IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

DAVID J. BLOCH,

Plaintiff,

v.

HEATHER BOUCHEY, *et al.*,

Defendants.

Civil Case No. 2:23-cv-00209-cr

PLAINTIFF'S OPPOSITION TO DEFENDANTS HEATHER BOUCHEY, JAY NICHOLS, WINDSOR CENTRAL SUPERVISORY UNION, AND SHERRY SOUSA'S MOTIONS TO DISMISS (DOCS. 29, 34, 37)

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

LEGAL STANDARD 2

FACTUAL BACKGROUND 2

I. Coach Bloch founded the school's snowboarding program and has led it to success both on and off the slopes. 2

II. Coach Bloch and his athletes discuss male athletes competing against females. 3

III. Defendant Sousa terminates Coach Bloch under Defendants' policies and procedures. 4

IV. Defendants' unconstitutional law, policies, and procedures. 4

ARGUMENT 6

I. Coach Bloch has plausibly alleged standing to challenge Defendants' policies. 6

A. The complaint plausibly alleges Defendants Bouchey and Nichols require Defendant school district—and all Vermont school districts—to enforce their unconstitutional policies. 6

B. Declaratory and injunctive relief will redress the injury inflicted by Defendant Nichols. 8

II. Coach Bloch has sufficiently alleged Defendants' policies violate the First Amendment. 9

A. Defendants' policies flunk narrow tailoring. 10

1. Defendants' policies define harassment to prohibit even a single, off-duty comment, so Coach Bloch has stated a claim they are overbroad. 10

2. Coach Bloch has stated a claim that Defendants' policies discriminate based on content and viewpoint. 14

3. Coach Bloch has stated a claim that Defendants' policies impose a prior restraint 17

B. Defendants cannot meet their burden of showing a compelling interest on a motion to dismiss. 19

III. As Defendants' enforcement in this case shows, Coach Bloch has stated a void for vagueness claim. 21

CONCLUSION 22

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases

Alexander v. United States,
509 U.S. 544 (1993) 17

Americans for Prosperity Foundation v. Bonta,
141 S. Ct. 2373 (2021) 10, 18

Amidon v. Student Association of SUNY at Albany,
508 F.3d 94 (2d Cir. 2007) 17

B.P.J. v. W. Va. State Bd. of Educ.,
--- F. Supp. 3d ----, 2023 WL 111875 (S.D.W.V. Jan. 5, 2023) 21

Barone v. City of Springfield,
902 F.3d 1091 (9th Cir. 2018) 13

Boos v. Barry,
485 U.S. 312 (1988) 15

Brewer v. City of Albuquerque,
18 F.4th 1205 (10th Cir. 2021) 20

Carter v. HealthPort Technologies, LLC,
822 F.3d 47 (2d Cir. 2016) 2

Cash v. County of Erie,
654 F.3d 324 (2d Cir. 2011) 6

Citizens United v. Schneiderman,
882 F.3d 374 (2d Cir. 2018) 18

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 15

Cornelio v. Connecticut,
32 F.4th 160 (2d Cir. 2022) 2, 19, 20, 22

Cunney v. Board of Trustees,
660 F.3d 612 (2d Cir. 2011) 21, 22

Davis ex rel. LaShonda D. v. Monroe County Board of Education,
526 U.S. 629 (1999) 11, 12, 13

Harman v. City of New York,
140 F.3d 111 (2d Cir. 1998) 9, 10, 14, 17

Hill v. Colorado,
530 U.S. 703 (2000) 20

Iancu u. Brunetti,
139 S. Ct. 2294 (2019) 16

Janakievski v. Executive Director, Rochester Psychiatric Center,
955 F.3d 314 (2d Cir. 2020).. 8

Janus v. American Federation of State, County & Municipal Employees,
138 S. Ct. 2448 (2018) 9, 13

Kennedy v. Bremerton School District,
142 S. Ct. 2407 (2022) 13

Kentucky v. Graham,
473 U.S. 159 (1985) 8

Kolender v. Lawson,
461 U.S. 352 (1983) 21

Latino Officers Association, New York, Inc. v. City of New York,
196 F.3d 458 (2d Cir. 1999).. 9

Locurto v. Guliani,
447 F.3d 159 (2d Cir. 2006).. 18

Matal v. Tam,
582 U.S. 218 (2017) 16

Moonin v. Tice,
868 F.3d 853 (9th Cir. 2017) 14, 18

N.Y. Civil Service Commission v. Snead,
425 U.S. 457 (1976) 7

National Institute for Family & Life Advocates. v. Becerra,
138 S. Ct. 2361 (2018) 20

Parents Defending Education v. Olentangy Local School District Board of Education,
2023 WL 4848509 (S.D. Ohio July 28, 2023) 16

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 14, 16, 21

Ramirez v. Coughlin,
919 F. Supp. 617 (N.D.N.Y. 1996) 9

Reed v. Town of Gilbert,
576 U.S. 155 (2015) 15

Saxe v. State College Area School District,
240 F.3d 200 (3rd Cir. 2001) 11, 12, 13, 14, 15, 16

Scott v. Meyers,
191 F.3d 82 (2d Cir. 1999).. 9

Speech First, Inc. v. Cartwright,
32 F.4th 1110 (11th Cir. 2022) 10, 11, 14

Speech First, Inc. v. Khator,
603 F. Supp. 3d 480 (S.D. Tex. 2022) 11

Tucker v. State of California Department of Education,
97 F.3d 1204 (9th Cir. 1996) 13

United States v. National Treasury Employees Union,
513 U.S. 454 (1995) 9

Vermont Right to Life Committee, Inc. v. Sorrell,
221 F.3d 376 (2d Cir. 2000) 7

Vitagliano v. County of Westchester,
71 F.4th 130 (2d Cir. 2023) 8

White River Amusement Pub, Inc. v. Town of Hartford,
481 F.3d 163 (2d Cir. 2007) 15

