VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

C[redacted] and T[redacted] I[redacted];

R.I. and V.I., minors, by and through their parents, C[redacted] and T[redacted] I[redacted], as the minors' next friend;

M[redacted] and M[redacted] M[redacted];

P.M., a minor, by and through the minor's parents, M[redacted] and M[redacted] M[redacted], as the minor's next fri

K[redacted] and M[redacted] G[redacted];

T.G. and N.G., minors, by and through their parents, K[redacted] and M[redacted] G[redacted], as the minors' nex ;

E[redacted] and T[redacted] D. T[redacted];

D.T. and H.T., minors, by and through their parents, E[redacted] and D[redacted] T[redacted], as the minors' next friend;

M[redacted] R[redacted]; and

L.R., a minor, by and through the minor's parent, M[redacted] R[redacted], as the minor's next friend;

***Plaintiffs*,**

v.

ALBEMARLE COUNTY SCHOOL BOARD; MATTHEW S. HAAS, Superintendent, in his official capacity; and BERNARD HAIRSTON, Assistant Superintendent for School Community Empowerment, in his official capacity;

Defendants.

Case No. CL21001737-00

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Policy that Plaintiffs challenge, by its clear terms, dictates that students in Defendants' schools should be treated differently based on their race. To defend the Policy, Defendants respond "that **all** ACPS students have been subject to the School Board's implementation of the Policy"—as if a policy of widespread racial discrimination were more defensible than a narrower one. Br. in Opp'n to Pls.' Mot. for Prelim. Inj. 17 ("MPI Resp."). But Defendants do not dispute the factual underpinnings of Plaintiffs' claims, for example, that school officials said they would place one Plaintiff in a racially segregated environment if the Policy's implementation made him uncomfortable. Instead, Defendants argue that, because they can characterize the Policy as a "curricular decision[]," this Court lacks any power to review it, even though that decision overtly discriminates against students based on race. *Id.* at 2. Their cited authority does not support that broad and patently absurd proposition. *See, e.g.*, *Cnty. Sch. Bd. of Spotsylvania Cnty. v. McConnell*, 212 S.E.2d 264, 267 (Va. 1975) (reciting arbitrary-and-capricious standard applicable to certain employment decisions by schools).

Whether or not the Plaintiff accepted Defendants' offer to segregate students by race, that the offer was made exemplifies the "concrete harm [Plaintiffs] have experienced as a result of the Anti-Racism Policy." MPI Resp. 2. Particularly in schools, any "government classification and separation on grounds of race themselves denote[] inferiority." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality op.). But the Policy does not just classify students based on race. To qualify as "anti-racist," students must "change how" they "look," "think," "act," and "sound." App. 491. For example, they must say, "My school has inequitable systems that disadvantage[] the students of color," but not "I do not say mean things about people of other races." App. 462. Through these and other

requirements, the Policy forces students to make statements supporting its race-based classifications and adopting its racialized ideology.

Compounding the harm of the Policy's race-based classifications, the Policy also treats students differently based on their religion, for example, by singling out only Christian students as part of the so-called "dominant culture." App. 402. Defendants do not dispute Plaintiffs' detailed factual accounts of the religiously hostile environment created by the Policy, arguing only that the environment is not yet hostile enough to violate the Virginia Constitution. *See* MPI Resp. 24. But "even slight suspicion that" the Policy "stem[s] from animosity to religion or distrust of its practices" is enough to render it unconstitutional. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Plaintiffs are likely to succeed on their claims that the Policy is impermissibly discriminatory based on race and religion.

They are also likely to succeed on the merits of their other claims. Whether or not Defendants have already disciplined students for violating the Policy, *see* MPI Resp. 20, the Policy expressly allows for such race-based discipline. That threat of discipline is enough to compel or silence student speech. Worse, the Policy only threatens discipline for voicing certain viewpoints. And Defendants are simply wrong to argue (*see id.* at 25-27) that Plaintiff parents have no judicial recourse for violations of their fundamental "right to make decisions concerning the care, custody, and control of [their] child." *L.F. v. Breit*, 736 S.E.2d 711, 721 (Va. 2013). The Virginia Supreme Court has said that "interfere[nce] with a parent's fundamental rights survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest." *Id.* The Policy cannot survive that test.

