SCV: Submitted on 10-24-2016 14:07:16 EDT for filing on 10-24-2016

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

Plaintiffs-Petitioners,

v.

SCHOOL BOARD OF FAIRFAX COUNTY,

Defendant-Respondent.

OPENING BRIEF

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STATEMENT OF CASE AND FACTUAL BACKGROUND

I. PRELIMINARY BACKGROUND.

On December 21, 2015, Petitioners filed this action seeking declaratory relief pursuant to Va. Code § 8.01-184, and preliminary and permanent injunctive relief pursuant to Va. Code § 8.01-620, against Fairfax County School Board ("Board") for its *ultra vires* and void *ab initio* actions in violation of the Dillon Rule. (Joint Appendix, "App." at 2, ¶¶3-8). In violation of the law, the Board added "sexual orientation," "gender identity," and "gender expression" to its non-discrimination policy and student handbook. (*Id.* at ¶3).

Petitioners are taxpayers, citizens, parents, and a student. (*Id.* at 3-5, ¶¶ 9-18). Petitioner Lafferty is a citizen, taxpayer, and resident of Fairfax County with a particularized interest in the policies and procedures of the Board. (*Id.* at 3-4, ¶¶ 9-14). Petitioner Lafferty has worked extensively on the issues presented by the Board's actions relating to the addition of new categories of non-discrimination, which

are not permitted by state law, including providing the Board with research and analysis concerning the effects and issues presented by the unauthorized inclusion of the aforementioned categories. (*Id.* at 4, ¶ 13).

Petitioner Jack Doe is a minor and high school student in Fairfax County Public Schools ("FCPS") who resides in Fairfax County. (*Id.* ¶ 15). Petitioners John Doe and Jane Doe are parents, taxpayers, citizens, and residents of Fairfax County, and their son, Jack Doe, is a student in FCPS who suffers injury and discipline by the Board's unlawful act. (*Id.* ¶¶ 16-17).

II. THE BOARD'S *ULTRA VIRES* ACTIONS.

Despite overwhelming opposition from citizens, parents, and students, and without lawful authority, the Board added "sexual orientation," "gender identity," and "gender expression" as new non-discrimination categories to its policy and student handbook, violations of which result in discipline. (*Id.* at 2, ¶ 4). The Board's additions were *ultra vires* and void *ab initio* because non-discrimination categories must be uniform throughout the Commonwealth,

and the Board's additional categories are not included in state law. (*Id.* ¶ 6).

The Board exceeded its scope of authority. (*Id.* at 5-6, ¶¶ 21-26). As noted below:

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

(*Id.* at 7, ¶ 30) (quoting Va. Code § 22.1-78) (emphasis added).

The Dillon Rule and Va. Code § 22.1-78 require that the Board abide by state law in general, and in particular the Board cannot add additional categories of non-discrimination that go beyond state law. (*Id.* ¶¶ 23, 30). The Virginia Human Rights Act, Va. Code §§ 2.2-3900 *et seq.*, prohibits unlawful discrimination in places of public accommodation, including educational institutions, based *on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or*

disability. (*Id.* at 5-6, ¶ 24) (emphasis added). The General Assembly has defined "unlawful discrimination" as: "Conduct which violates any Virginia or federal statute or regulation governing discrimination on the basis of *race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability*." (*Id.* ¶ 25) (emphasis added). "Sexual orientation," "gender identity," and "gender expression" are not recognized non-discrimination categories. (*Id.* ¶ 26). By adding these additional categories, the Board violated Virginia law. (*Id.* at 9, ¶ 42 and 13, ¶¶ 66, 67).

III. INJURY CAUSED BY THE BOARD'S *ULTRA VIRES* ACTIONS.

Petitioner Jack Doe, and his parents John and Jane Doe, suffer substantial harm and immediate and irreparable injury by the Board's action. The new categories cause confusion, violate the privacy rights of students, (*Id.* at 11, ¶ 58), place Jack Doe in fear of safety and discipline, cause distraction and conflicts, and interfere with a safe and enjoyable education. (*Id.* ¶ 62). Jack Doe's right to privacy, a

safe environment, and education are severely impacted by the Board's action.

The lack of clarity of the new categories coupled with discipline for violating them places Jack Doe in a state of distress because he has no idea what words or conduct violate these unlawful additions. (*Id.* at 14, ¶ 70-71). Jack Doe is in a constant state of fear, anxiety, and distress, because his privacy has been invaded. He is now forced to share private restrooms for boys with girls contrary to his cultural and religious values. A wrong word, act, or protest will subject him to discipline. (*Id.* ¶ 73, 15, ¶ 74). Jack Doe no longer feels safe to discuss these or related topics at school and cannot fully participate in the educational process. (*Id.* ¶ 75-76).

The Board's action has significantly diminished Jack Doe's ability to fully and freely participate in the educational environment and process, which is guaranteed by the Commonwealth. (*Id.* ¶ 76). As parents and next friends of Jack Doe, John and Jane Doe have

also suffered direct injury as a result of the injuries to their son's educational environment and process.

Petitioners Lafferty, John Doe, and Jane Doe have all also experienced harm as taxpayers and citizens of Fairfax County. The Board's *ultra vires* actions have resulted in the expenditure of funds, waste of resources, and exposure to potential liability that arises from actions in excess of the Board's authority. (*Id.* at 3, ¶¶ 11-12).

IV. THE CIRCUIT COURT'S DECISION.

The Circuit Court granted the Board's motion to dismiss and denied Petitioners the opportunity to amend. (App. at 197). The court held that Petitioner Jack Doe suffered no injury because he had not been subjected to punishment by the Board, and thus did not have standing. (*Id.* at 199-200). The court also found that Petitioners John and Jane Doe did not have standing as parents for the same reason as Jack Doe. (*Id.*). Finally, the court held that as taxpayers, Petitioner Lafferty and John and Jane Doe did not have taxpayer standing. (*Id.* at 197-200).

