V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

CALVARY ROAD BAPTIST CHURCH, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. CL 20006499
MARK HERRING, et al.,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF PLEA IN BAR

Mark R. Herring
Attorney General

Erin B. Ashwell (VSB No. 79538)
Chief Deputy Attorney General

Samuel T. Towell (VSB No. 71512)
Deputy Attorney General

Toby J. Heytens (VSB No. 90788)*
Solicitor General

Martine E. Cicconi (VSB No. 94542)*
Michelle S. Kallen (VSB No. 93286)
Deputy Solicitors General

Jessica Merry Samuels (VSB No. 89537)*
Assistant Solicitor General

Kendall T. Burchard (VSB No. 95710)
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-6835 – Telephone
(804) 371-0200 – Facsimile
solicitorgeneral@oag.state.va.us

Donnie L. Kidd (VSB No. 44241)
Chief Counsel – Financial Services

Patricia A.C. McCullagh (VSB No. 43456)
Deputy Chief Counsel – Financial Services

Justin Lo (VSB No. 93288)
Associate General Counsel – Financial Services

Office of General Counsel
Virginia State Corporation Commission
1300 East Main Street
Richmond, Virginia 23218
(804) 371-9671 – Telephone
(804) 371-9240 – Facsimile
Donnie.Kidd@scc.virginia.gov
Patricia.McCullagh@scc.virginia.gov
Justin.Lo@scc.virginia.gov

***Counsel of Record for Defendants**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutory Authorities

INTRODUCTION

Under the Virginia Values Act of 2020, it is "the policy of the Commonwealth" to "[s]afeguard all individuals . . . from unlawful discrimination" in places of public accommodation and employment—including discrimination based on "sexual orientation" or "gender identity." Va. Code Ann. § 2.2-3900(B). Another newly enacted statute prohibits discrimination in health insurance coverage "on the basis of gender identity or status as a transgender individual." § 38.2-3449.1(B). With these laws, Virginia's elected leaders sought to protect the Commonwealth's more than 300,000 LGBT residents from the type of discrimination that has long infected public life.

Plaintiffs seek to invalidate both new laws as incompatible with religious freedom. But plaintiffs have not—and cannot—identify any non-speculative harm caused by the statutes. For one thing, the Virginia Values Act has never been enforced against plaintiffs, much less in the way they claim. Even more problematic, one of the challenged statutes (House Bill 1429) would never apply to them because the statute imposes obligations on insurers, not employers. Accordingly, plaintiffs lack standing to assert constitutional or statutory challenges to either law.

Even if plaintiffs could satisfy their burden to establish standing, their challenge to HB 1429 would also fail because they have not named any proper defendants. It is well settled that this Court lacks jurisdiction over the State Corporation Commission, and neither of the other named defendants have any enforcement authority under the new law.

The plea in bar should therefore be sustained, and plaintiffs' complaint should be dismissed in its entirety.

STATEMENT

A. Relevant Legislation

This year, the General Assembly adopted two new laws that significantly expanded the legal rights of LGBT individuals: (1) Senate Bill 868, referred to as the "Virginia Values Act," which revised the Virginia Human Rights Act; and (2) House Bill 1429, which prohibits discrimination in health benefit plans on the basis of gender identity.[1] Both bills passed with bipartisan support, making Virginia the first southern State to adopt comprehensive legal protections against discrimination for the LGBT community.

1. The Virginia Values Act

As relevant here, the Virginia Values Act added "sexual orientation" and "gender identity" to the list of protected characteristics in state anti-discrimination laws. See 2020 Va. Acts ch. 1140; see also Va. Code Ann. § 2.2-3900 ("declaration of policy"). In the realm of employment, it is now "unlawful" for an employer to "[f]ail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, or national origin." § 2.2-3905(B)(1).

The Virginia Values Act also added a new section expressly prohibiting discrimination in public accommodations, including on the basis of sexual orientation or gender identity. As of July 1, 2020, it is "an unlawful discriminatory practice for any person . . . to refuse, withhold from, or deny any individual . . . any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation . . . on the basis of race, color,

[1] See 2020 Va. Acts ch. 1140 (Apr. 11, 2020) (adopting SB 868); 2020 Va. Acts ch. 844 (Apr. 7, 2020) (adopting HB 1429).

religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, marital status, disability, or status as a veteran." Va. Code Ann. § 2.2-3904(B). The statute defines "[p]lace of public accommodation" to mean "all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations." § 2.2-3904(A).

