VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY SCHOOL BOARD, Plaintiff, v. DEBRA TISLER and CALLIE OETTINGER, Defendants.	Case No. 2021-13491

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE

Defendants complied in every respect with this Court's October 22 order. It required Defendants to identify each of the Board's censorship demands and specify their objections thereto. Defendants have done so. The Board's motion to strike should therefore be denied.

The Board continues to misrepresent this case as being about whether the Virginia Freedom of Information Act (VFOIA) authorized them to withhold certain information. (This despite the fact that the Board conceded that it "has not filed any claims under VFOIA, nor is it asking that the Court interpret VFOIA." Board's Reply Mem. In Support of Emergency Mot. for Prelim. Inj. at 3). But that is simply not what this case is about. These documents were **already turned over** to Defendants, and **have already been published.** This case is therefore a *prior restraint* case. The Board is demanding that Defendants be prohibited from publishing information they lawfully obtained. *Cf. New York Times v. United States*, 376 U.S. 254 (1964); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

That means a different standard applies. It **does not matter** whether the Board could have withheld certain information. Instead, the Board, to prevail here, bears the burden of

showing that "the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures" than by censoring the Defendants. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994). It has not even attempted to satisfy its burden.[1] For that reason, this case should be dismissed in its entirety.

Defendants have now endured more than a month of censorship—forbidden to share information that is already available on the internet right now. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Board's motion for an injunction should therefore be denied **immediately**, the September 30 order should be dissolved, and this case dismissed forthwith.

November 3, 2021

Respectfully submitted,

DEBRA TISLER and CALLIE OETTINGER

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[1] Also, the Board's motion to strike does not meet the legal standard for having a paper struck and violates this Court's rules. (1) A strike motion should be granted only where the targeted paper was filed in defiance of the rules, *In re Carpitcher*, 47 Va. App. 513, 523 (2006), or is procedurally deficient. *Marni v. Marni*, No. 0103-18-4, 2018 WL 5913142, at *3–5 (Va. Ct. App. Nov. 13, 2018). The Board has not identified any rule or procedure that Defendants' filing violated. Also, (2) this Court requires two weeks' notice for motions of this sort. *See* Circuit Court Motions Docket Procedures ¶ 6 ("Motions for which Counsel for either party wishes to file a Memorandum in Support of or in Opposition to the Motion" require two weeks' notice). The rules also require the Board to certify that its counsel contacted Defendants' counsel and made a good faith effort to resolve the question. *Id.* ¶ 5. The Board did not do so.

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CERTIFICATE OF SERVICE

I certify that on November 3, 2021, a true and accurate copy of this document was sent by email and first class mail to:

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