Virginia:
In the Circuit Court of the City of Richmond, John Marshall Courts Building

HADASSAH HUBBARD CARTER,

Plaintiff,

v.

VIRGINIA REAL ESTATE BOARD,

Defendant.

Case Number: CL19-4150

MEMORANDUM OPINION AND ORDER

This matter is before the court on Plaintiff's motion for summary judgment. Plaintiff claims the presumption of unlawful discrimination contained in the Commonwealth's Fair Housing Law, Va. Code Ann. § 36-96.3(A)(3) (Lexis 2023), amounts to an infringement of her protected activity of expression under the First Amendment to the United States Constitution. The court agrees, and for the reasons stated below, the motion will be granted.

Background

Plaintiff, Hadassah Hubbard Carter, was a licensed realtor employed through a brokerage office, Keller Williams Realty ("KWR") in Midlothian, Virginia. (Plaintiff's Amended Complaint ¶ 6, Exhibit A).. In the Spring of 2017, Ms. Carter was working with a client on the purchase of a home from a construction company. (*Id.* ¶ 11, Exhibit A). For reasons that are immaterial to this matter, Ms. Carter believed that the company was engaged in unlawful discrimination against Ms. Carter's client on the basis of her race and age. (*Id.*, Exhibit A). Ms. Carter reached out in a series of emails to the Fair Housing Board

within the Department of Professional and Occupational Regulation ("DPOR") to seek guidance and initiate a complaint against the company and its agents. (*Id.*, Exhibit A).

In addition to the allegations of discrimination against her client, Carter's emails to DPOR contained a signature line reading: "For Faith and Freedom, Jesus Loves You, and with God [a]ll things are Possible." (Id. ¶ 13, Exhibit A). The emails also contained a "Personal Statement" that read, "For God so loved the world that He gave his only begotten Son, that whosoever believeth in Him should not perish but have everlasting life. 'John 3:16.'" (*Id.* ¶ 13 Exhibit A).

The record is silent on what action, if any, DPOR took regarding the allegation of race and age discrimination against Ms. Carter's client. However, on August 15, 2017, another agency within DPOR, the Virginia Real Estate Board ("VREB"), began an investigation of Ms. Carter by filing a Housing Discrimination Complaint ("HDC"). (*Id.* ¶ 12, Exhibit A). The HDC listed Ms. Carter, KWR, and Kathleen Edwards, as respondents. (*Id.*, Exhibit A). It alleged that Ms. Carter had violated the Fair Housing Law through statements she made referencing religion. It cited her emails as well as statements made on her business website that likewise referenced her faith. (*Id.* ¶¶ 12–14, Exhibit A). The HDC cited the language of Virginia's Fair Housing Law prohibiting the use of published materials referencing religion. (*Id.* ¶12c, Exhibit A). *See* Va. Code Ann. § 36-96.3(A)(3).

The VREB required Ms. Carter to participate in its investigation. (*Id.*, Exhibit 1A). VREB's investigation was extensive and had been ongoing for over eight months when a "Conciliation Agreement" was executed. (*Id.*, Exhibit B). The agreement required KWR to undertake several remunerative actions, including supplemental training for employees, revisions to its anti-discrimination policy, and to prohibit any reference to religion in its marketing materials. (*Id.*, Exhibit B, ¶¶ 11–13).). It also required KWR to specifically monitor Ms. Carter's "websites, email signature and real estate advertisements" indefinitely.

(*Id.*, Exhibit B, ¶ 13). VREB chose to drop Ms. Carter from its complaint during the pendency of the investigation, but it is uncontroverted that Ms. Carter ceased her work as a professional realtor during this time frame (*Id.* ¶¶ 22, 27). Her complaint alleges that she fears working in the real estate industry due to potential enforcement actions by the VREB based on her expression of religious faith. (*Id.* ¶ 30).

Positions of the Parties

Carter claims, in part, that the presumption of unlawful discrimination contained in Va. Code Ann. § 36-96.3(A)(3), violates her First Amendment right to speech on its face.[1] (Transcript of Hearing at 24–25 (Dec. 21, 2023)). The Commonwealth, on behalf of the VREB, denies this claim, and in any event alleges that further factual development is necessary to establish a proper record for review. (*Id.* at 49–50).