These provisions are enforced by the Division of Human Rights in the Office of the Attorney General (Division). See Va. Code Ann. § 2.2-520, § 2.2-3907. The Division investigates complaints alleging unlawful discrimination, makes determinations about whether there is reasonable cause to believe state or federal laws have been violated, and facilitates conciliation efforts among the parties to resolve disputes. See § 2.2-3907; see also Declaration of R. Thomas Payne, II ¶¶ 4–6 (Payne Decl.) (attached as Exhibit A). A complaint alleging unlawful discrimination may be filed either by individuals "claiming to be aggrieved" or by the Division itself. Va. Code Ann. § 2.2-3907(A). Once a complaint is filed, the Division conducts an investigation and prepares a report on the reasonable cause determination. § 2.2-3907(D). The parties may also agree to participate in mediation. § 2.2-3907(C).

Separate from the administrative enforcement process, the Attorney General may "commence a civil action" to seek "appropriate relief" in cases involving a "pattern or practice" of discrimination or "an issue of general public importance." Va. Code Ann. § 2.2-3906(A). The Attorney General may also "intervene" in civil actions brought by private parties alleging unlawful discrimination where "the case is of general public importance." § 2.2-3908(C).

2. HB 1429

Also this year, the General Assembly codified anti-discrimination protections for transgender individuals in health insurance coverage. Under House Bill 1429, state insurance law

now prohibits "discrimination under a health benefit plan on the basis of gender identity or being a transgender individual, including by being denied coverage of medically necessary transition-related care." Va. Code Ann. § 38.2-3449.1(D). The statute defines "[m]edically necessary transition-related care" to include "any medical treatment prescribed by a licensed physician for treatment of gender dysphoria," including certain enumerated treatments such as "outpatient psychotherapy and mental health services," "continuous hormone replacement therapy," and "gender reassignment surgeries." § 38.2-3449.1(A). "[H]ealth carrier[s] offering a health benefit plan" are also required to "[p]rovide coverage . . . without discrimination on the basis of gender identity or status as a transgender individual" and must "[t]reat covered individuals consistent with their gender identity." § 38.2-3449.1(B).

B. This Litigation

1. Plaintiffs allege that they are all "Bible-based ministries," specifically: churches (Calvary Road Baptist Church and Community Fellowship Church), schools (Community Christian Academy and the schools associated with both churches), and a "nonprofit corporation that supports a network of . . . pregnancy centers" (Care Net). Compl. at 2, 5–6. All four plaintiffs are employers, Compl. ¶¶ 26, 59, 94, 116, and two offer health insurance plans in which employees may choose to enroll, ¶¶ 52–53, 150.

Plaintiffs believe that "marriage has only one meaning: the uniting of one man and one woman." Compl. ¶ 34–35; see also ¶¶ 71–72, 99, 122. Plaintiffs also believe that "God creates each human uniquely and immutably male or female" and that "transgender conduct . . . is sinful and outside of God's will." ¶¶ 70, 72; see also ¶¶ 33, 100, 124–27. "[S]ame-sex marriage" and "transgender ideology" both "conflict[]" with plaintiffs' "biblical views on marriage and sexuality." ¶ 179.

All four plaintiffs allege that they only hire employees who share their religious beliefs and that all employees are required to live according to those views. ¶¶ 37, 51, 75–76, 96, 109–14, 118, 134–48. At least two plaintiffs require every employee to sign the organization's "Statement of Faith." ¶¶ 112, 142.

