VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

HADASSAH HUBBARD CARTER,

Plaintiff,

v. Case No: CL19-4150

VIRGINIA REAL ESTATE BOARD

Defendant.

PLAINTIFF'S MEMORANDUM AGAINST
DEFENDANT'S PLEA IN BAR AND DEMURRER

Plaintiff Hadassah Carter, by counsel, submits this memorandum of law in support of her Complaint, against Defendant's Plea of Sovereign Immunity and Demurrer and moves the Court to deny the Plea and Demurrer for the reasons stated below.

STANDARD OF REVIEW

"The purpose of a demurrer is to determine whether the complaint states a cause of action upon which the requested relief may be granted." *Pendleton v. Newsome*, 290 Va. 162, 171 (2015). "A demurrer tests the legal sufficiency of a [complaint], ensuring that the factual allegations set forth in the pleading are sufficient to state a cause of action." *La Bella Dona Skin Care v. Belle Femme Enters., LLC*, 294 Va. 243, 255 (2017) (citation omitted). In its consideration of a demurrer, the court "accept[s] as true all properly pled facts and all inferences fairly drawn from those facts." *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 204 (2007).

The purpose of a 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). "A plea in bar presents a distinct issue of fact which, if

Furthermore, in *DiGiacinto*, the Supreme Court cited *Gray* when making its determination that George Mason University [GMU] did not have sovereign immunity against a Bill of Rights-based claim. The Court noted that, even though "[a]s an agency of the Commonwealth, [GMU] is entitled to the protection of sovereign immunity afforded to the state," 281 Va. at 137 n.1,

> *sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia or claims based on federal law.* [*Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 104-07, 662 S.E.2d 66, 71-73 (2008).] . . . Thus, a plea of sovereign immunity cannot bar a claim by DiGiacinto for declaratory and injunctive relief, challenging GMU's authority to promulgate the regulation, based upon a self-executing provision of the Constitution of Virginia.

Id. at 137 (emphasis added).

Specifically, in *DiGiacinto*, the plaintiff, who was not a GMU student or employee, desired to carry a firearm when he was on campus and inside university buildings. However, a GMU regulation[3] greatly restricted the possession of weapons on campus. *Id.* at 131. The plaintiff filed a complaint seeking a declaratory judgment against GMU alleging that the regulation violated his federal constitutional right to carry a firearm and also raised other state constitutional claims as well as statutory or non-constitutional claims. The trial court dismissed the complaint on the grounds of sovereign immunity, but the Supreme Court reversed the trial court's ruling regarding sovereign immunity because the plaintiff alleged a violation of the federal constitution and Virginia's self-executing constitutional provisions, which waive sovereign immunity. *Id.* at 136.

B. Federal Constitutional Claims Waive Sovereign Immunity.

The Court in *DiGiacinto* concluded that federal constitutional provisions, unlike the Virginia Constitution, do not need to be self-executing in order to waive sovereign immunity. *Id.* at 137; *see also Alliance to Save the Mattaponi*, 270 Va. at 455–56 (citations omitted) (upholding

[3] The regulation is codified at 8 VAC § 35-60-20.

claim of sovereign immunity where there was an "absence of any alleged violation of federal constitutional rights"). The Defendant cites *Alliance* for the general proposition that state entities have sovereign immunity. Def.'s Mem. 5. However, their argument does not acknowledge the fact that the Supreme Court has repeatedly held that immunity does not apply to claims arising from federal constitutional protections. *Id.* In *Alliance*, the Court stated that, although it is the "general rule" that the Commonwealth is immune from suits, complaints based on the federal Constitution are generally *not* barred by sovereign immunity because "state officials are not permitted to act in violation of the federal constitution." *Id.* In the present case, the Complaint alleges that Ms. Carter's self-executing state constitutional rights, as well as her federal constitutional rights, were violated, and that is sufficient to defeat Defendant's sovereign immunity argument.

Recently, the Supreme Court reiterated that sovereign immunity does not protect federal unconstitutional acts by affirming an unlawful search claim brought against a police officer—which is a "common law tort that has achieved constitutional dimensions"—because the officer's search was performed contrary to well-established federal law and violated the plaintiff's Fourth Amendment rights. *Cromartie*, 837 S.E.2d at 254–55. In sum, claims under the federal Constitution waive sovereign immunity.

C. Ms. Carter Has Valid, Self-Executing State and Federal Constitutional Claims.

All of Ms. Carter's counts allege a violation of either the Virginia Constitution's Bill of Rights or the United States Constitution's Bill of Rights. Count I alleges violation of Va. Const. Art. 1, Section 16. Count II alleges violation of Va. Const. Art. 1, Section 11. Count III alleges violation of Va. Const. Art. 1, Section 12. Counts IV and V allege violations of the First Amendment to the United States Constitution. Count VI alleges a violation of the First and Fourteenth Amendments to the United States Constitution.