Statutes

Vt. Stat. Ann. tit. 16, § 11(a)(26)(A) 4

Vt. Stat. Ann. tit. 16, § 11(a)(26)(B) 5

Vt. Stat. Ann. tit. 16, § 570(b) 4

Rules

Fed. R. Evid. 201(b)(2) 19

Other Authorities

V. Compl. *Allen v. Millington*, No. 2:22-cv-00197-cr (D. Vt. May 23, 2023) 7

INTRODUCTION

When Coach Bloch offered his opinion that males generally have advantages over females in sports, Defendants Windsor Central Supervisory Union Board and Superintendent Sherry Sousa ("School Defendants") fired him. They claimed he violated the school district's Harassment, Hazing, and Bullying (HHB) policy, adopted as required by law from Defendant Secretary of Education Bouchey's model policy, and the Vermont Principals' Association (VPA) policy. Those policies "prohibit[ ]" "harassment" based on "gender identity," including "comments, insults, derogatory remarks, ... and negative references." They regulate speech both on and off duty, and—as Secretary Bouchey admits—can punish even a single comment.

Coach Bloch filed suit against Defendants' unconstitutional retaliation and policies. Defendants have moved to dismiss his challenges to the policies. Their motions have no merit. Coach Bloch has standing to challenge the policies because his Complaint's undisputed allegations establish that Defendant Bouchey and Defendant VPA Executive Director Nichols require school districts to implement their policies. Those policies are thus the moving force behind the constitutional violations here, despite Defendants' ex post attempts to disclaim their overbroad policies' enforcement.

As alleged in the Complaint, Defendants' policies impose an ex ante employee speech prior restraint that is overbroad, discriminates based on content and viewpoint, and is unconstitutionally vague. But, on a motion to dismiss where all allegations must be accepted in Coach Bloch's favor, the policies cannot meet the demands of exacting scrutiny. They proscribe much more than speech pursuant to official duties, and they license subjective enforcement. As this case shows, Defendants' policies forbid even a single respectful conversation on a widely discussed issue. And Defendants cannot meet their burden to establish a compelling interest on their Motions to Dismiss. This Court should deny the Motions.

LEGAL STANDARD

On a facial 12(b)(1) motion, "the plaintiff has no evidentiary burden." *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47, 56 (2d Cir. 2016). The court "accept[s] as true all material factual allegations of the complaint and draw[s] all reasonable inferences in favor of the plaintiff." *Id.* (cleaned up). As no Defendant has "proffer[ed] evidence beyond the Pleading," the facial standard properly controls, and Defendant Nichols is wrong to assert Coach Bloch must show standing by a preponderance of the evidence. *Id. Contra* Doc. 37 at 9. He need only "allege facts that affirmatively and plausibly suggest that [he] has standing to sue." *Carter*, 822 F.3d at 56 (cleaned up).

"[A] complaint will survive a motion to dismiss under Rule 12(b)(6) if it alleges facts that, taken as true, establish plausible grounds to sustain a plaintiff's claim for relief." *Cornelio v. Connecticut*, 32 F.4th 160, 168 (2d Cir. 2022). "The dismissal of a claim challenging a law that abridges protected speech will rarely, if ever, be appropriate at the pleading stage. Instead, factual development will likely be indispensable to the assessment of whether such a law is constitutionally permissible." *Id.* at 172 (cleaned up).

FACTUAL BACKGROUND

Coach Bloch's Verified Complaint (Doc. 1) alleges the below facts, which must be accepted as true at the motion-to-dismiss stage. *See id.* at 168.

I. Coach Bloch founded the school's snowboarding program and has led it to success both on and off the slopes.

As alleged in the Complaint, Coach Bloch created the snowboarding program at Woodstock Union High School in 2011. Doc. 1 ¶ 73. He has served as the head coach every year since. *Id.* ¶ 75. To start the program and provide an activity to develop students' athletic, social, and teamwork skills, Coach Bloch coached as a volunteer for the first three seasons. *Id.* ¶ 76. The program has achieved enormous athletic and personal success. *Id.* ¶ 77. Its snowboarders have consistently won top

three placements statewide, with at least three individual state champions. *Id.* ¶ 78. Many students join the team reluctantly at the behest of their parents to become more involved, but over the course of the season become motivated to work not only on their physical fitness and snowboarding skills but also on their academic progress. *Id.* ¶ 81.

II. Coach Bloch and his athletes discuss male athletes competing against females.

On February 8, 2023, Coach Bloch and his team were waiting in the lodge for a competition to start. *Id.* ¶ 92. No other teams or snowboarders were present in that area of the lodge. *Id.* That day, Coach Bloch's team was to compete against a team from another school district that had a male snowboarder who identifies as a female and competes against females. *Id.* ¶ 93.

While waiting, Coach Bloch was sitting at a table with two of his snowboarders, Student 1 (a male) and Student 2 (a female), who were discussing transgender-identifying athletes. *Id.* ¶ 95. Student 1 offered his opinion that males competing against females was unfair based on biological differences. *Id.* ¶ 97. Student 2 responded by accusing Student 1 of being transphobic. *Id.* ¶ 98. At that point, Coach Bloch chimed into the conversation. *Id.* ¶ 99. Coach Bloch recognized that people express themselves in different ways and that there can be masculine women and feminine men. *Id.* ¶ 100. He also asserted his belief that as a matter of biology, males and females have different DNA. *Id.* ¶ 101. Coach Bloch said that those differences in DNA cause males to develop differently from females and to have different physical characteristics, which generally give males competitive advantages in sports. *Id.* ¶¶ 102–03.

Despite disagreeing with Coach Bloch's views, Student 2 thanked him for a "good conversation." *Id.* ¶ 108. The respectful conversation lasted no longer than three minutes. *Id.* ¶ 106. No other people were present during the conversation. *Id.* ¶ 107. And during that conversation Coach Bloch at no point referred to the

transgender-identifying snowboarder. *Id.* ¶ 104. In fact, after the competition, Coach Bloch and his team shared a bus home with the team with the male who identifies as a female, who was also on the bus. *Id.* ¶ 111. There was no tension on the bus. *Id.* ¶ 112.

