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IN THE

Supreme Court of Virginia

Record No. 160777

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,

Appellants/Petitioners,

v.

SCHOOL BOARD OF FAIRFAX COUNTY,

Appellee/Respondent.

BRIEF *AMICUS CURIAE* OF
VIRGINIA SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF
APPELLEE SCHOOL BOARD OF FAIRFAX COUNTY

From the Circuit Court of Fairfax County
No. CL 2015-17327

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INTEREST OF *AMICUS CURIAE*

This Brief *Amicus Curiae* is filed by and on behalf of the Virginia School Boards Association ("VSBA") in support of Appellee School Board of Fairfax County. Pursuant to Rule 5:30(b)(2), the VSBA has obtained the written consent of all counsel to file this brief.

The VSBA is a voluntary, nonpartisan organization of Virginia school boards. Every public school board in the Commonwealth of Virginia is a member of the VSBA. The VSBA promotes excellence in public education through training, advocacy, and services. *See* http://www.vsba.org/.

The VSBA submits this Brief *Amicus Curiae* to address the standing theory advanced by the Appellants. Under the theory advanced by the Appellants, there is no limiting principle or governing rule. Instead, according to Appellants, any individual has standing to sue any school board in the Commonwealth without regard to any justiciable interest, injury, or right of action.

Virginia school boards members of the VSBA would be severely and adversely impacted were this Court to adopt the standing theory advanced by the Appellants. Under settled Virginia law, a "heckler's veto" is not enough to give an individual standing to maintain a lawsuit. The VSBA respectfully urges the Court to affirm the judgment of the trial court.

STATEMENT OF THE CASE

The VSBA adopts the Nature of the Case, Material Proceedings Below, and Statement of Facts of Appellee School Board of Fairfax County to the extent necessary for the arguments in this brief.

ARGUMENT

In their Verified Complaint, Appellants claimed the actions by the School Board of Fairfax County were "*ultra vires* acts in violation of Virginia law and Dillon's Rule." App. 15, 18. Appellants sought declaratory and injunctive relief. App. 20-22. The trial court correctly held that it was without jurisdiction because none of the Appellants had standing to bring the claims or seek the relief requested in Appellants' Verified Complaint. App. 197-201, 203-204.

Now, in their Assignments of Error 1, 2, 3, and 4, Appellants ask this Court to adopt a broad and expansive theory of standing that is without precedent in this Commonwealth. If adopted, every Virginia school board would be subjected to endless litigation by individuals who disagree with the board's policy decisions. Rather than focusing on their duties under Article VIII of the Constitution of Virginia and Title 22.1 of the Code of Virginia, school boards would be forced to devote thousands of hours of administrative time and millions of dollars to needless litigation. The VSBA

respectfully asks the Court to affirm the judgment of the trial court.

I. Appellants Ask this Court to Create an Expansive Standing Doctrine that Alters Virginia Law Regarding Standing to Seek Declaratory or Injunctive Relief

Rather than citing this Court's precedent and the Code of Virginia, Appellants discuss and cite a host of decisions from various federal circuit and district courts in an effort to support their broad and unprecedented theory of standing. The law of the Commonwealth of Virginia, however, is clear regarding a plaintiff's standing to seek declaratory or injunctive relief.

A. "Substantive Law" and the Ability to Bring a Judicial Action

This Court recently articulated the relationship between "substantive law" and a claimant's right to bring a judicial action in *Cherrie v. Virginia Health Services*, 787 S.E.2d 855, 2016 Va. LEXIS 106 (July 14, 2016). There the Court stated:

> In Virginia, "substantive law" determines whether a private claimant has a right to bring a judicial action. *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 21, 736 S.E.2d 910, 915 (2013) (quoting *Roller v. Basic Constr. Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989)). Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and historic common-law principles recognized by our courts. A "*right of action*" is a legally recognized "remedial right" to "enforce a *cause of action*," which is simply the "set of operative facts" that causes a claimant to assert his claim. *Id.* (emphasis added); *see also* Black's Law Dictionary 266, 1520 (10th ed. 2014) (defining "cause of action" as a "group of

> operative facts giving rise to one or more bases for suing" and "right of action" as the "right to bring a specific case to court"). The distinction between a *right* of action and a *cause* of action should not be dismissed as an odd, rhetorical anachronism. It factors into many modern legal doctrines, including res judicata, accrual for statute-of-limitations purposes, and, pertinent here, a party's right to seek judicial remedies.

