VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

BYRON TANNER CROSS

Plaintiff,

v.

LOUDOUN COUNTY SCHOOL BOARD, SCOTT A. ZIEGLER, Interim Superintendent, in his official and personal capacity; and **LUCIA VILLA SEBASTIAN**, Interim Assistant Superintendent for Human Resources and Talent Development, in her official and personal capacity;

Defendants.

Case No. _____

PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

****EXPEDITED HEARING REQUESTED****

Plaintiff Byron Tanner Cross moves this Honorable Court for an emergency temporary restraining order and preliminary injunction against Defendants Loudoun County School Board and its agents, officers, directors, employees, and representatives, including Defendants Scott A. Ziegler and Lucia Villa Sebastian. Plaintiff also requests an emergency hearing on this motion. Specifically, Plaintiff requests:

A. A temporary restraining order and a preliminary injunction directing Defendants and any other persons acting on their behalf to immediately reinstate Plaintiff to his position at Leesburg Elementary School and remove the ban from Loudoun County Public School property; and

B. A temporary restraining order and a preliminary injunction prohibiting Defendants and any other persons acting on their behalf from enforcing Defendants' policies to prohibit Plaintiff from, or punish Plaintiff for, expressing his views on proposed gender-identity education policy, including at future Loudoun County School Board meetings.

C. An emergency hearing on Plaintiff's motion for a temporary restraining order and/or preliminary injunction as soon as possible.

In support of this motion, Plaintiff files herewith a Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted this 1st day of June, 2021.

Tyson C. Langhofer
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
Email: tlanghofer@ADFlegal.org

J. Caleb Dalton
Virginia State Bar No. 83790
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393–8690
Facsimile: (202) 347–3622
E-mail: cdalton@ADFlegal.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on June 1, 2021, I filed the Complaint with the Clerk of the Circuit Court for the County of Loudoun. The Clerk accepted the complaint for filing on June 1, 2021.

I further certify that on June 1, 2021, I served the foregoing by e-mail and mailing a true and correct copy of the same to:

Stacy L. Haney
HANEY PHINYOWATTANACHIP PLLC
11 S. 12th Street, Suite 300C
Richmond, VA 23219
Telephone: (804) 500-0301
Facsimile: (804) 500-0309
shaney@haneyphinyo.com

Tyson C. Langhofer
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
Email: tlanghofer@ADFlegal.org

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Tyson C. Langhofer
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Tel: (571) 707-4655
Fax: (571) 707-4656
Email: tlanghofer@ADFlegal.org

J. Caleb Dalton
Virginia State Bar No. 83790
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393–8690
Facsimile: (202) 347–3622
E-mail: cdalton@ADFlegal.org

June 1, 2021

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INTRODUCTION

In under sixty seconds on the evening of Tuesday, May 25, Plaintiff B. Tanner Cross spoke at Defendants' public school board meeting during the portion of the meeting set aside for public comment. He spoke eloquently, respectfully, and with conviction about a topic that was under debate by the board and that has roiled school districts across the nation: how to address youth struggling with gender dysphoria. Less than forty-eight hours later, Defendants retaliated against Mr. Cross for his constitutionally protected speech by suspending him from work, notifying each students' parents of his suspension, barring Mr. Cross from the grounds and buildings of Loudoun County Public Schools (the "District') including future School Board meetings, and excluding him from all school-sponsored activities or extracurricular events. Mr. Cross needs a temporary restraining order and preliminary injunction because Defendants' unlawful acts are inflicting ongoing, irreparable injury on him.

Defendants' suspension of Mr. Cross is unlawful because Mr. Cross spoke as a private citizen on a matter of public concern, and his interest in speaking outweighs any interest Defendants may claim to have in restricting his speech, which in this case is nonexistent. At the May 25 meeting, the board invited public comment on various policies under consideration. One of these, Policy 8040 ("the Policy"), would alter the way schools and teachers address students who struggle with gender dysphoria. Among the Policy's changes is a requirement that all teachers use a student's preferred pronouns, regardless of whether those pronouns correspond to the student's biological sex.

