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181037

Supreme Court of Virginia

Record No. 181037

SANJAY AND SONA SAINANI,
Defendants/Appellants,

v.

BELMONT GLEN HOMEOWNERS ASSOCIATION, INC.,
Plaintiff/Appellee.

On Appeal from the Circuit Court of the County of Loudoun

Honorable Jeanette A. Irby, Judge

BRIEF AMICI CURIAE OF SIKH FOUNDATION OF VIRGINIA, HINDU AMERICAN FOUNDATION, AND RAJDHANI MANDIR IN SUPPORT OF APPELLANTS

Anand Agneshwar*
Mitchell Russell Stern*
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

Matthew M. Shultz (VSB 65936)
Michael B. Bernstein*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-6000

**pro hac vice* pending

Counsel for Amici Curiae Sikh Foundation of Virginia, Hindu American Foundation, and Rajdhani Mandir

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STATEMENT OF INTEREST

This appeal challenges a regulation of holiday light displays adopted and enforced by a property owner's association against a Hindu family that belongs to the Sindhi-Sikh community and observes Hindu, Sikh, and Sindhi religious festivals in their religious practices. The regulation on its face treated religious and secular holidays differently and gave preferential treatment to certain religious holidays over others. The association also enforced the regulation in an unreasonable, arbitrary, and capricious manner, including by penalizing the family for their holiday light display at a time of year when everyone else in the community was freely permitted to display holiday lights and decorations.

Amici Curiae—the Sikh Foundation of Virginia ("SFV"), the Hindu American Foundation ("HAF"), and Rajdhani Mandir (collectively, "Amici")—are a Sikh faith community in Northern Virginia, an advocacy organization for the Hindu American community, and a Hindu temple in Northern Virginia who have vested interests in protecting their members, and the larger Hindu and Sikh communities, from religious discrimination and bias.

A. The Sikh Foundation of Virginia

SFV began in 1978 for the purpose of establishing a Gurdwara (a place of worship for Sikhs) in Northern Virginia in order to meet the religious, cultural, and social needs of the Sikh community in Virginia. At that time, most Sikh families

living in Virginia attended the Gurdwara in Washington, D.C. or Silver Spring, Maryland. In 1981, SFV acquired land in Fairfax County for the Gurdwara and eventually broke ground in 1987. During this period, the Sikh community in Virginia held kirtan diwan (devotional singing) and langar (free vegetarian meals open to people of any faith, economic status, or ethnicity) on Sundays in the houses of its members. The Gurdwara, located at 7250 Ox Road, Fairfax Station, was inaugurated in 1989 and was the first Gurdwara established in the Commonwealth. At the time, approximately 150 families attended the Gurdwara. Since then, membership has grown to over 400 families, and upwards of 1,000 attend the Gurdwara during major celebrations.[1] There are approximately 15,000 Sikhs in Virginia, and close to 50,000 Sikhs in the Washington, D.C. metropolitan area.

SFV also works with other national organizations, including SALDEF (Sikh American Legal Defense and Education Fund), the Sikh Coalition, and United Sikhs, on issues related to religious tolerance. For example, SFV has worked with some of these organizations on issues related to airport security screenings, which can raise sensitive issues related to the touching or removal of a Sikh's turban. SFV is also a member of Interfaith Communities for Dialogue, which is a

[1] Although the Sainanis have attended services at the Gurdwara, they are not members of SFV.

multifaith and multiethnic organization that works to promote understanding, respect, and relationships among religiously and culturally diverse communities in Northern Virginia.

B. Hindu American Foundation

HAF is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues—from the portrayal of Hinduism in K-12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy.

HAF educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Through its advocacy efforts, HAF promotes dignity, mutual respect, and pluralism in order to ensure the well-being of Hindus and for all people and the planet to thrive.

Since its inception, HAF has been actively involved in the realm of legal advocacy. From issues of religious accommodation, religious discrimination, and hate crimes to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF informs the public and the courts about various aspects of Hinduism and issues impacting the Hindu American community.

C. Rajdhani Mandir

Rajdhani Mandir is one of the largest Hindu temples in Northern Virginia and was established to serve the religious, spiritual, cultural, educational, and social needs of the Hindu community in Northern Virginia, as well as to foster and spread the philosophy of Hinduism. It was founded in 1985 and opened its current temple in Chantilly, Virginia in March 2000. Rajdhani Mandir estimates that 500 to 700 people attend regular services at the temple, and that upwards of 1,500 to 2,000 people participate in festival celebrations at the temple.[2] Rajdhani Mandir is a member of the Association of United Hindu & Jain Temples, an association of all major temples in the Washington, D.C. and Baltimore metropolitan areas, which was founded in 1993 to promote activities related to Hinduism and Jainism, interfaith dialog, and non-violence. The Association of United Hindu & Jain Temples is a member of the Inter Faith Conference of Metropolitan Washington.