Cherrie, 787 S.E.2d at 857, 2016 Va. LEXIS 106, at *3-*4 (emphases in original). Nowhere below or in their Opening Brief do Appellants articulate any recognized right of action under the Constitution of Virginia, the common law, or the Code of Virginia to seek the declaratory or injunctive relief they requested. *See Cherrie*, 787 S.E.2d at 857, 2016 Va. LEXIS 106, at 4 ("it does not answer the threshold question of whether the 'substantive law' gives the [plaintiff] the legal 'right' to seek judicial enforcement of their claimed cause of action.") (citation omitted). As the trial court correctly concluded, Appellants do not have a "right of action" beyond Appellant Jack Doe's possible claim under Code § 22.1-87 — if and when such a "cause of action" accrues. *See* App. 199-200.

B. <u>Standing under Virginia Law to Seek Declaratory Relief</u>

Because the Appellants have no right of action, they could not seek declaratory relief. "To show a justiciable controversy sufficient to establish a claim for declaratory judgment, the individual complainants must

articulate legally enforceable rights, and courts must be able to evaluate those claims of right." *Friends of the Rappahannock v. Caroline County Bd. of Supervisors*, 286 Va. 38, 48 (2013). This Court clearly articulated the general principles requiring a complainant to assert a justiciable controversy for a circuit court to exercise its authority in a declaratory judgment action in *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors*, 285 Va. 87 (2013).

There, this Court recognized that Code § 8.01-184, which is the "statutory authority for declaratory judgment proceedings," authorizes jurisdiction "[i]n cases of actual controversy." *Charlottesville Area Fitness*, 285 Va. at 97-98. Because "[t]he purpose of a declaratory judgment proceeding is the adjudication of rights[,] an actual controversy is a prerequisite to a court having authority." *Id.* at 98. A plaintiff's pleadings, therefore, must allege an "actual controversy" existing between the parties based upon an "actual antagonistic assertion and denial of right." Code § 8.01-184; *see also Charlottesville Area Fitness*, 285 Va. at 98.

As this Court recognized, Code § 8.01-184 "is the statutory authority for declaratory judgment proceedings in this Commonwealth. From it stems the jurisdiction of the courts of record to entertain applications for declaratory relief and the power to make binding adjudications of the rights

of the parties involved." *Charlottesville Area Fitness*, 285 Va. at 97 (citing *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964)). "'The declaratory judgment acts do not create or change any substantive rights, or bring into being or modify any relationships, or alter the character of controversies, which are the subject of judicial power.'" *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 662 (1962) (quoting 26 C.J.S., Declaratory Judgments, § 7 at 59-60)).

The reason for the standing rules governing declaratory judgment actions "'is that the courts are not constituted, and the declaratory judgment statute was not intended to vest them with authority, to render advisory opinions, to decide moot questions, or to answer inquiries which are merely speculative.'" *Charlottesville Area Fitness*, 285 Va. at 99 (quoting *Shanklin*, 205 Va. at 229-30). Thus, "[t]his Court will consider, *sua sponte*, whether a decision would be an advisory opinion, because we do not have the power to render a judgment that is only advisory." *Charlottesville Area Fitness*, 285 Va. at 99-100 (citing *Martin v. Ziherl*, 269 Va. 35, 40 (2005)).

As the trial court below correctly (and properly) recognized, it "has no authority to exercise jurisdiction over a declaratory judgment proceeding absent a justiciable controversy." *Charlottesville Area Fitness*, 285 Va. at 100. There is no basis for adopting Appellants' arguments and altering

Virginia law regarding standing – especially where, as here, the change in the law would allow almost limitless litigation against the school board members of the VSBA and other similarly situated Commonwealth of Virginia agencies. The judgment of the trial court should be affirmed.