Mr. Cross spoke as a private citizen during the comment period open to private citizens. The subject matter of the Policy implicates some of the most profound and difficult matters of public concern facing many communities today: the interrelation of sex and gender, the proper response by public schools to

students whose gender identity does not correspond to their biological sex, and how such student should be addressed when others have moral, philosophical, scientific, or religious objections to using the requested pronouns.

Mr. Cross, an educator with over fifteen years' experience, voiced his opposition to the Policy's adoption because of his concerns for compelled speech and his students' well-being. Mr. Cross's expression did not disrupt the meeting, and he attended school and performed all of his normal duties the next day without disruption or incident. Nonetheless, Defendants suspended Mr. Cross on the morning of May 27 solely because of his comments at the May 25 meeting, based on Defendants' assessment of the content and viewpoint of those comments and in response to out-of-school complaints objecting to Mr. Cross's expressed viewpoint, none of which disrupted school operations.

No legitimate interest of the Defendants justifies their suspension of Mr. Cross. Indeed, Defendants' suspension undermines the District's interest in the efficient provision of services by chilling Mr. Cross and other teachers from speaking about any policies under consideration for fear of further retaliation.

Defendants' suspension of Mr. Cross is actionable retaliation because the chill caused by the suspension adversely affects Mr. Cross's exercise of his constitutional liberties and would deter any reasonable person from continuing to speak. Specifically, Mr. Cross is barred from attending and delivering comments at future School Board meetings during the suspension. The swift suspension with its attendant consequences, and resulting notification to every parent following the suspension, deters Mr. Cross and every teacher in the district from engaging in their constitutional right to comment as citizens on matters of public concern.

This Court should grant Mr. Cross's request for immediate preliminary relief because being compelled to forego the exercise of constitutional rights is an irreparable injury, an injunction would not injure the Defendants, and an injunction

would serve the public interest. Defendants suspended Mr. Cross for speaking out against a policy that has not yet been adopted. Therefore, enjoining Defendants from this act of retaliation would not impair Defendants' ability to enforce existing policy or to adopt new policies. And enjoining this retaliatory act would serve the public interest, because it is always in the public interest to vindicate even one person's constitutional liberties, and here an injunction would thaw the chill that Defendants' unlawful acts have cast over the exercise of constitutional rights by every public school teacher in the district.

The core of constitutional liberty in a free society—the ability to comment on public policy under consideration without fear of retaliation—is at stake in this case. This is doubly so because the Policy in question concerned whether the school district would take one side in an ongoing debate about some of the deepest and most difficult questions about who and what we are as human beings, and then compel teachers to affirm that same side with their own mouths, even when their religious beliefs command them to do otherwise. Mr. Cross used his constitutional right to speak up in the hope of persuading the Board not to go down the unconstitutional trail the Policy would blaze. Mr. Cross hoped that the Board would instead follow the "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In response, Mr. Cross was met with a separate, immediate violation of his rights—a retaliatory suspension and prior restraint on his speech. To preserve the most fundamental constitutional freedom in this Commonwealth, he therefore asks this Court to grant his motion for a preliminary injunction.

FACTS

Mr. Cross is a resident of Hamilton, Virginia and a teacher at Leesburg Elementary, a part of Loudoun County Public Schools. Mr. Cross has worked in the field of education for fifteen years, with five years at Rolling Ridge Elementary in the District and three years at Leesburg Elementary, where he still teaches. Complaint ¶¶15, 36-38. In addition to teaching, Mr. Cross has also served as the head coach for freshman football at Loudoun County High School. *Id.* at ¶ 39.

From Mr. Cross's training and long experience as an educator, Mr. Cross understands that children do not have a fully developed capacity to understand the long-term consequences of their decisions. *Id.* at ¶ 46. As an educator, Mr. Cross always endeavors to serve his students' best interest. One way he does that is by respecting the right of parents to direct the upbringing and education of their children and keeping the importance of parental involvement in mind when he discusses school policy or potential changes to school policy. *Id.* at ¶ 48-52. Mr. Cross opposes school policies that hinder parental involvement in and direction of a child's education. *Id.*

Another way Mr. Cross serves the best interest of his students is by telling them the truth. Mr. Cross understands, based on scientific evidence, that human beings have two anatomical sex presentations (except in rare, identified, and diagnosable medical conditions). *Id.* at ¶ 55. Based on his experience as an educator and coach, Mr. Cross understands that policies that limit access to private facilities based on anatomical sex are important safeguards for student privacy. He does not believe those facilities should be opened to students based on other factors, like subjective gender identity. *Id.* at ¶ 56. Where possible, Mr. Cross thinks additional facilities should be made available to students who are uncomfortable with these sex-segregated facilities. *Id.* at ¶ 57.