The Circuit Court's wrong premise was that Va. Code § 22.1-87 provides an exclusive remedy, and any challenge to the Board's actions must be brought within 30 days of an adverse action. (*Id.* at 197-200). Section 22.1-87 that "[a]ny parent, custodian, or legal guardian of a pupil . . . who is aggrieved by an action of the school board may, within thirty days after such action, petition the circuit court" to review the Board's action. Va. Code § 22.1-87. As to Petitioner Jack Doe, the court noted that his standing was a "closer call." (*Id.* at 199). Despite the presumption of truth given to allegations in a complaint at the demurrer stage, the court disagreed that Jack Doe's "disappointment with or anxiety or confusion or distress over the actions of the school board constitutes a case or controversy." (*Id.*). The court held that Jack Doe and his parents could only bring a challenge if Jack Doe was actually subject to punishment and then could only bring such a challenge under Va. Code § 22.1-87. (*Id.* at 199-200).

The premise of the Circuit Court's conclusion relating to taxpayer standing cases was that Petitioners Lafferty, John Doe, and Jane Doe did not fall within the meaning of an "aggrieved party" under Va. Code § 22.1-87, and thus could not bring a challenge by virtue of taxpayer status. (*Id.* at 198). The court concluded that it was without jurisdiction and dismissed all claims with prejudice. (*Id.* 200-01).

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in failing to give proper inferences and presumptions in favor of the injuries alleged in Plaintiffs' Complaint.

   This error was preserved at Appendix pages 197, 199, 201, and 204.

2. The Circuit Court erred in concluding that Jack Doe failed to allege an actual controversy sufficient to invoke the Circuit Court's jurisdiction.

   This error was preserved at Appendix pages 197, 199, 201, and 204.

3. The Circuit Court erred in concluding that John Doe and Jane Doe failed to allege an actual controversy as parents and next friends of Jack Doe.

   This error was preserved at Appendix pages 197, 199, 201, and 204.

4. The Circuit Court erred in concluding that John Doe, Jane Doe, and Andrea Lafferty did not have taxpayer standing.

   This error was preserved at Appendix pages 197, 199, 201, and 204.

5. The Circuit Court erred in dismissing the Complaint without ever affording Plaintiffs the opportunity to amend.

   This error was preserved at Appendix pages 197, 199, 201, and 204.

ARGUMENT AND AUTHORITIES

I. THE SCHOOL BOARD VIOLATED THE DILLON RULE WHEN IT ADDED NONDISCRIMINATION CATEGORIES TO ITS POLICY AND STUDENT HANDBOOK THAT ARE NOT PERMITTED BY STATE LAW.

(***Assignment of Error 2***)

The Dillon Rule and state law require nondiscrimination categories to be uniform throughout the Commonwealth. That requirement is applicable to actions taken by the Board. Contrary to the Circuit Court's decision, challenges brought under the Dillon Rule are not subject to the 30-day limitation of Va. Code § 22.1-87. The Board violated the Dillon Rule when it added "sexual orientation," "gender identity," and "gender expression" to its policy and student handbook.

A. The Dillon Rule And State Law Require Nondiscrimination Categories To Be Uniform Throughout The Commonwealth.

"There can be no question that Virginia long has followed, and still adheres to, the Dillon Rule of strict construction concerning local governing bodies." *Commonwealth v. Cnty. Bd. of Arlington Cnty.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977). The Dillon Rule makes it abundantly clear that local governing bodies "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, or those that are essential and indispensable." *City of Richmond v. Confrere Club of Richmond, Va., Inc.*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990). Because it is a rule of strict construction, "[i]f there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body." *Id.*, 387 S.E.2d at 473.

The Dillon Rule is simply a recognition that "[l]ocalities have no element of sovereignty and are agencies created by the Commonwealth." *Sinclair v. New*

Cingular Wireless PCS, LLC, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012). The Dillon Rule recognizes that the Commonwealth has the sole authority to enact or expand certain categories relevant to its statutes, and that local governing bodies must adhere to the provisions outlined by the Commonwealth. *Id.*, 727 S.E.2d at 44. "Accordingly, when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, *the statute must prevail*." *Id.*, 727 S.E.2d at 44 (emphasis added). The enactments of local governing bodies therefore must be consistent with those statutes to which the General Assembly has mandated uniformity. *Id.*, 727 S.E.2d at 45-46.

Virginia statutory law makes it evident that the laws of the Commonwealth are supreme, and that local government regulations or policies cannot be inconsistent with the Commonwealth's general laws.

> The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons *shall*

> *not be inconsistent* with the Constitution and laws of the United States or of the Commonwealth.

Va. Code § 1-248 (emphasis added).

The General Assembly has explicitly stated that its nondiscrimination statute removes authority from local governing bodies to expand categories to which the Commonwealth has granted protection. Indeed,

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

Va. Code § 15.2-965 (emphasis added). Local governing bodies possess no authority to enact a nondiscrimination policy inconsistent with or more expansive than Virginia's nondiscrimination statute.

B. The Dillon Rule Applies To School Boards.

School boards in Virginia are subject to the Dillon Rule of strict construction. "School boards thus established constitute public quasi corporations that exercise limited powers and functions of a public

nature granted to them expressly or by necessary implication, and none other." *Kellam v. Sch. Bd. of City of Norfolk*, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960); *see also Payne v. Fairfax Cnty. Sch. Bd.*, 288 Va. 432, 437-38, 764 S.E.2d 40, 44 (2014). "A school board may exercise only the power granted to it by the General Assembly." *Sch. Bd. of Amherst Cnty. v. Burley*, 225 Va. 376, 302 S.E.2d 53 (1983). School boards are therefore constrained in the exercise of their authority by the express provisions of the General Assembly, and the Dillon Rule supersedes even the general supervisory power given them by the Virginia Constitution. *See Arlington Cnty.*, 217 Va. at 575, 232 S.E.2d at 41.

The General Assembly has enacted a statutory Dillon Rule applicable to local school boards.

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

Va. Code § 22.1-78 (emphasis added). The exercise of a school board's authority is expressly limited by the provisions of state law, and therefore school boards cannot pass regulations or bylaws inconsistent with the laws of the Commonwealth.

