9th ed. 2009).

substantive law principles. First, as shown above, this Court's common law recognizes a right of action under the Dillon's Rule to seek declaratory relief. Even when there was no statutory right of action authorized, this Court still considered such challenges. Here, Va. Code § 22.1-78 requires that Board regulations "not [be] inconsistent with state statutes." When this Court's common law is coupled with this statutory command, a right of action is clearly authorized and may be brought by Jack Doe and the other Petitioners. Second, Jack Doe's challenge implicates constitutional rights to education and privacy. (App. at 188). Thus, even under the Board's construction of the right of action at issue here, Petitioners can bring their claims under the Declaratory Judgment Act.

The Board's contention that Va. Code § 22.1-87 provides the "exclusive" vehicle to obtain "review of any school board decision" is also wrong. (Opp. at 26-27 & n.6). That contention, which echoes the holding of the circuit court that Petitioners can only challenge Board policies under Section 22.1-87 and only within

thirty days of the decision (App. at 197-201), ignores the long-standing precedent of this Court authorizing declaratory judgment challenges under the Dillon Rule. While the Board claims it was incumbent on Petitioners to identify some substantive law authorizing such challenge (Opp. at 28) and that Petitioners cannot because it only arises under Section 22.1-87 (*id.*), such an assertion ignores the common law of this Court. Section 22.1-87 is not the sole mechanism to obtain review of the Board's actions, and Petitioners' challenge is thus proper under the Declaratory Judgment Act. (*See also* Opening Br. at 14-25).

**B. Jack Doe's Claims Establish An Actual Controversy Sufficient For Declaratory Relief.**

Jack Doe has alleged an actual controversy because he is currently suffering injuries and is immediately threatened with discipline.[3] The interpretation of the Board's non-discrimination policy and student handbook are proper subjects under the Declaratory Judgment Act.

[3] Petitioners John and Jane Doe, as next friends, have established an actual controversy by virtue of Jack Doe's alleged injuries. *See Estate of James v. Peyton*, 277 Va. 443, 454, 674 S.E.2d 864, 869 (2009).

### 1. Jack Doe has alleged sufficient injury to establish an actual controversy.

The Board contends that no actual controversy exists because mere disagreement with or distress over Board decisions is insufficient. (Opp. at 12-18). This contention mischaracterizes Jack Doe's claims and ignores substantial precedent from this Court.

First, Jack Doe alleged actual injuries resulting from the Board's actions. (App. at 15, ¶ 73) (the Board's actions have adversely impacted Jack Doe's ability to fully participate in and benefit from his constitutional right to education); (*id.* ¶ 75) (Jack Doe's right to privacy is injured by the Board's actions). Jack Doe is not merely suffering distress, but significant harm to his constitutionally guaranteed rights. The Board's contention (Opp. at 14-16), which mirrors the erroneous determination of the circuit court (App. at 199), that Jack Doe was merely distressed and anxious, and that such feelings were insufficient to establish an actual controversy ignores

his allegations of an ongoing injury sufficient to establish an actual controversy.

Jack Doe is also threatened with discipline under the Board's policy and student handbook. (App. at 14-15, ¶¶ 70, 72, 75) (discussing the threat of discipline under the policy and student handbook). This impending threat of discipline represents injury to Jack Doe sufficient to satisfy the actual controversy requirement for declaratory judgment. *See, e.g.*, *Cupp v. Bd. of Supervisors of Fairfax Cnty.*, 227 Va. 580, 593, 318 S.E.2d 407, 413 (1984) (threatened injuries are sufficient to create an actual controversy for purposes of declaratory judgment); *City of Fairfax v. Shanklin*, 205 Va. 227, 230, 135 S.E.2d 773, 776 (1964) (same).[4]

Jack Doe's claims are similar to those in *Cupp*. There, this Court determined a Dillon Rule challenge under the Declaratory Judgment Act based on the threat of injury to the plaintiffs as a result of the

[4] The Board concedes, as it must, that threatened injury is sufficient to create an actual controversy. (App. Br. at 16).

government's *ultra vires* actions. *Cupp*, 227 Va. at 593, 318 S.E.2d at 414. The plaintiffs' claims were based solely on a challenge to the government's claimed authority to impose certain restrictions on them. *Id.* at 591, 318 S.E.2d at 412. This Court noted that the controversy over the government's claimed authority "is a classic example of a case contemplated by the Declaratory Judgment Act." *Id.* at 592, 318 S.E.2d at 413.