Mr. Cross understands that, because of the difficulty of assessing matters of gender identity and the long-term irreversible consequences of certain treatments for transgender-identifying people, including hormone replacement therapy and sex-reassignment surgery, children should not be encouraged to undertake social or medical transition because of their inability to assess long-term consequences. *Id.* at ¶ 47. Mr. Cross believes that any policy that encourages children to undertake social or medical transition, especially without parental involvement, is harmful to children. *Id.* at ¶ 52.

Mr. Cross is also a Christian, and he strives to act consistent with his faith at all times. *Id.* at ¶ 60. Mr. Cross has sincerely held beliefs about human nature, marriage, sexuality, morality, politics, and social issues rooted in his Christian faith. *Id.* at ¶ 61. Respecting sex and gender identity, Mr. Cross believes that God creates each person as male or female; that the two distinct and complementary sexes reflect the image of God; and that adopting a gender identity inconsistent with sex rejects God's image and design for a person and does harm to that person. *Id.* at ¶ 63.

Mr. Cross's faith commands him to tell the truth and not to tell lies. *Id.* at ¶ 64. Mr. Cross's understanding of both biology and his faith bind his conscience to using pronouns consistent with a person's biological sex since, to Mr. Cross, using pronouns inconsistent with biological sex would be lying. *Id.* at ¶ 65. He also believes speaking such lies would be harmful to the individual struggling with gender dysphoria. *Id.* at ¶ 65.

Mr. Cross does not believe that every student or teacher in the District should have to accept his view of how best to show compassion to youth struggling with gender dysphoria or to act in accord with that view. But he also believes that teachers should not be compelled to say things that they do not believe to be true. *Id.* at ¶ 58-59.

Recently, Mr. Cross became aware that the Board was considering the adoption of the Policy. The Policy would allow students to use a chosen name different than their legal name "without any substantiating evidence, regardless of the name . . . recorded in the student's permanent educational record." *Id.* at ¶ 44. The Policy would allow students to use a chosen gender identity pronoun different than the pronoun consistent with their biological sex "without any substantiating evidence, regardless of the gender . . . recorded in the student's permanent educational record." *Id.* The Policy would require school staff "when using a name or pronoun to address the student, [to] use the name and pronoun that correspond to their gender identity" rather than their legal name and pronoun consistent with their biological sex, whenever requested by a student or parent. *Id.* The Policy would allow students to use restrooms and locker rooms based on their gender identity rather than their biological sex (i.e., allow biological boys to use locker rooms and bathrooms alongside biological girls and vice versa). *Id.* Finally, the Policy would revise existing policy to allow students to participate in sports, based on their gender identity rather than their biological sex (i.e., allow biological males to compete against biological females and vice versa). *Id.*

Based on his experience as an educator and a coach, Mr. Cross believes that the Policy, if adopted, would do harm to students by encouraging social transition without parental involvement and exposing students to members of the opposite sex in sex-segregated facilities and sports. Mr. Cross believes the Policy would do harm to parents by allowing students to use different pronouns and sex-segregated facilities without parental involvement or knowledge. Mr. Cross believes the policy would do harm to teachers by compelling them to address students with pronouns inconsistent with biological sex. *Id.* at 46-67.

To protect the interests of parents, teachers, and students, Mr. Cross registered to speak at the School Board's meeting on May 25, 2021. *Id.* at ¶ 70.

