IN THE
SUPREME COURT OF VIRGINIA

Record No. 211061

PETER VLAMING,

Appellant,

v.

WEST POINT SCHOOL BOARD; LAURA ABEL, in her official capacity as Division Superintendent; JONATHAN HOCHMAN, in his official capacity as Principal of West Point High School; and SUZANNE AUNSPACH, or her successor in office, in her official capacity as Assistant Principal of West Point High School,

Appellees.

REPLY BRIEF OF PETER VLAMING

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SUMMARY OF REPLY

High school French teacher Peter Vlaming was fired because he could not use biologically incorrect pronouns without violating his religious convictions and core beliefs. JA2–3, JA10–11. When one of his students began identifying as transgender, Vlaming agreed to use the student's new chosen name and to avoid using pronouns to refer to the student in the student's presence. JA7–9. But that wasn't good enough for the School Defendants, so they fired him. JA12–16. The record is clear that Vlaming "wasn't fired for something he said." JA2. "He was fired for what he didn't say." *Id.* And that firing violated his state constitutional and statutory free-exercise, Opening Br. 17–48, free-speech, *id.* at 49–58, and due-process rights, *id.* at 58–59.

The School Defendants defend firing Vlaming based on an overly narrow reading of Virginia's constitutional free-exercise protections, an overly broad reading of a statutory exception contained in Virginia's Religious Freedom Restoration Act, and an overly broad reading of their own authority to control every word teachers say at school. Each of those readings contradicts the text, history, tradition, and caselaw surrounding the relevant constitutional and statutory provisions. And in several respects, the School Defendants' arguments and reading of the record conflict with the facts alleged in Vlaming's complaint. Especially at the demurrer stage, the School Defendants' arguments fail, and this Court should reverse.

STATEMENT OF CORRECTED FACTS

A. The School Defendants' self-serving statements in an exhibit can't trump facts alleged in Vlaming's complaint.

On an appeal from a demurrer, this Court "accept[s] as true all factual allegations expressly pleaded in the complaint" and all reasonable "unstated inferences" from the facts alleged, interpreted "in the light most favorable to the claimant." *Doe by & Through Doe v. Baker*, 299 Va. 628, 641, 857 S.E.2d 573, 581 (2021) (cleaned up).

The School Defendants concede this standard applies. Resp. Br. 7. But they say the "exhibits attached to Vlaming's complaint are 'part of the record' and thus 'properly considered . . . for purposes of resolving the demurrer.'" *Id.* (quoting *Ayers v. Shaffer*, 286 Va. 212, 217 n.1 (2013)). And so they craft a statement of facts based mainly on their own self-serving statements in a letter they sent to Vlaming. *Id.* at 2–6. Vlaming attached that letter as an exhibit to his complaint because it states the School Board's "alleged basis for firing him." JA16. But he did not endorse every self-serving statement the Board made in it.

For example, Vlaming alleged he "rarely, if ever, used third person pronouns to refer to any students." JA7. There were no "reactions or issues in the classroom because of [his] use of the student's preferred name rather than using a pronoun." JA13. And the student did not object to "Vlaming's practice of not using pronouns in class." JA8, JA13. The student seemed "satisfied and comfortable with the situation." JA8.

In stark contrast, citing the Board's termination letter, the School Defendants state that the Board "found that Vlaming's refusal to use pronouns of any kind to refer to [the student], while using pronouns to refer to other students, 'had the effect of singling out the student,' and thus created 'an intimidating, hostile, and offensive educational environment for the student.'" Resp. Br. 6 (citing JA68).

Similarly, Vlaming alleged he only used a biologically correct pronoun in the student's presence one time, by mistake: "This one excited utterance is the only time [he] used the female pronoun to refer to the student in [the student's] presence . . . ." JA13. But the School Defendants cite the termination letter as proof Vlaming used biologically correct pronouns "multiple" times. Resp. Br. 4 (citing JA66).

And even when the School Defendants cite Vlaming's complaint, they misstate or omit key details alleged in it. For example, Vlaming alleged he accidentally used a female pronoun during a class activity to prevent the student from running into a wall, and he acknowledged his mistake and apologized to the student after class. JA12. In their version, the School Defendants imply Vlaming used a pronoun on purpose, and they falsely claim he *did not* apologize "or otherwise indicate that he had made a mistake." Resp. Br. 5 (citing JA12).

