IN THE
SUPREME COURT OF VIRGINIA

Record No. 211061

PETER VLAMING,
Appellant,

v.

WEST POINT SCHOOL BOARD, et al.,
Appellees.

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLANT

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May 23, 2022

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"No State has more jealously guarded and preserved the questions of religious belief and religious worship as questions between each individual man and his Maker than Virginia." *Jones v. Commonwealth*, 185 Va. 335, 343 (1946). Pioneering guarantees of free exercise have been enshrined in Virginia's Constitution since 1776 and formed the basis for the religious-freedom provisions of the U.S. Constitution. The Commonwealth's interest in securing the religious liberty of its citizens against interference or penalty from any government remains as strong today as it was when those provisions were adopted more than 200 years ago.

Virginia's broad protections of its citizens' religious liberty—more extensive than the protections provided by the federal Constitution—are a product of Virginia's pluralistic origins and tradition of equal opportunity for its citizens regardless of their beliefs. Thus, Virginia's Constitution acknowledges the fundamental truth that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience" and provides that no one "shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." Va. Const. art. I, § 16. Specifically, the Constitution protects Virginia's citizens' "civil capacities" from being diminished, enlarged, or otherwise affected because of their religious opinions or beliefs. *Id.*

The West Point School Board and the other defendants (collectively, the School Board) terminated Peter Vlaming's employment as a public-school teacher because he declined to express personal agreement with a message contrary to his deeply held religious beliefs. By punishing him for refusing to violate the dictates of his religion, the School Board penalized Vlaming in his civil capacity as a teacher because of his religious beliefs.

This brief addresses the history and scope of Virginia's broad statutory and constitutional protections of religious exercise. This Court has not yet interpreted the Virginia Religious Freedom Restoration Act, nor has it defined the scope of the Virginia Constitution's free-exercise right. To assist the Court in construing Virginia's statutory and constitutional protection of these fundamental rights, this brief sets forth the Commonwealth's understanding of the historical development and broad scope of the statutory and constitutional provisions at issue.

For these reasons and those discussed further below, the Commonwealth urges this Court to reverse the circuit court's judgment and hold that Virginia's Constitution and Code forbid the government from forcing its citizens to express personal agreement with messages contrary to their deeply held religious beliefs.

STANDARD OF REVIEW

The Commonwealth adopts the standard of review set forth in Vlaming's brief.

ARGUMENT

I. The Virginia Religious Freedom Restoration Act forbade the School Board to fire Vlaming because of his religious objection to the School Board's pronoun-usage rule

The 2007 General Assembly, following in the footsteps of Virginia's founding fathers, enacted the Virginia Religious Freedom Restoration Act (VRFRA) by a broad, bipartisan consensus. See Code § 57-2.02. Under VRFRA, the government may not infringe upon the free exercise of a person's religious beliefs unless it demonstrates that the imposition is essential to further a compelling government interest and is the least restrictive means of furthering that interest. Code § 57-2.02(B).

Vlaming's complaint set forth a VRFRA claim sufficient to survive demurrer. The School Board has at this stage of the litigation failed to demonstrate that requiring Vlaming to use a student's preferred pronouns advances a compelling interest in complying with federal prohibitions on discrimination. The School Board also has failed to show that it has used the least restrictive means necessary to vindicate its purported compliance interest by imposing the requirement on Vlaming rather than, for example, accepting Vlaming's proposed accommodation of using the student's name instead of a pronoun. This Court should therefore reverse and remand for full consideration of Vlaming's VRFRA claim.

A. A bipartisan supermajority of the General Assembly enacted VRFRA to expand and entrench Virginia's protections for religious liberty

For decades, the U.S. Supreme Court enforced a rigorous understanding of the First Amendment Free-Exercise Clause under which government intrusion on the exercise of one's religion had to survive strict scrutiny. See, *e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Under this stringent standard, if a government policy substantially burdened an individual's religious exercise, then the government was required to show that (1) the burden was necessary to achieve a compelling government interest and (2) the government had employed the least restrictive means in pursuing that compelling interest. *Sherbert*, 374 U.S. at 406–10. A governmental intrusion that failed on either of these points was an unconstitutional infringement of First Amendment free-exercise rights.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Supreme Court abandoned the *Sherbert* framework and held that a government policy substantially burdening the free exercise of religion was not subject to strict scrutiny so long as the policy was neutral with regard to religion and generally applicable. See *Smith*, 494 U.S. at 879, 885. The *Smith* decision immediately sparked bipartisan opposition in Congress. By a unanimous vote in the House of Representatives and a 97-to-3 vote in the Senate, Congress enacted the Religious Freedom

Restoration Act (RFRA), which President Clinton signed into law. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat 1488 (codified as 42 U.S.C. § 2000bb). Congress intended RFRA to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

After the Supreme Court held that the federal RFRA did not apply to the States, see *City of Boerne v. Flores*, 521 U.S. 507, 534–36 (1997), the General Assembly joined the legislatures of nearly half of the States in adopting—on a wide, bipartisan basis—its own version of RFRA. See Paul Baumgardner & Brian K. Miller, *Moving from the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections*, 82 Alb. L. Rev. 1385, 1392–93 (2019). VRFRA began as House Bill 3082 in the 2007 General Assembly session and generally tracked the language of the federal RFRA. The bill provided that "no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability," then provided an exception if the government could "demonstrate[]" that application of the burden on the person is "(i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest." H.B. 3082

(introduced), Va. Gen. Assem. (Reg. Sess. 2007), https://tinyurl.com/2xkdbnys. These core provisions remained unchanged throughout the legislative process.