III. Defendant Sousa terminates Coach Bloch under Defendants' policies and procedures.

The very next day, Defendant Sousa summoned Coach Bloch to her office. *Id.* ¶ 117. Before any discussion began, she handed him a notice of his "immediate termination." *Id.* ¶ 118. The notice accused him of violating Defendant Windsor Central Supervisory Union Board's HHB Policy and "the Vermont Principals' Association Athletics Policy." *Id.* It claimed that Coach Bloch "made reference to [a] student in a manner that questioned the legitimacy and appropriateness of the student competing on the girls' team to members of the WUHS snowboard team." *Id.* ¶ 119. The notice also asserted that "administrators investigated" and their "findings confirmed that" Coach Bloch's comments "constituted harassment based on gender identity." *Id.* ¶¶ 120–21. To complete the punishment, Defendant Sousa barred Coach Bloch from even "consider[ation] for any future coaching positions within" the school district. *Id.* ¶ 122.

IV. Defendants' unconstitutional law, policies, and procedures.

As alleged, Vermont law requires every school board to adopt and enforce HHB policies "at least as stringent as model policies developed by the Secretary." *Id.* ¶ 141 (quoting Vt. Stat. Ann. tit. 16, § 570(b)). The statute "prohibit[s]" harassment, which it defines as including

> an incident or incidents of verbal, written, visual, or physical conduct . . . based on or motivated by a student's or a student's family member's actual or perceived race, creed, color, national origin, marital status, sex, sexual orientation, gender identity, or disability that has the purpose or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment. *Id.* ¶ 144 (quoting Vt. Stat. Ann. tit. 16, § 11(a)(26)(A)).

The statutory definition of "harassment" also

> includes conduct that violates subdivision (A) of this subdivision (26) and constitutes . . . conduct directed at the characteristics of a student's or a student's family member's actual or perceived creed, national origin, marital status, sex, sexual orientation, gender identity, or disability and includes the use of epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, taunts on manner of speech, and negative references to customs related to any of these protected categories. *Id.* ¶ 145 (quoting Vt. Stat. Ann. tit. 16, § 11(a)(26)(B)).

Defendant Secretary of Education Heather Bouchey has adopted a model policy and procedures implementing the statutory definition of "harassment" in full. *Id.* ¶¶ 147–48.[1] Consistent with Vermont law, Defendant Board adopted Defendant Secretary's model policy and procedures substantively verbatim. *Id.* ¶ 149. Both the model policy and Defendant Board's policy threaten "termination for employees" for "substantiated complaints" of "harassment." *Id.* ¶¶ 151–52.

The VPA has also adopted the statutory definition and prohibition of "harassment." *Id.* ¶ 160. Its policy "prohibit[s] ... harassment of students on school property or at school functions by students or employees." *Id.* ¶ 162. The VPA governs athletic competitions across Vermont, including those for Coach Bloch's snowboarding team. *Id.* ¶¶ 34–36, 91. Schools that are members of the VPA must abide by its policies. *Id.* ¶ 36. Otherwise, they cannot compete in VPA sports competitions. *Id.* ¶ 37.

Coach Bloch filed suit against Defendants' retaliation and policies. *See generally* Doc. 1. He brought overbreadth, content and viewpoint, prior restraint, and unconstitutional vagueness claims against Defendants' policies. *Id.* ¶¶ 185–233. Defendants Bouchey and Nichols have moved to dismiss all claims against the policies. Doc. 29 at 1; Doc. 37 at 9. Defendant Nichols also argues Coach Bloch's

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[1] School Defendants argue that Coach Bloch's exhibit omitted a page of the Secretary's model policy. Doc. 34 at 8 n.2. But the exhibit has all pages, including the one School Defendants claim is absent. *See* Doc. 1-11 at 3.

requested relief against him will not redress any injury. Doc. 37 at 13. School Defendants have moved to dismiss only the overbreadth, content and viewpoint discrimination, and prior restraint claims. Doc. 34 at 1.

ARGUMENT

I. Coach Bloch has plausibly alleged standing to challenge Defendants' policies.

A. The complaint plausibly alleges Defendants Bouchey and Nichols require Defendant school district—and all Vermont school districts—to enforce their unconstitutional policies.

Defendants Bouchey and Nichols attempt to evade responsibility for their policies by arguing they do not inflict any injury on Coach Bloch. Doc. 29 at 6–7; Doc. 37 at 12. But they do not—and cannot—dispute the Complaint's well-pleaded allegations that they require school districts (as confirmed by the school district here) to enforce their policies. As alleged, Defendant Bouchey promulgated the model HHB policies that School Defendants—as required by law—adopted "substantively verbatim." Doc. 1 ¶ 12. The Complaint also alleges she "ensure[s] compliance" with the model HHB policies. *Id.* ¶ 20. The VPA requires its school members, including Woodstock Union, to abide by its policies to compete in athletic events. *Id.* ¶¶ 35–37. As School Defendants concede, they must obey both policies. Doc. 34 at 3; Doc. 35 at 2. The Complaint alleges that Defendant Sousa cited the required HHB policy and VPA harassment policy when she fired Coach Bloch, and both policies infringe on Coach Bloch's constitutional rights. Doc. 1 ¶¶ 118, 185–233. Coach Bloch sufficiently alleged "causation" against Defendants Bouchey and Nichols because their policies are the "moving force" behind Defendants' constitutional violations. *See Cash v. Cnty. of Erie*, 654 F.3d 324, 342 (2d Cir. 2011).

