In The
Court of Appeals of Virginia

RECORD NO. 0951-22-2

CARLOS IBANEZ, *ET AL.*,

***Appellants*,**

v.

ALBEMARLE COUNTY SCHOOL BOARD, *ET AL.*,

***Appellees*.**

REPLY BRIEF OF *AMICUS CURIAE* THE FAMILY FOUNDATION IN SUPPORT OF APPELLANTS

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Argument

In its initial amicus brief, the Family Foundation focused primarily on the trial court's erroneous ruling that the Virginia Bill of Rights is not self-executing. Most Virginians would be shocked to hear that the Virginia Constitution offers them no protection if public school personnel or other government officials trample on their most fundamental rights. Yet, that is precisely what the Albemarle County School Board ("School Board" or "ACSB") urges this Court to find. Its defense of such an argument lacks merit, as this reply will show.[1]

The Lawsuit Is Not Barred by Sovereign Immunity

ACSB seeks to evade accountability by claiming sovereign immunity. But its arguments confuse and conflate the issues:

First, as for monetary damage claims, ACSB ignores the distinction between (i) claims that arise from ordinary tort actions, and (ii) those that arise from constitutional violations. The Complaint seeks the second sort of damages, not the first. To say that immunity must be expressly waived by statute before anyone can sue a school board for ordinary tort actions (as various cases state) does not mean that legislative action is needed before damages can be sought for a ***constitutional*** violation. As ACSB has conceded, to say that a constitutional provision is self-executing is to say that the Constitution has waived sovereign immunity for

[1] This reply amicus brief is filed under Supreme Court Rule 5A:23(b).

violations of that provision. *See* ACSB Br. at 30-31. Because the constitutional provisions at issue here are self-executing, the sovereign immunity claim must fail.

Second, ACSB ignores the distinction between (i) a school board's immunity from monetary damage claims, and (ii) immunity of its officials from injunctive relief. The Complaint seeks both sorts of relief. Even if a school board cannot be made to pay damages for what it has already done, it can and should be made to cease its unconstitutional conduct by the familiar remedy of an injunction against its officials.

Consider the doctrine of *Ex parte Young.* When a state official threatens to act in violation of the ***federal*** constitution, he is subject to an injunction even though the State has not waived its sovereign immunity and even though that immunity is recognized by the Eleventh Amendment. That is because "a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment." *Ex parte Young*, 209 U.S. 123, 154 (1908). "A State officer acting in violation of federal law thus loses the 'cloak' of State immunity, because in such a situation, the State has no power to impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (cleaned up).

Here, the Complaint names not just ACSB, but also two individuals, Matthew Haas, Superintendent; and Bernard Hairston, Assistant Superintendent. Both are sued "for the purpose of preventing them as officers of a [school board] from enforcing an unconstitutional [policy] to the injury of the rights of the plaintiff[s]." 209 U.S. at 154. Under *Ex parte Young*, Haas and Hairston could not use sovereign immunity against a suit for ***federal*** constitutional violations. Likewise, they cannot use sovereign immunity against this lawsuit for ***state*** constitutional violations. To borrow from the Fourth Circuit: "A [school board] officer acting in violation of [the Virginia Constitution] thus loses the 'cloak' of State immunity, because in such a situation, the [school board] has no power to impart to [the official] any immunity from responsibility to the supreme authority of the [Virginia Constitution]." *Antrican*, 290 F.3d at 184.

Indeed, ACSB has conceded that "the ***analyses*** under Article I, § 11 and Article I, § 12 [the constitutional provisions at stake here] are ***coextensive*** with federal law." ACSB Br. at 40 (emphasis added).[2] Coextensive analyses of counterpart rights means that the remedies must be coextensive, too. Just as Haas and Hairston would be subject to an injunction for violating federal constitutional guarantees, they are also subject to an injunction for violating state constitutional

[2] The Family Foundation reserves the right to explain how Virginia's Bill of Rights may be even more protective than federal law.

guarantees. Besides, to say otherwise would not afford school officials any real protection. It would simply force litigants to focus on the ***federal*** version of their constitutional rights, consigning the Virginia Bill of Rights to irrelevancy.

The Cases Cited by the School Board Are Not Persuasive.

ACSB cites some Virginia circuit court cases in support of its claim that Article I, § 11 is not self-executing here.[3] But those cases dealt with claims for monetary damages for past misconduct, not with injunctive relief to prevent future misconduct.[4] ACSB also offers the rationale on which those circuit courts relied, and that rationale is flawed.