H.B. 3082 passed the House with over a two-thirds majority. H.B. 3082, Va. Gen. Assem. (Reg. Sess. 2007), https://tinyurl.com/3yns7x4s. Senator John Edwards proposed several amendments that would have reduced the government's burden of justifying an imposition on free exercise:

- striking the word "essential" in the phrase "essential to further a compelling government interest,"
- striking the clear-and-convincing-evidence standard from the definition of "demonstrates," leaving it to mean merely meeting "the burdens of going forward with the evidence and of persuasion,"
- striking the definition of "substantially burden" in its entirety, and
- replacing the requirement of demonstrating that a burden is "essential to further" a compelling government interest with the less rigorous showing that the burden "is in furtherance of" a compelling government interest.

H.B. 3082 (Senate amendments rejected), Va. Gen. Assem. (Reg. Sess. 2007), https://tinyurl.com/yznsujx8. Each of these proposed amendments was either withdrawn or defeated, and the legislation—with minor other amendments—passed the Senate and House. *Id.*

Governor Kaine proposed minor amendments consolidating the free-exercise analysis into a single subsection without changing its substance and inserting sub-

section (E), providing that "[n]othing in this section shall prevent any governmental institution or facility from maintaining health, safety, security or discipline." H.B. 3082 (Governor's recommendation), Va. Gen. Assem. (Reg. Sess. 2007), https://tinyurl.com/24zau8wf. These recommendations proved uncontroversial; the Senate adopted them unanimously and the House concurred by a 94-to-3 vote. H.B. 3082, Va. Gen. Assem. (Reg. Sess. 2007), https://tinyurl.com/3yns7x4s. VRFRA became law on July 1, 2007. 2007 Acts ch. 889, https://tinyurl.com/23bd42jk.

VRFRA provides that the government may not

> substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.

Code § 57-2.02(B). The statute defines key elements of this standard. "Exercise of religion" means religious exercise under Article I, § 16 of Virginia's Constitution, the federal First Amendment, or the Virginia Statute for Religious Freedom. Code § 57-2.02(A); see *infra* Part II. The government "substantially burdens" free exercise of religion when it "inhibit[s] or curtail[s] religiously motivated practice." Code § 57-2.02(A). Despite the proposed amendments that would have weakened the government's burden, "demonstrates" still means that the government must meet its "burdens of going forward with the evidence and of persuasion" by "clear

and convincing evidence." *Id.* This requirement both inverts the ordinary burden of proof in civil litigation by placing it on the defendant rather than the plaintiff and elevates that burden from the preponderance-of-the-evidence to the much higher clear-and-convincing-evidence standard. See *Commonwealth v. Allen*, 269 Va. 262, 275 (2005) ("Clear and convincing evidence . . . [is] 'more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.'" (quoting *Fred C. Walker Agency, Inc. v. Lucas*, 215 Va. 535, 540–41 (1975))).

B. VRFRA prohibits government actions like those alleged here

Vlaming's complaint states a claim under VRFRA sufficient to survive demurrer. See *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013) ("The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted."). Although this Court has not previously interpreted VRFRA, it and the Court of Appeals have considered similar analyses under the federal RFRA and First Amendment that, together with VRFRA's clear definitions and other judicial interpretations of the federal RFRA, guide application of VRFRA's free-exercise protections.

1. The School Board's actions imposed a substantial burden on Vlaming's free exercise of religion

The government imposes a substantial burden on the free exercise of religion when it "inhibit[s] or curtail[s] a religiously motivated practice." Code § 57-

2.02(A). No Virginia court has yet interpreted VRFRA's restrictive definition of "substantial burden."[1] Nevertheless, reference to judicial interpretation of the federal RFRA's more lenient definition of "substantial burden" is instructive. For instance, the Court of Appeals has held that the government imposes a substantial burden on religion under the federal RFRA when it "compels a party to affirm a belief they do not hold." *Horen v. Commonwealth*, 23 Va. App. 735, 745 (1997); see also *Ballweg v. Crowder Contracting Co.*, 247 Va. 205, 213–14 (1994) (holding that government action forcing a person "to choose between fidelity to religious belief and employment" imposes a substantial burden on First Amendment free-exercise rights (quoting *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 832 (1989))). The U.S. Supreme Court similarly has held that the government substantially burdens religious exercise under the federal RFRA by requiring someone to either "engage in conduct that seriously violates [his or her] religious beliefs" or

[1] A federal district court previously interpreted the meaning of "substantial burden" under VRFRA. *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418 (E.D. Va. 2020). But it relied on an Oklahoma intermediate court's interpretation of the Oklahoma RFRA, which in turn relied on a decades-old Tenth Circuit case interpreting the federal RFRA. *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003) (citing *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995)). And the district court did so without briefing from the Commonwealth while denying an *ex parte* request for a temporary restraining order. This Court need not follow the district court's attenuated definition of "substantial burden" in this case.

face economic consequences. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014).[2]