STATEMENT OF THE CASE

A. Nature of the Case and Disposition Below

This is an appeal from a Final Order of the Circuit Court of Loudon County (Hon. Jeanette A. Irby), following a bench trial, awarding judgment in favor of Plaintiff/Appellee Belmont Glen Homeowners Association, Inc. ("BGHOA") against Defendants/Appellants SanJay and Sona Sainani (the "Homeowners") for

[2] Although the Sainanis have attended services at the temple, they are not members of Rajdhani Mandir.

$884.17 in assessments for violations of BGHOA's rules, injunctive relief, and $39,148.25 for attorney's fees and costs. (JA152-55).

B. The Homeowners' Religious Practices in their Home

The Homeowners observe Sikh, Hindu, and Sindhi religious traditions. (JA414).[3] As Mr. Sainani testified at trial, light is "part and parcel" of their religious traditions, celebrations, and observances. (JA415). During religious holidays, the family lights an "Akhand Jyoti" lamp in their home, which is kept burning for the duration of the holiday. (*Id.*). The act of bringing brightness and light into the environment is done "in devotion to God." (JA416). As part of this observance and devotion to God, the Homeowners display lights on the exterior of their home as an extension of the Akhand Jyoti. (JA416, 427). As Mr. Sainani explained, this is because his traditions teach that when one spreads light inside the home one should also spread light outside the home. (*Id.*).

The Homeowners observe various festivals and birthdays of deities or gurus throughout the year, generally from late September or early October through March or April, including:

- Navratri, a nine-day festival that celebrates the feminine divine and typically falls in late September or early October (*see* JA412);

[3] Mr. Sainani is a Sindhi Hindu, but it is a tradition in his community that the oldest son in each family also observe the Sikh traditions and holidays. (JA414). Sindhis are a socio-ethnic group originating from Sindh, a province of modern-day Pakistan.

- Diwali, a five-day festival, known as the "festival of lights" celebrating the light of knowledge and truth and the victory of good over evil, which typically falls in October or early November (*see id.*);
- Guru Nanak Gurpurab, in early or mid-November, which celebrates the birthday of Guru Nanak, the founder of Sikhism (JA413);
- Christmas, the birth of Lord Jesus (*id.*);
- Makar Sankranti, in mid-January, which is a festival for the return of the sun (*id.*);
- Maha Shivaratri, which celebrates the birth of Lord Shiva, the divine manifestation of transformation and regeneration, and falls in early or mid-March (*see id.*);
- Cheti Chand, which celebrates the birth of Jhulelal and marks the beginning of the Sindhi Hindu New Year (JA414).[4]

C. Relationship Between the Parties

Plaintiff BGHOA is an association of property owners under the Virginia Property Owners' Association Act, Va. Code Ann. § 55-508 *et seq.*, and subject to an Amended and Restated Declaration of Covenants, Conditions and Restrictions recorded in 2014 (the "Amended Declaration"). (*See* JA71).[5] The Homeowners own a residential lot that is part of the BGHOA. (*Id.*).

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[4] The Gregorian calendar dates of these observances vary from year to year because they are based on the lunar calendar.

[5] Amici understand that whether the Amended Declaration and, by extension, the rules were properly adopted and therefore effective and enforceable against Homeowners is disputed in this appeal. However, for purposes of argument in this brief, Amici take no position on these issues but assume that the Amended Declaration was effective and enforceable.

D. BGHOA's Seasonal Holiday Decorations Guidelines

1. No Seasonal Guidelines prior to August 2014

Prior to August 2014, the community "did not have specific holiday lighting guidelines." (JA223). There were no specific rules about dates for setting up or taking down holiday lights and no specific rules about when holiday lights had to be turned on or off. (JA318). However, "people started coming to the HOA meetings complaining about" the Homeowners' lights. (JA222). Members of the board of directors also raised to Mr. Sainani "the fact that these lights were up and that was a problem" and that "people were complaining they should be taken down." (JA223).

2. The 2014 Guidelines

In August 2014, BGHOA adopted guidelines for "Seasonal Holiday Decorations" (the "2014 Guidelines"), with the express purpose of "avoid[ing] religious issues in the community." (JA993).[6] The August 2014 Guidelines defined "Seasonal Decorations" as "those tasteful special decorative objects and lighting that are consistent with recognized Federal Holidays, Religious Holidays, Valentine's Day and Halloween." (JA994). Seasonal Decorations could be installed no more than 7 days before and had to be removed no more than 3 days after "all Federal Holidays, Religious Holidays and Valentine's Day," but longer

[6] Amici use the terms "Seasonal Guidelines" or "Guidelines" to refer collectively to the 2014 and 2015 Guidelines, as defined in this section.

display periods were allowed for Halloween, Thanksgiving, 4th of July, and "Winter Holidays." (JA994). BGHOA's board president and the chair of the Architectural Review Board ("ARB"), the subcommittee responsible for enforcing the 2014 Guidelines, both testified at trial that "Winter Holidays" was meant to refer primarily to Christmas. (JA284, 324).