When it was his turn to speak, Mr. Cross gave the following statement, lasting less than one minute:

> My name is Tanner Cross. And I am speaking out of love for those who suffer with gender dysphoria. *60 Minutes*, this past Sunday, interviewed over 30 young people who transitioned. But they felt led astray because lack of pushback, or how easy it was to make physical changes to their bodies in just three months. They are now de-transitioning. It is not my intention to hurt anyone. But there are certain truths that we must face when ready. We condemn school policies like 8040 and 8035 because it will damage children, defile the holy image of God. I love all of my students, but I will never lie to them regardless of the consequences. I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God.

Id. at ¶ 71.

The next day, Wednesday, May 26, Mr. Cross went to work at Leesburg Elementary. Mr. Cross taught his classes and played t-ball with students as usual, with no disruption or interference. *Id.* at ¶¶ 74-75. Nevertheless, that evening Alix Smith, HRTD Supervisor for the District, called Mr. Cross and instructed him to come to her office the next morning. *Id.* at ¶ 78. When Mr. Cross did so on Thursday, May 27, he was informed by Ms. Smith that he was being suspended and placed on administrative leave. *Id.* at ¶ 79. Ms. Smith handed Mr. Cross a folder and a letter, which stated that the School Board was conducting "an investigation of allegations that you engaged in conduct that has had a disruptive impact on the operations of Leesburg Elementary School." *Id.* at ¶¶ 81-82.

Neither Ms. Smith nor the letter identified any disruption that occurred because of Mr. Cross's speech. Mr. Cross did not observe any disruption at Leesburg Elementary caused by his speech, because there was none. *Id.* at ¶¶ 76-77. Later that day, an e-mail was sent to all Leesburg Elementary parents and staff that Mr. Cross had been placed on leave. *Id.* at ¶ 85.

After his suspension, Mr. Cross sent a letter to Defendants through counsel demanding his reinstatement. *Id.* at ¶ 91. Defendants responded by email through

counsel, claiming that "there was significant disruption at Leesburg Elementary School, including multiple complaints and parents requesting that Mr. Cross have no contact with their children *because of his comments*." *Id.* at ¶ 92. (emphasis added). However, Defendants identify no specific disruption at the school or any interruption of its provision of services—Defendants identified only off-campus complaints relayed to on-campus recipients, and expressly admitted that the complaints were in reaction to Mr. Cross's speech. *Id.*

ARGUMENT

This Court has authority to grant a temporary restraining order or preliminary injunction. VA. CODE ANN. § 8.01-620. When determining whether to grant a temporary restraining order or injunction, Virginia courts look to the factors the United States Supreme Court articulated in *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *See CG Riverview, LLC v. 139 Riverview, LLC*, 98 Va. Cir. 59 (2018); *Wings, L.L.C. v. Capitol Leather*, LLC, 88 Va. Cir. 83 (2014). Those factors are: "(1) Is the movant likely to prevail on the merits of the case?; (2) Will the movant suffer irreparable harm if not granted the preliminary injunction?; (3) Does the balance of the equities favor the movant?; and (4) Is granting the injunction in the public interest?" *CG Riverview*, 98 Va. Cir. at 59. All four factors favor Mr. Cross.

I. Mr. Cross is likely to prevail on the merits of his claims.

Mr. Cross is likely to prevail on the merits of his claims that Defendants violated his constitutional rights to free speech and free exercise of religion by suspending him in retaliation for his speech during the time for public comment at the School Board meeting.

A. Defendants violated Mr. Cross's right to freedom of speech.

The Virginia Constitution states:

> the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; [and] that the General Assembly shall not pass any law abridging the freedom of speech or of the press.

VA. CONST. art. I, § 12. This protection "is coextensive with the free speech provisions of the federal First Amendment." *Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004). Thus, Virginia courts, though not bound by federal courts' First Amendment rulings, find them persuasive when interpreting the Virginia Constitution. *Id.*

Here, Mr. Cross alleges that Defendants violated his Article I, Section 12 right to freedom of speech by suspending him in retaliation for his public expression. *See* Complaint ¶¶ 105-129. The "right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). A free speech retaliation claim has "three elements: (1) the plaintiff engaged in constitutionally protected . . . activity, (2) the defendant took an action that adversely affected that protected activity, and (3) there was a causal relationship between the plaintiff's protected activity and the defendant's conduct." *Booker v. South Carolina Dept. of Corrections*, 855 F.3d 533, 537 (4th Cir. 2017). Mr. Cross is likely to prevail in showing all three elements.