Vlaming alleges that the School Board has substantially burdened his free exercise. First, he alleges that his "sincerely held religious beliefs prohibit him from using male pronouns to refer to a female and *vice versa*." JA 32 (Compl. ¶ 268). Declining to express a view in public that is contrary to one's religion is an exercise of religion within the meaning of the federal and Virginia constitutions. See, *e.g.*, *Smith*, 494 U.S. at 875, 877 ("exercise of religion" is "religiously motivated conduct," including "the performance of (or abstention from) physical acts");

[2] Other federal courts of appeals have adopted similar definitions. See, *e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013) ("At a minimum, a substantial burden exists when the government compels a religious person to 'perform acts undeniably at odds with fundamental tenets of his religious beliefs.'" (quoting *Yoder*, 406 U.S. at 218)); *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (defining "substantial burden" to include forcing "individuals . . . to choose between following the tenets of their religion and receiving a governmental benefit"); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (a substantial burden is "one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,' or one that forces a person to 'choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'") (citations omitted); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[A] substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'") (citation omitted).

Sherbert, 374 U.S. at 403 (the exercise of religion entails "conduct motivated by religious principles").[3]

Second, Vlaming has alleged a substantial burden on that exercise. In *Sherbert*, for example, the plaintiff was fired for refusing to work on "the Sabbath Day of her faith." 374 U.S. at 399. The state refused unemployment benefits to the plaintiff on the ground that she lacked good cause for having failed to accept work. *Id.* at 399–401. The Supreme Court held that this condition imposed a substantial burden on the plaintiff's religious exercise because it forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Similarly, in *Ballweg*, this Court invoked *Sherbert* to hold that denying worker's compensation benefits to an injured worker because he refused to work on his religion's holy day imposed a substantial burden on the exercise of religion. 247 Va. at 213–14.

As in *Sherbert* and *Ballweg*, the School Board put Vlaming to a choice between following his religious beliefs and a government benefit (his employment as a teacher). The plaintiffs in *Sherbert* and *Ballweg* adhered to religions that forbade

[3] Although the religious belief must be sincerely held, neither courts nor the government may dispute the truth or substantiality of the belief or its importance to the believer. See *Hernandez*, 490 U.S. at 699; *Thomas v. Review Bd. of the Indiana Empl. Sec. Div.*, 450 U.S. 707, 714 (1981).

them from working on Saturdays, and each was denied government benefits because they chose to live consistently with their religious precepts. *Sherbert*, 374 U.S. at 400–01; *Ballweg*, 247 Va. at 207–08. In both cases, the courts held that it was a substantial burden on religious exercise to put the plaintiffs to the choice of either following their religious beliefs or forfeiting a government benefit. *Sherbert*, 374 U.S. at 403–04; *Ballweg*, 247 Va. at 210–11. The same is true in this case. Vlaming alleged that his "conscience and religious practice prohibits him from . . . referring to a female as a male by using an objectively male pronoun." JA 11 (Compl. ¶ 83). The School Board put Vlaming to the choice of following his religious beliefs or forfeiting a government benefit. That choice constitutes a substantial burden on Vlaming's free exercise.

2. The School Board lacked a compelling government interest justifying its substantial burden

Second, VRFRA requires the School Board to show that its substantial burden on Vlaming's religious exercise is "essential to furthering a compelling government interest." Code § 57-2.02(B). The General Assembly's rejection of amendments that would have made *any* government interest sufficient to justify a burden on free exercise, or that would have permitted a substantial burden merely "in furtherance of" a compelling interest, makes clear that VRFRA requires a compelling-

interest test at least as stringent as that articulated in *Sherbert* and *Yoder* and incorporated in the federal RFRA. See *Ballweg*, 247 Va. at 214 (quoting *Yoder*, 406 U.S. at 215); *Horen*, 23 Va. App. at 748 (quoting *Sherbert*, 374 U.S. at 406).

The School Board bears the burden of showing by clear and convincing evidence that forcing Vlaming to choose between his religious beliefs and his employment is essential to further a compelling interest. On demurrer and in opposition to Vlaming's petition for appeal, the School Board argues that its compelling interest in preventing discrimination against students, and in complying with nondiscrimination laws such as Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–88, and the Virginia Human Rights Act (VHRA), Code §§ 2.2-3900–02, justify its burden on Vlaming's religious exercise, JA 114–16; BIO 12–13. Notably, the School Board's argument on this aspect of the VRFRA analysis focuses solely on whether it has a compelling interest. It largely ignores VRFRA's requirement that the government's burden on religious exercise be "*essential to further*" the purported compelling interest. Code § 57-2.02(B) (emphasis added); see *Jones v. Conwell*, 227 Va. 176, 181 (1984) ("[I]t is well established that every act of the legislature should be read so as to give reasonable effect to every word . . . ."). Nevertheless, neither interest asserted by the School Board rises to the level needed to overcome VRFRA's high bar.

The School Board makes much of its interest in preventing discrimination, and rightly so. Governments, including school boards, have an important interest in preventing unlawful discrimination. See *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (assuming without deciding that compliance with federal antidiscrimination law was a compelling state interest). But the School Board has articulated its nondiscrimination rationale at a high level of generality. It argues generally that schools have a compelling interest in preventing sex discrimination against students. JA 114–16. "RFRA, however, contemplates a 'more focused' inquiry: It requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 573 U.S. at 726 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)).