Defendant Bouchey attempts to rely on pre-enforcement standing cases and cases in which the plaintiff attempted to challenge a law that wasn't applied to him. Doc. 29 at 6–7. This case is anything but. In *Snead*, the plaintiff brought a claim that

the City of New York "had not followed the procedures set forth in [N.Y. Civ. Serv. Law §] 72." *N.Y. Civ. Serv. Comm'n v. Snead*, 425 U.S. 457, 457 (1976). The Supreme Court recognized that "she may indeed have had a claim against the city of New York," but she didn't have one against the appellants, the state civil service commission and its members. *Id.* at 458. That's because those defendants had not "applied" "the statutory procedure which [the plaintiff] challenged." *Id.* Here, as the Complaint alleges, School Defendants didn't follow the procedures required by Defendants' policies, Doc. 1 ¶¶ 129–33, but Coach Bloch doesn't challenge those procedures in Defendant Bouchey's model policy. He challenges all Defendants' definition of "harassment," which School Defendants undisputedly applied to him based on Defendants Bouchey and Nichols' policies. Doc. 1 ¶ 118.

The Second Circuit has already rejected the Vermont Attorney General's standing argument that "the statute does not reach the expressive activities in which [the plaintiff] wishes to engage." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000). The plaintiff's interpretation of what the statute proscribes need only be "reasonable enough." *Id.* at 383. As alleged, the overbroad terms of Defendant Bouchey's model policies license unbridled discretion, *infra* Section II.A, allowing school districts to use the policies to target speech like Coach Bloch's. *See also* V. Compl. ¶¶ 54–55, 112, *Allen v. Millington*, No. 2:22-cv-00197-cr (D. Vt. May 23, 2023) (school district found violation of HHB policies for referring, outside the presence of the student, to a male who identified as a female as a male and asserting that student should not use the female locker room).

Coach Bloch agrees with Defendant Bouchey that he didn't harass anyone, Doc. 29 at 7, but the Secretary's post hoc disavowal of her model policies' enforcement cannot defeat standing. *See Vt. Right to Life*, 221 F.3d at 383 (declining to "plac[e] [the plaintiff's] asserted First Amendment rights at the sufferance of Vermont's Attorney General" (cleaned up)); *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 138

(2d Cir. 2023) (to establish standing "conduct need only be arguably proscribed by the challenged statute, not necessarily in fact proscribed" (cleaned up)). And the Complaint alleges that School Defendants terminated Coach Bloch based on a purported violation of the policies. Doc. 1 ¶ 118; *see* Doc. 1-10 at 3.

B. Declaratory and injunctive relief will redress the injury inflicted by Defendant Nichols.

Coach Bloch's Complaint names Defendant Nichols "in his official capacity only." Doc. 1 ¶ 30. Coach Bloch has no damages claims against him, making Defendant Nichols' repeated invocation of damages liability irrelevant. *See Kentucky v. Graham*, 473 U.S. 159, 170 (1985). Coach Bloch's "injury is fairly traceable to [the VPA's definition of 'harassment'] and can be redressed by [his] requested relief, *i.e.*, a declaration that the [definition] is unconstitutional and an injunction enjoining its enforcement." *See Vitagliano*, 71 F.4th at 140.

As for equitable relief on Coach Bloch's retaliation claim, the Complaint alleges that School Defendants must obey Defendant Nichols's policy, which they cited in terminating Coach Bloch. Doc. 1. ¶ 118. As stated in the Complaint, Coach Bloch's team competes in snowboarding competitions governed by the VPA. *Id.* ¶ 91. Thus, Coach Bloch's purported violation of VPA policy—according to School Defendants—required his termination and bars his reinstatement. And Coach Bloch also seeks injunctive relief to purge Defendant Nichols's records of "any reference" to his "termination." Doc. 1 at 30. Defendant Nichols has not provided—and cannot provide on his Motion to Dismiss—a factual basis for his assertion that he "very literally could not comply with Plaintiff's request that all Defendants reinstate his employment." Doc. 37 at 13. Coach Bloch's requested injunctive and declaratory relief against Defendant Nichols will redress his injury. *See Janakievski v. Executive Director, Rochester Psychiatric Ctr.*, 955 F.3d 314, 324 (2d Cir. 2020) ("[A] partial remedy [is] sufficient to support a finding of redressability." (cleaned up)); *Ramirez v. Coughlin*,

919 F. Supp. 617, 623 (N.D.N.Y. 1996) ("[T]he doctrine of personal involvement . . . does not bar either declaratory or injunctive relief . . . .").

II. Coach Bloch has sufficiently alleged Defendants' policies violate the First Amendment.

Under Supreme Court and Second Circuit precedent, Defendants bear a "particularly heavy" burden to save their policies because they operate as ex ante employee speech restrictions. *Harman v. City of N.Y.*, 140 F.3d 111, 118 (2d Cir. 1998). They are "blanket polic[ies] designed to restrict expression by a large number of potential speakers." *Id.* "To justify this kind of prospective regulation, 'the Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government.'" *Id.* (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995)) (cleaned up).

To justify their ex ante employee speech restriction, Defendants must meet "exacting scrutiny." *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2472 (2018). They must show their law, policies, and procedures "serve a compelling state interest that cannot be achieved through means significantly less restrictive of [First Amendment] freedoms." *Id.* at 2465. That scrutiny imposes a narrow tailoring requirement: government cannot use "means that broadly stifle personal liberties when the end can be more narrowly achieved." *Scott v. Meyers*, 191 F.3d 82, 88 (2d Cir. 1999). So, "the government must do more than simply posit the existence of the disease sought to be cured." *Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 463 (2d Cir. 1999) (cleaned up). Defendants "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* Defendants do not dispute that exacting scrutiny provides the proper standard, but they cannot meet

their burden on their Motions to Dismiss of showing that they employ means narrowly tailored to any compelling interest.

A. Defendants' policies flunk narrow tailoring.

"[T]he concerns that lead courts to invalidate a statute on its face may be considered as factors" showing an ex ante public employee speech restriction lacks narrow tailoring. *Harman*, 140 F.3d at 118. The Complaint's allegations—which must be accepted as true at this stage—have stated a claim that Defendants' definition of harassment is overbroad, discriminates based on content and viewpoint, and imposes a prior restraint, which all show that Defendants cannot meet their narrow tailoring burden.