1. Mr. Cross's speech at the School Board meeting was constitutionally protected activity.

As a public employee, Mr. Cross's speech at the May 25 meeting was constitutionally protected activity so long as he was (1) speaking as a citizen (2) on a matter of public concern, and (3) his interest in speaking outweighs Defendants' interest in restricting his expression. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968).

Mr. Cross's appearance at a public meeting is speech as a private citizen. An employee is deemed to *not* speak as a private citizen when the expression is made "pursuant to [his or her] official duties." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). No part of Mr. Cross's official duties involves attending School Board meetings on personal time and making a statement. Mr. Cross appeared on his own time to offer his opinion—informed by his experience as a teacher and a coach but not in his capacity as a public employee—about the Policy. Mr. Cross's speech here is similar to the speech the Supreme Court found to be protected in *Pickering*, where a teacher sent a letter to a newspaper to critique school officials' past handling of revenue. 391 U.S. at 571–72.

Mr. Cross addressed a matter of public concern by speaking in opposition to the Policy's adoption. The "broad conception of 'public concern,'" *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001), encompasses anything that "can be fairly considered as relating to any matter of political, social, or other concern to the community," or "of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up). This includes teachers complaining "that a public school discriminates on the basis of sex," *Seemuller v. Fairfax Cnty. Sch. Bd.*, 878 F.2d 1578, 1583 (4th Cir. 1989); protesting racial discrimination *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979); or speaking out on matters like "academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality." *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 565 (4th Cir. 2011). Speech only falls outside this "broad conception" when they address "personal grievances . . . about conditions of employment" or "complaints of interpersonal discord." *Brooks v. Arthur*, 685 F.3d 367, 372 (4th Cir. 2012) (citations omitted).

The Policy, and specifically its rules requiring teachers to use pronouns inconsistent with biological sex and requiring sex-segregated facilities to be open to

students based on gender identity instead of sex, deals with matters of public concern. *See Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021) ("[T]he use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.").

Any balance of rights weighs in Mr. Cross's favor, because no interest supports Defendants punishing him for offering his opinion about school policy at a public meeting opened for that purpose. Indeed, by punishing Mr. Cross for this activity, Defendants undermine their *own* interests, because "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to. . . the operation of the schools . . . ." *Pickering*, 391 U.S. at 572. Defendants' acts punishing Mr. Cross, deterring him from speaking, Complaint ¶¶ 94-95, and deterring other teachers from speaking, Complaint ¶ 96, undermine their own interests in evaluating policy. *Pickering*, 391 U.S. at 572.

Nor can Defendants identify any interest in avoiding disruption by suspending Mr. Cross. No on-campus services were disrupted as a result of Mr. Cross's speech. Complaint ¶¶ 76-77. Defendants claim they received some complaints from parents who disagreed with Mr. Cross's viewpoint but have not identified any disruption of services caused by Mr. Cross's speech. Complaint ¶¶ 82, 92. The fact that some in the community complained about Mr. Cross's speech does not establish disruption: "[e]ven where the employer provides evidence of a negative reaction to speech, courts require evidence that it will disrupt the workplace." *Moser v. Las Vegas Metropolitan Police Dep't*, 984 F.3d 900, 910 (9th Cir. 2021). *See also Ridpath v. Board of Governors Marshall University*, 447 F.3d 292, 318 (4th Cir. 2006) (rejecting claim of disruption where there was no evidence "that [plaintiff's] comments impaired the maintenance of discipline, hurt workplace morale, or constituted an abuse of his position").

Mr. Cross spoke as a private citizen on matters of public concern. With no disruption to the school itself and counter to their own interests and Mr. Cross's constitutional rights, Defendants suspended him because of his speech.

2. Defendants' suspension of Mr. Cross adversely affected his constitutionally protected activity.

""In order to state a retaliation claim, [plaintiffs] are required to show that [defendants'] actions adversely impacted these [constitutional] rights." *Suarez*, 202 F.3d at 685. "Determining whether a plaintiff's [constitutional] rights were adversely affected by retaliatory conduct is a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." *Id.* at 686. In an employment relationship, an adverse action exists where "a similarly situated person of 'ordinary firmness' reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006).

