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January 31, 2022

Via Hand Delivery

The Honorable Jon R. Zug, Clerk
Albemarle County Circuit Court
501 East Jefferson Street
Charlottesville, VA 22902

Re: Carlos and Tatiana Ibanez, et al 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.
Case No.: CL21001737-00

Dear Mr. Zug:

Enclosed find the Demurrer, Plea in Bar, Motion Craving Oyer, and Motion to Dismiss and/or Drop for Misjoinder to be filed on behalf of the Defendants Albemarle County School Board, Superintendent Matthew S. Hass in his official capacity, and Assistant Superintendent Bernard Hairston in his official capacity.

Best regards.

Very truly yours,

Jeremy D. Capps

JDC/ajk
Enc.
cc: Ryan Bangert, Esq.
Kate Anderson, Esq.
Tyson C. Langhofer, Esq.
(Via U.S. Mail and E-Mail)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

CARLOS AND TATIANA IBANEZ; R.I. AND V.I., MINORS, BY AND THROUGH THEIR PARENTS, CARLOS AND TATIANA IBANEZ, AS THE MINORS' NEXT FRIEND; MATTHEW AND MARIE MIERZEJEWSKI; P.M., A MINOR, BY AND THROUGH THE MINOR'S PARENTS, MATTHEW AND MARIE MIERZEJEWSKI, AS THE MINOR'S NEXT FRIEND; KEMAL AND MARGARET GOKTURK; T.G. AND N.G., MINORS, BY AND THROUGH THEIR PARENTS, KEMAL AND MARGARET GOKTURK; ERIN AND TRENT D. TALIAFERRO; D.T. AND H.T. MINORS, BY AND THROUGH THEIR PARENTS, ERIN AND DANIEL TALIAFERRO, AS THE MINORS' NEXT FRIEND; MELISSA RILEY; AND L.R., A MINOR, BY AND THROUGH THE MINOR'S PARENT, MELISSA RILEY, AS THE MOTHER'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

DEMURRER

NOW COME the Defendants, the Albemarle County School Board, Superintendent Matthew S. Haas in his official capacity, and Assistant Superintendent Bernard Hairston in his

official capacity (collectively "the School Board"), by counsel, pursuant to Virginia Code § 8.01-273, and hereby demur to the Complaint. The School Board is committed to "[r]especting and championing the diversity of life experiences of all community members to support the school division's mission, vision, goals, and objectives." (Compl. Ex. 1 001.) Because the Complaint is premised on Plaintiffs' unreasonable and factually unsupported interpretation of its policies, the School Board states as follows for their Demurrers to the Complaint:

ALLEGATIONS AND CLAIMS

1. Plaintiffs are eight children[1] enrolled as students in Albemarle County Public Schools ("ACPS"), as well as nine parents[2] of those eight children. (Compl. ¶¶ 18, 21, 22, 27, 29, 35, 39, 41, 42, 47, 48.)

2. Plaintiffs allege that the School Board adopted an "Anti-Racism Policy" (the "Policy") in 2019 for the purpose of eliminating "all forms of racism" from ACPS. (Compl. ¶¶ 6, 83.) According to Plaintiffs, because the Policy embraces the "ideology" of anti-racism, it "indoctrinate[s] children to view "everyone and everything through the lens of race," thereby "treat[ing] students differently based on race ..." (Compl. ¶¶ 7, 94, 193-95.)

3. Plaintiffs allege three specific ways in which the Policy has been implemented. First, Plaintiffs allege that the School Board conducted trainings for its teachers and staff regarding the Policy. (Compl. ¶¶ 13, 101, 107, 109, 111, 113.) Second, Plaintiffs point to a "new curriculum" (the "Pilot Program") taught to eighth graders at Henley Middle School in the Spring 2021 semester. (Compl. ¶¶ 11, 133.) Plaintiffs claim that the Pilot Program "redefined

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[1] Plaintiffs R.I., V.I., P.M., T.G., N.G., D.T., H.T., and L.R. will be referred to collectively as the "Students."

[2] Plaintiffs Carlos and Tatiana Ibañez, Matthew and Marie Mierzejewski, Kemal and Margaret Gokturk, Erin and Trent Taliaferro, and Melissa Riley will be referred to collectively as the "Parents."