To do that, the Court must "loo[k] beyond broadly formulated interests" and "'scrutiniz[e] the asserted harm of granting specific exemptions to particular claimants'—in other words, look to the marginal interest in enforcing" the challenged policy to the particular claimant. *Id.* at 726–27 (quoting *O Centro*, 546 U.S. at 431). The School Board must therefore prove by clear and convincing evidence that its particular interest in requiring Vlaming to use a specific student's preferred pronouns in the classroom is compelling. See *Holt v. Hobbs*, 574 U.S. 352, 363

(2015) (requiring government to demonstrate that its general interest in prison security was compelling with regard to a specific prisoner's requested religious exception).

At this stage, the School Board has not carried this burden. The School Board argued that terminating Vlaming furthered its generalized interest in combatting discrimination. JA 117–18. But even if Vlaming's religiously motivated refusal to use a student's preferred pronouns could constitute unlawful sex discrimination, the School Board would have to demonstrate that its interest in burdening Vlaming's religious exercise was compelling in the particular circumstances of this case—for example, by showing that Vlaming's specific conduct threatened the peace, safety, or good order of the school. See *infra* Part II.B.2; see also Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 Harv. J. L. & Gender 103, 121–22 (2015) (noting that RFRA's requirement that government demonstrate its compelling interest in enforcing generally applicable law as to the particular individual religious-freedom claimant "preserve[s] the law's core purposes while also protecting religious freedom"). The School Board has provided nothing by which the strength of its purported interest could be assessed in the circumstances of this case. See *Hobby Lobby*, 573 U.S. at 726. That alone is sufficient to reverse the dismissal.

The School Board also identifies a concern that terminating Vlaming was necessary to comply with Title IX. The School Board argues that Title IX forbids discrimination on the basis of gender identity, BIO 12; JA 98, 116, 205, 208 (citing *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020)), and that using any identifier other than a student's preferred pronouns constitutes actionable discrimination under Title IX, BIO 19; JA 108, 120–23, 194, 203. Compliance with federal antidiscrimination statutes may be a compelling state interest. See *Bethune-Hill*, 137 S. Ct. at 801; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in part and dissenting in part) ("We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling state interest."); see also *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (characterizing a state actor's interest in "complying with its constitutional"—as opposed to statutory—"obligations" as "compelling").[4] But, as stated by the School Board, this formulation suffers from the same overgeneralization problem as its nondiscrimination interest.

[4] It goes without saying that state-law religious-liberty protections cannot exempt an individual from complying with the requirements of the U.S. Constitution, like those contained in the Fourteenth Amendment, or of federal laws with preemptive effect, like the Civil Rights Act of 1964's prohibition on employment discrimination.

A generalized "reasonable concern" about Title IX liability, standing alone, cannot justify substantially burdening an individual's exercise of religion.[5] Cf. *Ricci v. DeStefano*, 557 U.S. 557, 581–82, 584 (2009) (requiring government to provide "a strong basis in evidence" that a race-based policy that otherwise violates Title VII is necessary to avoid Title VII disparate-impact liability); *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (requiring "a strong basis in evidence of the harm being remedied" rather than "the government's mere assertion that the remedial action is required" when a state governmental entity seeks to justify, as a remedy for past discrimination, race-based policies that would otherwise violate the Equal Protection Clause). Instead, even assuming that compliance with Title IX is a compelling governmental interest under VRFRA, the School Board must show by clear and convincing evidence, Code § 57-2.02(A), that the application of its policy was essential to vindicating its interest in Title IX compliance not as a general matter, but with regard to Vlaming's specific conduct and his requested exemption, see *Hobby Lobby*, 573 U.S. at 726–27.

At this stage of the litigation, the School Board has not made such a showing. For one thing, the only U.S. court of appeals to have directly confronted the

[5] Significantly, sex-based classifications are subject only to intermediate scrutiny, a lower standard than the far stricter scrutiny that protects religious exercise under VRFRA and Virginia's constitutional free-exercise protections. See *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (establishing intermediate scrutiny for sex-based classifications); *infra* Part II.

question has held that Title IX is not implicated by an instructor's refusal to use a student's preferred pronouns in the classroom. *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) ("[T]he [government]'s purported interest in complying with Title IX is not implicated by [the instructor's] decision to refer to [the student] by name rather than [the student]'s preferred pronouns.").[6] For another, successive administrations have disagreed strongly about whether Title IX applies to pronoun usage, compare U.S. Dep't of Educ., Interpretation, 86 FR 32637 (June 22, 2021) (expressing the Biden Administration's view that Title IX covers pronoun usage), with U.S. Dep't of Educ., Dear Colleague Letter (Feb. 22, 2017), https://tinyurl.com/237b7knr (expressing the Trump Administration's contrary view)—further undermining any argument that a government interest was implicated by Vlaming's specific conduct.[7]

[6] The School Board has not identified any case holding that refusal to use a student's preferred pronouns in the classroom constituted sex discrimination under Title IX—much less where the refusal was motivated solely by a deeply held religious belief.

[7] The disagreement among successive administrations highlights another argument against the School Board's purported interest. Title IX is an exercise of Congress's Spending Clause power. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). A recipient of funds under Title IX is subject to liability only where Congress "sp[oke] with a clear voice" in imposing the obligation on the recipient. *Id*. As the disagreement among administrations makes clear, Congress has not spoken with a "clear voice" on whether a teacher's refusal to use a student's preferred pronouns constitutes sex discrimination under Title IX.