Article I of the Virginia Constitution is titled: "Bill of Rights." Article 1, Section 16 states in relevant part, "No man shall be . . . restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities." Additionally, Article 1, Section 11 says: "the right to be free from any governmental discrimination upon the basis of religious conviction . . . shall not be abridged." Further, Article 1, Section 12 says: "the General Assembly shall not pass any law abridging the freedom of speech. . . ." Moreover, the United States Supreme Court has held that the First and Fourteenth Amendments are self-executing, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("[T]he Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."). In sum, all counts of the Complaint are premised upon self-executing constitutional protections, so sovereign immunity is inapplicable to this case.

Neither *Alden v. Maine*, 527 U.S. 706 (1999), nor *Clark v. Va. Dep't of State Police*, 292 Va. 725 (2016), cited by Defendant, are applicable here. Although the Defendant asserts that *Alden* supports the claim that "sovereign immunity shields the Commonwealth from *any* private suit in its own courts," Def.'s Mem. 6 (emphasis added), the Supreme Court of the United States actually said *the exact opposite*: "Sovereign immunity, moreover, *does not* bar *all* judicial review of state compliance with the Constitution and valid federal law." *Alden,* 527 U.S. at 755 (emphasis added). The most relevant part of the decision is the Court's statement that, "in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution. . . . By imposing explicit limits on the powers of the States . . . the Amendment 'fundamentally altered the balance of state and federal power struck

by the Constitution.'" *Id.* at 756 (citation omitted). Similarly, in *Clark*, the Supreme Court noted that "[t]he enduring role of sovereign immunity is not without its qualifications," such as when the Fourteenth Amendment is involved. 292 Va. at 731. *Alden* and *Clark* are inapposite.

Defendant has no answer for the numerous previously discussed decisions that make it clear that sovereign immunity does not bar any of Ms. Carter's claims. For instance, *Gray*, *DiGiacinto*, *Cromartie*, and *Robb* are not even mentioned in Defendant's Memorandum. Defendant cited *Alliance* for the general rule barring many non-constitutional claims, but ignored that decision's express recognition of an exception for constitutional claims. In sum, it is clear that sovereign immunity is inapplicable here, as all of the constitutional claims arise under the Virginia and/or federal Bill of Rights, or the Fourteenth Amendment.

II. Ms. Carter Has Standing Because the Complaint Presents a Justiciable Controversy.

The Supreme Court has recognized that a declaratory judgment action that presents "a challenge to the constitutionality of a statute based upon United States law or self-executing provisions of the Virginia Constitution"—such as the present case—"presents a justiciable controversy." *Daniels v. Mobley*, 485 Va. 402, 412 (2013). There is no justiciability bar to the present case, as Virginia Code § 8.01-184 provides that, "in cases of actual controversy, circuit courts . . . shall have power to make binding adjudications of right," and, "[c]ontroversies involving the interpretation of . . . statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right." The Court has stated that a right giving rise to a justiciable controversy may arise from statutes, constitutional provisions, or the common law. *Lafferty v. Sch. Bd. of Fairfax Cty.*, 293 Va. 354, 362 (2017). Ms. Carter has standing because there is an actual controversy impacting her constitutional freedoms that is ripe for judicial adjudication.

To have standing to seek a declaratory judgment, a plaintiff must simply have a "'justiciable interest' in the subject matter of the proceeding." *Id.* at 360 (citation omitted). For instance, in *Bd. of Supervisors v. Southland Corp.*, the Supreme Court held that the plaintiff had standing to bring a constitutional challenge to a zoning ordinance. 224 Va. 514, 517, 520 (1982). Southland, which was engaged in the business of obtaining additional sites for 7-Eleven stores, alleged that the zoning ordinance's special exception requirements imposed a financial disadvantage upon Southland that was not imposed on other similarly situated businesses. *Id.* at 520. Southland asserted a right to build stores without going through the special exception process, but the Board of Supervisors disagreed. *Id.* Although *Southland* had not applied for an exception under the ordinance, and thus had never been denied an exception by the board, the Court held that Southland had a justiciable interest that "was ripe for judicial determination, rather than one which was merely hypothetical or abstract." *Id.* at 520–21.