Analysis

Summary Judgment

Summary judgment is proper in cases where no "material fact is genuinely in dispute" and the moving party is entitled to judgment as a matter of law. *See* Va. Sup. Ct. Rule 3:20. "[A] grant of summary judgment is proper if, in consideration of the undisputed facts in the light most favorable to the non-moving party, it appears that the moving party is entitled to judgment as a matter of law. In considering the motion, the Court considers the facts and all inferences fairly drawn therefrom, and is prohibited from drawing inferences that are 'forced, strained, or contrary to reason.'" *Pack v. Ga.-Pacific LLC*, 95 Va. Cir. 351, 352 (Cir. Ct. 2017).

[1] She also raises an "as applied" claim and a "due process" claim. The court need not reach these claims.

Carter's seeks declaratory judgment pursuant to Va. Code Ann. § 8.01-184 (Lexis 2023). A declaratory action is remedial in nature and is to be "liberally interpreted and administered" so as to avoid "the uncertainty and insecurity attendant [to] controversies over legal rights." Va. Code Ann. § 8.01-191 (Lexis 2023).

Standing

As an initial matter, the court recognizes certain bedrock principles that properly constrain the role of the judiciary. First, the courts of the Commonwealth do not have jurisdiction to take up any claim in the absence of a demonstrated "justiciable interest." *See W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 383 (1996). A party must demonstrate an actual controversy such that his or her rights will be affected by the outcome of the case. *Id.* Second, lawfully enacted legislative directives are entitled to a presumption of validity in the courts. As the Commonwealth aptly notes, "all actions of the General Assembly are presumed to be constitutional." (Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment at 5 (citing *Montgomery Cnty. v. Virginia Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435 (2011)). Third, facial constitutional challenges must be held to a narrow scope. Plaintiffs who bring a facial challenge to a statute must show that their "own speech or conduct" was limited or punished by the statute. *See Stanley v. Norfolk*, 218 Va. 504, 506 (1977).

The above principles were distilled by the Supreme Court of the United States in *Broadrick v. Oklahoma*:

> [C]onstitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

413 U.S. 601,610–11 (1973). The Supreme Court of Virginia has cited *Broadrick* approvingly. *See Stanley*, 218 Va. at 506.

These general guideposts on restraint are counterbalanced by other considerations in cases that involve the First Amendment. First, standing is widened in the First Amendment context to allow litigants, even in the absence of their own rights being violated, to bring a statutory challenge on the basis that "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612; *Stanley*, 218 Va. at 507–08.[2] Second, a facial challenge to a statute in the context of the First Amendment requires demonstrating the "substantial overbreadth" of the statute, such that it "has the potential to repeatedly chill the exercise of expressive activity by many individuals." *New York v. Ferber*, 458 U.S. 747, 769-71 (1982). This lower threshold stands in contrast to the broader requirement that a successful plaintiff must show "that no set of circumstances exist under which [the challenged law] would be valid." *United States v. Stevens*, 559 U.S. 460, 472 (2010). Finally, and perhaps most importantly, content-based proscriptions[3] on speech are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). They will only be upheld where the Commonwealth can establish the statute is "narrowly tailored to serve compelling state interests." *Id.*

Ms. Carter concedes the Commonwealth's compelling interest in eliminating discrimination in the context of the sale or leasing of housing. (Plaintiff's Memorandum at 19; Transcript of Hearing at 20 (Dec. 21, 2023)). Consequently, the sole question before the court is whether the statute is narrowly tailored to its goal, or, to the contrary, overly

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[2] *See also* Hous. Cmty. Coll. Sys. v. Wilson, ___ U.S. ___, 142 S. Ct. 1253, 1262 (2022) ("When the government interacts with private individuals as sovereign, employer, educator, or licensor, its threat of a censure could raise First Amendment questions.").