2. Plaintiffs filed this suit on September 28, 2020. The complaint names three defendants: Attorney General Mark R. Herring; the Director of the Division of Human Rights at the Office of the Attorney General (R. Thomas Payne, II); and the State Corporation Commission. Compl. ¶¶ 14–20. The complaint asserts five claims under Virginia law: violation of the Virginia Act for Religious Freedom (Va. Code Ann. § 57-1 *et seq.*) and four provisions of the Virginia Constitution, specifically Article I, § 16 (free exercise of religion), Article I, § 12 (freedom of speech), Article I, § 16 (establishment clause), and Article I, § 11 (due process). ¶¶ 302–80. As relief, plaintiffs seek: (a) declarations that the Virginia Values Act and HB 1429 violate plaintiffs' statutory and constitutional rights as applied; (b) a permanent injunction "to stop Defendants . . . from . . . enforcing" either law; and (c) attorneys' fees, costs, and expenses. Compl. at 55–56.

Defendants have filed two responsive pleadings: a demurrer and this plea in bar.

LEGAL STANDARD

"A plea in bar is a defensive pleading that reduces the litigation to a single issue which, if proven, creates a bar to the plaintiff's right of recovery." *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594 (2000) (citations and quotation marks omitted). "[T]he function of the plea in bar . . . is to narrow the litigation by resolving an issue that will determine whether a plaintiff may proceed to trial on a particular cause of action." *Hawthorne v. VanMarter*, 279 Va. 566, 578 (2010); see also *Braddock, L.C. v. Board of Sup'rs of Loudoun Cty.*, 268 Va. 420, 426 (2004) (affirming dismissal for lack of standing on plea in bar). The party asserting the plea bears the

burden of proof on the issues raised and may "elect[ ] to meet that burden by presenting evidence or relying on the pleadings." *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019).

ARGUMENT

Separate and apart from whether plaintiffs' claims have any merit,[2] their challenges to both the Virginia Values Act and HB 1429 fail at the outset for two independent reasons. First, plaintiffs lack standing to pursue all five counts of the complaint because they cannot show any harm caused by either statute based on present facts rather than future speculation. In addition, plaintiffs' challenge to HB 1429 also fails because the complaint does not name any proper parties charged with enforcing that statute and subject to this Court's jurisdiction.

I. Plaintiffs do not have standing to bring any of their claims

Whether a party has "standing to maintain the action they filed" is a "preliminary jurisdictional issue" that must be addressed "before considering the merits." *McClary v. Jenkins*, 848 S.E.2d 820, 823 (Va. 2020). To establish standing under Virginia law, a plaintiff must show "a justiciable interest in the subject matter of the proceeding" by "demonstrat[ing] an actual controversy between the plaintiff and the defendant." *Lafferty v. School Bd. of Fairfax Cty.*, 293 Va. 354, 360 (2017). More specifically, a plaintiff who seeks to invalidate a statute "has the burden of proving that he himself has been injured or is threatened with injury by . . . enforcement" of the challenged law. *De Febio v. County Sch. Bd. of Fairfax*, 199 Va. 511, 514 (1957); see also *Avery v. Beale*, 195 Va. 690, 706 (1954) ("[T]he person questioning the constitutionality of a legislative enactment must clearly show that in its operation he has been injured thereby."). "The reason for these rules," the Supreme Court of Virginia has explained, "is

[2] Defendants contend that each of plaintiffs' claims fail on the merits and will assert those defenses should the court overrule this plea in bar. But because plaintiffs' claims fail for the reasons described *infra*, this Court need not reach the merits of those claims to dismiss the complaint in its entirety.

that the courts are not constituted . . . to render advisory opinions . . . or to answer inquiries which are merely speculative." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Sup'rs*, 285 Va. 87, 99 (2013) (*Charlottesville*).

Here, plaintiffs have not—and cannot—show any concrete harm or imminent threat of enforcement under either the Virginia Values Act or HB 1429. In the absence of any such injury, plaintiffs lack standing, and the complaint should be dismissed in its entirety.[3]

A. Plaintiffs' alleged harm under the Virginia Values Act is entirely speculative

For a controversy to be justiciable, the complaint must raise "specific adverse claims, based upon present rather than future or speculative facts, [that] are ripe for judicial adjustment." *Charlottesville*, 285 Va. at 98. Plaintiffs' theories under the Virginia Values Act rely solely on speculation about what the future may hold and accordingly fail to show any "justiciable interest" appropriate for this Court's resolution. *Id.*