Defendants' constitutional violations irreparably harm Plaintiffs. And it is no answer that Defendants have discontinued "the Pilot Program as it existed in 2021," MPI Resp. 3, because that is the entire point of a pilot program—a temporary and introductory program simply as a roll-out, designed to precede broader

implementation of its racist ideology. Defendants fail to respond to the fact that the content of that program is now "woven through in all of the[] classes in Albemarle County." App. 534. The irreparable harm to Plaintiffs and their classmates is exemplified by the Pilot Program. But the harm now extends beyond that Program. To remedy it, the Court should grant Plaintiffs' motion.

REPLY TO DEFENDANTS' BACKGROUND STATEMENT

A full recitation of the facts is included in Plaintiffs' prior filings. *See* Mem. in Supp. of Pls.' Mot. for Prelim. Inj. 2-10 ("MPI"); Mem. in Opp'n to Defs.' Dem., Plea in Bar, Mot. Craving Oyer, and Mot. to Dismiss and/or Drop for Misjoinder 2-6 ("MTD Resp."); *see generally* App. in Supp. of Pls.' Mot. for Prelim. Inj. ("App."). But four points in Defendants' Background Statement warrant a response.

Defendants' Policy and materials demand racial discrimination. Defendants open their response with a selective account of the Policy and the materials implementing it. *See* MPI Resp. 3-10. They highlight statements about their opposition to "all forms of racism," *id.* at 3 (quoting App. 1), while ignoring the many other passages that make clear the Policy actually requires racially discriminatory speech and actions. That Defendants' Policy-related materials contain some seemingly uncontroversial statements does not immunize the racial discrimination that is embedded within the curricula.

Defendants do not address the racially discriminatory foundation of the Policy. For example, Defendants' materials define terms like "oppression," "white privilege," and "white supremacy" so that only white people can be "racist" or "oppress" others, and only people of other races can be "oppressed." *See* App. 13-15. One presentation instructed teachers "to define and then unpack" the "4 areas that emerge as elements of White consciousness," App. 203, and to understand "[c]ommunication is a [r]acialized [t]ool," contrasting "White Talk" with "Color Commentary," App. 169.

Defendants also directed language-arts teachers to the "common text," *Letting Go of Literary Whiteness*, App. 501, which advocates such practices as "tying learning goals and *even grades* to racial literacy growth," App. 676 (emphasis added). In other words, Defendants have directed teachers to treat students differently based solely on race, to teach students to see everyone and everything through the lens of race, to require students to speak and participate in racial discrimination, and then to grade students based on their adherence to a racially discriminatory ideology.

That some of these materials were "for faculty and staff and [were] not directed to students" directly does not mean, as Defendants imply, that students were shielded from their overt discrimination. MPI Resp. 5. Documents like the Vetting Tool were meant to guide teachers' "instruction and curricula." App. 6. By design, therefore, their racially discriminatory principles would affect students. And implementing those principles was not optional. Defendant Hairston told staff members to decide whether they are on the "antiracism school bus, or if you need help finding your seat and keeping your seat, or if it's time for you to just get off the bus." App. 528.

Policy implementation is widespread and beyond the Henley Pilot Program. Defendants' response brief is singularly focused on the Henley Pilot Program. And they only contest it, in part, by way of a self-serving affidavit that says it will not be offered in Spring 2022 "in the form that was provided in June 2021." MPI Resp. Ex. 1 ¶ 8. But nothing is said about a similar dedicated "anti-racism" unit being taught again in Fall 2022 or after. *Id.* And nothing is said about the Policy's full implementation to change instruction in every core subject districtwide. Widespread implementation has been Defendants' main goal and promise from the beginning, and it is Plaintiffs' main concern in this case. App. 4, 78-81, 91, 534. Although parents may have been able with the Pilot Program to withdraw their children from its ungraded advisory class, *see* MPI Resp. Ex. 1 ¶ 5, widespread implementation of the Policy has led, and will continue to lead, to a racist curriculum so ubiquitous that no

opt-opt will be possible, because it would mean opting out of all core classes—a point Defendants themselves have admitted, *see* App. 78-81, 91, 534.