C. Virginia Code § 22.1-87 Providing Thirty Days To File A Grievance With The Circuit Court Does Not Apply To A Dillon Rule Challenge.

The provision in Va. Code § 22.1-87 providing thirty days to file a grievance with the Circuit Court is inapplicable to a Dillon Rule challenge. First, the plain language of Section 22.1-87 indicates that it is not an exclusive remedy for challenges to the actions of a school board. Second, the requirements of Section 22.1-87 do not impact a circuit court's jurisdiction to hear a challenge brought under the Dillon Rule. Finally, the time limitations listed in Section 22.1-87 were not intended to impose hardship on those students challenging the actions of a school board.

1. Section 22.1-87 is not exclusive.

Section 22.1-87 states,

> [a]ny parent, custodian, or legal guardian of a pupil attending the public schools in a school division who is aggrieved by an action of the school board, *may*, within thirty days after such action, petition the circuit court having jurisdiction in the school division to review the action of the school board.

Va. Code § 22.1-87 (emphasis added).

The plain language clearly indicates the statute is permissive, not mandatory. The mandatory-permissive canon of statutory construction implies that such language indicates discretion. Under that canon, mandatory words impose a duty, permissive words grant discretion. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112-15 (West 2012). Notably, "the word 'may' is prima facie permissive, importing discretion." *Caputo v. Holt*, 217 Va. 302, 305 n.*, 228 S.E.2d 134, 137 n.* (1976). Only when the manifest purpose of the legislature suggests otherwise will courts construe "may" to mean "must." *Id.*

The manifest purpose of Section 22.1-87 does not indicate any such purpose. Here, may does not equal must. That a plaintiff *may* bring his challenge to a

school board action under Section 22.1-87 does not mean that he *must* bring his claim under that provision and only that provision. Courts in the Commonwealth have permitted challenges to school board actions without even a mention of Section 22.1-87. *See, e.g.*, *White v. Sch. Bd. of Henrico Cnty.*, 36 Va. App. 137, 549 S.E.2d 16 (2001) (plaintiff brought claims against the school board under different statutes, Va. Code § 22.1-213 to 22.1-221 and the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, and was permitted to proceed without even one mention of the provisions in Va. Code § 22.1-87); *Martin v. Sch. Bd. of Prince George Cnty.*, 3 Va. App. 197, 348 S.E.2d 857 (1986) (plaintiff brought claims against the school board without mention of Va. Code § 22.1-87).

Virginia statutory law also makes clear that Section 22.1-87 is not exclusive. If Section 22.1-87 were the exclusive remedy by which aggrieved students could bring any challenge against the actions of a school board, then the General Assembly would have no need of enacting Va. Code § 22.1-214. That statute also

permits parties aggrieved by the decisions of a school board to challenge their actions in the circuit court.

Under the Circuit Court's strained interpretation of Va. Code § 22.1-87, courts in the Commonwealth would be without jurisdiction to adjudicate claims brought under 42 U.S.C. § 1983, because the General Assembly purportedly preferred an exclusive remedy in Va. Code § 22.1-87. But, such is not and cannot be the case, as cases under Section 1983 that could have been brought in circuit court have proceeded in federal court without even a mention of Va. Code § 22.1-87. *See, e.g.*, *L.E.A. v. Bedford Cnty. Sch. Bd.*, No. 6:15-cv-00014, 2015 WL 4460352 (W.D. Va. July 21, 2015) (bringing claims against the school board without even mentioning Va. Code § 22.1-87); *R.M.B. v. Bedford Cnty. Sch. Bd.*, No. 6:15-cv-00004, 2015 WL 4092301 (W.D. Va. July 7, 2015) (same); *Tucker v. Sch. Bd. of the City of Va. Beach*, No. 2:13cv530, 2014 WL 5529723 (E.D. Va. Oct. 31, 2014) (same).

Circumscribing circuit courts' jurisdiction over the actions of school boards would lead to the result

that plaintiffs were without remedies made available to them under numerous other statutes. Section 22.1-87 cannot be read in such a manner. Such a strained and narrow interpretation would yield an absurd result, which this Court has said must be avoided when construing a statute. *See, e.g.*, *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) ("the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction [and] a statute should never be construed in a way that leads to absurd results.") (internal citations and quotations omitted). Section 22.1-87 is simply not an exclusive remedy.

2. Section 22.1-87 does not limit a circuit court's jurisdiction to hear a challenge brought under the Dillon Rule or other statutes.

The thirty-day time period in Section 22.1-87 does not limit a circuit court's jurisdiction, unless a challenge is brought specifically under that statute. This Court discussed a similar limitations period in *Kole v. City of Chesapeake*, 247 Va. 51, 439 S.E.2d 405

(1994). In *Kole*, plaintiffs challenging a rezoning decision had only thirty days to challenge any modifications. *Kole*, 247 Va. at 57, 439 S.E.2d at 408. Like Section 22.1-87, the statute at issue in *Kole* restricted the circuit court's review to whether the amendment was permissible under the statute's terms. *Id.*, 439 S.E.2d at 408. This Court held that the thirty-day limitations period of Va. Code § 15.1-493(G) was only applicable to challenges brought under that statute to challenge the reasonableness of the decision. *Id.*, 439 S.E.2d at 408. However, "[t]he 30-day period *would not bar the [plaintiffs'] claims that the [government action] is void ab initio*." *Id.*, 439 S.E.2d at 409 (emphasis added). This Court also said that the thirty-day limitations period would also not be applicable to constitutional claims challenging the local government's actions. *Id.*, 439 S.E.2d at 409.