1. The complaint challenges protections against discrimination on the basis of sexual orientation and gender identity in public accommodations (Code § 2.2-3904) and employment (Code § 2.2-3905). Plaintiffs do not contend that these provisions have *ever* been enforced against their ministries. See Compl. at 4 (describing suit as a "pre-enforcement challenge"). Nowhere in the complaint do plaintiffs identify any administrative charges they have faced under the Virginia Values Act or other state anti-discrimination laws. Nor do they assert that the Division (or the Office of the Attorney General more broadly) has threatened to initiate

[3] The fact that Code § 57-2.02 creates a private right of action to enforce its provisions has no bearing on whether plaintiffs have satisfied the separate requirement of showing that an actual controversy exists because "[t]he presence or absence of a statutory right of action" and "the question whether a litigant has standing" raise distinct issues. *Howell v. McAuliffe*, 292 Va. 320, 333 n.5 (2016). Accordingly, plaintiffs' lack of standing defeats both their statutory claim (Count 1) and their constitutional claims (Counts 2–5).

proceedings against them or suggested that any enforcement action against plaintiffs may be imminent.

This silence is telling, and there is good reason for it. The Virginia Values Act has only been effective since July 1 of this year and, as of this month, the new state law prohibitions on discrimination based on sexual orientation or gender identity have not yet been enforced against *anyone*—much less plaintiffs. See Payne Decl. ¶¶ 9, 11–12. Indeed, in the fewer than six months that the new law has been on the books, no complaints alleging discrimination on either basis have been filed. *Id.* ¶ 9, 11. Historical patterns of enforcement are no help to plaintiffs either: before the Virginia Values Act was adopted, state law did not separately prohibit discrimination based on sexual orientation or gender identity in any context. *Id.* ¶ 8.

2. Without any relevant enforcement action, plaintiffs must look elsewhere to establish their standing to challenge the Virginia Values Act. But the complaint comes up short there as well. Plaintiffs do not assert that they have ever actually been harmed by the public accommodations or employment provisions. Although the complaint identifies some hypothetical situations in which plaintiffs claim the statutes might apply in the future, those scenarios involve several links in a chain that are far too speculative to "clearly show" that the "operation" of the Act has caused plaintiffs injury. *Avery*, 195 Va. at 706.

a. As to the public accommodations provision, plaintiffs suggest that they may be "force[d] . . .to include a biological male as part of the women's Bible study" or "to open [their] sex-specific sports to members of the opposite sex." Compl. ¶¶ 205, 209. But nowhere do plaintiffs allege that any of their churches or schools has ever been approached by a transgender person who wishes to join a certain group or sports team. The same is true of plaintiffs' suggestion that the Act will "force them to facilitate same-sex weddings and ceremonies,"

Compl. ¶ 211, because the complaint does not allege that any of the plaintiff churches have ever received such a request.

b. Plaintiffs' claims under the employment provision of the Act are likewise premised on speculative harm. Although plaintiffs insist that they will "be forced to retain teachers who are in same-sex relationships" or "guidance counselors who take gender-suppressing hormones," Compl. ¶ 186, the complaint does not allege that plaintiffs currently employ any such teachers or guidance counselors or that there is any likelihood they ever would in the future.

To the contrary, plaintiffs' own allegations make clear that such situations are extremely *unlikely*. As plaintiffs explain, their religious beliefs compel them to hire as employees only individuals who share "the tenets of [plaintiffs'] faith, including biblical teachings on marriage, sexuality, and gender." Compl. ¶ 304; see also Compl. ¶ 51 (any "potential workers" must "share Calvary Road's religious values and doctrinal beliefs"); ¶ 76 (same as to Community Fellowship); ¶ 114 (all employees at Community Christian must "agree with and live consistent with its religious beliefs"); ¶ 148 (same as to Care Net).[4] And, according to plaintiffs, "same-sex marriage" and "transgender ideology" are fundamentally inconsistent with their sincerely held religious beliefs, which hold that "marriage should be between one man and one woman" and "biological sex is fixed at birth." Compl. ¶¶ 179, 212. These "biblical views on marriage and

[4] Moreover, the text of the Virginia Values Act includes a specific exemption for religious employers to consider religion when making employment decisions. See Va. Code Ann. § 2.2-3905(E) ("The provisions of this section shall not apply to the employment of individuals of a particular religion by a religious corporation, association, educational institution, or society to perform work associated with its activities."). For that reason, it is at best speculative whether the Act would preclude plaintiffs from terminating an employee in the circumstances they raise in their complaint.

sexuality," plaintiffs explain, "are central to [their] ministries," Compl. ¶ 179, underscoring the speculation in plaintiffs' hypotheticals.