The record reflects evidence of the ongoing and widespread implementation in all core subjects "at every grade level." App. 4. For example, Defendants have repeatedly announced this goal and their progress towards it in their yearly reports on the Anti-Racism Policy. *See, e.g.*, App. 641. Defendants told language-arts teachers that their approach "must change immediately" to conform to *Letting Go of Literary Whiteness*. App. 502; *see* App. 501-18. Through classroom instruction, Defendants taught (and are teaching) students that only white students are "racist" and only people of color are "oppressed." App. 452; *see* MPI 5-6. And the District purchased the book *Stamped* for all 11th grade students as part of their social-studies class. App. 81. Slides produced with the Complaint highlight the District's new and singular focus on race in science and language arts. App. 520-21. Defendants prepared a framework for a Policy-based "middle school advisory experience," App. 642, and announced that by Fall 2023, all middle school courses will include "antiracism lessons and alignment . . . [with] the Middle School Advisory Framework"—presumably the Pilot Program. App. 654. Defendants also completed "anti-racism" changes to 3rd grade history instruction, App. 642, conducted targeted teacher training in the elementary grades, *see Updated Info re: "Reframing the Narrative" Cohorts for Elementary Teachers*, DIVISION COMPASS (Aug. 23, 2021), https://compass.k12albemarle.org/?p=2339615, and publicized their creation of "anti-racist, inquiry-based units for Pre K-5" during the 2021-22 school year. App. 642.

Even now, while briefing Plaintiffs' motion for preliminary relief, Defendants continue to implement the Policy. On March 24, 2022, the Board published a presentation describing certain "Essential Actions," including "[c]ontinued implementation of the anti-racism policy" and "[c]ulturally responsive teaching." App. 767. It publicly recommitted to "ensur[ing] Culturally Responsive Teaching practices

are implemented in *all* classes." *Id.* at 759 (emphasis added). Defendants have mandated that all staff complete (or re-complete for many) the Anti-Racism Policy Orientation training by April 1. *See Reminder: This Friday Is the Deadline for Completing the ACPS Anti-Racism Policy Orientation*, DIVISION COMPASS (Mar. 29, 2022), https://compass.k12albemarle.org/?p=2340646#more-2340646.

The Policy threatens punishment for dissenting from its ideology. Defendants say that students cannot be punished for "disagreement" with a policy, but the evidence does not support that assertion as it relates to the Anti-Racism Policy. *See* MPI Resp. 10. Defendants rely on a self-serving affidavit that says students have not yet been punished for "disagreement" with the Policy. *See* MPI Resp. Ex. 2 ¶¶ 5-6. It does not say that Defendants cannot or will not punish students in the future for failure to affirm the Policy's ideology, as the Policy specifically commands.

The Policy says that students can be referred for discipline if a school official deems them to have engaged in a "racist act." App. 4-5. It allows punishment both under the Policy and the Student Conduct Policy. And Defendants have not disavowed that. The Policy materials define a "racist act" to include speech: like advocating for "colorblindness," taking certain positions on topics like immigration and local funding of schools, and even disagreeing with the Policy itself. *See, e.g.*, App. 454, 462. Defendants do not deny that either. Likewise, Defendants have failed to disavow their intent to punish students with lower grades if they do not support Defendants' ideology in their written assignments, which the Policy also encourages. *See* App. 676. The threat of punishment remains real and is likely to silence dissent or compel student speech and actions to adhere to the Policy's racist ideology.

Plaintiffs have experienced concrete harm. Despite re-stating many of Plaintiffs' allegations of concrete harm, *see* MPI Resp. 10-14, Defendants suggest that Plaintiff students have not experienced sufficient concrete harm in the form of racial and religious hostility under the Policy, *see id.* at 17-18, 23-24. Plaintiffs have. And

that harm is highlighted in each of the Plaintiffs' declarations attached to Plaintiffs' motion for preliminary injunction. *See generally* Decls. C.I., M.M., M.R., T.T., and M.G.[1] To point to a few examples, Defendants' racist ideology confused and disturbed V.I. because it told her she was oppressed by white students as a Latina, but also that she is part of the "dominant culture" as a Christian. Decl. C.I. ¶¶ 10-14. And P.M. was cyber-bullied when, in class, he respectfully expressed his Catholic beliefs, which differ from Defendants' ideology. Decl. M.M. ¶¶ 22-24. Likewise, the racially charged Policy has caused L.R., who is white, Native American, and black, to negatively view his black heritage. Decl. M.R. ¶¶ 20-23. M[redacted] R[redacted] objected when school officials told her they would create a "safe space" for her son—segregated from his white peers. Decl. M.R.¶¶ 13-17. Defendants say no student was sent to a segregated "safe space," *yet*. MPI Resp. Ex. 1 ¶ 7. But they do not dispute that school officials offered that to Ms. R[redacted], based solely on L.R.'s race. Nor do they dispute that, under the Policy, students were forced to create "anti-racist" vision statements stating how they would "change" the way they "look," "think," "sound," and "act." App. 483-91.