1. Defendants' policies define harassment to prohibit even a single, off-duty comment, so Coach Bloch has stated a claim they are overbroad.

As alleged, Defendants' definition of harassment "is staggeringly broad." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125 (11th Cir. 2022) (holding policy overbroad that "prohibit[ed] a wide range of 'verbal' . . . expression"; censored speech "including verbal acts, name-calling, graphic or written statements"; and "employ[ed] a gestaltish 'totality of known circumstances' approach to determine whether particular speech" was prohibited). A policy is overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the [policy's] plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

As the Complaint alleges and as Defendant Bouchey concedes, Defendants' definition of "harassment" targets even a single "incident" of "verbal" conduct and uses the open-ended prefatory phrase "includes." Doc. 1 ¶¶ 216–17; Doc. 29 at 10. It prohibits "comments, insults, derogatory remarks, gestures, . . . circulation of written or visual material, . . . and negative references." Doc. 1 ¶ 207. It restricts speech even off-campus and off-duty. *Id.* ¶¶ 162; Doc. 1-12 at 5; Doc. 1-13 at 8. And the Complaint's allegations show Defendants' policies license government officials to

consider "all the facts and surrounding circumstances" when determining whether speech constitutes "harassment"—without defining what those "facts" and "circumstances" could be. Doc. 1 ¶ 153. "[A] totality of known circumstances approach, based on a non-exhaustive list of factors," *Speech First*, 32 F.4th at 1115 (cleaned up), is overbroad because it can sweep in those "simple acts of teasing and name-calling" that the First Amendment undisputedly protects, *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

Accepting the Complaint's allegations as true, Defendants' policies prohibit much more than unlawful harassment. The Supreme Court has crafted a constitutional standard for actionable harassment because "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Davis*, 526 U.S. at 649 (rejecting assertion by dissent that the liability standard would require schools to police protected speech). Schools can constitutionally regulate harassment that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633; *see also Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480, 482 & n.6 (S.D. Tex. 2022) (enjoining harassment policy that did not comply with *Davis*). For that reason, School Defendants' proffered "limiting construction" limits nothing. *See* Doc. 34 at 8. They claim that they and Defendant Bouchey can only regulate harassment "consistent with" the First Amendment. *Id.* That begs the question. The First Amendment protects Coach Bloch's speech, but School Defendants still fired him because of it.

As the Complaint's allegations show, Defendants' definition of harassment "prohibits substantially more conduct than would give rise to liability under [*Davis*]." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3rd Cir. 2001) (Alito, J.). *Contra* Doc. 29 at 14–15. Defendant Bouchey argues the policies provide "two potential avenues to show harassment": conduct which has the "purpose or effect" of

(1) "objectively and substantially undermining and detracting from or interfering with" educational performance or access to school resources or (2) being "so sweeping" as to "create[e] an objectively intimidating, hostile, or offensive environment." Doc. 1 ¶ 144; Doc. 29 at 15. Both are much more expansive than *Davis* allows, for at least three reasons.

First, "[u]nlike federal anti-harassment law, which imposes liability only when harassment has 'a systemic *effect* on educational programs and activities,' the [definition] extends to speech that merely has the 'purpose' of harassing another." *Saxe*, 240 F.3d at 210 (quoting *Davis*, 526 U.S. at 633). The definition's "purpose or effect" clause expands—not limits—its application. *Contra* Doc. 29 at 9–10; Doc. 34 at 17. By examining "purpose," Defendants' policies "focus[ ] on the speaker's motive rather than the effect of speech on the learning environment." *Saxe*, 240 F.3d at 210–11. Contrary to what the Secretary claims, the "purpose or effect" clause is not "objective." Doc. 29 at 10. Nor do the policies' incorporation of other seemingly objective criterion save them from overbreadth. As the Secretary and School Defendants admit, the "purpose or effect" phrase "modifies everything else in the definition of harassment." Doc. 29 at 9; *see* Doc. 34 at 17. So the policies—in every situation—allow the application of the subjective purpose criterion. That element "sweep[s] in" and prohibits protected speech. *Saxe*, 240 F.3d at 211.

Second, neither of those "avenues" requires the "severe, pervasive, *and* objectively offensive" conduct the *Davis* Court held necessary to prevent schools from policing "simple acts of teasing and name-calling." *Davis*, 526 U.S. at 652 (emphasis added). As the allegations here show, Defendants' harassment definition applies even to a single conversation. *See id.* at 552–53 ("unlikely" that "single instance of sufficiently severe" harassment could have "a systemic effect on educational programs"). Because the "'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to

cover any speech about some enumerated personal characteristics the content of which offends someone." *Saxe*, 240 F.3d at 217. That bans "much 'core' political and religious speech," including "speech about such contentious issues as" "gender identity" and "sexual orientation." *See id.*; Doc. 1 ¶ 145.

Third, the "hostile environment" prong requires no showing that the purported harassment "effectively bars the victim's access to an educational opportunity or benefit." *See Davis*, 526 U.S. at 633.

Defendants' definition of "harassment" also prohibits far more than what *Pickering* allows. *Contra* Doc. 29 at 11–12; Doc. 34 at 14; Doc. 37 at 16–17. As the Complaint alleges and as Defendant Bouchey recognizes, her and School Defendants' policies apply to "off campus" speech. Doc. 31 at 9; Doc. 1-13 at 8. Defendant Nichols's policy regulates speech at all times while "on school property or at school functions." Doc. 1 ¶ 162; Doc. 37 at 17. None of Defendants' policies limit their scope to "employment-related speech." *Barone v. City of Springfield*, 902 F.3d 1091, 1106 (9th Cir. 2018). They "prevent[ ] free expression by employees, whenever they are in the workplace, even during lunch breaks, coffee breaks, and after-hours." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 (2022) (government cannot "posit[ ] an excessively broad job description" to "treat[ ] everything teachers and coaches say in the workplace as government speech subject to government control" (cleaned up)). And the policies on their face restrict speech on matters of public concern. They target speech on "gender identity" and "sexual orientation"—topics the Supreme Court has recognized are "undoubtedly matters of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up). As the allegations here show, School Defendants consider discussing, during downtime before a competition, males competing against females—a topic of extensive public dialogue—to be prohibited harassment.