3. For these reasons, the complaint does not raise a "justiciable interest" or "actual controversy" sufficient to confer standing on plaintiffs as to any of their claims. *Charlottesville*, 285 Va. at 98. In *Lafferty*, the Supreme Court of Virginia similarly rejected a pre-enforcement challenge for lack of standing where the "complaint allege[d] only" how the plaintiff "fear[ed]" a non-discrimination policy might be applied to him personally. 293 Va. at 361. Because the plaintiff had "not allege[d] any present facts" suggesting enforcement was or could be imminent, the Court held that "any injury" from the policy was "purely speculative" and "insufficient . . . for standing." *Id.* at 361–62.

So too here. Like the plaintiff in *Lafferty*, plaintiffs rely on the "bald assertion of fear of [enforcement] without any alleged predicate facts to form the basis for such a fear." 293 Va. at 361. And, as in *Lafferty*, the speculative nature of plaintiffs' claims prevents them from establishing standing to maintain the current suit. See also *Park v. Northam*, No. 200767, 2020 WL 5094626, at *4 (Va. Aug. 24, 2020) (for purposes of standing, "[i]t is not enough to simply take a position and then challenge the government to dispute it" (internal quotation marks omitted)); *City of Fairfax v. Shanklin*, 205 Va. 227, 231 (1964) (no justiciable controversy where claim based on how ordinance might be applied in the future "depend[ed], of necessity, upon future or speculative facts").

4. The fact that plaintiffs' current challenge to the Virginia Values Act is not justiciable will not leave them without a remedy should one ever become necessary. For example, if a civil suit or administrative charge under the Virginia Values Act were to be filed against plaintiffs at some point in the future, they would be free to raise a First Amendment

defense as appropriate. And even before that, plaintiffs could attempt to seek affirmative relief in the event that any fear of harm becomes sufficiently credible and imminent to satisfy the standing requirement. In contrast, waiting to resolve plaintiffs' claims until such a threat materializes—if it ever does—will ensure that any judicial intervention is "constrain[ed]" to "the case that is actually" presented and avoid an "an advisory opinion on . . . hypothetical situations." *Boyd v. County of Henrico*, 42 Va. App. 495, 520 (2004).[5]

B. HB 1429 does not apply to or otherwise injure plaintiffs

1. Plaintiffs' lack of standing to challenge HB 1429 is even more obvious: there is *no* set of circumstances under which that statute could *ever* be enforced against their ministries.[6]

The statutory text makes clear that HB 1429 operates only on "health carrier[s]" that "offer[ ] a health benefit plan." Va. Code Ann. § 38.2-3449.1. For example, subsection (B) requires "[a] *health carrier* offering a health benefit plan to . . . [p]rovide coverage . . . without discrimination on the basis of gender identity or status as a transgender individual" and "[t]reat covered individuals consistent with their gender identity." § 38.2-3449.1(B) (emphasis added). Health carriers must also provide coverage for "medically necessary transition-related care," and

[5] Deferring adjudication of plaintiffs' objections until presented with an actual controversy is consistent with how courts evaluate other religious freedom claims: based on the specific facts and circumstances of a particular situation. See, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018) (limiting holding to "the Commission's actions here" and reserving judgment as to "some future controversy involving facts similar to these"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (analyzing ministerial exception to anti-discrimination laws based on "all the circumstances of [the individual's] employment"); see also *Horen v. Commonwealth*, 23 Va. App. 735, 740 (1997) (analyzing constitutionality of criminal law "under the facts and circumstances of this case").