In *Cupp*, as does the Board here, the government relied on *Shanklin* to suggest that no actual controversy existed and that any potential injury was completely speculative. *Id.*, 318 S.E.2d at 413. This Court squarely rejected that argument, holding that "although the Board is correct in stating that it had not yet imposed the restrictions and conditions on the Cupps, *it claimed it had the power to do so and this claim threatened the Cupps.* Thus, a controversy, within the contemplation of the Declaratory Judgment Act, existed." *Id.*, 318 S.E.2d at 414 (emphasis added). The

same is true here, as the Board claims it has the authority to impose such discipline.

The Board's reliance on *Shanklin* is similarly misplaced. (Opp. at 13-14). There, this Court noted that no actual controversy existed because the government had not made any decision affecting the plaintiffs. *Shanklin*, 205 Va. at 230-31, 135 S.E.2d at 776. Here, Petitioners challenged the Board's additions of new categories in conflict with Virginia law, in violation of Dillon's Rule. (App. 2, ¶ 7). While in *Shanklin* the taxpayers challenging the ordinance had suffered no injury under the government's actions, here Jack Doe has established that he is currently suffering injury and is threatened with discipline as a result of the Board's *ultra vires* actions. (*Id.* 14-15, ¶¶ 70-76). Jack Doe's allegations are not speculative or hypothetical, but concrete and actual. Jack Doe has alleged an actual controversy.

### 2. The interpretation of the Board's policy and student handbook are proper subjects in declaratory judgment actions.

Declaratory relief is a proper vehicle for the interpretation of government regulations. Va. Code § 8.01-184 ("Controversies involving the interpretation of . . . government regulations may be so determined."). Jack Doe's challenge to the Board's revision of its non-discrimination policy and student handbook may be properly determined by declaratory relief. As this Court has noted, challenges to government regulations — including those of the Board here — may be "tested not only by what has been done under its provisions, *but what may be done thereunder*." *Bd. of Supervisors of James City Cnty. v. Rowe*, 216 Va. 128, 132, 216 S.E.2d 199, 205 (1975) (emphasis added). As in *Rowe* and *Cupp*, the Board's claimed authority may be tested by declaratory judgment actions, and the circuit court's decision to the contrary was in error.

## II. PETITIONERS' ARGUMENTS FALL WITHIN THE REASONABLE SCOPE OF THE GRANTED ASSIGNMENTS OF ERROR.

The Board's contention that Petitioners' arguments are outside of the assignments of error is without merit. (Opp. at 6-8). Rule 5:17 provides that the assignments of error shall list "clearly and concisely and without extraneous argument, the specific errors upon which the party intends to rely." Rule 5:17(c)(1). Petitioners' Assignments of Error comply with this mandate, and the scope of the errors contemplates all arguments.

"A sufficient assignment of error puts before this Court an 'alleged error' committed by the court below. That alleged error defines the focus of what this Court can address on appeal." *Ergan v. Butler*, 290 Va. 62, 79, 772 S.E.2d 765, 775 (2015). "The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment." *Harlow v. Commonwealth*, 195 Va. 269, 271, 77 S.E.2d 851, 853

(1953). The assignments of error are intended to prevent an opposing party from having to "hunt through the record for every conceivable error." *First Nat'l Bank v. William R. Trigg Co.*, 106 Va. 327, 333, 56 S.E. 158, 163 (1907).

Here, Petitioners' assigned errors contemplate all arguments raised in their Opening Brief. First, Assignment of Error 5 clearly contemplates that the error arose from dismissing the complaint in its entirety *and* dismissing the complaint without granting leave to amend. The scope of an assigned error is derived not merely from its text, but also by a "reasonable reading" of what Petitioners intend to seek. *Kirby v. Commonwealth*, 264 Va. 440, 444, 570 S.E.2d 832, 834 (2002). Petitioners "laid their finger on the error" by noting that the error was preserved in an objection to the order stating that "the motion to dismiss is granted *and* this case is dismissed without leave to amend." (App. at 203-04) (emphasis added); (Opening Br. at 9). The objection and assigned error plainly demonstrate that Petitioners objected to the

dismissal and the failure to grant leave to amend, not merely the latter. The arguments presented thereunder are within the scope of the assigned error.