The Plaintiff parents object to Defendants' indoctrination of their children in a racist ideology that forces them to speak and act in ways contrary to their religious beliefs. Decls. C.I. ¶¶ 10-17, 27; M.M. ¶¶ 14-18, 22-24; M.R. ¶¶ 20-25, 33; M.G. ¶¶ 24-26; T.T. ¶¶ 20-21; *see* App. 688, 690-91, 701, 705. Plaintiffs D[redacted] and E[redacted] T[redacted] and M[redacted] and M[redacted] M[redacted] have pulled children from District schools because of the racially and religiously hostile Policy-based instruction. Decls. T.T. ¶¶ 4-7; M.M. ¶21. And Plaintiffs K[redacted] and M[redacted] G[redacted] are ready to do the same if Defendants continue to perpetuate this racist ideology in the schools. Decl. M.G. ¶

[1] Without any supporting argument, Defendants claim that Plaintiffs' declarations are "procedurally improper." *See* MPI Resp. 24 nn.5-6. But all of Plaintiffs' declarations conform to the requirements for "unsworn written declarations" and are thus of equal evidentiary value to the two affidavits Defendants attach as exhibits to their MPI Response. *See* Va. Code § 8.01-4.3.

9. These harms are only the beginning, as Defendants promise to implement the Policy—a promise they have already begun to fulfill—so it is "woven through" every class at every grade level with no opportunity to opt out.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims.

A. Plaintiffs have standing to bring their claims, which arise under self-executing provisions of the Virginia Constitution.

Defendants incorporate by reference their arguments that, because the relevant provisions of the Virginia Constitution are not self-executing and Plaintiffs lack standing, Defendants can violate Plaintiffs' constitutional rights with impunity. Plaintiffs have already refuted these arguments. *See* MTD Resp. 7-18. Defendants cannot escape judicial review so easily.

B. Defendants' Policy overtly discriminates on the basis of race.

Because the Policy insists that "different groups will be treated differently," App. 579—and does so in classroom instruction, no less—it "demeans the dignity and worth of a person," *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). This offends the most basic principles of equality in the Virginia Constitution. *Cf., e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal."). Defendants require white students to acknowledge a privilege solely based on race and to work to dismantle it, while other students are required to recognize their "internalized racism." *See* App. 374, 461, 551; *see also Parents Involved*, 551 U.S. at 723 (plurality op.) (criticizing schools' "limited notion of diversity, viewing race exclusively in white/nonwhite terms"). And all students are told that what they can achieve in life depends on their race. Decl. C.I. ¶¶ 10-13. This creates explicit racial classifications within the student body that "stigmatize individuals by reason of their membership in a racial group." *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

Defendants are wrong, therefore, to raise the question whether the Policy "was enacted with discriminatory intent." MPI Resp. at 17. Plaintiffs have already explained the problems with this focus on intent. *See* MTD Resp. 20-21. Because Defendants' racial classifications are overt, "[n]o inquiry into legislative purpose is necessary." *Shaw*, 509 U.S. at 642. All overt racial classifications, including "benign" ones, are "presumptively invalid." *Id.* at 642-43 (cleaned up).

Rather than disavow the idea that the Policy promotes such race-based classifications, Defendants simply argue that, because "**all** ACPS students have been subject to" the racist Policy and curriculum equally, no constitutional violation has occurred. MPI Resp. 17 (emphasis in original). But state-sanctioned racism does not become constitutional merely because the government is equally racist against all students. In fact, this school-sponsored discrimination on a mass scale makes the violations all the more blatant and pervasive. *See Brown*, 347 U.S. at 494 (impact of racial classifications on students "is greater when it has the sanction of the law"). It doesn't matter whether Plaintiffs have been harmed "in the exact same way as every other student enrolled in ACPS," MPI Resp. 18, when Defendants' racist Policy and curriculum harm *all* students, "affect[ing] their hearts and minds in a way unlikely ever to be undone," *Brown*, 347 U.S. at 494.