Here, the Defendant claims that Ms. Carter must actually be sued by the Commonwealth, or lose her license, before her claim is ripe. Def.'s Mem. 11. However, just like in *Southland*, where the Court found that the claim was ripe even though the plaintiff had not yet applied for an exception under the ordinance, Ms. Carter's claim is ripe even though her license has not been revoked. Ms. Carter challenges a presumption which imposes a specific burden on religious speech. She was engaged in the sale of real estate until the Defendant investigated her speech. Pl.'s Compl. ¶ 32. Ms. Carter asserts a right to conduct her profession without fear of professional discipline due to her constitutionally-protected religious expression. As in *Southland*, Ms. Carter has a justiciable interest that is neither hypothetical nor abstract: there are current restrictions against her religious speech, backed by the threat of further proceedings against her if she again

adds the religious speech to her work email and website.[4] Because of this, Ms. Carter has not engaged in her real estate practice. Due to the prior administrative proceeding against her, Ms. Carter's fear of repercussions from the VREB is reasonable and justified. Therefore, just as the Court held in *Southland*, Ms. Carter's claims are ripe for judicial adjudication.

The Defendant's brief stated that "[t]he VREB never took adverse action against Plaintiff or her real estate license." Def.'s Mem. 10. This is plainly untrue. VREB itself filed a complaint against her due to her religious expression. Paragraphs 23–27 of the Complaint demonstrate that Ms. Carter was forced to resign her job because her employer agreed to a conciliation agreement with the VREB without her consent. Paragraph 24 shows the current harm suffered by Ms. Carter: "The terms of the conciliation agreement further required that Midlothian prevent any of its employees from posting or including religious statements or material on any of their communications or advertising material." Because of the agreement made by her employer, Ms. Carter was forced to leave her position due to her religious beliefs.

Contrary to the Defendant's claim, there is an actual controversy and the VREB took direct action against Ms. Carter. The Supreme Court has clarified that, "at the pleading stage, the plaintiff must allege facts 'demonstrat[ing] an actual controversy between the plaintiff and the defendant, such that [plaintiff's] rights will be affected by the outcome of the case.'" *Deerfield v. City of Hampton*, 283 Va. 759, 765 (2012). Here, this litigation will determine whether Ms. Carter may

[4] The Defendant goes outside the Complaint to make a number of unsupported assertions regarding a "specific disclaimer." Def.'s Mem. 12. While the Defendant claims that Ms. Carter would be free to practice her religion with the addition of a "specific disclaimer" in her communications, they do not provide any evidence (or case law) demonstrating that they will not take any future action against her if she agrees to include a "specific disclaimer." Furthermore, the conciliation agreement between the Defendant and Midlothian specifically required that all employees remove anything religious (regardless of whether any "specific disclaimer" was present). Pl.'s Compl. ¶ 24. Finally, the fact that the Board considers any and all religious expression to be inherently suspect, such that a "specific disclaimer" is needed, illustrates the validity of Ms. Carter's claims.

exercise her constitutional rights free from fear of disciplinary proceedings, loss of licensure, etc. The controversy created by the VREB's actions have significantly affected Ms. Carter's rights by completely silencing her religious expression. The Board filed, investigated, and dismissed—without prejudice—a complaint against her. Moreover, by signing a conciliation agreement with her employer, the VREB functionally forced Ms. Carter to remove all of her religious speech or be terminated. Ms. Carter was forced to resign because of her religious beliefs. If not for the VREB's actions, Ms. Carter would still have a position with her employer.

The VREB then went a step further: "The terms of the conciliation agreement further require that Midlothian report to the VREB any individual who resigns their position due to the restriction on religious material, as well as the name of their new broker." Pl.'s Compl. ¶ 25. This clearly indicates that the VREB will likely take future action against Ms. Carter if she chooses to exercise her religious belief as alleged in the complaint. By threatening to take possible future action against Carter, the actions of the Defendant are having a chilling effect on her religious speech. A "chilling effect," a deterrent causing an individual to censor his or her expression, has been recognized by the U.S. Supreme Court as providing a sufficient basis for standing on numerous occasions. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003) ("[W]aiting extracts a heavy First Amendment price. If this suit goes forward, both Nike and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. *See Time*, 385 U.S., at 389; *Gertz*, 418 U.S., at 340. That is what a 'chilling effect' means.").