[3] The Commonwealth concedes that Section 36-96.3(A)(3) is content based in so much as it prohibits certain speech related to protected classifications but then goes on to argue that the presumption contained in the second part of the subsection may not be content based. (Transcript of Hearing at 56–57 (Dec. 21, 2023)). The court rejects this argument. The presumption likewise makes reference to specific content, that is, content referencing "a particular religion, national origin, sex, or race." As such, the court finds it to be content based.

broad. *See Broadrick* at 612–13, 615 ("the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

Federal and Virginia Fair Housing Laws

Before taking on Carter's claim of overbreadth, it is helpful to consider the historical context of the Commonwealth's Fair Housing Law. On April 11, 1968, just days after the assassination of Dr. Martin Luther King, Jr., President Lyndon Baines Johnson signed into law Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act ("FHA"). The FHA declares, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C.A. § 3601. Passage of the FHA was an effort to oppose long-standing practices of systemic racism, antisemitism, and other forms of discrimination that had plagued the housing market for decades.

At the signing ceremony in the East Room of the White House, President Johnson recalled that when he first met with leaders in 1966 – a group that included Dr. King – to call for a federal law against discrimination in the sale and rental of housing, "few in the Nation . . . believed that fair housing would – in our time – become the unchallenged law of this land. And indeed, this bill has had a long and stormy trip. And now . . . at long last . . . its day has come. I do not exaggerate when I say that the proudest moments of my Presidency have been times such as this when I have signed into law the promises of a century." *Remarks on Signing the Civil Rights Act, April 11, 1968*, https://millercenter.org/the-presidency/presidential-speeches/april-11-1968-remarks-signing-civil-rights-act.

The policy implemented by the FHA was one that "Congress considered to be of the highest priority." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). While acknowledging that "members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those

who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." *Id.* at 210. The scope of the FHA intended to provide relief not only for racial and ethnic minorities but for all those who suffered from unfair housing practices of whatever stripe.

After enactment of the FHA, forty-nine states and the District of Columbia enacted their own fair housing laws. *See* The Policy Surveillance Program, *Fair Housing Summary Report* (Temple University Beasley School of Law, 2019). In 1972, the Commonwealth enacted its own Fair Housing Law ("VFHL"), noting in part, "[i]t is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens." *Hudler v. Cole*, 236 Va. 389, 391 (1988).

"The VFHL largely tracks the language of the FHA." *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 495 n. 2 (E.D. Va. 2002). In many instances, analysis under the FHA is almost, if not completely, identical to analysis under the VFHL. *Id.*

The VFHL originally prohibited discrimination in housing related to race, color, religion, national origin, or sex. The law has been periodically amended and has gradually expanded to include additional protected classes. *See* Va. Code Ann. § 36-96.3 (Lexis 2023) (additionally listing elderliness, source of funds, familial status, sexual orientation, gender identity, and military status as characteristics that are now specifically protected from discrimination).

In order to facilitate the goals of the VFHL, one of its provisions makes unlawful the:

> mak[ing], print[ing], or publish[ing] . . . [of] any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination on the basis of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability.

Va. Code Ann. § 36-96.3(A)(3). This provision of the Virginia Fair Housing Law mirrors the language of the Federal FHA, with a purpose of ensuring equal access to housing for all. *Compare* 42 U.S.C. §3604(c) (2023).

Virginia's statute was put to the test in 1989 when the Supreme Court of Virginia took up the case of *Commonwealth v. Lotz Realty Co.*, 237 Va. 1 (1989). In that case, the Virginia Real Estate Commission (the predecessor to the VREB) brought a complaint against real estate brokers in Newport News for the utilization of Christian iconography and statements contained in brokerage materials. *See Id.* at 4–5. The broker's letterhead and advertisements contained a caricature of a fish and included the language, "Jesus is Coming." *Id.* The brokers sued, and the trial court declined to take up the constitutional issues, ruling instead that the Commission had failed to carry its burden of establishing a violation of the statute. *See Id.* at 5–8. In short, the trial court concluded that the broker's use of religious symbology and speech, standing on its own, failed to establish unlawful conduct. *See Id.*

The Supreme Court of Virginia affirmed in relevant part, rejecting the Commission's request for a "per se" finding of unlawful discrimination based on the use of symbols and speech alone. *See Id.* at 8. The *Lotz* Court held that the danger of prohibiting nondiscriminatory advertisements outweighed the Commonwealth's interest in preventing discrimination. *Id.* ("We think application of a per se rule should be reserved for those instances where there can be no doubt that a discriminatory preference is indicated, else there is danger of prohibiting 'nondiscriminatory as well as discriminatory advertisements.'" (quoting *Spann v. Colonial Village, Inc.*, 662 F. Supp. 541, 545 (D.D.C. 1987))).