[6] Because Community Fellowship and Community Christian do not provide employer-sponsored health plans, only Calvary Road and Care Net bring claims as to HB 1429. See Compl. at 45 n.8. The claims regarding HB 1429 are limited to Counts 1, 2, and 4, as Counts 3 and 5 are based on the Virginia Values Act alone. *Id.* ¶¶ 337–52, 368–80.

may not deny coverage to a transgender individual "for health care services that are ordinarily or exclusively available to covered individuals of one sex" on the basis of that individual's "gender identity." § 38.2-3449.1(C), (D).

None of HB 1429's provisions apply to—or even mention—employers of any kind. Nor is there any plausible argument that employers like plaintiffs could be considered "health carriers" under the statute because the Code specifically defines that term to mean "an entity subject to the insurance laws and regulations of the Commonwealth . . . that contracts or offers to contract to provide, deliver, arrange for, pay for, or reimburse any of the costs of health care services." Va. Code Ann. § 38.2-3438; cf. Compl. ¶ 52 ("Calvary Road offers its employees an employer-sponsored health plan through Kaiser Permanente"); ¶ 150 ("Care Net . . . provides a fully insured health plan for its employees").[7] Should health insurance coverage offered by plaintiffs be found to violate HB 1429, any potential legal consequences or enforcement action under that statute would be against the *insurers*, not plaintiffs. See generally Va. Code Ann. § 38.2-200, § 38.2-218, § 38.2-219. Simply put, because HB 1429 imposes no legal obligations on plaintiffs as employers, they lack standing to challenge the constitutionality of that law as it applies to them. *De Febio*, 199 Va. at 514 ("[A] person whose rights are not infringed by enforcement of a state statute can not successfully attack its constitutionality.").

2. Even setting aside the statute's inapplicability to employers, plaintiffs' challenge to HB 1429 fails for the additional reason that plaintiffs do not identify any non-speculative harm inflicted by that statute. According to the complaint, under the new law, "employers like Calvary Road and Care Net, which provide full coverage health insurance for employees" will be forced

[7] Recent changes to § 38.2-3438 that take effect in January 2021 do not alter the definition of "health carrier." See 2020 Va. Acts ch. 1080 at 3; ch. 1081 at 3; ch. 1160 at 2.

"to pay for 'gender-affirming' therapy, cross-sex hormones, and 'gender-reassignment' surgery in their employee benefit plans." Compl. ¶ 293.

Those claims are defective for the same reason as those under the Virginia Values Act: plaintiffs have pleaded themselves out of court. Even under HB 1429, the only way that any health plan offered by plaintiffs would ever have to pay for the services to which plaintiffs object would require at least three steps: (a) plaintiffs would have to actually employ a transgender person; (b) that person would have to choose to enroll in the health plan offered by plaintiffs; and (c) the person would have to file a claim with the health carrier for transition-related care.

Plaintiffs' own allegations make clear why—under the specific set of facts alleged—this chain of events will never happen. The complaint asserts that it would be against plaintiffs' sincerely held religious beliefs to employ a transgender individual. See Compl. ¶ 179 (describing "transgender ideology" as "conflicting" with plaintiffs' "biblical views on . . . sexuality"); see also *supra* at 4. Indeed, plaintiffs allege that *all employees* are required (in writing in some circumstances) to affirm their commitment to plaintiffs' asserted religious beliefs—including that "biological sex is fixed at birth." Compl. ¶ 212; see also ¶¶ 33, 37, 70–75, 100, 112, 127, 142. The hypothetical and seemingly implausible possibility that a transgender person would make that affirmation *and then* seek coverage for transition-related care does not "aver a controversy beyond the realm of speculation." *Martin v. Garner*, 286 Va. 76, 83 (2013) (internal quotation marks omitted). Accordingly, like plaintiffs' other claims, their challenge to HB 1429 is not now—and may never be—"ripe for judicial adjustment." *Lafferty*, 293 Va. at 361.

* * *

Because plaintiffs have failed to show that they "ha[ve] been injured or [are] threatened with injury" by the enforcement of either the Virginia Values Act or HB 1429, they lack standing

to bring any of their claims. *De Febio*, 199 Va. at 514. For that reason alone, the complaint should be dismissed in its entirety.[8]

II. Plaintiffs' challenge to HB 1429 should also be dismissed because plaintiffs have not identified a proper defendant

Even if plaintiffs had sufficiently demonstrated standing to challenge HB 1429, their claims under that statute cannot proceed because the complaint fails to name a proper defendant.