It also doesn't matter that Defendants' resources, along with their racist content, say *some* things that, taken in isolation, are not racially discriminatory. *See* MPI Resp. 18. Plaintiffs have shown that Defendants' Policy, resources, trainings, and curriculum contain racially discriminatory content and that Defendants use that content to overtly discriminate against students based on race. For example, Defendants' very definitions of "racism" and "anti-racism" are racially discriminatory. According to Defendants, racism is "[t]he marginalization and/or oppression of people of color based on a socially constructed racial hierarchy that privileges white people." App. 452. Along with that, "anti-racism," which is "the practice of identifying,

challenging, and changing the values, structures, and behaviors that perpetuate systemic racism," App. 2, requires students to constantly speak and "mak[e] anti-racist choices" and to dismantle white privilege. App. 461. Otherwise, Defendants say students are "uphold[ing] aspects of white supremacy, white-dominant culture, and unequal institutions and society." App. 461. A racist action, under Defendants' definitions, is one that upholds "white-dominant culture." Singling out a particular race like this is overt racial discrimination.

In line with the Policy's racially charged content, Defendants admit that they will treat different races differently. *See* App. 551, 579; *see also* App. 461 (characterizing all actions and ideas as either "racist" or "anti-racist," depending on their relationship to "white-dominant culture"). In training staff about how to enforce the Policy against students, Defendants told teachers that they must "help to dismantle structures and practices that intentionally and/or unintentionally disadvantage historically marginalized people," App. 13, and eliminate "white racism" in their classrooms. App. 230. Defendants even insist that teachers accomplish these goals by grading students differently based on affirmation of Defendants' racist ideology in students' work. *See* App. 676 ("We believe that adding this dimension to curriculum design—tying learning goals and even grades to racial literacy growth—can have a potent impact on student learning around race."); *see also* App. 501 (referring to book excerpted at App. 658-81 as Defendants' "common text" underlying their language-arts curriculum).

Overt racial classifications like those in Defendants' Policy are "simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved*, 551 U.S. at 720 (plurality op.) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). For the Policy to withstand constitutional scrutiny, therefore, Defendants must put forward an "extraordinary justification," which they cannot do and have not done. *Shaw*, 509 U.S. at 644 (citation omitted).

Instead, they offer a single paragraph that relies on unrelated cases. One held that a lesson about Islam caused no problem under the Establishment or Free Speech Clauses. *Wood v. Arnold*, 915 F.3d 308, 318-19 (4th Cir. 2019). In the other case, the challenged program did "not contain an explicit racial classification," and the plaintiffs there had failed to allege the program "was enacted with a discriminatory intent." *Menders v. Loudon Cnty. Sch. Bd.*, No. 1:21-cv-669, 2022 WL 179597, at *5 (E.D. Va. Jan. 19, 2022). So the court applied only rational-basis review. *See id.* at *6.

Here, by contrast, the Policy's overt "racial classifications" trigger strict scrutiny, so Defendants must show the Policy is "narrowly tailored to achieve a compelling government interest." *Parents Involved*, 551 U.S. at 720 (plurality op.) (cleaned up). Attempting to satisfy this standard, Defendants assert, without explanation, that the Policy is narrowly tailored to "[a]ddress[] racism." MPI Resp. 18-19.

There are at least two problems with Defendants' cursory argument. First, Defendants cannot prove a compelling interest in the Policy by invoking a generalized interest in combatting racial discrimination. They must prove specifics: *How* is the Policy *specifically* "remedying the effects of past intentional discrimination"? *Parents Involved*, 551 U.S. at 721 (plurality op.). They make no attempt to answer that question. So they cannot show a compelling interest in the Policy. Second, Defendants' Policy "addresses" racism by engaging in more racism and requiring students to do so under threat of punishment. But Defendants do not offer any evidence that they considered any "race-neutral alternatives." *Id.* at 735 (citation omitted). Defendants' failure to "consider[] methods other than explicit racial classifications to achieve their stated goals" defeats any argument that the Policy is narrowly tailored to those goals. *Id.* In short, Defendants fail to show that the Policy must "address racism" with racism. The Policy cannot survive strict scrutiny.

Because the Policy contains overt racial classifications, actions, and speech, it is "presumptively invalid." *Shaw*, 509 U.S. at 643 (citation omitted). And Defendants have failed to rebut that presumption by failing to satisfy strict scrutiny. Therefore, Plaintiffs are likely to succeed on their racial-discrimination claim.