Even if Vlaming's conduct could give rise to Title IX liability, the relevant question would be whether the conduct in question was "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633, 650–53. Answering that question requires a fact-intensive inquiry into the purpose, severity, and extent of the alleged conduct. See *Jennings v. University of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007). At this stage of the litigation, in which this Court "accept[s] as true facts properly pleaded . . . and all reasonable and fair inferences that may be drawn from those facts," *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554 (2003), the School Board has not demonstrated by clear and convincing evidence that firing Vlaming was essential to its interest in avoiding Title IX liability.[8]

[8] Moreover, even if the failure of a teacher to use a student's preferred pronouns constitutes sex discrimination under Title IX, the strength of the School Board's interest in substantially burdening Vlaming's religious exercise in order to comply with Title IX would depend on whether Congress intended to displace statutory and constitutional protections for religious exercise. *Wyeth v. Levine*, 555 U.S. 555, 565 ("'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))); *Kinsey v. Virginia Elec. & Power Co.*, 300 Va. 124, 131 (2021) (similar). The absence of a preemption provision in Title IX, and the special solicitude Congress showed for religious institutions in that statute, see, *e.g.*, 20 U.S.C. § 1681(a)(3) (exempting religious organizations from Title IX insofar as application of Title IX "would not be consistent with the religious tenets of such organization"); *id.* § 1687 (same); 34 C.F.R. § 106.12 (implementing Title IX's religious exemption), suggest that Congress has not expressed a "clear and manifest purpose" of superseding state religious-liberty protections, *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The School Board also suggests that substantially burdening Vlaming's religious exercise was necessary to comply with the VHRA's prohibition against sex discrimination. BIO 19. But at the time that the School Board terminated Vlaming's employment, the VHRA provided for private causes of action only in cases of employment discrimination involving small employers—not for parents or students against schools. See Code § 2.2-3903(A)–(C) (repealed by Acts 2020, ch. 1140, cl. 2.) (providing that the only private causes of action authorized by the VHRA are employment discrimination claims); see also *Berner v. Mills*, 265 Va. 408, 413 (2003) (It is a "fundamental principle[] of statutory construction that . . . a statute is always construed to operate prospectively unless a contrary legislative intent is manifest."). Moreover, the VHRA prohibited "unlawful discrimination because of . . . religion" no differently than it prohibited sex discrimination. See Code § 2.2-3900(B)(1) (2019). The School Board cannot interpose as a compelling interest compliance with a statute that prohibited the very conduct Vlaming alleges in this case.

3. The School Board did not employ the least restrictive means of pursuing its asserted interest

The School Board must also demonstrate that the substantial burden it imposed on Vlaming was "the least restrictive means of furthering" a "compelling governmental interest." Code § 57-2.02(B). To meet this burden, the School Board

must establish by clear and convincing evidence that no other less restrictive option was available to further its interest. Code § 57-2.02(A); *Horen*, 23 Va. App. at 749–50.

"The least-restrictive means standard is exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. Under it, the government must "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Hobby Lobby*, 573 U.S. at 728. This is a searching inquiry; merely stating that no other option was available under existing policy and practice is inadequate. See *Horen*, 23 Va. App. at 749–50. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Hobbs*, 574 U.S. at 365 (quoting *United States v. Playboy Entertainment Grp.*, 529 U.S. 803, 815 (2000)).

Vlaming alleges that "he had been accommodating the student by using [the student's] new preferred name and that he did not refer to the student in question with female pronouns in class," but that the assistant principal told him "that his non-use of pronouns was not enough: that he should use male pronouns or his job could be at risk." JA 10 (Compl. ¶¶ 77–78). Vlaming has therefore adequately alleged a plausible less-restrictive alternative, which is enough to survive demurrer.

See *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122 (2006) (test for review of a sustained demurrer is "whether the [complaint] alleged sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law").[9]

4. The School Board's construction of VRFRA would vitiate the statute and is inconsistent with the General Assembly's understanding of it

The foregoing analysis, the School Board contends, is a futile exercise because subsection (E) of VRFRA, Code § 57-2.02(E), renders the whole statute inapplicable to these facts. This Court should reject the School Board's construction because it violates fundamental principles of statutory interpretation and ignores the original understanding of that proviso.

"When interpreting statutes, courts 'ascertain and give effect to the intention of the legislature.'" *Boynton v. Kilgore*, 271 Va. 220, 227 (2006) (quoting *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 547 (2003)). "That intent is usually self-evident from the words used in the statute," *id.*, but if "a literal interpretation would

[9] Vlaming did not even need to allege the availability of a less-restrictive alternative, because VRFRA requires *the School Board* to show by clear and convincing evidence that less restrictive means *are not* available. Code § 57-2.02(A), (B); see *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022) (Under RLIUPA, once a plaintiff has shown a substantial burden, "the burden flips and the government must 'demonstrate[] that imposition of the burden on that person' is the least restrictive means of furthering a compelling governmental interest."). The School Board has not even tried to make such a showing in this litigation.

result in manifest absurdity" or the statute "is subject to more than one interpretation, [this Court applies] the interpretation that will carry out the legislative intent behind the statute," *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007).

The relevant language provides that nothing in VRFRA "shall prevent any governmental institution or facility from maintaining health, safety, security or discipline." Code § 57-2.02(E).[10] Every conceivable government interest, defined broadly enough, sounds in at least one of those four exceptions. Thus, the School Board's reading of subsection (E) neuters the rest of the statute by excluding nearly every government function from its reach.