First, the Norfolk Circuit Court relied on the fact that the General Assembly "has never adopted any statute comparable to 42 U.S.C. § 1983." ACSB Br. at 35 (quoting *Young*, 62 Va. Cir. at *4). But the Family Foundation already explained the fallacy of that theory. *See* Amicus Br. at 18. ACSB has said nothing to rehabilitate the theory.

Second, in another case, the Norfolk Circuit Court said: "the Virginia Declaration of Rights [has] been in effect since June of 1776 ... and the failure of

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[3] Article I, § 11 provides the basis for the discrimination, due process, and parental rights claims. *See* Amicus Br. at 15-16.

[4] *See Gray v. Rhoads*, 55 Va. Cir. 362 (C'ville Cir. July 2, 2001); *Young v. Norfolk*, 62 Va. Cir. 307, at *4 (Norfolk Cir. July 17, 2003); *Quigley v. McCabe*, 91 Va. Cir. 397 (Norfolk Cir. Nov. 30, 2015); *Chandler v. W.B. Routin*, 63 Va. Cir. 139 (Norfolk Cir. Sept. 23, 2003); *Jafari v. Wiggins*, 41 Va. Cir. 514, at *3 (Richmond City Cir. 1997).

any court to recognize such a private right of action over such a long period is conclusive proof that no such right of action exists." ACSB Br. at 35 (quoting *Quigley*, 91 Va. Cir. at *399). That is a *non sequitur*. Courts speak through their orders, not their silence. And, if a court has not addressed an issue, it certainly does not mean that the issue already has been decided.

ACSB cites four federal district court cases where plaintiffs raised claims under Article I, § 11, only to have the court say that this constitutional provision is not self-executing. In three of those cases, the plaintiff was only seeking monetary damages, not an injunction.[5] They can be distinguished in the same way as the state court cases where only monetary damages were sought. In one case, the plaintiff sought an injunction to remedy a denial of due process governmental discrimination based on sex.[6] But, the rationale used by that federal court was largely to follow the lead of a Virginia circuit court where only damages were sought, and the federal court's failure to consider the distinction further undermines any persuasive value of that case. In any event, where a state appellate court has not spoken on an issue, the role of federal courts is not to ***say*** what the law is, but to ***predict*** what it will be once

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[5] *Botkin v. Fisher*, No. 5:08-cv-58, 22009 U.S. Dist. LEXIS 24554 (W.D. Va. March 25, 2009); *Quigley v. McCabe*, No. 2:17-cv-70, 2017 141408 (E.D. Va. Aug. 30, 2017); *Jones v. City of Danville*, 2021 U.S. Dist. LEXIS 157888 (W.D. Va. Aug. 20, 2021).

[6] *Doe v. Rector and Visitors of George Mason University*, 132 F. Supp. 3d 712 (E.D. Va. 2015).

such a court has ruled. *Wells v. Liddy*, 186 F.3d 505, 528 ("if state law is unclear federal courts must predict the decision of the state's highest court") (citing *Liberty Mut. Ins. Co. v. Triangle Indus*., 957 F.2d 1153, 1156 (4th Cir. 1992)). Thus, this Court need not be reluctant to reach a different conclusion than the federal district courts – or, for that matter, the state circuit courts. It need only say that their prediction was wrong.

Turning to the free speech claims raised under Article I, § 12, ACSB cites *Virginia Student Power Network v. City of Richmond*, 107 Va. Cir. 137 (Richmond City Cir. 2021). There the plaintiffs sought an injunction to prevent police from using certain crowd control tactics that allegedly ran afoul of those free speech protections, but the circuit court ruled that those protections are not self-executing. What matters most, however, is not ***how*** it ruled, but ***why*** it ruled that way, and its rationale cannot withstand scrutiny:

> The conclusion that Article I, Section 12 is self-executing only as to the General Assembly (and other lawmaking bodies) is further evidenced by the fact it is coextensive with the free speech provisions of the federal First Amendment. ... If the First Amendment were self-executing as to all branches of the government, Congress would not have needed to enact a law creating a private right of action for violations of citizens' First Amendment rights.

Id. at 139.

The Family Foundation does not quarrel here with the proposition that free speech rights under the Virginia Constitution are co-extensive with the federal. But

the remainder of the court's statement is simply wrong. Congress did ***not*** have to enact a law to create a private right of action for violations of citizens' First Amendment rights. "The first eight Amendments to the Constitution set forth ***self-executing prohibitions on governmental action***.... [and] [t]he Fourteenth Amendment confers substantive rights against the States which ... are ***self-executing***." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (emphasis added).