C. Defendants' Policy both compels and forbids speech on the basis of viewpoint.

There is no question that schools compel student speech when they force students to affirm a politicized racist ideology under threat of punishment. *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-31, 642 (1943). Defendants themselves do not disagree. *See* MPI Resp. 19-20. They simply argue that no threat of punishment is present here. *See id.* at 20-21. But that argument is unavailing for several reasons, including that it contradicts the evidence and that compelled speech is unconstitutional regardless of any punishment.

Under the Policy, students "MUST" become "anti-racists" or else be punished for what Defendants deem "racist acts." App. 1-5; 455. That means students may not make statements like there are "two sides to every story" or "politics doesn't affect me." App. 454. Defendants also forbid students from denying "white privilege" or promoting "colorblindness." *Id.* And students cannot even "remain[] apolitical" but must take Defendants' side on issues like immigration and school funding. *Id.*

What's more, the Policy requires students to state how they will "change" how they "look," "think," "act," and "sound" to be "anti-racist." App. 464, 483-85, 490-91. They had to affirm the racist ideology by creating "anti-racist" classroom vision and mission statements. App. 488-89, 491. For example, students could not simply say "I treat others with respect," or "I do not say mean things about people of other races." App. 462. Instead, students are compelled to make "anti-racist" statements like "I am learning about my culture and privilege," or "[I am] actively questioning systems of power and working to influence other people in my culture to do the same." *Id.*

This compulsion obviously goes beyond mere disagreement with curriculum—Defendants explicitly compelled students to incant certain statements in support of a specific politicized ideology and refrain from making statements that go against it. That is viewpoint discrimination, which is "presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

Defendants enforce their "anti-racism" regime by threatening to punish student dissent under the Policy as well as "other explicit policies," which reasonably includes the Student Conduct Policy. App. 4-5. That means that, under the Policy, if students speak unacceptable statements, they can be punished for committing a "racist act" with suspension or even expulsion. App. 743-44.

Defendants say that students *have not been* punished for disagreeing with the Policy or curriculum, *see* MPI Resp. 20, but they never say students *will not be* punished for "racist acts" like those cited above—acts that Defendants themselves defined as "racist" under the Policy. Indeed, rather than flatly deny the possibility of this punishment for such "racist acts," a school administrator had to review multiple years of disciplinary records to conclude that to date no student has been punished under the Policy. MPI Resp. Ex. 2 ¶ 5.

Regardless of whether any student has been punished yet, the Policy's language expressly authorizes such future punishment. *See* App. 4 ("When school administrators determine a student has committed a racist act, the student will be provided the opportunity to learn about the impact of their actions on others through such practices as restorative justice, mediation, role play, or *other explicit policies* or training resources." (emphasis added)). Students have no reason to doubt the Policy's language or classroom instruction defining "racist acts." They must operate on the understanding that, for example, they could face suspension for "remaining apolitical" through silence during a political discussion or offering a certain opinion on school funding. App. 454.

Finally, Defendants' argument that students may simply opt out of Policy-based classroom activities is contradicted by their own characterization of how the Policy is implemented now and in the future. Defendants themselves have said on record that the Policy's racist ideology is being "woven through in all of [the] classes in Albemarle County." App. 534. For the Pilot Program, some parents withdrew students from the advisory class, which is ungraded, and those students have not been punished. But Defendants give no assurance that this immunity will continue, nor that similar actions by parents will even be possible in the future, as the "anti-racist" content is woven into English, social studies, math, science, and other subjects. In fact, they have guaranteed just the opposite—that the "anti-racism" instruction will be taught to every student, in every school, at every grade level, and in every subject—making an opt-out impossible. App. 78-81, 91, 534. For example, in English, teachers have been instructed to employ an "anti-racist pedagogy," which includes assigning lower grades for students who do not adequately affirm "anti-racism" in their writing. App. 78-79, 501, 676.

Separately, Defendants' government-speech argument is nearly identical to the argument they made in their Demurrer. *Compare* MPI Resp. at 21-22, *with* Demurrer ¶¶ 15-16. Plaintiffs have already explained why this argument fails. *See* MTD Resp. 21-23. In short, the government-speech doctrine does not empower Defendants to "prescribe what [is] orthodox in politics, . . . religion, or other matters of opinion [and] force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Because that's what the Policy does, it's unconstitutional.