Similarly, the Supreme Court of Virginia has noted that a chilling effect imposed upon the exercise of one's First Amendment rights gives rise to standing. *See, e.g., Daniels*, 485 Va. at 417-18 (recognizing standing in First Amendment cases alleging a chilling effect on the exercise of

constitutionally protected speech or conduct). Ms. Carter would clearly have standing to assert her claims in federal court and, as such, she has standing to assert her claims here. *See, e.g., Jaynes v. Commonwealth*, 276 Va. 443, 455-58 (2008) (noting that, although state courts may apply *less stringent* standing requirements for First Amendment free speech plaintiffs than federal courts, they may not set *higher* standing requirements). Therefore, the Defendant's claim that there is no standing because there was no adverse action or possibility of future action is without merit.[5]

Additionally, Virginia Fair Housing Law § 36-96.3(A)(3) states (in relevant part) that "[i]t shall be an unlawful discriminatory housing practice . . . [t]o make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination . . . based on . . . religion. . . ." In other words, the making of such a statement is unlawful *at the moment it is made*, so the law clearly applies to speakers at the time they speak. Under the Defendant's position, the Board could repeatedly issue complaints against realtors—and subject them to investigation—for wearing a yarmulke, hijab, cross necklace, or other religiously-affiliated attire under the theory that those realtors might be indicating an illegal preference based on religion, and those realtors would have no recourse before any court for such a flagrantly unconstitutional action unless and until the point at which they

[5] Defendant's argument on the merits—that Ms. Carter is free to exercise her religion—is premature and incorrect. Def.'s Mem. 11–12. First, the two cases cited for the claim that "[t]he constitutionality of the Fair Housing Act is clearly established" have nothing to do with the question of whether the government may treat benign, non-discriminatory religious expression of one's faith as if it were invidious discriminatory speech. *Id.* Here, the Complaint does not broadly attack the Fair Housing Act in its entirety; only the presumption contained in one particular subsection of the Act is challenged. Pl.'s Compl. ¶ 3-4. Second, that "Plaintiff is free to practice her Christian faith in her personal life and her personal communications" does not lessen or justify the burden imposed upon her by the government in her professional life. *Id.* The Virginia and federal Bill of Rights provisions at issue in this case do not permit the Commonwealth to force the expression of religious faith out of the public sphere.

actually have their licenses revoked[6] or are sued by the government. Clearly, the law does not require an individual whose constitutional freedoms have been infringed upon to wait to be arrested, fined, subjected to the forfeiture of a license, or similarly harmed before being able to assert his or her constitutional rights in court.

The Supreme Court has explained that a declaratory judgment action is intended to avoid situations like this where "[t]he only step left was for the [b]oard to invade the rights of the [plaintiffs] or vice versa." *Cupp v. Bd. of Supervisors*, 227 Va. 580, 592 (1984). Although in *Cupp* the board "had not yet imposed the restrictions and conditions" on the plaintiffs, an actual controversy existed because the board "claimed it had the power to do so and this claim of power threatened the Cupps." *Id.* at 593. Thus, the Court held that the plaintiffs had standing because they "alleged a controversy under the Declaratory Judgment Act." *Id.* at 598.

Similarly, as discussed above, when the Court concluded in *DiGiacinto* that GMU did not have sovereign immunity against a Bill of Rights-based claim, they also considered the merits of the plaintiff's constitutional claim even though there was no indication that he had ever been specifically threatened with any adverse action against him. *See DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127 (2011). The fact that the regulation at issue impaired the plaintiff's ability to carry a firearm created sufficient standing. *Id.*

Similar to the constitutional claims in *Cupp* and *DiGiacinto*, a violation of Ms. Carter's rights under the United States Constitution, the Virginia Constitution, and Virginia Code § 57-2.02(B) presents an "actual antagonistic assertion and denial of right" that is properly before this court as a declaratory judgment action. The Complaint asserts that "the Defendant's prior

[6] The VREB has the power to initiate administrative hearings to revoke real estate licenses. Va. Code § 36-96.20(A); *see also Carpenter v. Va. Real Estate Bd.*, 20 Va. App. 100 (1995).

Complaint and subsequent actions require Ms. Carter to refrain from religiously motivated speech and conduct and negatively affect her livelihood as a Christian real estate agent." Pl.'s Compl. ¶ 32. As in *Cupp* and *DiGiacinto*, the VREB's assertion of power to prevent Ms. Carter from engaging in religious expression creates an actual controversy. There was an actual controversy in *Cupp* when the board claimed the power to impose restrictions on the Cupps, even though the board had not yet done so, and the claim in *DiGiacinto* was justiciable even though there was no specific application of the regulation to the plaintiff. Here, the VREB has asserted the power to restrict Ms. Carter's speech by filing its complaint and investigating her, and has further threatened to again file a complaint against her if she exercises her right to free speech.

In sum, Ms. Carter has standing because these are present facts ripe for adjudication under the declaratory judgment statute.

CONCLUSION

Therefore, Hadassah Carter moves that Defendant's Demurrer and Plea in Bar be denied. In the alternative, should the Court agree with Defendant's arguments in whole or in part, Ms. Carter moves for leave to amend.

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