Except as specifically permitted by the 2014 Guidelines, BGHOA required residents to apply for permission in advance of displaying decorations for any other holidays. The policy stated that "[n]o application is necessary for holiday decorations that . . . are displayed only during the proper holiday time frame" (JA993), but also required "permission to install decorations for none [sic] nationally recognized holidays" (JA994). Furthermore, although not contained in the version of the Guidelines that appears in the BGHOA handbook, BGHOA permitted residents to apply for the use of lights and decorations for only two "unapproved" holidays (*i.e.*, holidays not recognized in the 2014 Guidelines). (JA240, 242, 286).

3. The 2015 Guidelines

In October 2015, BGHOA adopted amended guidelines for "Seasonal Decorations" (the "2015 Guidelines"). (JA1019). The amended 2015 Guidelines removed the reference to "religious issues" and stated that their purpose was to "avoid the prolonged display of lights and decorations outside the respective

holiday." (JA1019). The 2015 Guidelines also eliminated the language from the 2014 Guidelines that appeared to permit displays for "Religious Holidays" that were not listed in the policy. (*Compare* JA994, *with* JA1020). Instead, residents were expressly required to request permission from the ARB "to install decorations for other holidays or celebrations," which in all cases could be displayed only "for a period not to exceed fourteen (14) days." (JA1020). The 2015 Guidelines also added an exception for the religious holiday Diwali, permitting installation no sooner than 5 days before and requiring removal no later than 5 days after the holiday, for a total timeframe of no more than 15 days. (JA1020). As with the 2014 Guidelines, BGHOA permitted residents to apply for the use of lights and decorations for only two "unapproved" holidays (*i.e.*, holidays not recognized in the 2015 Guidelines) even though no such limit appears in the handbook. (JA240, 242, 286).

E. BGHOA's Enforcement of the Seasonal Guidelines Against the Homeowners

Although the 2014 Guidelines appear to permit Seasonal Decorations for all "Religious Holidays" without prior approval, BGHOA assessed charges against the Homeowners for their religious displays of lights during various Sikh, Hindu, and Sindhi celebrations prior to the adoption of the amended 2015 Guidelines. (JA6-8). This included alleged violations that indisputably took place during the proscribed timeframe for "Winter Holidays," as defined in the 2014 Guidelines.

(*See, e.g.*, JA77; JA321-27; JA994). As the ARB chair testified at trial, the Homeowners were assessed charges for their holiday lights during that time period because "these lights that were up had nothing to do with holiday decorations for winter holidays." (JA327). ***In other words, even at a time of year when everyone in the community was freely permitted, without prior approval, to display holiday lights and decorations, the Homeowners were assessed charges for their religious observance because it did not look like any "Winter Holidays" recognized by the ARB***.

In January 2016, BGHOA also assessed charges against the Homeowners under the 2015 Guidelines for allegedly leaving on their holiday lights past midnight. (JA40, 54, 112, 313, 385-86). However, BGHOA apparently decided not to pursue this assessment. (JA369-70).

F. The Circuit Court's Decision

BGHOA filed suit to collect the charges assessed against the Homeowners, for injunctive relief, and for attorney's fees. Following a bench trial, the Circuit Court entered judgment against the Homeowners in the amount of $884.17 for the alleged violations, an injunction to remove their holiday lights and not to reinstall them except in accordance with BGHOA's rules and regulations or with the written consent of the ARB, and $39,148.25 for attorney's fees and costs. (JA152-55).

This appeal followed.

ARGUMENT

Over 1.7 million Virginians live in communities governed by common interest community associations, such as homeowners and condominium associations (collectively, "HOAs").[7] Those Virginians pay over $2 billion each year to their HOAs.[8]

HOAs serve important functions and provide significant benefits to their residents. These include providing community services such as recreational facilities, community parks and other common areas, and road and sidewalk maintenance. They also include sponsoring events to foster a sense of community, as well as establishing and enforcing architectural and landscaping standards, and the like, in order to preserve property values. In exchange, HOA members give up some of their freedoms and subject themselves to the HOA's rules and regulations. While HOA governing bodies have authority to promulgate and enforce rules and regulations, this authority is not unfettered. Relevant here, HOAs have obligations to serve fairly and equitably the interest of all of their members, regardless of

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[7] *See* Community Associations Institute, *Statistical Review for 2016* (2016), https://www.caionline.org/AboutCommunityAssociations/Statistical%20Information/2016StatsReviewFBWeb.pdf.

[8] *See* Community Associations Institute, *Virginia Community Associations Facts & Figures*, https://www.caionline.org/Advocacy/Resources/Documents/Infographics/VA_FactsFigures_Info.pdf.

religion, ethnicity, social status, political affiliation, or any other personal characteristic.