C. Standing under Virginia Law to Seek Injunctive Relief

The granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. *See, e.g., Fancher v. Fagella*, 274 Va. 549, 556 (2007); *Seventeen, Inc. v. Pilot Life Ins. Co.*, 215 Va. 74, 78 (1974); *Akers v. Mathieson Alkali Works*, 151 Va. 1, 8 (1928). Unless entitled to an injunction pursuant to a statute, a party must establish the "traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law" before a request for injunctive relief will be sustained. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008) (citing *Virginia Beach S.P.C.A., Inc. v. South Hampton Rds. Veterinary Assoc.*, 229 Va. 349, 354 (1985); *Carbaugh v. Solem*, 225 Va. 310, 315 (1983)).

Appellants did not assert below, and do not assert in their Opening Brief, that they are entitled to an injunction based on any provision of the Code of Virginia. Therefore, Appellants must establish the "traditional prerequisites." But, Appellants cannot show any of the traditional

prerequisites for injunctive relief. As the trial court recognized, there is an adequate remedy for Jack Doe under Code § 22.1-87 when and if a cause of action accrues to create a right of action. Until then, there is no basis for injunctive relief. The judgment of the trial court should be affirmed.

II. Dillon's Rule Applies to School Boards, But There is No Precedent under Virginia Law Allowing Dillon's Rule to be Invoked Absent Standing to Bring a Right of Action

Dillon's Rule of statutory construction "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Board of Zoning Appeals v. Board of Supervisors*, 276 Va. 550, 553-54 (2008). A corollary of the rule extends this limitation to school boards. *Id.* at 554 (citing *Kellam v. School Board of the City of Norfolk*, 202 Va. 252, 254 (1960)). *See also Payne v. Fairfax County Sch. Bd.*, 288 Va. 432, 437-38 (2014). As a rule of strict construction, Dillon's Rule does not create an independent, stand-alone right of action or otherwise provide an independent basis for declaratory or injunctive relief absent a right of action that is based on a cause of action.

The School Board of Fairfax County, along with the other school boards constituting the VSBA, is vested with the supervision of its schools pursuant to Article VIII, § 7 of the Constitution of Virginia and Code § 22.1-

28. The General Assembly has outlined the responsibilities and authority of school boards in Chapter 7 of Title 22.1 of the Code of Virginia. The General Assembly has also required the Board of Education to establish guidelines and model policies for student codes of conduct, and required local school boards to adopt student codes of conduct. Code § 22.1-279.6.

The only allowance for judicial review provided by the General Assembly in Title 22.1 of the Code of Virginia is Code § 22.1-87. Thus, this can be the only basis for the Appellants' assertion of a justiciable controversy or right of action. *See Cherrie*, 787 S.E.2d at 857-58, 2016 Va. LEXIS 106, at *5 ("Sometimes called 'statutory standing,' this inquiry asks whether the plaintiff 'is a member of the class given authority by a statute to bring suit.'") (quoting *Small v. Federal Nat'l Mortg. Ass'n*, 286 Va. 119, 125 (2013). As this Court made clear in *Concerned Taxpayers of Brunswick County v. County of Brunswick*, "[w]hen a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." 249 Va. 320, 330 (1995).

As the trial court correctly recognized, "Once the school acts, in terms of some sanction on this young man, if it in fact does act, then [Code § 22.1-87] kicks in and within a certain period of time, 30 days, this court, through appellate process, has the ability to see whether the school board

acted arbitrarily or capriciously or abused its discretion or exceeded its authority, including any sort of Dillon violation in this case. That has not occurred in this case." App. 199-200. The trial court properly applied this Court's precedent, and the judgment of the trial court should be affirmed.

CONCLUSION

For these reasons, the VSBA respectfully asks the Court to affirm the judgment below.

Dated: Nov. 18, 2016

Respectfully submitted,

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CERTIFICATE

The undersigned hereby certifies that the foregoing complies with Rules 5:26, 5:28, and 5:30, and further certifies as follows:

1. The Appellant/Petitioners are 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.

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5. On this 18th day of November, 2016:

(a) Ten copies of the foregoing were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing.

(b) An electronic copy of the foregoing was delivered to the Clerk's office of the Supreme Court of Virginia as required by Rule 5:26(e) and Rule 5:32(a)(3)(i).

(c) An electronic copy of the foregoing was sent via electronic mail to all Counsel of Record.

/s Robert W. Loftin

_____
Robert W. Loftin