D. Defendants' Policy is unconstitutionally hostile to and discriminatory toward Plaintiffs' religious beliefs.

It is abundantly clear that the Virginia Constitution protects the freedom of religion. It plainly does so through two provisions. *See* Va. Const. art. I, § 11 (banning "governmental discrimination upon the basis of religious conviction"); *id.* § 16

(guaranteeing "free exercise of religion"). Religious freedom is so important in Virginia that the General Assembly even enacted a statute to protect it. *See* Va. Code § 57-2.02. These safeguards "are at least as strong, *if not stronger*, than their federal counterparts," *Vann v. Guildfield Missionary Baptist Church*, 452 F. Supp. 2d 651, 653 (W.D. Va. 2006) (emphasis added), which prohibit hostility toward religion, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Masterpiece*, 138 S. Ct. at 1731. Defendants open their response with the implication that only one or the other of the religion provisions in the Virginia Constitution prohibits religious hostility by the government. *See* MPI Resp. 22-23. But they cite no precedent for such a limited view of religious freedom in the Commonwealth.

Defendants also again recite the wrong standard, confusing this case with disparate-impact cases. *Id.* at 23. But, as in Plaintiffs' racial-discrimination claim, the discrimination against and hostility toward religion here is overt and requires no showing of discriminatory intent. *See supra* I.B. Rather, as Defendants concede, once intentional discrimination is shown, Defendants bear the burden to satisfy strict scrutiny. *See* MPI Resp. 19 n.4. A burden they cannot meet.

Defendants' Policy and its implementation unconstitutionally discriminate against Plaintiff students' religious convictions with "clear and impermissible hostility" toward religion. *Masterpiece*, 138 S. Ct. at 1729; *see Kotch v. Bd. of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552, 556 (1947) (explaining that hostility toward religion would violate equal protection). Classroom instruction hyper-focused students on their religious identities by teaching only Christian students that they have inherent privilege because of their religious beliefs. App. 415. This privilege marked Christian students as part of the "dominant culture," which "subordinates" and "oppresses" other religions, *see* App. 14, 399-402, 415, 452, 461, 689-91, and other religions, including "Muslim, Jewish, Buddhist, atheist, non-Christian folx" as part of the "subordinate culture." App. 400-02. Far from the

religious neutrality that the Constitution requires, Defendants literally made descriptive and normative assertions about students solely based on their religious identities. *See Masterpiece*, 138 S. Ct. at 1731. And by requiring Plaintiffs to engage in anti-racist activities, Defendants demand that Plaintiffs work to "break the box" of their own religious beliefs. App. 404; *see* App. 399-402.

But that's not all. Defendants compounded this religious discrimination by showing a video that denigrated Plaintiff V.I.'s Catholic faith. Defendants shrug off the incident because apparently only "two seconds" of the film which "only one of the student Plaintiffs viewed" was hostile to religion. MPI Resp. 24. But the placement of the Catholic imagery was clearly done to blame the father's beliefs about human sexuality on his Catholic faith—beliefs the video then denigrated. The Constitution does not have a time requirement for government acts to be considered sufficiently hostile. Instead, it does not permit *any* hostility toward religion. *See Masterpiece*, 138 S. Ct. at 1729-31 ("The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." (quoting *Lukumi*, 508 U.S. at 534)).

The Policy encouraged students to work against the "dominant culture," which is "white, middle class, Christian, and cisgender." App. 399, 460-61. It's no surprise then that a student obeyed Defendants' directive and did just that by cyberbullying Plaintiff P.M. for respectfully expressing his Catholic beliefs on sexuality. Decl. M.M. ¶¶ 22-24. Defendants then predictably defended the bully.

The Policy and curriculum openly promote unconstitutional hostility toward religion. Defendants have failed to offer any narrowly tailored compelling interest to justify this religious discrimination. Plaintiffs are likely to succeed on the merits of their religious-discrimination claim.

E. Defendants' Policy violates Plaintiff parents' fundamental right to direct their children's education.

The Virginia Constitution recognizes a parent's fundamental rights to control the education and upbringing of her children. *See Breit*, 736 S.E.2d at 711. Defendants again denounce this fundamental right as aspirational, focusing on the statutory parental-rights provision, which they argue does not create a private cause of action. MPI Resp. 25-26. But Plaintiffs have already explained that this provision merely codifies *Breit*'s holding, which recognized these parental rights and allowed lawsuits to vindicate them. *See* MTD Resp. 12-14; MPI 16-17.