Simply put, in this matter BGHOA acted arbitrarily and capriciously in instituting and enforcing a patently unreasonably regulation that discriminates on the basis of religion. Accordingly, Amici respectfully submit that this Court should reaffirm that HOAs are not given unfettered discretion to adopt regulations and impose sanctions for violations where those actions violate Virginia law and raise serious issues under the Constitutions of the United States and Virginia.

I. The Belmont Glen Homeowners Association's Actions Were Unreasonable

The trial court erred in finding that BGHOA's Seasonal Guidelines were reasonable. The trial court misapplied the reasonableness standard under Virginia law as to both the reasonableness of the Seasonal Guidelines on their face and how BGHOA applied them. These two issues are mixed questions of law and fact. The Court defers to the trial court's findings of fact but reviews *de novo* questions of law and the trial court's application of the law to the facts. *Nielsen Co. (US), LLC v. Cnty. Bd. Of Arlington Cnty.*, 289 Va. 79, 87 (2015); *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 573-74 (2005).

A. The Seasonal Guidelines are arbitrary and capricious on their face.

HOAs do not have unfettered discretion to promulgate and enforce their rules and regulations. In Virginia, as in other states, HOA rules and regulations must be reasonable on their face and as applied. *United Owners Ass'n of BuildAmerica-1 v. Gillman*, 223 Va. 752, 768-70 (1982). *Gillman* teaches that an HOA acts unreasonably when it "promulgat[es] arbitrary and capricious rules and regulations bearing no relation to the purposes of the [association]." *Id.* at 769. The Court in *Gillman* remanded the case to the trial court for a determination of whether, in light of all of the relevant facts and circumstances, the commercial condominium association's restriction on the number and weight of vehicles parked in the common area "serves a legitimate purpose or is arbitrary and oppressive in its application." *Id.* at 770. Furthermore, an act can be deemed arbitrary and capricious if the decision-making body departs from the appropriate standard, or the act is "willful and unreasonable" and done either "[i] without consideration or in disregard of facts or law or [ii] without determining principle." *James v. City of Falls Church*, 280 Va. 31, 42 (2010).

On their face, BGHOA's holiday display regulations are unreasonable, and they have been enforced in an arbitrary and capricious manner. Indeed, the regulations unnecessarily discriminate against non-favored holidays and therefore are not reasonably related to BGHOA's purported goals in adopting them.

At trial, BGHOA argued that its authority to promulgate the Seasonal Guidelines came from the Amended Declaration, which prohibits "[e]xterior lighting which results in an adverse visual impact to adjacent Lots," and the ARB's authority to "regulate the external design and appearance of the Property and the external design, appearance and location of the improvements thereon in such a manner so as to preserve and enhance property values." (JA400, 402-04, 523). The 2014 Guidelines also state that the purposes of the holiday lighting regulations were "(1) to promote harmony in the community; (2) avoid discourteous and unsafe conditions affecting property values; and (3) to avoid religious issues in the community." (JA993). The 2015 Guidelines make no mention of property values, nor of promoting harmony or avoiding religious issues, stating only, "The purpose for these guidelines is to avoid the prolonged display of lights and decorations outside the respective holiday." (JA1019).

Leaving aside the question of BGHOA's authority to promulgate holiday lighting regulations, BGHOA failed to explain how the regulations it adopted were reasonably related to its purported rationales. Alyssa Knight, the President of BGHOA at the time, testified at trial that BGHOA chose to include only four holidays in its Guidelines because it was more convenient to include the most

popular holidays and require approval for any others. (JA240-42).[9] BGHOA never explained how favoring some holidays over others relates to preserving property values. Not all potential home buyers celebrate the same holidays in the same manner. BGHOA provided no rational basis for its assumption that holiday light displays from October 1 to January 31 have no adverse visual impact while the very same light displays during the rest of the year do. Moreover, neither the 2014 Guidelines nor the 2015 Guidelines provide any criteria for BGHOA's review of alternative holidays. Without any criteria, BGHOA's decisions with respect to alternative holiday displays will, by definition, be arbitrary. *See James*, 280 Va. at 42 (defining arbitrary and capricious action to include acts that are "willful and unreasonable" and "without determining principle").

Rather than promoting community harmony and avoiding religious issues, as the 2014 Guidelines ostensibly were intended to do, BGHOA's regulations threaten to cause friction between neighbors. Some will be able to display lights by right; others will need to seek permission, without clear guidance on what will or will not be approved.

[9] The 2014 Guidelines permitted light displays as of right for Halloween, Thanksgiving, Winter Holidays, and Fourth of July. (JA49). The 2015 Guidelines permit light displays as of right for Halloween, Winter Holidays, Fourth of July, and Diwali. (JA50).