Defendants' policies have no relation to any disruption interest. They "make[ ] no distinction" between speech that "reasonably could be expected to disrupt [Defendants'] operations and speech that plainly would not, or that would do so only inasmuch as it engendered legitimate public debate"—like Coach Bloch's speech here. *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017). Defendants' "purpose" criterion targets "speech that merely intends to" cause disruption. *Saxe*, 240 F.3d at 216. That "ignores" even *Tinker*'s lower standard that "a school must reasonably believe that speech will cause actual, material disruption before prohibiting it." *Id.* at 217. And that invalidates School Defendants and Defendant Nichols's reliance on lower school student speech cases, which don't even apply to this public employee speech case. *See* Doc. 34 at 24; Doc. 37 at 22; *see also Saxe*, 240 F.3d at 211 n.9 (more "stringent standards" apply to restrictions on employee speech than student speech). The examination into purpose "inherently disfavors speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that toe the agency line." *See Harman*, 140 F.3d at 121 (cleaned up).

2. Coach Bloch has stated a claim that Defendants' policies discriminate based on content and viewpoint.

Speech "come[s] within the ambit of anti-discrimination laws . . . precisely because of its sensitive subject matter" and the "viewpoint it expresses." *Saxe*, 240 F.3d at 206. As the Complaint alleges, Defendants' definition draws facial distinctions based on the speech's subject matter—that is, speech about certain characteristics such as "gender identity." Doc. 1 ¶ 144; *see Speech First*, 32 F.4th at 1115–16, 1126 (prohibiting "discriminatory harassment" based on "gender identity" discriminates based on content); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding ordinance prohibiting "fighting words . . . on the basis of race, color, creed, religion or gender" "impose[d] special prohibitions on those speakers who express views on disfavored subjects"). That states a claim for content discrimination.

All Defendants incorrectly claim that their policies' "purpose" does not target content. Doc. 29 at 17–18; Doc. 34 at 17; Doc. 37 at 19–20. That argument has no merit for at least three reasons. First, such extra-Complaint speculation about the purpose behind Defendants' policies is improper on a motion to dismiss. Second, that contention contradicts their assertions that the policies restrict "discriminatory speech." Doc. 29 at 21; Doc. 37 at 20; *see also* Doc. 34 at 8. Third, it ignores the complete definition of content discrimination. A facially content discriminatory policy, as here, "is subject to strict scrutiny regardless of the government's benign motive." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

A "secondary effects" rationale has no application here. *Contra* Doc. 29 at 18; Doc. 34 at 17–19 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)); Doc. 37 at 20 (citing *Renton*). First, on a motion to dismiss, Defendants cannot include, nor do they have, the "require[d] pre-enactment evidence" necessary to support a secondary effects rationale. *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007); *see infra* Section II.B. Second, "[l]isteners' reactions to speech are not the type of 'secondary effects' [the Court] referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality). Indeed, the *Boos* Court distinguished *Renton* from an ordinance analogous to Defendants': "To take an example factually close to *Renton,* if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." *Id.* Defendants have aimed at precisely that "psychological" interest. Doc. 29 at 21; Doc. 34 at 15; Doc. 37 at 21. In sum, "the government may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its offensive content may have on a listener." *Saxe*, 240 F.3d at 209.

As the well-pleaded allegations demonstrate, Defendants' definition of "harassment" discriminates based on viewpoint by prohibiting "epithets, stereotypes,

slurs, . . . insults, derogatory remarks, . . . and negative references." Doc. 1 ¶ 193; *see Iancu v. Brunetti*, 139 S. Ct. 2294, 2298–99 (2019) (A "ban on registering marks that 'disparage' any 'person[ ], living or dead'" is "viewpoint-based."). "Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create an 'hostile environment' . . . precisely because of" the "viewpoint it expresses." *Saxe*, 240 F.3d at 206. Coach Bloch therefore has stated a viewpoint discrimination claim.

Defendant Bouchey's assertion that the policies don't discriminate based on viewpoint because they censor speech on both sides turns First Amendment law on its head. *See* Doc. 29 at 19 (citing *Parents Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Educ.*, 2023 WL 4848509, at *16 (S.D. Ohio July 28, 2023)). A policy that "prohibits disparagement of all groups" discriminates based on viewpoint in the "relevant" sense because "[g]iving offense is a viewpoint." *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality). As this case shows, "those arguing *in favor* of" competition in sports based on gender identity do not run afoul of Defendants' policies, but Coach Bloch—who asserted that sex should determine participation—did. *See R.A.V.*, 505 U.S. at 391. The *Olentangy* court cut to the core of viewpoint discrimination when it "separated" speech "discuss[ing] a political, social, or religious perspective in a non-derogatory manner" from purportedly derogatory speech. *See* 2023 WL 4848509, at *12. But the "essence of viewpoint discrimination" is the government's approval of a ostensibly "positive or benign" statement and punishment for an allegedly "derogatory one." *Matal*, 582 U.S. at 249 (Kennedy, J., concurring in part and concurring in the judgment).

School Defendants disclaim unbridled discretion, Doc. 34 at 20, but the Complaint plausibly alleges just the opposite. As alleged, Defendants' policies grant unbridled discretion in at least two ways, which licensed Defendant Sousa's viewpoint-discriminatory enforcement here. First, Defendants' definition of

"harassment" uses the open-ended prefatory phrase "includes," granting them the power to fill in the gaps as to what speech they consider "harassment." Doc. 1 ¶ 192. "[N]onexclusive" criteria create the "disconcerting risk that [Defendants] could camouflage [viewpoint discrimination] through post-hoc reliance on unspecified criteria." *See Amidon v. Student Ass'n of SUNY at Albany*, 508 F.3d 94, 104 (2d Cir. 2007). Second, Defendants have the discretion to target disfavored speech that they subjectively label as "epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, . . . and negative references." Doc. 1 ¶ 193.