This reading beggars belief. As noted above, the General Assembly adopted subsection (E) unanimously—save for three delegates—when it concurred in the governor's recommendations. See *supra* Part I.A. The fact that the governor's recommendation to insert subsection (E) did not prompt legislative uproar, or at least result in a much closer vote on the recommendations, strongly indicates that the legislature did not believe the amendment was a broad carve-out that would gut the

[10] It is unclear whether the School Board qualifies as a "government institution or facility," which VRFRA does not define, in contrast to "government entity," which the legislature defined, and which plainly includes the School Board. Code § 57-2.02(A) (defining "Government entity" to include "any political subdivision of the Commonwealth").

bill. After all, the Senate unanimously adopted the governor's recommendation *after* it narrowly rejected Senator Edwards's proposed amendments—amendments that seem mild compared to how the School Board reads subsection (E). Adopting the School Board's view against this legislative background and reasonable judicial interpretation would create a manifest absurdity and contravene established principles of statutory construction. See *Conyers*, 273 Va. at 104.

A better reading is that subsection (E) is a narrow exception designed to prevent VRFRA suits from inhibiting urgent and temporary government action in rare emergencies. *See Lighthouse Fellowship Church*, 458 F. Supp. 3d at 440 (subsection (E) "appears to contemplate a situation . . . where the Governor must act swiftly to protect the health and safety of Virginia residents, and such imperative actions might incidentally impact a religiously motivated practice.").

* * *

The circuit court erred in dismissing Vlaming's VRFRA claim. The School Board's conduct is precisely the sort of government overreach the General Assembly enacted VRFRA to combat. But VRFRA is only the latest chapter in Virginia's centuries-long history of vigorously protecting its citizens' religious exercise. As the following discussion demonstrates, Virginia's constitutional protections for free exercise are broader than those of the federal First Amendment and provide another avenue by which Vlaming may vindicate his religious liberty.

II. The School Board's decision to fire Vlaming violated Virginia's robust constitutional free-exercise protections, which reflect the Commonwealth's pioneering history of defending religious freedom

"The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated, and nowhere have they been more scrupulously observed." *Reid v. Gholson*, 229 Va. 179, 187 (1985). The Virginia Constitution's religious liberty provision is far "[l]onger and more inclusive than its federal counterpart," embodying a strict protection of Virginians' right to free exercise indicative of "Virginia's historic approach to questions of church and state since the time of Madison." 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 55 (1974); see also Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 410–11 (1986) ("The most significant developments" regarding religious liberty "prior to the [f]ederal constitution occurred in Virginia . . . . In contrast to the lengthy battle in Virginia, the debates about religion during the drafting of the federal constitution were brief and uninformative.").

In contrast to the First Amendment, which in few words forbids Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. amend. I, Virginia's Constitution sets forth a broad theory of religious freedom rooted in the premise that "religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed

only by reason and conviction, not by force or violence," Va. Const. art. I, § 16. "[T]herefore," the Constitution provides,

> all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . . No 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; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. . .

Id. This language "brings together two of the most classic statements of religious liberty in American history, one drafted by James Madison, the other by Thomas Jefferson." The Constitution of Virginia: Commission on Constitutional Revision, Report of the Commission on Constitutional Revision 100 (1969).

The history of these two statements—language Madison urged during Virginia's first constitutional convention to "guarantee[] the free exercise of religion . . . in place of a weaker provision drafted by George Mason," and language derived from Jefferson's Bill for Establishing Religious Freedom—demonstrates that Virginia's free-exercise protections were originally understood to preserve individual religious liberty in virtually all circumstances. *Id.* at 100–01. These protections have remained unchanged since the Founding and are broader than those afforded by the First Amendment.

The School Board's decision to fire Vlaming for refusing to express a belief he does not hold, and that is contrary to his faith, transgresses Virginia's longstanding constitutional protections. Because Vlaming stated a Virginia constitutional claim adequate to survive demurrer, this Court should reverse the dismissal of his claim.

A. Virginia's constitutional framers provided an inalienable right to free exercise of religion that includes the right to exemptions from otherwise generally applicable laws

After declaring independence from Great Britain in May 1776, the Fifth Virginia Convention turned to drafting a Constitution and Declaration of Rights for the newly independent state. Thomas E. Buckley, Establishing Religious Freedom: Jefferson's Statute in Virginia 47 (2013). Patrick Henry, a radical and outspoken defender of the rights of religious minorities in North America, urged the Convention to adopt a declaration guaranteeing individual religious liberty. *Id.* at 47–48. A committee including Henry, James Madison, and Edmund Randolph undertook to draw up the Declaration of Rights—including what would become the sixteenth article guaranteeing the free exercise of religion. *Id*.

George Mason drafted the original version of the sixteenth article. *Id.*; see also Robert A. Rutland, George Mason: Reluctant Statesman 67 (1961). Mason, like many of America's framers, drew inspiration from the political philosophy of

John Locke, including Locke's views on the intersection of state power and religious exercise. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430–35 (1990) [hereinafter McConnell, *Origins*] (discussing Locke's opinions on religious exercise and influence on the founding generation).