Other states have recognized that discriminatory HOA actions are unreasonable. For example, in *Worthlingen Condominium Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275, 1277-78 (Ohio Ct. App. 1989), the Court of Appeals of Ohio expressly adopted a discrimination prong as part of the reasonableness test, explaining that it "protects against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable and unfair to the minority because its effect is to isolate and discriminate against the minority. It provides a safeguard against a tyranny of the majority." *See also Nettles v. Ticonderoga Owners' Ass'n, Inc.*, 306 P.3d 441, 444 (N.M. 2013) ("While this reasonableness requirement has not been thoroughly developed in New Mexico, the legal principle is well settled in other jurisdictions. It often contains reference to protecting the minority from unreasonable actions of the majority."); *Buckingham v. Weston Village Homeowners Ass'n*, 571 N.W.2d 842, 844-46 (N.D. 1997) (adopting reasonableness test including discrimination prong).

Similarly, the *Restatement (Third) of Property, Servitudes* § 6.13(b) identifies fair treatment of members as one of the duties of common interest community governing bodies. The *Restatement* explains that "unequal treatment of members who are similarly situated will usually be an easy case of unfairness . . . . Often, following the majority view is fair, but only if the majority is not taking unfair advantage of the minority." *Id.* cmt. d. The religious

discrimination the Homeowners experienced in other aspects of their dealings with BGHOA underscores the need for a non-discrimination principle that applies to all HOA actions. (JA433-45).

BGHOA easily could have adopted holiday display guidelines that were neutral and non-discriminatory and that fulfill BGHOA's goals. Simply allowing each household to decide on its own what holidays to celebrate with the display of lights or decorations, with reasonable and neutral restrictions on such displays, would have been well within its authority.

Other nearby HOAs have taken such an approach. For example, the Brambleton Community Association Design Guidelines permit holiday lighting and decorations to be displayed thirty days in advance of the holiday and removed within fourteen days after the holiday.[10] The Brambleton Community Association can seek removal of the decorations if they attract excessive traffic, unreasonably interfere with the use and enjoyment of common areas or neighboring properties, or cause a dangerous condition.[11] Similarly, the Broadlands Homeowners

[10] Brambleton Community Association, Design Guidelines 63 (revised Apr. 7, 2015), https://brambletonhoa.com/250/Covenants.
[11] *Id.*

Association's Modifications Subcommittee Design Guidelines permit holiday lighting and decorations as long as they are removed thirty days after the holiday.[12]

Presumably, the Brambleton Community Association and the Broadlands Homeowners Association are just as concerned with preserving property values, avoiding adverse impacts, and promoting community harmony as is BGHOA. But they have regulated holiday light displays in a more neutral, non-discriminatory fashion. On the other hand, BGHOA has regulated in a way that allows only "major" holidays to be celebrated with exterior lights and decorations, while requiring approval for any other holidays.[13]

B. The Seasonal Guidelines are arbitrary and capricious as applied

BGHOA also applied its Seasonal Guidelines unreasonably. The 2014 Guidelines appear to permit decorations and lighting to be installed seven days prior—and removed within three days after—other federal holidays, religious holidays, and Valentine's Day. (JA994). However, it is clear from the testimony at trial that BGHOA never applied the 2014 Guidelines in this manner. (JA240). BGHOA also imposed a two-holiday limit on unapproved holidays, despite the

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[12] Broadlands Homeowners Association, Modifications Subcommittee Design Guidelines 53 (revised Oct. 2015), https://www.broadlandshoa.org/wp-content/uploads/2013/03/Lighting-DG-Oct-2015.pdf.

[13] While the 2014 Guidelines and 2015 Guidelines do not limit how many other holidays can be approved, the testimony indicates that the BGHOA would allow only two. (JA240, 242, 286). This arbitrary restriction is addressed more fully below.

absence of such a restriction in either the 2014 Guidelines or the 2015 Guidelines. BGHOA's failure to follow the standards set out in the Guidelines was arbitrary and capricious, as was its failure to define criteria by which to review unapproved holidays.

Furthermore, BGHOA acted unreasonably by punishing the Homeowners for conduct that occurred prior to the adoption of the 2014 Guidelines, during a period in which BGHOA had no guidelines for holiday displays and was not regulating light displays. It was also unreasonable for BGHOA to assess charges for light displays when they were allowed by right, and BGHOA's post hoc rationalizations for this decision do not justify it.

1. BGHOA's general haphazard enforcement of the Seasonal Guidelines

Before examining BGHOA's conduct with respect to the Homeowners specifically, the record in this case demonstrates that BGHOA was acting arbitrarily and capriciously in its enforcement of the Seasonal Guidelines. *First*, the 2014 Guidelines appear to permit "Seasonal Decorations"—defined as "tasteful special decorative objects and lighting that are consistent with recognized Federal Holidays, Religious Holidays, Valentine's Day and Halloween"—to be displayed without prior approval so long as they are installed seven days before and removed three days after "all Federal Holidays, Religious Holidays, and Valentine's Day." (JA994). However, it is clear from the testimony at trial that BGHOA did not

apply the 2014 Guidelines in this manner. In her testimony regarding the 2014 Guidelines, Alyssa Knight, who was President of the BGHOA board at the time, testified, "So we decided just to put the four major holidays that people typically decorate for with lighting. And then we allowed for people to pick two others at their discretion and just let us know." (JA240). Her testimony establishes that, despite the most natural reading of the 2014 Guidelines, BGHOA required approval of holiday light displays outside of the four "approved" holidays. By departing from the Guidelines in this way, BGHOA acted arbitrarily and capriciously.[14]