Besides, we should be comparing apples to apples. A better way to see how the ***state*** constitution limits ***state*** officials is to look at how the ***federal*** constitution limits ***federal*** officials. Section 1983 does not apply to federal officials, nor is there any comparable federal statute that does so. Yet, when a federal official threatens to violate a citizen's First Amendment rights, federal courts will grant an injunction to prevent the unconstitutional conduct. *See generally Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is established practice for this Court to sustain the jurisdiction of the federal courts to issue injunctions to protect rights safeguarded by the Constitution …"); *see also Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979) (federal employee "would of course have a right to sue directly under the constitution to enjoin her supervisors and other federal officials from violating her [First Amendment] constitutional rights."). Thus, federal free speech rights are self-executing against federal officials, and likewise, state free speech rights are self-executing against state officials. This is part of what it means to be "coextensive."

The School Board Disregards Other States' Precedent.

The Family Foundation cited cases from the highest courts of other States holding that their state bills of rights ***are*** self-executing. *See* Amicus Br. at 13-14. ACSB does not dispute the point, and it fails to show where the highest court of ***any*** state has ***ever*** reached a contrary conclusion. Nor has ACSB shown any reason why the citizens of Virginia should have less robust protections than citizens of other States. The Supreme Court of Virginia has never said that, nor has this Court.

The School Board Cites the Virginia Supreme Court, Then Turns Its Decision Upside Down.

ACSB acknowledges (at 31-32) the decision in *Robb v. Shockoe Slip Foundation*, 228 Va. 678 (1985), which said that provisions in the Bill of Rights are "***usually***" self-executing and that provisions that "specifically prohibit[] particular conduct" are "***generally, if not universally***" self-executing. *Id* at 681-82 (emphasis added). Thus, for a provision in the Bill of Rights ***not*** to be self-executing is the ***exception***, not the rule. But, having acknowledged the basic constitutional framework, ACSB then tries to turn that framework upside down by claiming that ***only one*** provision in the Bill of Rights is self-executing – the one prohibiting taking private property without just compensation. *See* ACSB Br. at 34. Under the ACSB approach, provisions in the Bill of Rights – including those at issue here, specifically

prohibiting particular conduct – are usually and generally ***not*** self-executing, thus directly contradicting the Supreme Court's teaching in *Robb*.[7]

Further guidance on discerning what is – and is not – self-executing is found in *Scott v. Commonwealth*, 247 Va. 379 (1994), which dealt with a claim that Virginia's system of funding public education ran afoul of state constitutional provisions, including one found in Article I, § 15 of the Bill of Rights:

> That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth ***should*** avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.

Emphasis added. Focusing on the word "should," the Court said that this language is "aspirational and not mandatory." 247 Va. at 386. By contrast, the constitutional provisions at issue here do not say "should." They use terms like "***shall not be abridged***" and "***can never be restrained***" and "***no person shall be deprived***." Art. I, §§ 11, 12. These terms are not aspirational. They are mandatory. *Wal-Mart Stores East, LP v. State Corp. Comm'n*, 299 Va. 57, 70 (2020) ("[t]he traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive") (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (2012)).

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[7] *See* Amicus Br. at 15-16 (showing that the constitutional provisions invoked by the lawsuit "prohibit particular conduct," thereby satisfying the *Robb* criterion identified by 228 Va. at 681-82).

ACSB also quotes another portion of *Robb*, which said:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

228 Va. at 682 (quoting *Newport News v. Woodward*, 104 Va. 58, 61-62 (1905) and 1 T. Cooley, Constitutional Limitations 167-68 (8th ed. 1927)). But that passage from *Robb* does not help ACSB. The constitutional provision under discussion there was not in the Bill of Rights (Article I), but in Article XI, § 1, declaring the policy of the Commonwealth with respect to natural resources, public lands and historic buildings.[8] And, in explaining why that provision was not self-executing, the Court noted its placement as a critical factor: "Article XI, § 1, contains no declaration of self-execution***, it is not in the Bill of Rights***, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law." 228 Va. at 682 (emphasis added). The constitutional provisions at issue here ***are*** in the Bill of Rights.

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[8] Article XI, § 1 states: "To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."

Perhaps, ACSB is implying that the constitutional principles at issue here are deficient because, even though found in the Bill of Rights, they are not accompanied by any detailed instructions to serve as guidance for judges in applying them. The same argument might be made about the federal Constitution, where the language of fundamental rights is often more general than what is found in its Virginia counterpart. In both cases, the argument would be wrong. "The first eight Amendments to the Constitution set forth ***self-executing prohibitions on governmental action***, and this [U.S. Supreme] Court has had primary authority to interpret those prohibitions." *City of Boerne*, 521 U.S. at 524 (emphasis added). Likewise, the Virginia Bill of Rights sets forth "self-executing prohibitions on governmental action." There is no need for some "Napoleonic Code" explaining in detail what those prohibitions mean. Virginia courts have authority to interpret them. While litigants may disagree on how they may apply in any given case, there should be no doubt that ***both*** Bills of Rights – federal and state – are self-executing in their protection of fundamental freedoms.