Here, the same result is also mandated. Petitioners did not bring their claims under Section 22.1-87 and are therefore not restricted by its thirty-day period. Petitioners, instead, brought their claims under the

Dillon Rule, Va. Code § 8.01-184, and Va. Code § 8.01-620. (App. at 1-3, ¶¶1-8). The gravamen of Petitioners' challenge was that the actions of the Board were *ultra vires* and thus void *ab initio*. (*Id.* at 2, ¶6) ("Defendant's actions were void *ab initio* under Virginia Code §§ 1.248, 15.2-965, and under the Dillon Rule"). As this Court said in *Kole*, challenges to a local government's action as void *ab initio* are not subject to the time restrictions of a particular statute. *Kole,* 247 Va. at 57, 439 S.E.2d at 409. Such a conclusion is further mandated by the fact that Petitioners did not bring their challenge under the statute imposing such a time requirement. *Id.*, 439 S.E.2d at 409. Petitioners' challenge is not restricted by Va. Code § 22.1-87.

This Court's conclusion in *Kole* that certain statutory requirements, including a time frame in which to bring a challenge, are only pertinent to challenges brought under those statutes finds additional support in numerous cases from this Court. *See, e.g.*, *Frace v. Johnson*, 289 Va. 198, 202-02, 768 S.E.2d 427, 429-30

(2015) (holding that the time limits in particular statutes are not an aspect of the circuit court's subject matter jurisdiction but merely a "statutory prerequisite" to actions brought under the statute in which they are included); *Bd. of Supervisors of Fairfax Cnty. v. Bd. of Zoning Appeals of Fairfax Cnty.*, 271 Va. 336, 345-47, 626 S.E.2d 374, 378-80 (2006) (holding that a time limit in a particular statute only effects the jurisdiction of a court to hear challenges brought under that statute); *Friends of Clark Mountain Found., Inc. v. Bd. of Supervisors of Orange Cnty.*, 242 Va. 16, 19-21, 406 S.E.2d 19, 20-21 (1991) (same).

Here, the thirty-day period of Section 22.1-87 did not apply to Petitioners' challenge because Petitioners did not bring their claims under that statute, nor were they required to do so. Petitioners challenged the Board's actions as *ultra vires* and void *ab initio* and thus were not subject to the limitations imposed by other statutes permitting different challenges. Section 22.1-87 does not apply to challenges brought under the Dillon Rule.

Applying this thirty-day provision to Dillon Rule challenges would allow school boards to pass unlawful regulations when students are not in school, and with no student to challenge the unlawful act, the action would be "grandfathered." If the Board violated the Dillon Rule at the beginning of the summer break, no student or parent would suffer the consequence of the act until school began in the fall. Thirty-days having passed with no challenge, the board's unlawful act would be immune from challenge. This makes no sense in the context of a Dillon Rule challenge that alleges a school board's act was *ultra vires* and void *ab initio*.

3. The thirty-day time requirements of Section 22.1-87 cannot be deployed to work injustice on a student challenging a school board's actions.

Even if the thirty-day limitations period of Section 22.1-87 were applicable to Petitioners' Dillon Rule challenge — which it is not — courts in the Commonwealth have held that such a provision may not be deployed to work an injustice on a student challenging the *ultra vires* actions of a school board. In a

student's challenge to a school board's action under Va. Code § 22.1-214, where plaintiffs questioned a similar thirty-day limitation period, the court stated that such a limitation could be overcome when it would work an injustice on the student bringing his challenge. *See Sch. Bd. of Cnty. of York v. Nicely*, 12 Va. App. 1051, 1064-65, 408 S.E.2d 545, 552-53 (Va. Ct. App. 1991). The court noted that the thirty-day limitation was primarily intended to ensure that a student's education did not hang in the balance while a challenge to the school board's action proceeded. *Id.*, 408 S.E.2d at 552-53. Indeed, the court stated that "a speedy resolution should not hinder or unduly burden a party to these disputes to obtain and prepare for a due process judicial review of an adverse administrative decision." *Id.* at 1064, 408 S.E.2d at 552.

While school boards have access to counsel for such challenges, the short limitations period should not prohibit a student harmed by a school board's action from bringing his claims. *Id.* at 1064-65, 408 S.E.2d at 552-53 ("a thirty day limitation period would

frequently result in an injustice to unrepresented parties who may not be able to obtain legal counsel and file a notice of appeal within such a relatively short limitation period.”).

Here, the same rationale is true of Va. Code § 22.1-87, where the restriction would work a manifest injustice on plaintiffs unable to obtain counsel and pursue their claims under an abbreviated limitation period. Such a working of injustice is why alternative mechanisms for challenging a school board’s action are available under the laws of the Commonwealth and circumscribing the circuit courts’ jurisdiction over school board actions to Va. Code § 22.1-87 is improper and unwarranted. Petitioners’ Dillon Rule challenge to the Board’s *ultra vires* and void *ab initio* actions are not subject to the thirty-day limitations period of Section 22.1-87.

D. The Board Violated The Dillon Rule When It Added "Sexual Orientation," "Gender Identity," And "Gender Expression" To Its Policy And Student Handbook.

"In considering whether a local governing body had authority to enact an ordinance, *there is no presumption that it is valid*; if no delegation from the legislature can be found to authorize its enactment, *it is void*." *Sinclair*, 283 Va. at 576, 727 S.E.2d at 44 (emphasis added). If a school board attempts to act in a manner inconsistent with a state statute, then its actions are *ultra vires* and void *ab initio*. *See, e.g.*, *Burley*, 225 Va. at 378-79, 302 S.E.2d at 55 ("In this case, the Board's attempt to purchase property without following the mandate of [the Virginia Code] was *ultra vires* and void *ab initio*."). In the case *sub judice*, the Board was mandated to follow the Commonwealth's nondiscrimination statute when enacting or modifying its regulations and policy on nondiscrimination.

Contrary to the Board's limited grant of authority, "[t]he legislature functions under no grant of power. It is the supreme law making body of the Commonwealth,

and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitution." *Arlington Cnty.*, 217 Va. at 575, 232 S.E.2d at 41. In its exercise of that authority, the General Assembly enacted the Virginia Human Rights Act, Va. Code § 2.2-3900 *et. seq.*, which prohibits unlawful discrimination on the basis of *race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability*, in places of public accommodation. Unlawful discrimination is defined as "[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of *race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability*." Va. Code § 2.2-3901 (emphasis added). The General Assembly has not included "sexual orientation," "gender identity," or "gender expression" to the list of protected categories.