Nothing in *Ayers* justifies the School Defendants' misreading of the facts alleged in Vlaming's complaint. In the footnote they cite, this Court merely explained that a court can consider "exhibits attached to

the original complaint" when the same exhibits are referenced in an amended complaint. *Ayers*, 286 Va. at 217 n.1, 748 S.E.2d at 86 n.1. That statement did not change the "[f]amiliar principles of appellate review." *Id.* at 216, 748 S.E.2d at 86. Unless the complaint expressly endorses them, a demurrer cannot rely on self-serving statements made by the defendant that contradict the facts alleged in the complaint.

B. The School Defendants can't justify Vlaming's firing based on cases and studies that have no relevance to the facts.

The School Defendants also cannot cite to any authority to support their claim that compelled pronoun usage "is a critical component of preventing discrimination against and ensuring the psychological well-being of transgender students." Resp. Br. 32–33. None of the cases or studies they rely on address the mere *non*-use of pronouns.

For example, the School Defendants cite cases showing students who identify as transgender sometimes "experience harassment" and "physical assault" and repeated use of their birth names and sex-based pronouns. Resp. Br. 32, 36. But none of that happened here. They also cite cases involving school bathroom policies. Resp. Br. 32–33. But this is a case about compelled speech—not bathrooms.

The studies the School Defendants cite are equally inapposite. To take just one example, the authors of one study they cite, Resp. Br. 35, expressly admit they did *not* ask participants whether their teachers had "failed to call [them] by [their] chosen name or pronouns." Jaime M.

Grant et al., The Nat'l Gay and Lesbian Task Force and the Nat'l Ctr. for Transgender Equal., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011).

Similarly, two of their *amici* claim a 2018 study found that "respecting transgender students' names *and pronouns* was associated with a 56 percent decrease in suicide attempts and a 29 percent decrease in suicidal thoughts." Br. of *Amici Curiae* ACLU, et al., at 4 (emphasis added) (citing Stephen T. Russell, et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Suicidal Behavior among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 505 (2018)). *Accord* Br. of *Amici Curiae* Equality Virginia, et al., at 6. But as the title of that study suggests, the study's authors did *not* ask about pronoun usage. They only asked "whether [participants] had a preferred name different from the name they were given at birth," and whether they were able to use their preferred name in various settings. Russell, *Chosen Name Use* at 504. Here, Vlaming agreed to use the student's preferred name. Yet the School fired him anyway.

Of course, none of this non-record "evidence" can help the School Defendants at the demurrer stage. *Elliott v. Shore Stop, Inc.*, 238 Va. 237, 239–40, 384 S.E.2d 752, 753 (1989) ("[N]o consideration properly can be given to additional facts that may be asserted on brief or during oral argument."). If this case goes to trial, Vlaming will proffer evidence showing the potentially *harmful* long-term effects of transitioning on

youth who suffer from gender dysphoria. *See, e.g.*, Reply Br. of *Amici Curiae* Quentin Van Meter, M.D., et al., at 8–17. At this stage, though, the important point is that the School Defendants did not fire Vlaming for any of the conduct discussed in the cases and studies they and their *amici* cite. They fired him merely because he would not "refer to [the student] using male pronouns." Resp. Br. 5. *Accord id.* at 6.

ARGUMENT

I. Vlaming sufficiently alleged the School Defendants violated his free-exercise rights, and their arguments to the contrary misread the relevant law and history.

A. This Court has not yet decided whether the Virginia Constitution's free-exercise provisions are more protective than the federal Free Exercise Clause.

As Vlaming has explained, "this Court has never said whether our Constitution's free-exercise section offers greater protection to religious freedom than the federal Free Exercise Clause." Opening Br. 19. And the Virginia Constitution's text, structure, and history—and Virginia caselaw—all support the same conclusion: Virginia's free-exercise provisions offer more robust protection than "the watered-down version of the federal right" that survived *Employment Division v. Smith*, 494 U.S. 872 (1990). Opening Br. 2, 16, 20–35.

The School Defendants claim the Court *has* decided that issue already—sort of. Resp. Br. 13–14. They repeatedly describe *Tran v. Gwinn*, 262 Va. 572, 554 S.E.2d 63 (2001), as a case "brought under" the

Virginia Constitution. Resp. Br. 13. And they insist *Tran* establishes that "this Court evaluates free exercise claims brought under the Virginia Constitution by applying the framework elaborated by the U.S. Supreme Court in *Employment Division v. Smith*." *Id.* But nothing this Court said in *Tran*—or in any other case the School Defendants cite—supports that claim.