The School Board Uses a False Analogy.

As to the ***federal*** Bill of Rights, ACSB concedes that: "The U.S. Constitution, including the Bill of Rights, is self-executing as to the United States government and its officers without requiring further action of Congress." ACSB Br. at 41. By analogy, the same must be true of the Virginia Bill of Rights. It also is self-

executing. ACSB tries to draw a different analogy but fails in the attempt. ACSB again argues that Congress needed to pass 42 U.S.C. § 1983 in order to make the federal Bill of Rights applicable against the States, and that the General Assembly likewise must pass legislation to make the Virginia Bill of Rights applicable against local school boards. *See* ACSB Br. at 41. The argument is doubly wrong.

First, Congress did ***not*** need to pass § 1983 in order to make the federal Bill of Rights applicable against the States. The 14th Amendment did that. *See supra* at 7 (quoting *City of Boerne*, 521 U.S. at 524). Likewise, the Virginia Bill of Rights confers substantive rights that are self-executing. So, there is no need to enact a state version of § 1983. *See* Amicus Br. at 18.

Second, the ACSB analogy also fails because the relationship between the federal and state governments is fundamentally different from the relationship between the state government and local school boards. The States were not created by the federal government. They began as separate sovereigns. While part of their sovereignty was transferred to the federal government by the Constitution, the States remain sovereign in their own sphere. *E.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022) ("[O]ur Constitution split the atom of sovereignty.... The Constitution limited but did not abolish the sovereign powers of the States, which retained a residuary and inviolable sovereignty.") (cleaned up).

Local school boards, on the other hand, are not separate sovereigns. Instead, they are creatures of the Commonwealth, created by the Virginia Constitution. *Fairfax Cty. Sch. Bd. v. S.C.*, 297 Va. 363, 375 (2019). To the extent that they enjoy any sovereignty, it is because they "partake of the ***state's*** sovereignty." *Kellam v. School Bd.*, 202 Va. 252, 259 (1960) (emphasis added). Thus, the sovereignty of school boards can rise no higher than the sovereignty of the Commonwealth. By forbidding the Commonwealth from violating certain fundamental rights, the Virginia Bill of Rights forbids all subsidiary units of the Commonwealth from doing so – and that includes local school boards. Thus, even if Congress needed to enact § 1983 to make the federal Bill of Rights applicable to the States, as ACSB mistakenly claims, there would be no similar need for legislation to make the Virginia Bill of Rights applicable to school boards.

The School Board's Argument Leads to Absurd Results.

"Absurd" is not a word to be used lightly. But the word applies here to ASPC's view of the law. If the Virginia Bill of Rights does not apply to school boards, then they can do all manner of wrongful things without any state constitutional remedy. They can segregate classes by race. They can require teachers to begin class with a prayer and denigrate whatever religion the school board finds disagreeable. They can make the students say the Pledge of Allegiance (or make them refuse) then punish those who do not comply. It is no answer to say that the

General Assembly could pass laws to prohibit these things. Legislatures change, and the very idea of a bill of rights is to make sure than our basic liberties are never subject to a majority vote. Nor is it any answer to say that, under the Fourteenth Amendment, the ***federal*** Bill of Rights would provide a remedy. The Virginia Bill of Rights predates the Fourteenth Amendment by nearly 100 years. Are we to suppose that, during all that time, there were no real constitutional protections, and that what Virginia's founders drafted was only a ***pretend*** bill of rights – rights with no remedies? To ask the question is to answer it.

Conclusion

It is a fundamental rule older than our Republic: "[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Marshall, Ch. J.) (quoting Blackstone, Commentaries Vol, 3, p. 23). The parents and students who brought this lawsuit have invoked provisions of the Virginia Bill of Rights that guarantee fundamental freedoms. Surely, they have a remedy. Whatever the other issues in this case may be – and however the evidence may turn out – the trial court erred when it said those provisions are not self-executing. This Court should so rule.

Respectfully submitted,

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Certificate

I hereby certify that on this 22nd day of December, 2022, pursuant to Rules 5A:1 and 5A:19, an electronic copy of the Reply Brief of *Amicus Curiae* has been filed with the Clerk of the Court of Appeals of Virginia, via VACES. On this same day, an electronic copy of the Reply Brief of *Amicus Curiae* was served, via email, upon:

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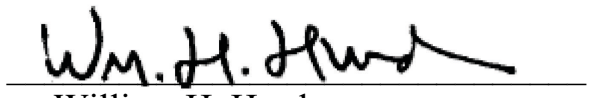

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