While local governing bodies, including the Board, may enact nondiscrimination polies or ordinances, those

enactments are statutorily prohibited from being "inconsistent with" or "more stringent than any applicable state law." Va. Code § 15.2-965.

Despite the Dillon Rule and statutory limitation on the Board's authority, it enacted a nondiscrimination policy and revised its student handbook in a manner inconsistent with and more stringent than the Commonwealth's nondiscrimination law. (App. at 8-15). The Board revised the nondiscrimination policy to state,

> No student, employee, or applicant for employment in the Fairfax County Public Schools shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, or disability, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity . . .

(*Id.* at 9, ¶ 42). The Board revised the student handbook to punish students for "discriminatory harassment," which was amended to include "harassment based on a person's race, color, religion, national origin, disability, personal or physical attributes or matters pertaining to sexuality, including sexual

orientation, gender identity, or gender expression." (*Id.* at 13, ¶ 66).

The Board's revision of its nondiscrimination policy and student handbook expanded the list of protected categories. Its addition of "sexual orientation," "gender identity," and "gender expression" find no parallel in the Commonwealth's nondiscrimination statute. In fact, those terms are wholly foreign to the Virginia Human Rights Act. Those terms are thus inconsistent with and more expansive than the Commonwealth's laws on this issue, and violate the Dillon Rule, Va. Code § 15.2-965, and Va. Code § 22.1-78. While the Board has authority to enact regulations and bylaws pertaining to its schools, "the general power of school boards to supervise does not necessarily include the right [to enact an expansive nondiscrimination policy] in any manner the board might choose, unfettered by legislative restriction." *Arlington Cnty.*, 217 Va. at 576, 232 S.E.2d at 41. This is particularly true where, as here, the General Assembly has been explicit in its limitation on the

authority of school boards to enact nondiscrimination regulations inconsistent with state law. The Board's actions thus violated the Dillon Rule and state statute.

II. PETITIONERS HAVE STANDING TO CHALLENGE THE BOARD'S *ULTRA VIRES* ACTIONS AS A VIOLATION OF THE DILLON RULE.

(***Assignments of Error 1, 2, 3, 4***)

A. The Standard Of Review Is De Novo.

"The legal question presented by a circuit court's decision to sustain a demurrer requires application of a de novo standard of review." *Cline v. Dunlora South, LLC*, 284 Va. 102, 106, 726 S.E.2d 14, 16 (2012) (citing *Glazebrook v. Bd. of Supervisors of Spotsylvania Cnty.*, 266 Va. 550, 544, 587 S.E.2d 589, 591 (2003)).

B. Petitioners Alleged Sufficient Injury To Obtain A Declaration That The Board's Actions Violated The Dillon Rule.

The Circuit Court erred in finding that Petitioners did not possess sufficient standing to challenge the Board's actions as a violation of the Dillon Rule. Petitioner Jack Doe has suffered and is suffering immediate and direct injuries as a result of the

Board's actions. Petitioners John and Jane Doe have standing parents and next friends of Jack Doe and as taxpayers of Fairfax County. Petitioner Lafferty has standing as a taxpayer of Fairfax County.

1. Petitioner Jack Doe has suffered direct injuries.

The Circuit Court was required accept Petitioner Jack Doe's allegations as true for purposes of determining whether a concrete and actual injury had been alleged. A circuit court *must* "consider as true all the material facts alleged in the bills of complaint, all facts impliedly alleged, and all reasonable inferences that may be drawn from the facts." *Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick*, 249 Va. 320, 327, 455 S.E.2d 712, 716 (1995). Here, the Circuit Court failed to give Petitioner Jack Doe's alleged injuries a presumption of truth. As the record makes abundantly clear, Jack Doe has suffered, is suffering, and will continue to suffer immediate and direct injuries as a result of the Board's *ultra vires* actions.

It cannot be disputed that Jack Doe has a constitutional right to education in the Commonwealth. *See, e.g.*, *Scott v. Commonwealth*, 247 Va. 379, 386, 443 S.E.2d 138, 142 (1994) ("[W]e agree with the trial court that education is a fundamental right under the Constitution."). The Board's *ultra vires* expansion of the nondiscrimination policy and student handbook has directly injured Jack Doe in his exercise of that constitutional right.

As a result of the Board's actions, Jack Doe is particularly anxious and distressed about the Board's decisions and has no idea what words or conduct will subject him to discipline under the new classifications. (App. at 14, ¶ 70-72). The Board's *ultra vires* actions have also caused significant harm to Jack Doe by forcing him into a state of anxiousness and distress by having to think about every statement he makes to all students and the potential sexual connotations such statement could have, which would subject him to discipline and punishment. (*Id.* ¶¶ 70-73).

Jack Doe suffers significant harm and direct injury to the point that it is adversely affecting his ability to participate in and benefit from the educational process and environment. (*Id.* at 15, ¶ 73). He is in fear of having to share intimate spaces with girls, which is an invasion of his privacy and forces him into a position that violates his cultural and religious values. (*Id.* ¶ 75). He no longer feels safe and fears to even discuss these or related topics. (*Id.*). The Board's unlawful action has diminished his ability to fully participate in the educational process. (*Id.* ¶ 76).

These injuries or impending injuries, arising from the Board's decision to amend its nondiscrimination policy and student handbook, are precisely the type the Declaratory Judgment Act is intended to remedy. Indeed, Section 8.01-184 provides that declaratory relief is appropriate for cases and "[c]ontroversies involving the interpretation of . . . municipal ordinances and other government regulations." Va. Code § 8.01-184. The

General Assembly also explicitly stated that the declaratory judgment statute is intended to

> afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor. *It is to be liberally interpreted and administered with a view to making the courts more serviceable to the people.*

Va. Code § 8.01-191 (emphasis added); *Fairfax Cnty. v. Soutland Corp.*, 224 Va. 514, 521, 297 S.E.2d 718, 721 (1982) (noting that the declaratory judgment relief is to be administered liberally and with an eye toward granting plaintiffs access to the courts for relief). Indeed, the declaratory judgment provision "is to be liberally interpreted and administered. It does not require one to wait until a right has been violated to seek judicial relief. Preventative relief is the moving purpose." *Portsmouth Rest. Ass'n, Inc. v. Hotel & Rest. Emp. Alliance, Local No. 807*, 183 Va. 757, 763, 33 S.E.2d 218, 221 (1945).