In *Tran*, this Court never mentioned the Virginia Constitution. And the parties' briefs contained only a single, passing reference to the Virginia Constitution's free-exercise provisions. Br. of Appellant, *Tran v. Gwinn*, 2001 WL 36281874, at *11 (broadly stating that an ordinance "implicate[d]" the First Amendment and "Article I, Section 16 of the Virginia Constitution"). That explains why the Court only discussed the First Amendment claim. *Tran*, 262 Va. at 577, 554 S.E.2d at 65. It is not the Court's job "to comb through the historical record, unassisted, to determine whether a [state] constitutional claim has merit." *Martin v. Commonwealth*, 64 Va. App. 666, 674–75, 770 S.E.2d 795, 799 (2015).

It also likely explains why the School Defendants describe *Tran* as a case "brought under" the Virginia Constitution, Resp. Br. 13, not a case *decided* under it. But it does not explain this description of *Tran* in the School Defendants' brief:

> - "This Court determined that Tran's Virginia Constitution claim 'must still be considered under the standard established in' *Smith*." Resp. Br. 13 n.1 (quoting *Tran*, 262 Va. at 580, 554 S.E.2d at 67).

That is *not* what this Court "determined" in *Tran*:

> - "*Despite the lack of impact this zoning ordinance has on religious conduct*, it must still be considered under the standard established in *Smith* . . . ." *Tran*, 262 Va. at 580, 554 S.E.2d at 67 (emphasis added).

Again, this Court never even mentioned "Tran's Virginia Constitution claim." Resp. Br. 13 n.1. It certainly did not decide it.

B. Text, history, and tradition support the conclusion that Virginia's free-exercise provisions require exemptions from some neutral and generally applicable laws.

"Neither the text of Virginia's free-exercise section nor the federal free-exercise clause" contains a *Smith*-like exception. Opening Br. 17. But Virginia's is the "'[l]onger and more inclusive'" of the two. *Id.* at 20 (quoting 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 55 (1974)). For example, it protects free exercise "according to the dictates of conscience." VA. CONST. art. I, § 16. At the founding, such protections "permitted persons to claim exemptions and accommodations from military conscription orders, oath-swearing requirements, state-collected church taxes, or comparable general laws that conflicted with their core claims of conscience." John Witte, Jr., *Back to the Sources? What's Clear and Not So Clear About the Original Intent of the First Amendment*, 47 BYU L. REV. 1303, 1309 (2022). *Accord id.* at 1373 (speculating about "why an explicit liberty of conscience clause, which includes the right to religious exemptions from compliance with general laws that violate conscience, was left out of the First Amendment").

Virginia's provisions also broadly promise that Virginians shall not "be enforced, restrained, molested, or burthened in [their] body or goods" or "otherwise suffer" based on "religious opinions or belief." VA. CONST. art. I, § 16. And all Virginians are "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." *Id.*

Undeterred by the text, the School Defendants offer a scattershot defense of a *Smith*-like exception. First, they suggest those provisions only prohibit targeting and punishing religion as such. Resp. Br. 22. But that reading ignores the much broader terms used in the text. VA. CONST. art. I, § 16 (e.g., "enforced, restrained, molested, or burthened," "otherwise suffer," "in nowise diminish, enlarge, or affect").

Second, the School Defendants quote slippery-slope arguments from *Smith* about the alleged threat of reading free-exercise protections too broadly. Resp. Br. 23. But that's a good reason to interpret the scope of the right carefully based on the text—not an excuse for reading in a *Smith*-like exception that has no basis in the text.

Third, the School Defendants offer a cramped interpretation of the phrase "civil capacities" based on *Perry v. Commonwealth*, 3 Gratt. (44 Va.) 632 (1846), and *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946). Resp. Br. 24–25. But neither of those cases says anything about whether to read an exception for neutral and generally applicable laws into the Virginia Constitution's free-exercise provisions.