Locke's views on religious liberty were complex, but in general, he argued for toleration, rather than full religious liberty, as a way out of the cycle of religious bloodshed that had plagued the seventeenth century. John Locke, A Letter Concerning Toleration 40–41 (William Popple, trans. 1689), https://tinyurl.com/2p8rpsw5 (blaming "the refusal of toleration to those that are of different opinions" for "the bustles and wars that have been in the Christian world upon account of religion"); see also Daniel L. Dreisbach, *George Mason's Pursuit of Religious Liberty in Revolutionary Virginia*, 108 Va. Mag. Hist. & Bio. at 5, 13 (2000) (explaining that "religious toleration stands in contrast to religious liberty" because the "former . . . is always a revocable grant of the civil state rather than a natural, unalienable right"). To achieve toleration, Locke sharply distinguished between civil and religious authority. The purpose of civil authority was to secure "each man's private possessions" and "the peace, riches, and public commodities of the whole people." Locke, *supra*, at 32. The purpose of religion was "the public worship of God and, by means thereof the acquisition of eternal life." *Id.* at 11. And

although "[a] good life" and certain "[m]oral actions" could implicate both civil authority and religion, individual conscience was safe so long as each authority remained in its sphere. *Id.* at 31.

Locke recognized, however, that there may be times of disagreement over whether some issue or act lay within the civil or religious jurisdiction. Where civil power exceeded "the verge of [its] authority" and legislated on matters properly committed to individual conscience, Locke argued that "obedience is due, in the first place, to God, and afterwards to the laws" such that the individual had no obligation to obey. *Id*. at 33. But that naturally led to the question: what if the civil magistrate believes that the law is properly directed toward the public good, and the individual believes it improperly invades a matter left to private conscience? *Id.* at 34. "God," Locke answered, "is the only judge in this case." *Id*. In practice, then, the civil authority was the arbiter of the extent of its own power, and of the extent of the protection afforded to individual conscience. *Id.*

The Lockean conception of toleration was therefore a nondiscrimination principle. McConnell, *Origins*, *supra*, at 1435. The government could not single out religion for mistreatment. But religious dissenters were not entitled to exemptions from laws that interfered with their religious exercise, since their right to exercise their religion depended entirely on the toleration by the civil authorities.

Mason's draft of the sixteenth article "went further than any previous declaration in force in Virginia," Dreisbach, *supra*, at 13, but retained Locke's tolerationist deference to civil authority, providing that "all Men should enjoy the fullest Toleration in the Exercise of Religion . . . unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safe-ty of Society, or of Individuals," Howard, *supra*, at 290. Madison, however, objected to Mason's draft, and disputed its Lockean underpinnings. See McConnell, *Origins*, *supra*, at 1431 ("The ways in which American advocates of religious freedom departed from Locke . . . are as significant as the ways in which they followed him.").

First, Madison objected to the word "toleration." To Madison, toleration meant "a system in which there was an established Church, and where a certain liberty of worship is granted, not of right, but of grace . . . and the exception to this granted liberty . . . in the hands of the dominant power, might be easily so construed as to impair, if not annul, the grant." 1 William C. Rives, History of the Life and Times of James Madison 140–41 (1859). True religious liberty, by contrast, was not "a mere privilege that the civil state could grant or revoke at its pleasure," but "rather . . . an equal, indefeasible right wholly exempt from the cognizance of the civil state and subject only to the dictates of a free conscience." Dreisbach, *supra*, at 12–13. Madison thus proposed replacing the toleration phrase with "'all

men are equally entitled to the full and free exercise' of religion," thus "substituting the language of entitlement for toleration" and "sound[ing] more of a natural right than did Mason's version." Howard, *supra*, at 290 (quoting 1 Papers of James Madison 174 (William T. Hutchinson & William M.E. Rachal eds., 2010)).

This change reflected Madison's departure from Lockean principles. To Madison, "the right of religious exercise was too important to be cast in the form of a mere privilege allowed by the ruling civil polity and enjoyed as a grant of governmental benevolence"; it was instead a "fundamental and irrevocable right, possessed equally by all citizens, that must be placed beyond the reach of civil magistrates." Dreisbach, *supra*, at 13. The Convention "readily exchanged" Mason's toleration language for Madison's far more expansive view, without notable objection from Mason. Dreisbach, *supra*, at 16 (quoting Letter from James Madison to George Mason (Dec. 27, 1827), https://tinyurl.com/jppfs899). Madison's language protecting free exercise as a fundamental, inalienable right is still enshrined in Virginia's Constitution today.

Second, Madison took issue with the clause permitting the government to override an individual's exercise of religion if that exercise disturbed the peace, happiness, or safety not only of society, but also of individuals. Extending this limitation to individuals was arguably broader than even the Lockean view in which the government could interfere with an individual's religious exercise only when it

clashed with an exercise of civil authority carried out "for the public good." Locke, *supra*, at 33; see also Dreisbach, *supra*, at 16. Moreover, the inclusion of the word "Happiness" alongside "Peace" and "Safety" is "a standard that would encompass virtually all legitimate forms of legislation," as "'happiness' is a term as compendious as all of public policy." McConnell, *Origins*, *supra*, at 1463.