A. This Court lacks jurisdiction over the State Corporation Commission

1. The Constitution of Virginia establishes the State Corporation Commission as "a permanent commission" responsible for "administering the laws . . . for the regulation and control of corporations doing business in this Commonwealth." Va. Const. art. IX, §§ 1, 2. The Commission is vested with "the powers of a court of record," and "[a]ll appeals from the Commission shall be to the Supreme Court only." *Id.* §§ 3, 4. Indeed, the Constitution specifically provides that "[n]o other court of the Commonwealth shall have jurisdiction to review, reverse, correct, or annul any action of the Commission or to enjoin or restrain it in the performance of its official duties." *Id.* § 4.

Under these constitutional provisions, the Commission "is a tribunal of a stature and dignity equal to that of a circuit court." *Atlas Underwriters, Ltd. v. State Corp. Comm'n*, 237 Va. 45, 47 (1989). "[A]ll challenges to all actions of the SCC" must be made directly to the Supreme Court of Virginia, which has "exclusive jurisdiction" over such claims. *Christian v. State Corp. Comm'n*, 282 Va. 392, 400 (2011). That jurisdictional limitation applies to any controversy that implicates how the Commission may exercise its delegated authority—whether judicial, legislative, or executive. *Atlas*, 237 Va. at 48; see also *Little Bay Corp. v. Virginia Elec. &*

[8] Plaintiffs' claim under Code § 57-2.02 (Count 1) also fails by that statute's own terms because the prohibitions apply only to policies and practices of "[g]overnment entit[ies]," not to laws that have been duly enacted by the General Assembly. See Va. Code Ann. § 57-2.02(B).

Power Co., 216 Va. 406, 409 (1975) ("If [any] challenge requires review leading to reversal, correction, or annulment of Commission action, the [state Constitution], in no uncertain terms, forecloses jurisdiction to any Virginia court save this tribunal.").

2. Plaintiffs' claims against the Commission run headlong into this jurisdictional bar. The complaint names the State Corporation Commission as a defendant and acknowledges that the Commission "has the authority to enforce Title 38.2, where HB 1429 is enacted." Compl. ¶ 23. Plaintiffs' prayer for relief seeks "[a] permanent injunction to stop Defendants . . . from . . . enforcing HB 1429 against the Plaintiffs and other similarly situated religious organizations." Compl. at 55–56. These allegations on their face demonstrate that plaintiffs seek to "enjoin or restrain" the Commission "in the performance of its official duties" by preventing the Commission from enforcing or otherwise acting in accordance with the requirements of HB 1429. Va. Const. art IX, § 4.[9]

As an example, one of the ways the Commission exercises its authority to "execut[e] . . . all laws relating to insurance," Va. Code Ann. § 38.2-200, is by reviewing and approving policy forms for accident and sickness insurance, see § 38.2-316. "The Commission may disapprove or withdraw approval of the form of any policy . . . if the form . . . [d]oes not comply with the laws of this Commonwealth." § 38.2-316(D). By requesting an injunction against the Commission, plaintiffs ask this Court to require the Commission to approve policy forms as complying with state law even where those forms do not cover the health care services listed in HB 1429. Because "the Supreme Court ha[s] exclusive jurisdiction over all challenges to all actions of the

[9] This jurisdictional bar applies to the Commission and each of the divisions under its authority—including the Virginia Bureau of Insurance and actions taken on behalf of that Bureau by the Commissioner of Insurance, to whom the Commission has delegated much of its authority under the Insurance Code (Title 38.2 of the Code of Virginia). See Va. Code Ann. § 12.1-16.