Here, the injuries Petitioner Jack Doe has suffered, is suffering, and will continue to suffer are

within those contemplated by the declaratory judgment statute. The gravamen of his complaint against the Board involves the Board's addition of "sexual orientation," "gender identity," and "gender expression" to the nondiscrimination policy and student handbook. (App. at 1-3, ¶¶ 1-8). As this Court's decisions and the plain language of the statute provide, declaratory relief is an appropriate remedy for such a Dillon Rule challenge. Petitioner Jack Doe has suffered direct injury as a result of the Board's action, and therefore has standing to challenge the Board's *ultra vires* and void *ab initio* actions.

2. Petitioners John and Jane Doe have standing as next friends and parents.

Petitioner John and Jane Doe have an independent and sufficient basis for the standing as next friends and parents of Jack Doe. Virginia's next friend statute provides that "[a]ny minor entitled to sue may do so by his next friend. Either or both parents may sue on behalf of a minor as his next friend." Va. Code § 8.01-8; *Herndon v. St. Mary's Hospital, Inc.*, 266 Va.

472, 477, 587 S.E.2d 567, 570 (2003) ("parents may initiate a single action as their child's next friend"). As this Court has noted, "an action for the benefit of a minor child must be brought in the name of the child by a next friend because the established rule is that the minor child, not the next friend, is the real party in interest in such an action." *Estate of James v. Peyton*, 277 Va. 443, 454, 674 S.E.2d 864, 869 (2009) (internal quotation marks omitted).

Here, as the above discussion demonstrates, Petitioner Jack Doe has suffered direct injuries as a result of the Board's *ultra vires* actions. *See supra* Section II.B.1. While Jack Doe is the real party in interest as it relates to the direct injuries he is sustaining to his constitutional right to education, he is required to bring his claims through his next friends and parents, John and Jane Doe. Petitioners John and Jane Doe therefore have standing as next friends and parents of Jack Doe by virtue of the indisputable injuries Jack Doe has suffered, is

suffering, and will continue to suffer absent relief from this Court.

3. Petitioners John Doe, Jane Doe, and Andrea Lafferty Have Taxpayer Standing.

It has long been axiomatic that "taxpayers have the right to resort to equity to restrain local government officials *from exceeding their powers* in any way which will injuriously affect the taxpayers." *Gordon v. Bd. of Supervisors of Fairfax Cnty.*, 207 Va. 827, 830, 153 S.E.2d 270, 273 (1967) (emphasis added). Such standing has been proper in Virginia since at least 1883. *Id.*, 153 S.E.2d at 273 (citing *Roper v. McWhorter*, 77 Va. (2 Hans) 214 (1883)). Assertions of taxpayer standing are not uncommon either, as "it appears that taxpayers' suits to test the legality of expenditures by local governments are permitted in virtually every state." *Id.* at 831, 153 S.E.2d at 273.

"[A] party has standing to initiate litigation if the party has sufficient interest in the subject matter to ensure that the litigants will be actual adversaries and that the issues will be fully and faithfully

developed." *Goldman v. Landslide*, 262 Va. 364, 371, 552 S.E.2d 67, 71 (2001). "The purpose of requiring standing is to make certain that a party who asserts a particular position has the legal rights to do so and that his rights will be affected by the disposition of the case." *Id.*, 552 S.E.2d at 71. Taxpayers and citizens of local governments have sufficient interest in the outcome of cases involving decisions from their local governments. "[A] citizen or taxpayer may challenge the legality of certain actions of a local government and its expenditures, because the interests of a citizen in matters of local government is direct and immediate, rather than remote and minute." *Id.* at 373, 552 S.E.2d at 72. Indeed, "[t]he direct and immediate interest of the citizen in the operation of local government . . . permits these citizen or taxpayer challenges." *Id.*, 552 S.E.2d at 72.

Moreover, in cases challenging the actions of local government under the Dillon Rule of strict construction, this Court has specifically noted taxpayers and citizens have standing. *See, e.g.*,

Arlington Cnty. v. White, 259 Va. 708, 528 S.E.2d 706 (2000) (determining a Dillon Rule challenge to county's extension of benefits to an expanded class of people brought solely by plaintiffs asserting taxpayer standing); *Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995) (noting that taxpayers have standing to challenge *ultra vires* government actions under the Dillon Rule when the complaint alleges acts done by government entities in excess of their authority). Other courts in the Commonwealth have reached similar conclusions. *See, e.g.*, *Karunakarum v. Town of Herndon*, 70 Va. Cir. 208 (Va. Cir. Ct. 2006) (holding that plaintiffs had standing to seek a declaration that their local government's action violated the Dillon Rule solely by virtue of their standing as taxpayers and their direct and immediate interest in the town and county's actions); *Bono Film & Video, Inc. v. Arlington Cnty. Human Rights Comm.*, 72 Va. Cir. 256 (Va. Cir. Ct. 2006) (declining to exercise jurisdiction over taxpayer plaintiffs' Dillon Rule challenge solely because the

government had voluntarily revoked the non-discrimination ordinance prior to the court's decision). Such standing is proper because of this Court's holding that taxpayers may challenge local government's actions as exceeding their powers. *Gordon*, 207 Va. at 830, 153 S.E.2d at 273.

a. Petitioners John and Jane Doe have taxpayer standing.