Defendants acknowledge the fundamental parental right under the federal Due Process Clause. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *see* MTD Resp. 26. But they ignore that the due-process guarantee of the Virginia Constitution is nearly identical to its federal counterpart and also protects this "oldest of the fundamental liberty interests." *Troxel*, 530 U.S. at 65; *see Breit*, 736 S.E.2d at 721 n.7.

By Defendants' logic, parents are powerless when a school racially and religiously discriminates against their children and compels student speech and actions as long as these violations are part of the "curriculum." But the Constitution permits no such immunity for unlawful government action. For it is parents—and not the government—who have the "primary role" in directing the "education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This is especially true when, as here, parents do not object to only one lesson being taught in a single subject. They object to racial and religious discrimination that is being "woven through" every grade and subject, making any opt-out impossible. App. 534. Plaintiffs are likely to succeed on their parental-rights claim.

II. The remaining preliminary injunction factors are met.

Defendants acknowledge that the federal preliminary-injunction standard applies in Virginia. MPI Resp. 15, 27. Yet they continue to minimize the gravity of any constitutional violations. But time and again courts have been clear that the "loss

of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (cleaned up); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (same); *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (same).

Plaintiffs have also shown that they have already suffered and will continue to suffer irreparable harm under the Policy and its implementation. *See* MPI 8-10; MTD Resp. 14-18. Defendants assert that the Henley Pilot Program will not be offered this semester "in the form that was provided in June 2021." MPI Resp. Ex. 1 ¶ 8. But they are silent on whether and what "form" it will be offered next year or in the future. And they have gone on record promising to implement substantially similar "anti-racist" content at every grade level and in every subject. App. 78-81, 91. Although some parents withdrew their children from the ungraded advisory class during the Pilot Program (while others did not), the racist ideology is so intentionally pervasive in district schools that parents have been assured no opt-out will be possible going forward. App. 534. That fact distinguishes this case from *Coble v. Lake Norman Charter School, Inc.*, 499 F. Supp. 3d 238, 248 (W.D.N.C. 2020).[2]

Similarly, Defendants' Policy authorizes punishing students for "racist acts.". They state only that they have not yet punished any students under the Policy, *see, e.g.*, MPI Resp. Ex. 2 ¶ 5, which does not save them. And worse, Defendants continue to remain silent on how the Policy will be enforced against students, granting unbridled discretion to teachers and staff. In any event, Defendants' "classification and separation" of Plaintiffs and other students "on grounds of race" under the Policy

[2] Defendants also cite *Vollette v. Watson* for the same point, but, contrary to Defendants' assertion, that case has nothing to do with a school's opt-out accommodation. Rather, that case pertains to a sheriff's retaliation against jail contractors for complaining about strip searches. *Vollette v. Watson*, No. 2:12cv231, 2012 WL 3026360, at *21 (E.D. Va. July 24, 2012).

"themselves denote[] inferiority" and thereby cause irreparable harm. *Parents Involved*, 551 U.S. at 746 (plurality op.). That the Policy also authorizes punishing students who choose not to speak its racialized message only intensifies the harm.

The balance of the equities also favors Plaintiffs. Like irreparable harm, this factor is intertwined with the merits. Here, "the balance of the equities favors preliminary relief because" the government "is in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Leaders of a Beautiful Struggle*, 2 F.4th at 346 (citation omitted). "If anything, the system is improved by such an injunction." *Id.* (citation omitted). Far from harming Defendants, enjoining them from continuing to implement their discriminatory Policy, with the racially and religiously hostile environment it has created, would improve the schools they operate.

Finally, preliminary relief would also serve the public interest. For "it is well-established that the public interest favors protecting constitutional rights." *Id.* Not only that, the public interest is not served by government curricula that purports to fight racism by advancing and compelling an overtly racist ideology.

CONCLUSION

Plaintiffs ask this Court to stop Defendants' continuous violations of Plaintiffs' constitutional rights by granting Plaintiffs' Motion.

Respectfully submitted this 1st day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, I served the foregoing by e-mailing and mailing a true and correct copy of the same to:

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