SCC," this Court is without authority to adjudicate exactly that type of claim. *Atlas*, 237 Va. at 49; see also *Louisa Cty. v. Virginia Dep't of Taxation*, 27 Va. Cir. 352, at *2 (1992) (dismissing claims for lack of jurisdiction because "the Virginia Supreme Court is the only judicial body permitted to review or correct actions of the Commission").[10]

B. The Attorney General and Director Payne have no authority to enforce HB 1429

The Attorney General and Director Payne are also not proper parties to plaintiffs' challenge to HB 1429 because they have no connection to that law. As plaintiffs point out, "authority to enforce" HB 1429 is vested in the Commission. Compl. ¶ 23; see also Va. Code Ann. § 38.2-200 ("The Commission is charged with the execution of all laws relating to insurance and insurers."). And nothing in the complaint—much less the statute itself—suggests that the Attorney General or those who report to him have anything to do with how that law is interpreted, implemented, or enforced. Accord Payne Decl. ¶ 13.

For this reason, any relief this Court may order against either the Attorney General or Director Payne would have no effect on plaintiffs' rights under HB 1429. Where, as here, "no relief can be afforded" on a particular claim, courts may not "give opinions on abstract propositions of law." *Hankins v. Town of Virginia Beach*, 182 Va. 642, 643–44 (1944). The Attorney General and Director Payne (both of whom are sued in their official capacities) are accordingly not proper defendants for the HB 1429 claims. See *Estate of James v. Peyton*, 277 Va. 443, 452 (2009) (explaining that "misjoinder" exists "where the person or entity identified by the pleading was not the person . . . against whom the action could . . . be[] brought").

[10] To the extent plaintiffs suggest it would be futile to proceed in the ordinary course before the Commission, "[t]he Supreme Court has previously approved instances where the Commission, acting in its judicial capacity, has reviewed the constitutionality of statutes that it is required to enforce or apply." *Louisa Cty.*, 27 Va. Cir. at *3. The Virginia Constitution also provides a right of appeal to the Supreme Court. See Va. Const. art. IX, § 4.

CONCLUSION

The plea in bar should be sustained, and the complaint should be dismissed.

Dated: December 7, 2020

Respectfully submitted,

MARK HERRING
R. THOMAS PAYNE, II
STATE CORPORATION COMMISSION

By: _____

Jessica Merry Samuels (VSB No. 89537)*
Assistant Solicitor General

Mark R. Herring
Attorney General

Erin B. Ashwell (VSB No. 79538)
Chief Deputy Attorney General

Samuel T. Towell (VSB No. 71512)
Deputy Attorney General

Toby J. Heytens (VSB No. 90788)*
Solicitor General

Martine E. Cicconi (VSB No. 94542)*
Michelle S. Kallen (VSB No. 93286)
Deputy Solicitors General

Kendall T. Burchard (VSB No. 95710)
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-6835 – Telephone
(804) 371-0200 – Facsimile
solicitorgeneral@oag.state.va.us

Donnie L. Kidd (VSB No. 44241)
Chief Counsel – Financial Services

Patricia A.C. McCullagh (VSB No. 43456)
Deputy Chief Counsel – Financial Services

Justin Lo (VSB No. 93288)
Associate General Counsel – Financial Services

Office of General Counsel
Virginia State Corporation Commission
1300 East Main Street
Richmond, Virginia 23218
(804) 371-9671 – Telephone
(804) 371-9240 – Facsimile
Donnie.Kidd@scc.virginia.gov
Patricia.McCullagh@scc.virginia.gov
Justin.Lo@scc.virginia.gov

***Counsel of Record for Defendants**

CERTIFICATE OF SERVICE

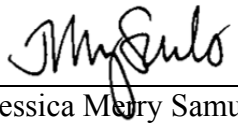
I hereby certify that on December 7, 2020, a true and accurate copy of the foregoing was transmitted by both first-class mail and email to:

Denise M. Harle
Alliance Defending Freedom
1000 Hurricane Shoals Rd., NE, Ste. D1100
Lawrenceville, GA 30043
dharle@ADFlegal.org

Kevin H. Theriot
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
ktheriot@ADFlegal.org

H. Robert Showers
William R. Thetford
Simms Showers, LLP
305 Harrison St., SE, Third Floor
Leesburg, VA 20175
hrshowers@SimmsShowersLaw.com
wrthetford@SimmsShowersLaw.com

Counsel for Plaintiffs



Jessica Merry Samuels