Defendant Bouchey (correctly) asserts Coach Bloch didn't harass anyone. Doc. 29 at 7. Yet, as alleged, School Defendants, who enforce the same policies, came to the opposite conclusion. Doc. 1 ¶ 118. And Defendant Nichols agrees with them. Doc. 37 at 17–18. That shows unbridled discretion in action. Defendants' policies must have "narrow, objective, and definite standards to guide the decision-maker." *Harman*, 140 F.3d at 120 (cleaned up). Their absence "raises the specter of content and viewpoint censorship," which "justifies an additional thumb on the employees' side of the scales." *Id.*

3. Coach Bloch has stated a claim that Defendants' policies impose a prior restraint.

Prior restraints "*forbid*[ ] certain communications when issued in advance." *Alexander v. United States*, 509 U.S. 544, 550 (1993). As alleged, Defendants' policies "prohibit" "harassment" based on certain characteristics like "gender identity" and thus impose a prior restraint. Doc. 1 ¶¶ 162, 204; *see Alexander*, 509 U.S. at 550 ("prohibiting the future exhibition of films" is a prior restraint). They thus operate to forbid discussions—like Coach Bloch's—that assert males generally have athletic advantages over females. Doc. 1 ¶¶ 103, 118–19.

Defendant Nichols' ipse dixit that his policy "does not categorically ban speech before it occurs," Doc. 37 at 23, cannot contradict the Complaint's well-pleaded

allegations. Despite those allegations, Defendant Nichols also argues that interpreting his harassment policy as a prior restraint would "stretch the doctrine beyond what it can bear." *Id.* (quoting *Citizens United v. Schneiderman*, 882 F.3d 374, 387 (2d Cir. 2018)). But, as Defendant Bouchey concedes, "flat prohibitions on employee speech on certain topics" are prior restraints. Doc. 29 at 16. *Schneiderman* did not involve an "outright ban"; it concerned a yearly donor disclosure requirement that left "solicitation activities" undisturbed. 882 F.3d at 387. The Second Circuit viewed the plaintiff as challenging "discretion to *withdraw* permission to solicit" not a ban in advance. *Id. But see Ams. for Prosperity Found.*, 141 S. Ct. at 2389 (holding donor-disclosure requirements like the one upheld in *Schneiderman* violate the First Amendment).

Defendants' policies implement a "regime[ ] prohibiting any and all discussion of certain topics with the public." *Moonin*, 868 F.3d at 869. *Contra* Doc. 29 at 17. The *Moonin* court invalidated a public employer policy prohibiting discussing "the Nevada Highway Patrol K9 program or interdiction program" with the public because it did not separate speech "that reasonably could be expected to disrupt" from "speech that plainly would not." 868 F.3d at 867. Here, too, the Complaint's allegations show that Defendants' policies make no such distinction. *Supra* Section II.A.1. As alleged, Defendants ban even single "comments, insults, derogatory remarks, gestures, . . . circulation of written or visual material, . . . and negative references" on disfavored topics. Doc. ¶ 145.

Defendants cite an ex post retaliation case involving "police officers and firefighters who deliberately don[ned] 'blackface,' parade[d] through the streets in mocking stereotypes of African–Americans and, in one firefighter's case, jokingly recreate[d] a recent vicious hate crime against a black man." *Locurto v. Guliani*, 447 F.3d 159, 182 (2d Cir. 2006). Under those facts, the court held that fear of disruption to government functioning was reasonable. *Id.* at 182–83. Nothing of the sort is

alleged to have happened here. And Defendants do not limit their ex ante speech restrictions to intentionally racist parades or reenactments of hate crimes. Rather, as alleged, they target even single, off-duty comments.

School Defendants argue they can prohibit speech in advance because their policies do not apply to topics of public concern. Doc. 34 at 21. That ignores that the Complaint alleges Defendants' policies facially target speech on matters of public concern. *Supra* Section II.A.1. And it also ignores the allegations in this case. Defendants interpret their purportedly limiting language—"[s]peech based on or motivated by a student's association with a protected category," Doc. 34 at 21—to encompass speech discussing gender identity even when that speech takes place outside the presence of the student in the protected class. Doc. 1 ¶¶ 107, 113, 118–19.

B. Defendants cannot meet their burden of showing a compelling interest on a motion to dismiss.

To meet its burden of showing a compelling interest, "the government must identify evidence—or, at least, provide sound reasoning that draws reasonable inferences based on substantial evidence." *Cornelio*, 32 F.4th at 172 (cleaned up). "For that reason, the norm is to wait until the summary judgment stage of the litigation to address the ultimate question of whether the [policy] should stand." *Id.* (cleaned up). On these Motions to Dismiss, Defendants have not identified any evidence in the Complaint's factual allegations. Nor are any of their proffered studies appropriate to consider on a motion to dismiss or allowable based on judicial notice because their "accuracy" can "reasonably be questioned." Fed. R. Evid. 201(b)(2); *see, e.g.*, Doc. 46 ¶ 173 (expert testimony questioning the accuracy of these studies and data).[2]

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[2] What's more, those studies don't provide any "substantial evidence." Many of them concern bullying and violence, neither of which are implicated by the challenge to the definition of "harassment" here. *E.g.*, Doc. 29 at 22–23; Doc. 37 at 20 n.1. Others refer to "harassment," but Defendants omit whether the studies' definition of harassment aligns with their own. *See* Doc. 29 at 21–23. And no evidence shows—or could show

School Defendants attempt to rely on a "right to be let alone," Doc. 34 at 16, but those cases acknowledge that the First Amendment protects the "right to persuade," *Hill v. Colorado*, 530 U.S. 703, 717 (2000). A person's interest in freedom from "importunity, following and dogging" ripens only "after an offer to communicate has been declined." *Id.* at 718. As this case shows, Defendants' policies apply even to speech outside the presence of the person ostensibly wanting to be let alone.