'racism' in a way that treated students differently based on race and necessarily set students with different skin colors at odds with each other." (Compl. ¶ 133.) Third, Plaintiffs allege, "[o]n information and belief," that the School Board has "started to implement, and [is] continuing to implement, 'an anti-racism curriculum'" in its English Language Arts and Social Studies classes, as well as in other classes generally. (Compl. ¶¶ 166, 178, 183.) Plaintiffs specifically point to an Equity Toolkit the School Board allegedly developed for English Language Arts teachers, (Compl. ¶ 167), a book it purchased for eleventh-grade students, (Compl. ¶ 179), and lecture slides from unspecified ACPS classes highlighting the skin color of famous scientists and literary characters. (Compl. ¶¶ 185-86.)

4. Without differentiating among the two groups of plaintiffs (Parents and Students), the Complaint purports to allege six claims for violations of the Constitution of Virginia and one statutory claim. The First Cause of Action alleges that the School Board violated Article I, § 11 of the Constitution of Virginia by engaging in "differential treatment of students based on race" and "creating or permitting a racially hostile educational environment." (Compl. ¶¶ 259-71.) The Second Cause of Action alleges that the School Board engaged in viewpoint discrimination, in violation of Article I, § 12 of the Constitution of Virginia, by "threaten[ing] to punish students who express dissent or heterodoxy..." (Compl. ¶ 281.) The Third Cause of Action alleges that the School Board violated Article I, § 12 of the Constitution of Virginia by compelling Plaintiffs, "subject to the pains of discipline and lower academic ratings, to affirm and communicate messages that conflict with their deeply held beliefs." (Compl. ¶ 292.) The Fourth Cause of Action alleges that the School Board's curriculum discriminates on the basis of religious beliefs in violation of Article I, § 11 of the Constitution of Virginia. (Compl. ¶¶ 299-309.) The Fifth Cause of Action claims that the Policy violates the due process provisions of Article I, § 11 by

setting "no defined limit to the words and actions for which Defendants can arbitrarily impose punishment." (Compl. ¶ 320.) Finally, the Sixth Cause of Action alleges, pursuant to Article I, § 11 and Va. Code § 1-240.1, that the School Board's Policy violates a parent's natural, fundamental, and common-law right to control the education and upbringing of her children.

DEMURRER I

The Complaint fails to state a claim because the cited provisions of the Constitution of Virginia and Code of Virginia are not self-executing and do not create a private cause of action.

5. The School Board demurs to the Complaint on the ground that it does not identify a cognizable cause of action against the School Board.

6. Counts I, IV, V and VI of the Complaint each purport to state a claim pursuant to Article I, § 11 of the Constitution of Virginia. Provisions of the Constitution of Virginia create a private right of action only when they are self-executing. *Robb v. Shockoe Slip Foundation*, 228 Va. 678, 681, 324 S.E.2d 674, 676 (1985). "'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.'" *Id.* (quoting *Newport News v. Woodward*, 104 Va. 58, 61-62, 51 S.E 193, 194 (1905)).

7. Courts have consistently concluded that Article I, § 11 of the Constitution of Virginia is not self-executing and does not create a private right of action. *See, e.g., Doe v. Rector and Visitors of George Mason Univ.*, 132 F. Supp. 3d 712 (E.D. Va. 2015); *Botkin v. Fisher*, No. 5:08-cv-58, 2009 WL 790144 (W.D. Va. Mar. 25, 2009); *Gray v. Rhoads*, 55 Va. Cir. 362 (Charlottesville Cir. 2001); *Chandler v. Routin*, No. CL02-1080, 2003 WL 23571249

(Norfolk Cir. Sept. 23, 2003). Accordingly, because Counts I, IV, V, and VI rely on Article I, § 11 to state a cause of action, each fails to allege a claim against the School Board and should be dismissed.

8. Counts II and III of the Complaint each purport to state a claim pursuant to Article I, § 12 of the Constitution of Virginia. Like Article I § 11, Article I § 12 is also not self-executing. *See Virginia Student Power Network v. City of Richmond*, 107 Va. Cir. 137, at *2-3, (Richmond City Cir. Ct. 2021). *See also Jackson v. Castevens*, No. 7:18-cv-362, 2020 WL 1052524 (W.D. Va. Mar. 4, 2020). Accordingly, because Counts II and III rely on Article I, § 12 to state a cause of action, both fail to allege a claim against the School Board and should be dismissed.