The Virginia Legislature responded to *Lotz* in 1991 by amending Code § 36-96.3(A)(3) to include additional statutory language (apparently unique in all fifty states)[4] that creates a *presumption* of unlawful conduct:

> The use of words or symbols associated with a particular religion, national origin, sex, or race shall be prima facie evidence of an illegal preference under this chapter that shall not be overcome by a general disclaimer.

Va. Code Ann. § 36-96.3(A)(3). The statute has been unaltered in relevant part, and, notably, unchallenged since. (Transcript of Hearing at 66 (Dec. 21, 2023).

First Amendment

Having considered the historical context for the Commonwealth's Fair Housing Law, the court now turns to Carter's overbreadth challenge. The statutory presumption makes unlawful *any* expression of individual identity that references religion, national origin, sex, or race, without any evaluation of the substantive message conveyed in the expression. The ban on expression is total. Thus, under the VFHL, a reference to the biblical verse: "Slaves, obey your earthly masters with respect and fear," *Ephesians* 6:5, would be presumed to carry an unlawful discriminatory purpose, but so also would reference to a verse such as, "Love your neighbor as yourself." *Mark* 12:31. All biblical references alike are presumed to convey the same invidious discriminatory animus. Even though the latter reference carries a message entirely consistent with the statute's purpose of eliminating disparate treatment, it is considered just as unlawful as the former, on the sole basis that it contains "words associated with a particular religion."

Other seemingly benign verbal or printed expressions of identity could likewise trigger the VFHL's presumption of unlawful conduct. Juneteenth, for example, is an official

[4] The Commonwealth does not dispute that the presumption contained in VFHL is unique to Virginia and does not appear in fair housing statutory language in the other forty-nine states. (Transcript of Hearing at 69 (Dec. 21, 2023)).

holiday recognized in the Commonwealth and observed across the United States commemorating the final emancipation of African Americans on June 19, 1865. 5 U.S.C. § 6103; Va. Code Ann. § 2.2-3300. If a realtor advertised property for let or sale on a website with an accompanying greeting, "Happy Juneteenth," such "words associated with a particular race" are considered "prima facie evidence of an illegal preference" under the VFHL.

Likewise, a realtor who expressed solidarity with the Ukrainian people by publishing a blue and gold flag could trigger the presumption relating to "national origin." The statute's proscription could even conceivably apply to a red, white, and blue banner hanging outside a realtor's office on the Fourth of July celebrating Independence Day as a "symbol associated with a particular national origin," since celebrating that uniquely American holiday could be viewed as exclusionary by some individuals with a foreign national origin. The list could go on – capturing an excessively broad range of conduct that has no objective or rational relationship to an intention to discriminate.

The Commonwealth's response to the numerous instances whereby the presumption of animus could be triggered is that the suspected realtor could overcome the presumption by presenting their own evidence of contrary intent. (Transcript of Hearing at 64–65 (Dec. 21, 2023)). This proposed solution to the statute's overbreadth misses the point. It is axiomatic that where the state alleges misconduct by its citizens, it is the state that bears the burden of proof. *See Sutherland v. Commonwealth*, 171 Va. 485, 494 (1938). The presumption in the VFHL relieves the Commonwealth of its burden and automatically penalizes the use of any and all words or symbols, even if they are entirely benign, because they carry the stigma of merely being "associated" with a particular religion, national origin, sex, or race.

Additionally, inconsistencies between the statute's initial scope and the amended language of the presumption call into question whether it meets the test of being narrowly tailored to its laudable goal of eliminating housing discrimination. The number of categories contained in the presumption clause of the statute is far smaller than the list of characteristics that are to be protected from discrimination. There are twelve categories in all that a realtor may not express preference for or discriminate against: race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability. However, only four of these twelve categories – religion, national origin, sex, and race – carry a presumption of unlawful intent.