The School Defendants next argue that, "[a]s explained in Professor Taylor's amicus brief, Vlaming's historical argument is particularly flawed." Resp. Br. 25. But Professor Taylor doesn't dispute the accuracy of Vlaming's historical account. Quite the opposite, he cites one of Vlaming's main sources—John Ragosta's WELLSPRING OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY (2010)—twice as many times as Vlaming did while providing basically the same historical account. Br. of *Amicus Curiae* Alan Taylor at 8–13, 15–21, 24–27, 31 (citing WELLSPRING 36 times).[1]

And while Taylor ultimately parts ways with Ragosta over the proper *conclusions* to draw from that story, he accepts Ragosta's premise that, "[g]iven the historic role of Virginia's dissenters in the development of religious freedom in the state . . . careful consideration should be given to the dissenters' understanding of what it was they fought for." *Id.* at 18 (quoting RAGOSTA, WELLSPRING at 137). And according to Ragosta, "if the voice of Virginia's dissenters is to be properly privileged, some exception from otherwise neutral laws for the free exercise of religion must be recognized." RAGOSTA, WELLSPRING at 158.

[1] In contrast, Taylor only cites his own works nine times, which makes sense given that his scholarship has not focused on Virginia's struggle for religious liberty. Br. of *Amicus Curiae* Alan Taylor at 32 n.4, 34–35 (mostly discussing Jefferson's failed public-education proposals).

As Ragosta explains, because Virginia's "dissenters believed that the right to free exercise predates the social compact and takes precedence to it, exemption from otherwise valid laws for free exercise, within limits, makes sense." RAGOSTA, WELLSPRING at 154. The School Defendants and Professor Taylor have no answer to that. Instead, they both cite to Philip Hamburger's article concluding that no such right exists under the *federal* free-exercise clause. Resp. Br. 26; Br. of *Amicus Curiae* Alan Taylor at 18. But Hamburger misreads the historical record. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?* 39 WM. & MARY L. REV. 819, 841–47 (1998).[2] And because his focus is national, Hamburger gives short shrift to the unique experience of Virginia's dissenters as compared to Virginia historians like Ragosta.

Regardless of whether the more cursory text of the federal free-exercise clause includes a right to exemptions from some neutral and generally applicable laws, the unique text, history, and tradition of Virginia's free-exercise provisions support the conclusion that at least some such exemptions are required.[3] *Accord* Opening Br. 22–35.

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[2] Even Justice Scalia—who relied heavily on Hamburger's reading of the history—came to question whether he had misread the original sources. Witte, *Back to the Sources*, 47 BYU L. REV. at 1379.

[3] Citing Professor Taylor's brief, the School Defendants also argue that Virginia's free-exercise provisions only "protect[] the right to *privately* express one's religious beliefs." Resp. Br. 26. But that position finds no support in the text, and it ignores extensive historical evidence to the

C. Vlaming has an absolute right not to be forced to endorse a message that violates his religious beliefs.

"[T]his Court need not define the outer boundaries of the broader free-exercise right" in this appeal, though, because "Vlaming's claim he was fired for declining to disavow his religious beliefs" implicates the Virginia Constitution's "even stronger" right to religious expression. Opening Br. 29, 35. That right is "limited in scope by the natural rights of others." *Id.* at 37. Otherwise, though, the right to "profess" and "maintain" one's religious beliefs must be protected absolutely so far as the right extends. *Id.* at 37–38 (quoting VA. CONST. art. I, § 16).

That position follows from the text, drafting history, and historical context surrounding Jefferson's Act for Establishing Religious Freedom. *Id.* at 29–37. It is consistent with tradition, including the defeat of a 1924 bill for compulsory Bible reading in public schools. *Id.* at 40–42.[4] It is consistent with decades of precedent prohibiting compelled speech to protect against compelled thought. Br. of *Amicus Curiae* Liberty Justice

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contrary. *See, e.g.*, RAGOSTA, WELLSPRING at 155 (Baptist minister John Leland "insisted that government had no right to restrict free exercise in 'time, place or manner,'" which represented "a long-standing part of Baptist and dissenter doctrine."); *id.* at 157 ("Dissenters often opposed facially neutral oath requirements as an unjust imposition on their religious objection to swearing."); *id.* ("Dissenters certainly believed that the protections for religious freedom bargained for during the war would prohibit imprisonment simply for preaching publicly.").

[4] *Accord N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (stating that when "analogous regulations . . . were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality").

Center at 7–9. It's even consistent with *Smith* because the "government may not compel affirmation of religious belief [or] punish the expression of religious doctrines it believes to be false." *Smith*, 494 U.S. at 877.