Contrary to the Secretary's argument, it matters that Defendants' policies "focus[ ] on identity-based harassment rather than general harassment" for two reasons. *See* Doc. 29 at 23. First, the Secretary concedes the Vermont Legislature relied on broad anti-harassment interests, *id.* at 21, but Defendants target only harassment based on certain characteristics, rendering their harassment definition unconstitutionally underinclusive. Their policies elevate certain classes while ignoring equally damaging harassment on any other basis, such as body weight or lack of academic, athletic, or social success. "Such underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Nat'l Inst. for Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (cleaned up).

Second, Defendants have no interest in picking and choosing what speech to target based on certain categories but not others. As this case shows, Defendants'

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at this stage—that the Vermont Legislature or any Defendant considered those studies when drafting and implementing their definition of harassment. But "the government must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Cornelio*, 32 F.4th at 171 (cleaned up); *see also Brewer v. City of Albuquerque*, 18 F.4th 1205, 1246 (10th Cir. 2021) (The government "*ordinarily* need[s] to show that it *seriously considered* alternative regulatory options that burden less protected speech."). No evidence even hints that Defendants' overbroad definition of harassment—which applies even to single statements on topics of public concern—will remedy the ills they describe.

policies punished Coach Bloch for speaking about athletic advantages males generally have over females. But their harassment definition would not apply if he had discussed, for example, advantages athletes with average body weight generally have over overweight competitors. Defendants cannot "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

III. As Defendants' enforcement in this case shows, Coach Bloch has stated a void for vagueness claim.

The Fourteenth Amendment requires Defendants to employ policies "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see Cunney v. Bd. of Trs.*, 660 F.3d 612, 620–21 (2d Cir. 2011). The Complaint plausibly states that terms like "gender identity" in Defendants' policies fail to give notice as to what those policies prohibit. As the Complaint alleges, Defendants don't define it. Doc. 1 ¶¶ 230–31. And Coach Bloch believes that sex is immutable, so "gender identity"—by its very nature—must be "subjective" and changing. Doc. 1 ¶¶ 66, 69, 230.

As the Complaint shows, the prohibition on "gender identity" harassment also is at war with the policies' prohibition of harassment based on "sex." *Id.* ¶¶ 145–46. Coach Bloch advocated for participation in sports based on sex—something that promotes "sex equality"—but for that same statement Defendants punished him for "gender identity" harassment. *See B.P.J. v. W. Va. State Bd. of Educ.*, --- F. Supp. 3d ----, 2023 WL 111875, at *9 (S.D.W.V. Jan. 5, 2023), *appeal pending*. Had he instead argued for participation in sports based on gender identity, his statements may also have run afoul of Defendants' policies for attempting to deny females opportunities to compete. Finally, the same terms that grant unbridled discretion also license arbitrary enforcement, as Coach Bloch's termination shows. *See supra* Section II.A.2.

Defendant Nichols argues that the definition provides sufficient notice by merely block-quoting the harassment definition. Doc. 37 at 18. It isn't "objective," contrary to his claims. *See id.* Similarly, Defendant Bouchey's lone argument against vagueness relies on the same "purpose or effect" clause that allows for subjective intent to control harassment decisions. *See* Doc. 29 at 24; *supra* Section II.A.1. The Complaint alleges that Defendants' policies allow individual administrators to rely on a nonexhaustive list of factors to ascertain an employee's purpose in speaking. Doc. 1 ¶ 153. That's the definition of arbitrary enforcement. Due process prohibits "*ad hoc* and subjective" standards. *Cunney*, 660 F.3d at 621.

CONCLUSION

Accepting the Complaint's allegations as true, Coach Bloch has standing to challenge and has stated claims against Defendants' overbroad, content and viewpoint discriminatory, and unconstitutionally vague prior restraint. This is not one of those "rare[ ]" First Amendment cases subject to dismissal. *Cornelio*, 32 F.4th at 172. This Court should deny Defendants' Motions to Dismiss.

Dated: September 29, 2023

Respectfully submitted,

/s/ Mathew W. Hoffmann

Tyson C. Langhofer
VA Bar No. 95204
Mathew W. Hoffmann
DC Bar No. 1617417
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, Virginia 20176
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
tlanghofer@ADFlegal.org
mhoffmann@adflegal.org

David A. Cortman
GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd NE
Suite D1100
Lawrenceville, Georgia 30043
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
dcortman@ADFlegal.org

Anthony R. Duprey
VT Bar No. 3204
Duprey Law, PLLC
11 Main Street, Suite B110F
Vergennes, Vermont 05491
Telephone: (802) 870-6563
anthony@dupreylaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, I electronically filed the foregoing on the Court's CM/ECF system, which automatically sends an electronic notification with this filing to the following attorneys of record:

Pietro J. Lynn, Esq.
Sean M. Toohey, Esq.
Lynn, Lynn, Blackman & Manitsky, P.C.
76 St. Paul Street, Suite 400
Burlington, VT 05401
T: (802) 860-1500
plynn@lynnlawvt.com
stoohey@lynnlawvt.com

Steven J. Zakrzewski, Esq.
GORDON REES SCULLY MANSUKHANI, LLP
95 Glastonbury Blvd, Suite 206
Glastonbury, CT 06033
T: (860) 494-7511
szakrzewski@grsm.com

Eleanor L.P. Spottswood
Solicitor General
Office of the Attorney General
109 State Street
T: (802) 793-1646
Montpelier, VT 05609-1001
eleanor.spottswood@vermont.gov

Jaime Kraybill
Assistant Attorney General
Agency of Education
1 National Life Building, Davis 5
Montpelier, VT 05620-2501
T: (802) 828-0160
Jaime.Kraybill@vermont.gov

Counsel for Defendants

Dated: September 29, 2023

/s/ Mathew W. Hoffmann
Mathew W. Hoffmann
Counsel for Plaintiff