The fact that only four of the twelve potentially discriminatory categories carry the presumption leads to contradictory and nonsensical outcomes. For example, a realtor is presumed to be engaged in unlawful conduct by proclaiming, "Proudly serving the African American community for thirty years," because a reference to race triggers the presumption of an illegal preference. However, a nearly identical statement, "Proudly serving the LGBT community for thirty years," carries no presumption of unlawful intent, despite being an identical expression of pride in serving a distinct community, because a reference to sexual orientation carries no presumption under the statute. Such an outcome is arbitrary.

Words and symbols are powerful because they express identity. Language and imagery by their very nature are at the heart of individual liberty. The right to express one's personal identity and opinion lay at the heart of the freedoms which the Founders were intent on protecting from the interference of government and have been universally guaranteed to all Americans since the ratification of the First Amendment of the U.S. Constitution in 1791. Virginians, however, may make an even older claim to this

fundamental right, which was enshrined in the Virginia Statute of Religious Freedom drafted by Thomas Jefferson in 1777 and enacted into law in 1786.[5]

In drafting the Virginia Statute of Religious Freedom, Jefferson asserted a sweeping foundational principle of freedom to express one's identity: "[A]ll men shall be free to profess, and by argument to maintain, their opinions." Va. Code Ann. § 57-1.[6] Although originally expressed in the context of religious freedom, the statute's broad language makes clear that every individual person shall be free to express their identity, without restraint or burden from the government. Moreover, the statute presciently warns against any future restriction of this freedom, reminding Virginians that to do so impedes one of the most fundamental individual human liberties:

> [T]he rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

Id.

The text of the Virginia Fair Housing Law as contained in Va. Code Ann. § 36-96.3 infringes the natural right of individuals to express their identity and, as such, stands in sharp contrast to the freedom of Virginians and Americans to express their identity that lie at the heart of the First Amendment to the United States Constitution and the Virginia Statute for Religious Freedom. Moreover, the statute restricts individual expression with a sweeping generalization so broad that *any* expression of individual identity related to religion, national origin, sex, or race is deemed tantamount to a desire to engage in unlawful discrimination.

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[5] While the court notes that the present motion for summary judgment is based on the First Amendment of the Federal Constitution, it nonetheless finds a consideration of the Virginia Statute of Religious Freedom to be instructive.

[6] Jefferson's first draft of the Bill, submitted to the Virginia General Assembly in 1779, contained a similar foundational statement of principle: "[T]he opinions of men are not the object of civil government, nor under its jurisdiction." A Bill for Establishing Religious Freedom (June 18, 1779), *The Papers of Thomas Jefferson Digital Edition* (Barbara B. Oberg and J. Jefferson Looney, eds., 2008).

These United States have combined in a pluralistic union that to date has succeeded because of the contributions of many unique individuals from varying backgrounds and differences whose rights to expression are guaranteed by the First Amendment. Virginia's presumption of animus in the Fair Housing Law inequitably and overbroadly inhibits those rights, and as such, it fails to give the breathing space that First Amendment freedoms require. *See NAACP v. Button*, 371 U.S. 415, 429-31 (1963).

This conclusion does not leave the Commonwealth powerless in its efforts to eliminate discrimination in housing. Indeed, forty-nine other states have pursued this noble goal for decades without the aid of a presumption. In short, should the Commonwealth confront a claim or suspicion of discrimination, it is properly situated to collect evidence, present proof, and establish its case. What it cannot do is rest upon a presumption that improperly and unconstitutionally restricts speech and expression.

Conclusion

Accordingly, **Plaintiff's motion for summary judgment is granted.** The court finds the portion of Va. Code Ann. § 36-96.3(A)(3) presuming unlawful animus due to the mere use of words or symbols associated with a particular religion, national origin, sex, or race to be an unconstitutional abridgement of the rights to speech and expression established by the First Amendment. **Defendant is enjoined from the enforcement of the same.** The Clerk of Court is requested to send copies of this Memorandum Opinion and Order to the parties.

So ordered, this 24th day of January, 2024,

Tracy Thorne-Begland, Judge