Unable to rebut that position,[5] the School Defendants misstate it. Resp. Br. 22 (claiming Vlaming seeks "an 'absolute right' to disregard official instructions prohibiting discrimination"). All Vlaming seeks is the right not to be forced to choose between his job and expressing personal agreement with messages that violate his religious beliefs. Given the nature of that right, it would be wrong to let courts balance it away based on the government's alleged interest in compelling speech. After all, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Bruen*, 142 S. Ct. at 2129 (cleaned up). *Accord* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72 (2019).

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[5] Professor Taylor doubts whether a position as a public schoolteacher qualifies as a "civil capacity." Br. of *Amicus Curiae* Alan Taylor at 31–35. But all he can show is that the phrase was "not used consistently" during the founding. *Id.* at 32. And at least two uses he cites are broad enough to include public employment. *Id.* at 32–34. Moreover, the 1785 edition of the "most famous and most cited" founding-era dictionary, Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 385 (2014), lists the top two definitions for "civil" as (1) "Relating to the community; political; relating to the city or government," and (2) "Relating to any man as a member of a community," 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Vlaming's position in the community as a public schoolteacher easily qualifies as a "civil capacity" under those definitions.

D. The School Defendants misread (and misquote) Virginia's Religious Freedom Restoration Act.

Under Virginia's state RFRA, government entities are prohibited from substantially burdening a person's religious exercise even through generally applicable rules unless the government can satisfy strict scrutiny. VA. CODE § 57-2.02(B). The School Defendants cannot make that required showing. Opening Br. 47–48. So they and their *amici* rely heavily on the following exception: "Nothing in this section shall prevent any governmental institution or facility from maintaining health, safety, security or discipline." VA. CODE § 57-2.02(E).

The School Defendants and *amici* claim the statute does not apply if the government's "purpose" is to maintain "health, safety, security or discipline." Resp. Br. 43; Br. of *Amici Curiae* Timothy Kaine, et al., at 3, 5–6, 12–14, 19. The School Defendants even misquote the statute—twice—in making that argument, insisting that "[b]ecause the Policies were adopted '*to maintain* . . . safety,' § 57-2.02 does not apply." Resp. Br. 43 (misquoting VA. CODE § 57-2.02(E)) (emphasis added). *Accord id.* ("In addition, the School Board's action was taken '*to* maintain[] . . . discipline.'") (misquoting VA. CODE § 57-2.02(E)) (emphasis added).

To the School, it's the government's *intent* that counts. But that's not what the statute's text says. The exception only applies when the religious exercise would "prevent" the government "from maintaining health, safety, security or discipline." VA. CODE § 57-2.02(E).

The "vice in reading [subsection (E)] as proposed by [the School] is that [subsection (B)] would then become virtually meaningless." *State Farm Mut. Auto. Ins. Co. v. Cuffee*, 248 Va. 11, 14, 444 S.E.2d 720, 722 (1994). If the government only had to show a permissible "purpose," it would never have to show that the burden on religion is "essential to further a compelling governmental interest." VA. CODE § 57-2.02(B). And the exception would swallow the rule.[6]

To avoid that absurd result, the better reading of subsection (E) "would limit its application to cases involving emergency situations." Opening Br. 48. At the very least, the government should have to show that an accommodation would have the actual *effect* of preventing it "from maintaining health, safety, security or discipline." VA. CODE § 57-2.02(E). And the School Defendants have not made that showing here.

II. Vlaming sufficiently alleged the School Defendants violated his free-speech rights.

On Vlaming's free-speech claim, this Court should hold that (1) *Garcetti*'s official-duties test does not apply to a high school teacher's "speech related to scholarship or teaching," Opening Br. 50–51 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)), and even if it did, pronoun usage is not an official duty, *id.* at 52; (2) exacting scrutiny applies in cases involving compelled government-employee speech, *id.*

[6] The same goes for the School Defendants' circular argument that disciplining Vlaming was justified by the School's intent to maintain discipline. Resp. Br. 43–44.

at 52–54; and (3) the School Defendants' refusal to grant Vlaming an accommodation fails exacting scrutiny, *id.* at 54–58. The School's contrary arguments all fall apart on closer inspection.

A. If the School were right about *Garcetti*, other schools could force teachers to use pronouns to express the opposite message about sex and gender identity.