Petitioners John and Jane Doe brought this challenge as taxpayers, citizens, and residents of Fairfax County. (App. at 4, ¶¶16-17). John and Jane Doe do not have a remote or minute interest in the decisions of the Board. As taxpayers of Fairfax County with children directly impacted by the decisions of the Board, their interest could not be any more direct and immediate. Indeed, there is no question that Petitioners John and Jane Doe are in an adversarial position to the Board regarding its amendments to the nondiscrimination policy and student handbook, and that they have an interest in seeing that the issues are

"fully and faithfully developed." *Goldman*, 262 Va. at 371, 552 S.E.2d at 71.

Petitioners John and Jane Doe contribute to the taxpayer funds from which the Board derives it budget, are acutely interested in the outcome of the Board's decisions, and particularly interested in how the Board — which is responsible for educating their minor child, Jack Doe — makes its decisions and the impact such decisions have on the funds expended. Petitioners John and Jane Doe brought this Dillon Rule challenge to invalidate the *ultra vires* actions of the Board to expand it nondiscrimination policy and student handbook and to ensure that the Board was not improperly expending taxpayer resources to facilitate its unconstitutional and unlawful actions. This is the very essence of a claim brought under taxpayer standing. *See Gordon*, 207 Va. at 830, 153 S.E.2d at 273 (holding that taxpayers have standing to challenge the actions of local governments when its actions will "injuriously affect" the taxpayers by exceeding the scope of granted

authority). Petitioners John and Jane Doe therefore have taxpayer standing to bring this action.

b. Petitioner Lafferty has taxpayer standing.

Petitioner Lafferty also has taxpayer standing to challenge the *ultra vires* actions of the Board in violation of the Dillon Rule. Lafferty has sufficiently alleged that she is a taxpayer, citizen, and resident of Fairfax County with a particular interest in her local government bodies, including making sure that they do not exceed the scope of their authority. (App. at 3-4, ¶¶ 9-14). Under Virginia's long-standing precedent, such allegations are sufficient to enable her to bring litigation against an action that will injuriously impact her as a taxpayer of Fairfax County. *Gordon*, 207 Va. at 830, 153 S.E.2d at 273. There is little question that Petitioner Lafferty has a direct interest in the actions of the Board and in this litigation.

Lafferty actively participated in the Board's consideration of its revisions. (App. at 3, ¶¶ 12-13). She has provided the Board with extensive research and

analysis of financial costs and potential financial liability for decisions made outside the scope of the Board's authority. (*Id.*). Her contributions and active participation in the discussion of the Board's decision therefore evidence her direct and immediate interest in the litigation and are far from remote or minute.

Lafferty's interest in the subject matter of this litigation and in the Board's *ultra vires* decision is precisely the type of interest found sufficient to grant taxpayer standing in Dillon Rule challenges. *See, e.g.*, *Arlington Cnty.*, 259 Va. 708, 528 S.E.2d 706 (permitting taxpayer's Dillon Rule challenge to local government action creating new categories of individuals receiving benefits under employee benefit program). Petitioner Lafferty therefore has taxpayer standing.

III. THIS COURT SHOULD ENGAGE IN PLENARY REVIEW AND DETERMINE THE MERITS OF THE PURE QUESTIONS OF LAW PRESENTED BY PETITIONER'S CLAIMS. (*Assignment of Error* 5)

A. The Standard Of Review For Pure Questions Of Law Is De Novo.

When this Court reviews pure questions of law, the standard of review is de novo. *See, e.g.*, *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 357, 626 S.E.2d 369, 372 (2006) ("We review questions of law de novo."); *Jones v. Commonwealth*, 276 Va. 121, 124, 661 S.E.2d 412, 414 (2008) (same).

B. Petitioners' Appeal Presents Pure Questions Of Law Not Requiring Record Factual Development.

It is well within the purview of this Court to engage in a plenary review of this case. It is appropriate to engage in plenary review when a trial court's ruling "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986), *rev'd in part on other grounds Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *see also Va.*

Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113 (4th Cir. 1993) (same); *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 359 (4th Cir. 1998) (decisions of a trial court involving pure questions of law may be reviewed on the merits by an appellate court); *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (same).

Plenary review of the merits is permissible when an appeal involves pure questions of law. *See, e.g.*, *Taylor v. Commonwealth*, 66 Va. App. 619, 790 S.E.2d 151 (Va. Ct. App. 2016) (if appeal involves pure questions of law, court can engage in plenary review and address the merits); *Loudoun Hosp. Ctr. v. Stroube*, 50 Va. App. 478, 650 S.E.2d 879 (Va. Ct. App. 2007) (appellate courts can engage in plenary review of pure questions of law); *DeBroux v. Commonwealth*, 32 Va. App. 364, 528 S.E.2d 151 (Va. Ct. App. 2000) (same).

This case involves pure questions of law in which the facts are either established or of no controlling relevance. This Court should engage in plenary review

and address the merits of Petitioners' challenge to the Board's *ultra vires* and void *ab initio* actions.

1. The Facts of Petitioner's Claims are Established or of No Controlling Relevance.

Petitioners have brought a challenge under the Dillon Rule seeking a declaration and injunctive relief against the Board's decision to add "sexual orientation," "gender identity," and "gender expression" to the nondiscrimination policy and student handbook. (App. at 20-22). Petitioners' challenge is a pure facial challenge, alleging that on its face the nondiscrimination policy and student handbook revisions violate the Dillon Rule, Va. Code § 22.1-78, and Va. Code 15.2-965. (*Id.*). The factual development is of no controlling relevance. The only relevant information is the text of the challenged law and the authority of the Board to enact it. Those facts are plainly established here, which permits this Court to engage in plenary review.

"Facial attacks, by their nature, are not dependent on the facts surrounding any particular [law]." *City of*

Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 n.11 (1988). "A facial challenge to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 176 (2d Cir. 2006) (citing *City of Lakewood*, 486 I.S. 770 n.11). Thus, "facial challenges are to constitutional law what *res ipsa loquitor* is to facts—in a facial challenge, *lex ipsa loquitor*: the law speaks for itself." *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (quoting Nicolas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1238 (2010)).