9. Count VI of the Complaint purports to state a claim pursuant to Va. Code § 1-240.1, which states, in its entirety, "A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child." Virginia Code § 1-240.1 is contained in Title I of the Code of Virginia, which lays out general provisions of construction applicable to the Code of Virginia. It does not explicitly create a cause of action. The Supreme Court of Virginia "has made abundantly clear that when a statute ... is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is palpable. *Michael Fernandez, D.D.S, Ltd. v. Commissioner of Highways*, 298 Va. 616, 618, 842 S.E.2d 200, 202 (2020) (internal quotation omitted). Accordingly, Virginia Code § 1-240.1 does not create a private cause of action, and Count VI does not state a statutory claim for relief against the School Board. Moreover, to the extent Plaintiffs rely on a right of substantive due process implied in Article 1 § 11 or by the common law, the Supreme Court of Virginia has never recognized such a right.

DEMURRER II

The Complaint does not allege sufficient facts to support an equal protection claim as alleged in the First and Fourth Causes of Action.

10. To establish an equal protection violation, a plaintiff must first demonstrate that he has been "treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). To determine whether a statute was enacted with discriminatory intent, the challenger first bears the burden of showing that racial discrimination was a "substantial or motivating factor behind enacted of the law." *N. Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020). "Satisfying that burden requires looking at the four factors from the Supreme Court's *Arlington Heights* decision: (1) historical background; (2) the specific sequence of events leadings to the law's enactment, including any departures from the normal legislative process; (3) the law's legislative history; and (4) whether the law 'bears more heavily on one race than another.'" *Id.* (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-69 (1977)). Where the discriminatory treatment is alleged to have occurred as a result of the plaintiff's race, it will be evaluated with strict scrutiny. *Id.* Discrimination on the basis of religion is also subject to strict scrutiny. *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County*, 915 F.3d 256, 265 (4th Cir. 2019).

11. In this case, no Plaintiff alleges sufficient facts to show that he or she has personally been subject to differential treatment on the basis of race or religion by the School Board or any of its staff. In fact, the Complaint maintains that *all* ACPS students have been subject to the School Board's implementation of the Policy. (Compl. ¶ 15.) The Complaint does

not allege that any Plaintiff has personally experienced, much less been harmed by, any of the three identified implementations of the School Board's Policy. No Plaintiff alleges that he or she participated in the training given to teachers and staff, or that he or she received instruction resulting from—or disparate treatment caused by—that training. Similarly, the Complaint recounts at length the alleged curriculum of the Pilot Program allegedly given to eighth graders, but acknowledges that the only Plaintiff—P.M.—who would have participated, withdrew from the Pilot Program at his parents' request. (Compl. ¶ 205.) Plaintiffs allege that L.R. and V.I. participated in the Pilot Program as seventh graders, (Compl. ¶¶ 23, 49), but allege no additional facts about the content of that program for seventh graders, or any alleged injury either sustained as a result of that participation. Finally, Plaintiffs purport to offer instances of the allegedly discriminatory curriculum provided by ACPS—including the draft English Equity Toolkit, the book provided to eleventh graders, and the classroom slides—but no Plaintiff claims to have personally experienced any of these alleged examples. The Complaint establishes no more than Plaintiffs' general objections to a Policy by which they have affected—if at all—in the exact same way as every other student enrolled in ACPS.

12. Similarly, the Complaint does not establish that the treatment any Plaintiff received was the result of "intentional or purposeful" discrimination on the part of the School Board. *Morrison*, 239 F.3d at 654. The Complaint relies almost exclusively on sources that were not produced or published by the School Board. (Compl. ¶¶ 90, 99, 103, 112, 123-26, 135 n.3, 170.) The Complaint further inaccurately and incompletely characterizes the information contained in materials created by the School Board and its staff. The exhibits attached to the

Complaint[3] demonstrate that Plaintiffs' inference of intentional and purposeful discrimination by the School Board is unreasonable and unsupported by the evidence on which they rely. The Court may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings. *Ward's Equipment v. New Holland North Am.*, 254 Va. 379, 382 (1997).

13. Finally, even were the Court to conclude that the Complaint alleges that the School Board engaged in purposeful differential treatment, that treatment—even as alleged—survives both rational basis and strict scrutiny review. Addressing racism is uncontrovertibly a legitimate pedagogical interest. *Menders v. Loudoun Cnty. School Board*, No. 1:21-cv-669, 2022 WL 179597, at *6 (E.D. Va. Jan. 19, 2022). "School authorities, not the courts, are charged with the responsibility of deciding what speech is appropriate in the classroom." *Wood v. Arnold*, 915 F.3d 308, 315 (4th Cir. 2019). The School Board's implementation of the Policy—including through the Pilot Program on a trial basis—is narrowly tailored to serve that legitimate interest.