Compelled endorsement of the government's viewpoint on gender identity is always wrong. The issue "presents ontological and moral questions about our identity as human beings." *Int. of C. G.*, 976 N.W.2d 318, 347 (Wis. 2022) (Hagedorn, J., concurring). "[T]itles and pronouns carry a message." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). But under the School's view, schools can force teachers to use *any* pronouns to express the school's preferred viewpoint.

The School Defendants insist that a teacher's "mode of addressing his students" constitutes part of the teacher's "official duties," and that therefore schools are "entitled to regulate it," even if that means compelling the use of certain pronouns. Resp. Br. 49, 51–52. But that argument rests on the rejected premise "that employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424. Compelling the use of pronouns to signal affirmation and agreement with a student's gender identity is "not a matter of classroom management," *Meriwether*, 992 F.3d at 507, and

that's true even at the high school level.[7] Otherwise, school boards could compel teachers to violate their core beliefs by using *biologically correct* pronouns to refer to students who identify as transgender. The School Defendants would never concede that—but that just proves compelled pronoun usage goes far beyond a public schoolteacher's official duties.

B. No state interests justify forcing teachers to endorse the government's viewpoint on gender identity.

Finally, the School Defendants cannot satisfy their burden under any test. First, they "cannot point to any accepted founding-era practice that even remotely resembles" compelling "public-sector employees" to endorse the government's viewpoint on a controversial issue of public concern. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2471 (2018).[8] "[P]rominent members of the founding generation," including Jefferson, "condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Id.* Second, Vlaming's non-use of pronouns did not keep him from teaching the curriculum, "nor did the School ever tie its demand he use certain pronouns to the curriculum [he] was assigned to teach." Opening Br. 52.

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[7] It's also not a matter of teaching the assigned curriculum, which Vlaming did well. JA6, JA26. The School Defendants' "directive . . . was not limited to classroom or instructional speech." JA15. As even they concede, it went far beyond that, including "talking with students, school personnel, or the student's parents." Resp. Br. 46.

[8] *Accord Bruen*, 142 S. Ct. at 2130 (government has the burden to "point to *historical* evidence" about the First Amendment's "reach").

And third, nothing in Title IX or *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), or any other case the School Defendants cite suggests that allowing the mere *non*-use of pronouns violates federal law or threatens the School's federal funding.[9] *Bostock* disclaimed application of its decision "beyond Title VII to other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. And for good reason. "Title VII differs from Title IX in important respects." *Meriwether*, 992 F.3d at 510 n.4. For example, Title IX *requires* schools to "consider sex in allocating athletic scholarships," *id.*, which makes sense given its intent to "prompt universities to level the proverbial playing field" between the sexes, *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767 (9th Cir. 1999). An identity-based definition of "sex" would defeat that purpose. Finally, even under Title VII, *Bostock* only addressed hiring and firing decisions, not "bathrooms, locker rooms, or anything else of the kind." 140 S. Ct. at 1753. It did *not* suggest the government must compel employees to endorse the government's views on controversial issues like gender identity. No authority supports that claim.

CONCLUSION

This Court should reverse the judgment of the King William County Circuit Court dismissing Claims 1–6 and a portion of Claim 9, and remand for further proceedings consistent with this Court's order.

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[9] See generally brief of *Amici Curiae* Bader Family Foundation, et al., and both briefs of *Amicus Curiae* Mountain States Legal Foundation.

Respectfully submitted,

PETER VLAMING
Appellant

By: */s/ Christopher P. Schandevel*

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CERTIFICATE OF TRANSMISSION AND SERVICE

Undersigned counsel certifies that on August 24, 2022, the foregoing Reply Brief of Peter Vlaming was filed with the Clerk of the Supreme Court of Virginia via the Court's VACES system, and a copy was served on each of Appellees' counsel by email the same day. This brief complies with the length requirement set forth in Rule 5:26(b) because it does not exceed 18 pages,[10] excluding the cover page, table of contents, table of authorities, signature blocks, and certificate.[11]

Vlaming desires to present oral argument in this case.

/s/ Christopher P. Schandevel

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Counsel for Appellant

[10] On August 1, 2022, this Court granted Vlaming's motion for extension of the page limit for his reply brief to 18 pages.

[11] Like the parties' opening and response briefs, this reply brief uses true double-spacing, which means that because the brief is set in 14-point font, the line spacing is set to Exactly 28 points.