Second, Ms. Knight's testimony indicates that BGHOA permitted residents to apply for the use of lights and decorations for only two "unapproved" holidays. (JA240, 242, 286). However, neither the 2014 Guidelines nor the 2015 Guidelines contain this two-holiday limit. (JA993-94, 1019-20). Moreover, there was no testimony explaining the rationale for this limit. By imposing the two-holiday limit without a basis in either set of Guidelines, and without justification, BGHOA acted arbitrarily and capriciously.

[14] The only reading consistent with BGHOA's application of the 2014 Guidelines is that they apply only to "*recognized* . . . religious holidays." But this reading renders the Guidelines arbitrary and capricious on their face because they do not define "recognized," and, even so, they arbitrarily discriminate against unrecognized religious holidays.

Finally, neither the 2014 Guidelines nor the 2015 Guidelines provide any standard by which requests for lights and decorations on "unapproved" holidays would be judged. The lack of any standard (*i.e.*, any determining principle) by which BGHOA's discretion would be guided and reviewed by a court makes the Seasonal Guidelines arbitrary and capricious. Ms. Knight's testimony highlights how the lack of an approval standard can lead to arbitrary action. In some places her testimony suggests that it was just a matter of notifying BGHOA. (*See, e.g.*, JA240 ("And then we allowed for people to pick two others at their discretion *and just let us know*." (emphasis added))). In others, that express approval was required. (JA286 ("[W]hatever your family chose to celebrate, you could *ask* to put up decorations for that holiday." (emphasis added))). This testimony illustrates that without clear standards, BGHOA was likely to act in an unfettered and arbitrary way.

2. BGHOA's application of the Seasonal Guidelines to the Homeowners

With respect to the Homeowners, BGHOA's imposition of charges in November 2014 amply demonstrates that BGHOA was acting unreasonably and arbitrarily and capriciously. *First*, the Homeowners were punished for actions that occurred prior to the adoption of the 2014 Guidelines. The minutes of the November 5, 2014 hearing at which the charges were assessed show that part of the reasoning for the assessment was that "[t]he homeowner has a record of leaving

holiday lights up at all times of the year." (JA1041). Because the 2014 Guidelines did not go into effect until August 1, 2014, BGHOA's stated reasoning necessarily refers to conduct that occurred prior to the adoption of the 2014 Guidelines. The testimony at trial of Frank Voight, the Chairman of BGHOA's ARB, supports the conclusion that the Homeowners were punished for conduct that occurred prior to the adoption of the 2014 Guidelines. (JA312-13, 315, 316, 325-26). And the trial court based its decision to order the Homeowners to pay the outstanding charges on the pre-Guidelines conduct. (JA157).

However, prior to the 2014 Guidelines, there were no BGHOA regulations governing the display of holiday lights or decorations. (JA317-21, 382). BGHOA may argue that the original declaration allowed holiday lights only with approval. (JA329-30). But the unrebutted testimony at trial shows that, prior to the 2014 Guidelines, residents of Belmont Glen displayed lights throughout the year without seeking approval. (JA416-18). Holding the Homeowners to a standard that did not exist while other residents were permitted to freely display lights without consequence is the definition of arbitrary and capricious.

Second, BGHOA acted unreasonably by punishing the Homeowners for displaying lights at a time during which its own guidelines permitted light displays. The assessment BGHOA sought to enforce in the trial court was for the 90-day period beginning November 6, 2014. (JA1041). The 2014 Guidelines permitted

holiday light displays continuously from October 1, 2014 through January 31, 2015. (JA994). From November 6, 2014, holiday light displays were therefore allowed for a total of 87 days. BGHOA attempted to justify the assessment by arguing that the lights displayed by the Homeowners were not appropriate to the season. (JA324-25). However, the 2014 Guidelines do not set out how holiday lights and other decorations will be judged as appropriate to the season. (JA325). Such unfettered discretion to judge holiday lights and decorations as appropriate or not appropriate is arbitrary by nature. In fact, the trial court implicitly acknowledged as much:

> But keep in mind, the way the guidelines are written, a seasonal display of lights can commence from October 1 to January 31. I know the ARB gentleman had a hard time with Halloween lights, but those could be black or orange or white or green. It doesn't matter.
>
> I think the way the guidelines are written with respect to this case, any color lights can be up from October 1 through January 31st.

(JA158). However, the trial court failed to recognize that this, by itself, rendered BGHOA's actions unreasonable.