Here, Defendants suspended Mr. Cross rapidly after he made a public comment in a forum open for that purpose. Complaint ¶¶ 82-83. On top of the suspension, the Defendants banned Mr. Cross from all School District property, including attending and delivering comments at future Loudoun County School Board meetings. *Id.* at ¶ 88. In doing so, Defendants have effectively imposed a prior restraint on Mr. Cross from providing his comments in a public forum on proposed policies which will affect him as a citizen of Loudoun County and a teacher in the District. This prior restraint was imposed upon Mr. Cross because of the content and viewpoint of his speech.

In addition to the prior restraint on his speech, the suspension barred him from performing his duties and harmed his professional development. *Id.* at ¶¶ 87-88. The suspension barred him from campus and extracurricular events. *Id.* at ¶ 84.

The district sent an email notifying every parent of every student in the school that Mr. Cross had been suspended. *Id.* at ¶85.

Mr. Cross has not only been stopped from speaking on School District property. Mr. Cross has verified that, despite his desire to continue speaking, he has stopped speaking in any forum for fear of additional punishment. And other teachers have verified that Defendants' suspension of Mr. Cross and subsequent communication to all parents in the school have deterred them from engaging in constitutionally-protected activity. Consequently, the Defendants' suspension of Mr. Cross produces a result where "a similarly situated person of 'ordinary firmness' reasonably would be chilled by the government conduct." *Ehrlich*, 437 F.3d at 416.

3. Defendants suspended Mr. Cross because of his constitutionally protected activity.

Defendants cannot dispute the causal connection between the suspension and Mr. Cross's speech. Mr. Cross has an exemplary performance record and no other basis for discipline exists. Complaint ¶¶ 40-41. In addition, Defendants' email cites "Mr. Cross's comments to the School Board" as the connection to the "disruption" that Defendants identified in conclusory fashion. Complaint ¶ 92. Defendants suspended Mr. Cross because of his speech.

Since Mr. Cross spoke as a citizen on a matter of public concern and his interest in speaking outweighed any interest in restricting his expression, his speech on May 25 was constitutionally protected activity. The suspension was an adverse action against Mr. Cross because it chilled his expression and would chill (and is chilling) other persons of ordinary firmness. And Defendants' decision was because of Mr. Cross's expression. Therefore, Mr. Cross is likely to prevail on his claim under Article I Section 12 of the Virginia Constitution.

B. Defendants violated Mr. Cross's right to free exercise of religion.

The Virginia Constitution provides, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." VA. CONST. art. I § 16. Accordingly, "[n]o man shall . . . be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief," and each person's religion "shall in no-wise diminish, enlarge, or affect their civil capacities." *Id.* At minimum, this prohibits the government from singling out any Virginian for disfavored treatment based on their religious views.[1] *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) ("The Free Exercise Clause forbids even 'subtle departures from neutrality' on matters of religion.") (citation omitted). And, no "principled rationale for the difference in treatment of . . . two instances [can] be based on the government's own assessment of offensiveness." *Id.* at 1731.

In this case Defendants acted out of hostility to Mr. Cross's expressed beliefs and based on an impermissible "assessment of offensiveness." *Id.* Mr. Cross said, "I love all of my students, but I will never lie to them regardless of the consequences. I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God." Complaint at ¶ 71. Defendants suspended him less than two days later and claimed he was responsible for "significant disruption at Leesburg Elementary School," even though there was no disruption "*at*" the school. *Id.* at ¶ 77. Defendants claim that a one-minute speech

[1] In addition, the Virginia Constitution's free exercise clause is more protective than the interpretation of the federal Constitution's First Amendment currently allows. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1463 (1990) (discussing Virginia's unique free exercise clause). For the purposes of the instant motion, the neutrality requirement alone is sufficient to establish Mr. Cross's likelihood of prevailing.

expressed in terms of loving regard and compassion for students caused a suspension-worthy disruption, alongside the fact that Mr. Cross is the only teacher to have been suspended for this sort of action is an "indication of hostility" by which this Court may find a free exercise violation. *Masterpiece*, 138 S. Ct. at 1730.