The facts necessary to determine whether the Board's actions were *ultra vires* and void *ab initio* are established. The relevant facts are that the Board added "sexual orientation," "gender identity," and "gender expression" to the nondiscrimination policy and student handbook. (App. at 2-3). The sole inquiry before this Court concerning that decision is whether the Board had authority to add such terms. That inquiry

depends entirely on the application of the Dillon Rule, Va. Code § 22.1-78, and Va. Code § 15.2-965. The remaining facts are of no controlling relevance, and this Court should engage in plenary review.

2. Whether the Board's Actions Violated Dillon Rule is a Pure Question of Law.

Pure questions of law arise when the validity of government action "comes out one way if the Constitution or statute means one thing, and the other way if it means something different." *Viracacha v. Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008); *Castro v. Holder*, 727 F.3d 125, 129 (1st Cir. 2013) (same). The question of whether a local governing body has "exercised its powers appropriately" under the Dillon Rule is a question of law. *Fowler v. Fairfax Cnty. Police Officers Retirement Sys.*, 57 Va. Cir. 553 (Va. Cir. Ct. 2000). Where, as here, Petitioners directly attack the validity of the Board's enactment and its authority to enact it at all, the question is purely legal. *See, e.g.*, *Triple G. Landfills, Inc. v. Bd. of Comm'rs of Fountain Cnty.*, 977 F.2d 287, 289 (7th Cir.

1992) ("This lawsuit . . . mounts a facial challenge to the validity of the ordinance itself. The issues posed are purely legal."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012) (same). The application of the Dillon Rule to the Board's actions is a pure question of law.

Additionally, the validity of the Boards actions will be determined by application Va. Code § 22.1-78 and Va. Code § 15.2-965. The interpretation of those statutes also presents a pure question of law. *See, e.g.*, *McKinney v. Va. Surgical Assoc., P.C.*, 284 Va. 455, 458, 732 S.E.2d 27, 28 (2012) (statutory interpretation is a pure question of law); *Perreault v. The Free Lance-Star*, 276 Va. 375, 666 S.E.2d 375 (2008) ("the construction of a statute presents a pure question of law"). Here, the validity of the Board's actions will be determined by whether its revisions and additions are inconsistent with or more stringent than the Commonwealth's nondiscrimination statute in violation of Va. Code § 15.2-965 and Va. Code § 22.1-78. Such a determination is a question of statutory

interpretation, and is therefore a pure question of law. This Court should engage in plenary review of this matter and determine the merits of the Board's actions.

C. This Court Should Engage In Plenary Review To Decide The Questions Of Significant Statewide Importance.

This Court should also engage in plenary review because this matter involves significant constitutional questions of statewide importance, and there is conflict concerning the appropriate resolution of those issues.

1. Conflicting Attorney General Opinions Warrant Plenary Review.

There is confusion in the Commonwealth concerning the permissibility of actions such as the Board's here, and such confusion is evident by the conflicting opinions of the Attorneys General in the Commonwealth. (App. at 137-38). A 2015 Attorney General opinion stated that adding nondiscrimination categories to school board policies was permissible. (*Id.* at 6-7). Notably, that decision was based solely on a federal court decision dealing with Virginia's marriage laws,

and had nothing to do with the authority of school boards. (*Id.*). That opinion recognized, as it must, that school boards are bound by the Dillon Rule, but remarkably excluded the pertinent language restricting a school board's authority. (*Id.* at 27). It cited Section 22.1-78 for the proposition that school boards have broad authority to adopt policies, but specifically excluded the limiting language that such policies not be "*inconsistent with state law.*" (*Id.*). While ignoring the language that made its opinion erroneous, the opinion concluded that an irrelevant decision concerning Virginia's marriage laws somehow permitted school boards to expand nondiscrimination categories beyond those enacted by the Commonwealth. (*Id.*).

That opinion was a wholesale reversal of a prior Attorney General opinion and provided no explanation as to why a reversal was warranted. (*Id.*). While Attorney General opinions have no force of law, *Barber v. City of Danville*, 149 Va. 418, 424, 141 S.E. 126, 127 (1928), the conflicting opinions concerning this issue

warrant this Court's plenary review to provide a definitive answer on this question of statewide importance. Such review is compelled by the fact that such opinions are also being used by school boards to act in excess of their authority and in violation of the Dillon Rule and Virginia statutory law.

2. A National Conflict Warrants Plenary Review.

The Board's action here was premised, in part, on "guidance" from the Department of Education that such policies are required under the law. (*Id.* at 10-11). However, that "guidance" has since been enjoined nationwide. *See Texas v. United States*, No. 7:16-cv-00054-O, dkt. 86 (N.D. Tex. Oct. 18, 2016). The United State Supreme Court has also placed a decision from the Fourth Circuit on hold involving a substantially similar policy from a school board in Gloucester County, Virginia challenged on federal civil rights grounds. *See Gloucester Cnty. v. Grimm*, 136 S. Ct. 2442 (2016). A decision on the merits is necessary to determine the legality of actions such as the Board's

here. Plenary review is warranted, and this Court should address the merits of the instant matter.

CONCLUSION

Because Petitioners have standing to challenge the Board's *ultra vires* and void *ab initio* actions when it enacted additional categories of nondiscrimination to its policy and student handbook, and because this appeal involve a pure question of law without need of record factual development, this Court should engage in plenary review, declare the Board's actions a violation of the Dillon Rule, Va. Code § 22.1-78, and Va. Code § 15.2-965, and enjoin the Board from enforcing these unlawful amendments.

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Dated: October 24, 2016

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CERTIFICATE PURSUANT TO RULE 5:26(h)

As required by Rule 5:26, I hereby certify that foregoing Opening Brief contains 8,748 words, excluding those parts of the brief that are exempted under Rule 5:26(b), and that the foregoing Opening Brief is otherwise in compliance with Rule 5:26.

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CERTIFICATE PURSUANT TO RULE 5:26(e)

As required by Rule 5:26, I hereby certify that on this 24th day of October, 2016, I served a true and correct copy of the foregoing via electronic mail on the following counsel of record:

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