Assignment of Error 2, which states that the circuit court erred in finding no actual controversy between Petitioners and the Board, clearly contemplates the Dillon Rule claim. Indeed, that is the gravamen of Petitioners' Complaint and the source of the actual controversy. As the discussion of this Court's Dillon Rule and Declaratory Judgment Act precedent details, *see supra* Sections I.A and I.B, declaratory judgment actions challenging a government's authority to enact policies create actual controversies sufficient for declaratory relief. *See also Cupp v. Bd. of Supervisors of Fairfax Cnty.*, 227 Va. 580, 592, 318 S.E.2d 407, 413 (1984). A reasonable reading of Petitioners' assigned errors reveals that the Dillon Rule challenge is within the scope of Assignment of Error 2 because it is the source of the actual controversy at issue here.

Moreover, even if the Board's contention was correct — which it is not — this Court has considered

matters outside the scope of assigned errors in cases of precedential value and those involving the constitutional authority of government action. *See, e.g.*, *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 749 S.E.2d 176 (2013) (determining whether the actions of the government exceeded its authority, despite being arguably outside of the scope of any assignment of error); *Id.* at 324-25, 749 S.E.2d at 196-97 (McClanahan, J., concurring) (refusing to join majority opinion concerning certain parts which were outside the scope of the assignment of error); *Washington v. United Parcel Serv.*, 267 Va. 539, 593 S.E.2d 229 (2004) (expanding consideration of the assigned errors in a case involving a "matter of significant precedential value"); *Id.* at 547, 593 S.E.2d at 233 (Kennan, J., concurring) (discussing the majority's opinion exceeding the scope of the assignment of error).

This case involves a matter of significant precedential value (Opening Br. at 49-52) and a matter of the Board's constitutional authority to adopt the

amended policy and student handbook. Even if some arguments were arguably outside the scope of any assigned error, which they are not, this Court's precedent permits consideration of such arguments.

## III. PETITIONERS' FIFTH ASSIGNMENT OF ERROR IS PROPERLY BEFORE THE COURT.

The Board's argument that Assignment of Error 5 was not properly preserved (Opp. at 35) mischaracterizes the record and is incorrect. Petitioners plainly preserved the assigned error, and the circuit court explicitly stated as much. (App. at 199) (stating that Petitioners' objection to the dismissal with prejudice was noted); (*id.* at 204) (objecting to the order dismissing the case and failing to grant leave to amend). Petitioners preserved the assigned error, and the arguments arising thereunder should be considered by this Court.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the

circuit court and declare the Board's action void under the Dillon Rule.

Respectfully submitted,

Dated: December 2, 2016

/s/ Daniel J. Schmid
Daniel J. Schmid
VA. Bar No. 84415
Mary E. McAlister
VA. Bar No. 76057
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@LC.org

Mathew D. Staver*
Horatio G. Mihet*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (470) 875-1776
Fax: (407) 875-0770
Email: court@LC.org

*Attorneys for Plaintiffs-Appellants*

*Admitted *pro hac vice*

**CERTIFICATE PURSUANT TO RULE 5:26(h)**

As required by Rule 5:26, I hereby certify that foregoing Reply Brief contains 2,625 words, excluding those parts of the brief that are exempted under Rule 5:26(b), and that the foregoing Reply Brief is otherwise in compliance with Rule 5:26.

Dated: December 2, 2016

/s/ Daniel J. Schmid
Daniel J. Schmid
Va. Bar No. 84415
LIBERTY COUNSEL
P.O. Box 540774
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@LC.org

**CERTIFICATE PURSUANT TO RULE 5:26(e)**

As required by Rule 5:26, I hereby certify that on this 2nd day of December, 2016, I served a true and correct copy of the foregoing via electronic mail on the following counsel of record:

**Counsel for Respondent, Fairfax County School Board**
Sona Rewari
VA. Bar No. 47327
Thomas J. Cawley
Va. Bar No. 04612
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive, Suite 1700
McLean, VA 22102
Phone: (703) 714-7512
Fax: (703) 918-4018
Email: srewari@hunton.com

/s/ Daniel J. Schmid
Daniel J. Schmid
Va. Bar No. 84415
LIBERTY COUNSEL
P.O. Box 540774
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@LC.org