14. The Complaint does not allege sufficient facts to support an equal protection claim on any theory, and the First and Fourth Causes of Action should be dismissed.

DEMURRER III

The School Board's Policy is government speech that does not violate Plaintiffs' constitutional rights.

15. "Government speech is a vital power of the Commonwealth, the democratic exercise of which is essential to the welfare of our organized society." *Taylor v. Northam*, 862 S.E.2d 458, 466 (Va. 2021). "Government speech does not need to be viewpoint neutral because the Free Speech Clause checks the government's regulation of private speech, but it does not

[3] The School Board his filed simultaneously with these Demurrers a Motion Craving Oyer of full versions of the documents attached as Exhibits 2, 5, 7, and 8 to the Complaint. The Exhibits currently present only incomplete excerpts of these documents.

regulate government speech." *Id.* Speech by the government is exempt from First Amendment free-speech scrutiny, even when it has the effect of limiting private speech. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). "Ultimately, it is the democratic electoral process that first and foremost provides a check on government speech." *Taylor*, 862 S.E.2d at 466.

16. The School Board's Policy—as well as its choice of curriculum in implementing that policy—is government speech, which does not implicate the First Amendment. *See Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 796 (4th Cir. 2004) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). "[I]t is not a court's obligation to determine which messages of social or moral values are appropriate in a classroom. Instead, it is the school board, whose responsibility includes the well-being of the students, that must make such determinations." *Robertson v. Anderson Mill Elementary School*, 989 F.3d 282, 289 (2021) (quoting *Lee v. York Cnty. Sch. Div*, 484 F. 3d 687, 700 (4th Cir. 2007). Accordingly, Plaintiffs' claims in the Second and Third Causes of Actions do not state a cause of action and should be dismissed with prejudice.

DEMURRER IV

The Complaint does not allege sufficient facts to support a claim of viewpoint discrimination.

17. Viewpoint discrimination is "discrimination in which the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

18. The Complaint does not identify any specific instance in which the School Board or its employees prohibited or targeted the expression of any viewpoint. Nor does the Complaint allege any opportunity or service that has been denied to any Plaintiff as a result of an unpopular

viewpoint. The Complaint, therefore, does not allege sufficient facts to state the claim alleged in the Second Cause of Action, and it should be dismissed.

DEMURRER V

Plaintiffs have not alleged a claim for compelled speech.

19. "The First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech." *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014). Compelled speech occurs when "an individual is obliged personally to express a message he disagrees with, imposed by the government ...." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). Thus, the "crucial question is whether, in speaking, the government is *compelling* others to espouse or to suppress certain ideas and beliefs." *Hanover County Unit of the NAACP v. Hanover County*, 461 F. Supp. 3d 280, 291 (E.D. Va. 2020). "In order to compel the exercise or suppression of speech, the governmental measure must punish, or *threaten to punish*, protected speech by governmental action that is 'regulatory, proscription, or compulsory in nature.'" *Id.* at 292 (quoting *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000)). "'A discouragement that is minimal and wholly subjective does not, however, impermissibly deter the exercise of free speech rights.'" *Id.* (quoting *Phelan*, 235 F.3d at 1247-48).

20. Plaintiffs have not alleged any instance in which the Policy or the School Board have compelled any person to speak. Similarly, Plaintiffs offer no examples in which they refused to speak and were punished or threatened with punishment for that refusal. In the absence of these allegations, Plaintiffs cannot state a claim for compelled speech as alleged in their Third Cause of Action. Accordingly, the Third Cause of Action should be dismissed.

DEMURRER VI

Plaintiffs' due process claim fails because it is premised on an unreasonable interpretation of the Policy and Plaintiffs lack standing to challenge the Policy on due process grounds.

21. "The constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause. The doctrine requires that a statute or ordinance be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal. Thus, the language of a law is unconstitutionally vague if persons of "common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application." *Norton v. Bd. of Supervisors of Fairfax Cty.*, 299 Va. 749, 858 S.E.2d 170, 175 (2021) (quoting *Tanner v. City of Virginia Beach*, 277 Va. 432, 439, 674 S.E.2d 848 (2009)) (internal citations omitted).