In addition, Defendants unconstitutionally suspended Mr. Cross using an impermissible "assessment of offensiveness." *Id.* at 1731. Defendants have admitted they suspended Mr. Cross in response to "multiple complaints and parents requesting that Mr. Cross have no contact with their children because of his comments." But Mr. Cross's comments furnish no basis for finding that he is a danger, or even a bad influence on children. *See* Complaint ¶ 41. Any objection "because of his comments" is rooted in an assessment of his claims relating to his religious duties to God as being offensive. Complaint ¶ 92; *Masterpiece*, 138 S. Ct. at 1731. Defendants cannot make such assessments themselves and cannot rely on them as the basis for punishing Mr. Cross.

These facts also demonstrate that Mr. Cross will likely prevail on his religious freedom claims under the Virginia Code. *See* Complaint ¶¶130-147. Defendants' suspension in retaliation for Mr. Cross's public statements explaining his religiously motivated objections to the Policy substantially burden his religious exercise. The suspension furthers no compelling governmental interest and is not the least restrictive means of furthering any governmental interest. Therefore, the suspension violates Mr. Cross's rights under Title 57.

II. Mr. Cross will continue suffering irreparable harm without an injunction.

Defendants' suspension of Mr. Cross unconstitutionally chills his exercise of protected freedoms, and the "loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsom ex rel. Newsom v. Albemarle County*, 354 F.3d 249,

261 (4th Cir. 2003) (same).

III. The balance of equities favors Mr. Cross.

Enjoining an unlawful, retaliatory suspension will impose no harm on the Defendants, especially when the Policy has not even been adopted or implemented and, in the event that it is adopted, Mr. Cross will also have substantial constitutional claims against it. *See id.*, ("[Defendant] is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional"). In this case, unlike *Newsom*, the Policy is merely a proposal. Defendants have no interest in enforcing its requirements until it is adopted. And, as long as the Policy is in the deliberative phase, Defendants' interests are served by *not* suspending teachers who speak up in that process, because of the insight teachers bring to inform those deliberations. *See Pickering*, 391 U.S. at 572; *supra* Part I.A.1.

IV. Granting the injunction will serve the public interest.

"The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. Surely, upholding constitutional rights serves the public interest." *Newsom*, 354 F.3d at 261. So too here, especially where the constitutional right at stake is the ability to participate in public meetings to debate the implementation of local policy—a core purpose of state constitutional speech protections—and where that policy itself implicates important constitutional questions about compelled speech and free exercise of religion. In this case, the public interest has been deeply harmed by Defendants' retaliatory and swift suspension of Mr. Cross and the impact it has had on all teachers in the district. An injunction is necessary to correct the chill Defendants have cast over every local employee's exercise of constitutional liberty.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court grant Plaintiff's motion and furnish all just and equitable relief.

Respectfully submitted,

Tyson C. Langhofer
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Tel: (571) 707-4655
Fax: (571) 707-4656
Email: tlanghofer@ADFlegal.org

J. Caleb Dalton
Virginia State Bar No. 83790
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393–8690
Facsimile: (202) 347–3622
E-mail: cdalton@ADFlegal.org

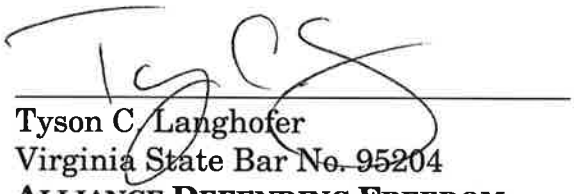
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on June 1, 2021, I filed the Complaint with the Clerk of the Circuit Court for the County of Loudoun. The Clerk accepted the complaint for filing on June 1, 2021.

I further certify that on June 1, 2021, I served the foregoing by mailing a true and correct copy of the same to:

Stacy L. Haney
HANEY PHINYOWATTANACHIP PLLC
11 S. 12th Street, Suite 300C
Richmond, VA 23219
Telephone: (804) 500-0301
Facsimile: (804) 500-0309
shaney@haneyphinyo.com



Tyson C. Langhofer
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
Email: tlanghofer@ADFlegal.org