Finally, BGHOA attempts to justify its assessment on the basis of its January 13, 2016 finding that the Homeowners left their lights on past midnight, in violation of the 2015 Guidelines. (JA313, 385-86). However, the Homeowners were never assessed charges on the basis of the January 13, 2016 decision, and the

BGHOA apparently decided not to pursue the assessment. (JA369-70). It is unreasonable for BGHOA to now attempt to use the second proceeding to justify the assessment of charges in the first proceeding, which was based on a separate, different violation.

* * *

BGHOA's actions in adopting and enforcing the Seasonal Guidelines were plainly unreasonable, arbitrary, and capricious. Unlike the neutral, non-discriminatory guidelines adopted by neighboring HOAs, the Seasonal Guidelines—adopted in the wake of complaints about the Homeowners' religious light displays—treated religious and secular decorations differently and gave preferential treatment to certain religious observances over others. BGHOA and the ARB apparently ignored the exemption for "Religious Holidays" contained in the 2014 Guidelines and invented a two-holiday limit for "unapproved" holidays. They then assessed charges against the Homeowners for purported violations that occurred (1) prior to the existence of *any* restrictions on holiday lights or decorations and (2) during a time period when lights or decorations were otherwise permitted under the Seasonal Guidelines. Amici hesitate to attribute any improper motive to BGHOA, but one has to wonder if they penalized the Homeowners for displaying holiday lights that they simply did not like or understand.

II. The BGHOA's Actions Raise Red Flags About Compliance with the Constitutions and Laws of the United States and the Commonwealth

That the BGHOA's actions were unreasonable, arbitrary, and capricious is further underscored by the extent to which the Seasonal Guidelines—and BGHOA's enforcement of them—were inconsistent with the guarantees of religious freedom embodied in the United States and Virginia Constitutions. Although these constitutional concerns were not raised directly in this case, they illustrate the dangers of permitting HOAs to have unfettered discretion. Virginians practice different religions and celebrate their faiths in different ways and at different times of year. As this case illustrates, allowing HOAs to regulate religious observances in the name of aesthetics and property values risks burdening religious freedoms.

An HOA, like BGHOA here, is a creature of statute and operates pursuant to authority granted by—and subject to—the Virginia Property Owners' Association Act ("POA Act") and other applicable Virginia statutes. (*See* JA71). *See generally* Va. Code Ann. § 55-508 *et seq*. The legislature had no intention that such an entity would be "a completely autonomous body." *Gillman*, 223 Va. at 763. To the contrary, although the POA Act "permit[s] the exercise of wide powers by an association of unit owners," those powers "are limited by general law and by the [POA] Act itself." *Id.* *Gilman* stands for the proposition that Virginia courts should not infer that POAs have powers that "[t]he statute does not purport

to grant," *id.* at 764, and it is axiomatic that the General Assembly cannot authorize POAs to take discriminatory actions that the legislature itself could not accomplish directly. Moreover, any such action, in the context of Virginia POA law, must be viewed as arbitrary and capricious. Indeed, the *Gillman* court invoked the predecessor to Virginia's current supremacy statute, to the effect that "[a]ny ordinance, resolution, bylaw, *rule, regulation*, or order of 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 Ann. § 1-248 (emphasis added).[15]

Article I, § 16 of the Virginia Constitution provides:

> No man shall be . . . enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities.

Va. Const. art. I, § 16. Article I, § 16 also prohibits the legislature from "confer[ring] any peculiar privileges or advantages on any sect or denomination." *Id.* The First Amendment to the United States Constitution similarly proscribes laws "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Although the text of Article I, § 16 departs from

[15] *Gillman*, 223 Va. at 763, relied on § 1-13.17, the predecessor to § 1-248.

the Religion Clauses of the First Amendment, and the protections of the former are not necessarily coterminous with those of the latter, this Court has looked to decisions of the U.S. Supreme Court to inform its "construction of Article I, § 16." *Virginia Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 626 (2000).

A. The Seasonal Guidelines Risk Burdening the Free Exercise of Religion

The Seasonal Guidelines risk enforcement that is inconsistent with the free exercise rights embodied in the United States and Virginia Constitutions because they subject religious practices to unequal treatment. Although "a religiously neutral law of general application" does not violate the Free Exercise Clause so long as it "rationally advances a legitimate state interest," *Horen v. Commonwealth.*, 23 Va. App. 735, 742-43 (1997) (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)), a law that is not religiously neutral must be "necessary to advance a compelling government interest and do[] so in the least restrictive manner," *id.* (citing S*herbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

"[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The Seasonal Guidelines are not neutral with respect to religion. On their face, the 2014 Guidelines had as an express objective the avoidance of religious issues. The Guidelines generally prohibit holiday lights without prior

approval, but then carve out exemptions for most forms of the conduct at issue, including a more generous rule for Christmas vis-à-vis other "Religious Holidays." For "none [sic] nationally recognized holidays," including "Religious Holidays" (JA994), homeowners needed to seek prior approval of the ARB, and were limited to two such approvals each year (JA240, 242, 286). Furthermore, even at a time of year when everyone in the community was freely permitted, without prior approval, to display holiday lights and decorations, the Homeowners were assessed charges for their religious observance because it did not look like any "Winter Holidays" recognized by the ARB.