22. The allegations in the Fifth Cause of Action are a pre-enforcement facial challenge to the School Board's policy on vagueness grounds. Plaintiff's claim is premised on an unreasonable interpretation of the policy—that it would be used in a punitive fashion under the Student Conduct Policy against protected student speech—that is not supported by the Exhibits attached to the Complaint. *See supra* ¶ 12. Plaintiffs cannot proceed with a vagueness challenge that relies on an unreasonable interpretation of the Policy. *See Norton*, 858 S.E.2d at 175.

23. The Fifth Cause of Action exemplifies why "[f]acial challenges are disfavored" in the Commonwealth. *Toghill v. Commonwealth*, 289 Va. 220, 227-28, 768 S.E.2d 674, 678 (2015). Facial challenges "create a risk of " 'premature interpretation of statutes on the basis of factually barebones records'"; they "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity

of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" and they invalidate an entire law that was passed through the democratic process." *Id.* (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450 (2008)).

24. Moreover, Plaintiffs lack standing to challenge the policy on due process grounds as overly broad. *See Stanley v. City of Norfolk*, 218 Va. 504, 237 S.E.2d 799 (1977) ("[W]hen overbreadth has only due process implications, [a plaintiff] has no standing to make a facial attack but only standing to challenge the statute as applied to his own conduct.").

DEMURRER VII

Parents have no fundamental constitutional right to dictate the content of the curriculum offered by a public school.

25. The Sixth Cause of Action argues that the Parents have a fundamental, substantive due process right to control the content of the education of their children. As outlined above, Article I, § 11 of the Constitution of Virginia is not self-executing, and Va. Code § 1-240.1 does not create a private right of action. *See supra* ¶¶ 7, 9. The Sixth Cause of Action, therefore, fails to state a claim.

26. Although the Fourteenth Amendment to the United States Constitution gives parents a fundamental right to control decisions regarding the school in which a child is educated, it does not give parents a fundamental right to dictate the content of the education a child receives once that choice is made. *See, e.g., Fields v. Palmdale School Dist.*, 427 F.3d 1197 (9th Cir. 2005); *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381 (6th Cir. 2005); *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). Accordingly, the Parents' objections to the content of the Policy and any curriculum developed and offered to students implementing the policy do not state a constitutional or common law cause of action.

27. Moreover, the facts alleged in the Complaint plainly establish that the Parents retained control over the education of their children. The only student who participated in the eighth-grade Pilot Program was withdrawn at his parents' request. Other Parents voluntarily withdrew their children from ACPS programs to seek out private opportunities that reflected the content the Parents wished their children to receive. Even under the facts alleged in the Complaint, the Parents retained full control of the education offered to their children, and the Sixth Cause of Action must be dismissed.

DEMURRER VIII

In their official capacity, Superintendent Haas and Assistant Superintendent Hairston have no legal identity independent of the School Board.

28. The Complaint names as defendants in their official capacities Superintendent Matthew S. Haas and Assistant Superintendent Bernard Hairston. When sued in his "official capacity," an agent or employee of a governmental entity has no identity independent of the agency. *Will v. Michigan Dept. of Sate Police*, 491 U.S. 58, 70 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") (internal quotation omitted). Accordingly, Plaintiffs have no independent claim against Superintendent Haas and Assistant Superintendent Hairston, and the claims against them should be dismissed with prejudice.

CONCLUSION

28. In support of this Demurrer, the School Board will file a brief pursuant to an agreed upon briefing schedule and hereby incorporates and adopts that Brief in Support of Demurrer as if fully set forth herein. The School Board further incorporates the arguments

presented in its Plea in Bar, filed herewith, as well as any arguments presented in any Brief in Support of Plea in Bar it should file in the future as if fully set forth herein.

WHEREFORE, for all of the foregoing reasons, the School Board, by counsel, respectfully requests that this Court sustain—with prejudice and in its entirety—this Demurrer for the reasons outlined above.

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.

By Counsel

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CERTIFICATE

I hereby certify that a true copy of the foregoing was sent via U.S. mail and email this 31st day of January, 2022 to:

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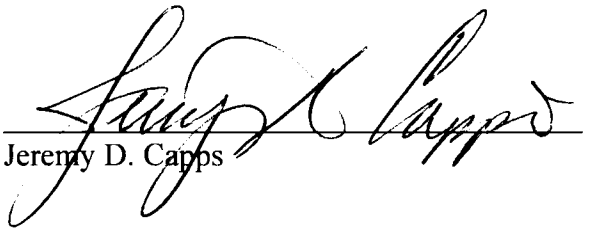

Jeremy D. Capps