Taken together, these rules risk burdening the religious exercise of those whose religions involve significant celebrations outside the Judeo-Christian "Winter Holidays." As Mr. Sainani testified, there are at least six different festivals or religiously significant birthdays that he and his family observe during the course of the year, some of which fall outside of the time periods expressly permitted by the Guidelines. The exterior display of lights is part of those observances. But, under the Seasonal Guidelines, Mr. Sainani would be limited to two of these religious observances each year, subject to BGHOA's approval. Furthermore, because the two "random" approvals applied to religious and secular uses alike, a family like the Sainanis might be forced to save their two allowed holidays for religious observances as opposed to secular events, such as a child's

birthday. Families whose religious observances overlap with the "Winter Holidays" or are otherwise "nationally recognized" do not face such choices.

B. The Seasonal Guidelines Favor Certain Religions

The Seasonal Guidelines risk burdening religious freedoms because they favor certain religions over others. A prohibition against rules that "prefer one religion over another" is "a fundamental limitation of the Establishment Clause." *Falls Church v. Protestant Episcopal Church in U.S.*, 285 Va. 651, 680 (2013). In short, "neutral treatment of religions [is] '[t]he clearest command of the Establishment Clause.'" *Falls Church*, 285 Va. at 680 (second alteration in original) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

Both on their face and as applied, the Seasonal Guidelines treated different religions differently. For example, although the 2014 Guidelines appear to permit Seasonal Decorations for other "Religious Holidays" to be displayed without prior approval for 7 days before and 3 days after the holiday, BGHOA did not apply the 2014 Guidelines in this manner. Instead, it required residents to ask for permission to display lights and decorations outside of "the four major holidays that people typically decorate for with lighting," (JA240), which BGHOA's counsel identified in her opening statement as "Halloween, Thanksgiving, Christmas, and the 4th of July." (JA208). Indeed, it is undisputed that the charges at issue in this case were

assessed against the Homeowners based on lights they displayed in connection with "Religious Holidays."

Moreover, the 2015 Guidelines removed the exemption for "Religious Holidays" and required prior permission from the ARB for *all* religious holidays other than "Winter Holidays" (*i.e.*, Christmas) and Diwali. Such religious favoritism also risks burdening religious freedoms.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

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Respectfully submitted,

/s/ Matthew M. Shultz
Matthew M. Shultz (VSB 65936)
matthew.shultz@arnoldporter.com
Michael B. Bernstein*
michael.b.bernstein@arnoldporter.com
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
(202) 942-5999 (*facsimile*)

Anand Agneshwar*
anand.agneshwar@arnoldporter.com
Mitchell Russell Stern*
mitchell.stern@arnoldporter.com
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(212) 836-8000
(212) 836-8689 (*facsimile*)

**pro hac vice* pending

Attorneys for Amici Curiae
Sikh Foundation of Virginia,
Hindu American Foundation, and
Rajdhani Mandir

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 5:30, I hereby certify that this brief complies with the requirements of Rule 5:26 and contains 6,467 words, exclusive of the parts of the brief exempted by Rule 5:26(b). This brief complies with the type style requirements of Rule 5:6(a)(2) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

Dated: January 28, 2019

/s/ Matthew M. Shultz
Matthew M. Shultz

CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(e), I hereby certify that on January 28, 2019 I caused the foregoing Brief to be filed with the Clerk of the Court for the Supreme Court of Virginia by using the Virginia Appellate Courts Electronic System (VACES) and to be served by First Class mail and by email to:

James J. Knicely (VSB 19356)
jjk@knicelylaw.com
THE KNICELY LAW FIRM, P.C.
487 McLaws Circle, Suite 2
Williamsburg, VA 23185
(757) 253-0026
(757) 253-5825 (facsimile)

William A. Marr, Jr. (VSB 16927)
wamjrlaw@aol.com
Tiago D. Bezerra (VSB 86124)
tiagoesq@aol.com
LAW OFFICE OF WILLIAM A. MARR, JR.
3861 Plaza Drive
Fairfax, VA 22030
(703) 691-2800
(703) 691-2541 (facsimile)

Attorneys for Defendants/Appellants SanJay and Sona Sainani

Marla J. Diaz (VSB 46799)
mdiaz@wtplaw.com
WHITEFORD, TAYLOR & PRESTON, L.L.P.
3190 Fairview Park Drive, Suite 800
Falls Church, VA 22042
(703) 280-9131
(703) 280-8946 (facsimile)

Attorneys for Plaintiff/Appellee Belmont Glen Homeowners Association, Inc.

Dated: January 28, 2019
.

/s/ Matthew M. Shultz
Matthew M. Shultz