Madison instead suggested far narrower circumstances in which government interests could override an individual's free exercise. He proposed replacing Mason's language with language providing that the government could not impinge upon an individual's free exercise of religion "[u]nless the preservation of equal liberty and the existence of the State are manifestly endangered." Dreisbach, *supra*, at 15 (quoting 1 Papers of James Madison, *supra*, at 171). In stark contrast to Mason's formulation, Madison's language created "a standard that only the most critical acts of government can satisfy." McConnell, *Origins*, *supra*, at 1463. Ultimately, the Convention rejected both formulations and "totally eliminated the clause qualifying religious exercise that is deemed a danger to the civil state." Dreisbach, *supra*, at 16.[11] The debate is illuminating, however, because "the debate

[11] As enacted, Article 16 of Virginia's 1776 Constitution read:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and there-

would have been irrelevant if either had thought the right to free exercise did not include a right to be exempt from certain generally applicable laws." *City of Boerne*, 521 U.S. at 556–57 (O'Connor, J., dissenting).

Subsequent developments in Virginia's law confirm that the right to free exercise in Virginia includes the right to individual exemptions from otherwise generally applicable laws. Adoption of Article 16 in the 1776 Constitution prompted "a torrent of petitions from clamoring religious dissenters demanding" an end to tax assessments supporting the established church, leading to a "tumultuous and divisive legislative struggle that gripped the Virginia legislature for a decade." Dreisbach, *supra*, at 18, 29; Buckley, *supra*, at 58–59. This struggle reached its climax in 1784–85, when the General Assembly considered a bill imposing a general assessment for the support of Episcopalian ministers. Dreisbach, *supra*, at 33; Sanford H. Cobb, The Rise of Religious Liberty in America 496–97 (1902). With the legislature set to vote on the bill in the November 1785 session, Madison embarked upon "a campaign of education" to sway public sentiment against the assessment

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> fore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Va. Decl. Rights art. XVI (1776), https://tinyurl.com/2jyh5zhz.

bill, which was antithetical to his progressive view that individual religious exercise "is exempt from the cognizance of both society and the state." H.J. Eckenrode, Separation of Church and State in Virginia: A Study in the Development of the Revolution 103, 105 (1910); Cobb, *supra*, at 497.

Madison drafted and circulated a *Memorial and Remonstrance Against Religious Assessments* opposing the bill by articulating his conception of the relationship between religion and the state. Referencing the protections enshrined in Article 16, Madison's *Remonstrance* argued that the free-exercise right is "precedent, both in order of time and degree of obligation, to the claims of Civil Society" such that "in matters of Religion, no man[']s right is abridged by the institution of Civil Society and . . . Religion is wholly exempt from its cognizance." 8 Papers of James Madison 299 (Robert A. Rutland & William M.E. Rachal eds., 1973). He went on to decry the bill as premised on the "arrogant pretension" that "the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy." *Id.* at 301. Madison's *Remonstrance* "proved effective in galvanizing antiassessment sentiment," Dreisbach, *supra*, at 35, "garner[ing] thousands of supportive signatures," McConnell, *Origins*, *supra*, at 1440. Although the *Remonstrance* was "the most eloquent and forceful," it was but one of a "torrent of signed petitions opposing the assessment plan." Dreisbach, *supra*, at 37; Buckley,

supra, at 60–61. The "weight of petitions settled the fate of" the assessment bill, which failed in committee after only brief consideration. Eckenrode, *supra*, at 113.

The *Remonstrance* demonstrated how removed from Lockean tolerationism Virginia was by 1785: mere nondiscrimination no longer provided remotely sufficient protection of religious exercise. Indeed, the assessment bill's defeat demonstrated the prevailing view in Virginia that the civil state was not entitled to deference in civil matters that implicated religious belief—a stark rejection of Locke's belief. Instead, the individual's religious beliefs were controlling.

"Emboldened by the demise of the general assessment plan, Madison brushed the dust off Jefferson's Bill for Establishing Religious Freedom," which had languished since Jefferson originally drafted it in 1777. Dreisbach, *supra*, at 37. Although Jefferson had sought passage of his bill in previous sessions, see *id.* at 23–25, by the time Madison's *Remonstrance* and antiassessment fervor had generated sufficient public support to enact it, Jefferson was in Europe serving as American minister to France, *id.* at 31. It was therefore Madison who "pushed [the bill] to passage by a comfortable margin" in 1786. *Id.* at 37.

Enacted as the Virginia Act for Establishing Religious Freedom and still codified at Code § 57-1, the Act "settled . . . the principle of religious freedom on the broadest possible basis." Cobb, *supra*, at 499. It provides in its recitations that "it is time enough for the rightful purposes of civil government, for its officers to

interfere, when principles break out into overt acts against peace and good order." Code § 57-1. This observation reveals much about the original public understanding of the scope of Virginia's free-exercise right, for if that right "did not extend to 'overt acts,'" as opposed to merely private beliefs, "the proviso[] would be unnecessary." McConnell, *Origins*, *supra*, at 1462. Indeed, this language makes sense "only if free exercise envisions religiously compelled exemptions from at least some generally applicable laws." *Id.* The Act then declared that

> no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

Code § 57-1. The operative language, including the express prohibition on government actions against an individual's civil capacity based on that person's religious beliefs, was incorporated into Virginia's Constitution of 1830 and now appears immediately after the Mason-Madison compromise language. Va. Const. art. I, § 16.

B. Virginia law, not imported federal practice, should govern Virginia constitutional free-exercise cases

1. In construing Article I, § 16, this Court should not follow the Supreme Court's interpretation of the federal First Amendment

Against this background, this Court should not look to *current* federal First Amendment jurisprudence for an analytical framework to consider claims brought under the Virginia Constitution's unique free-exercise provisions.

The Supreme Court held in *Smith* that a neutral and generally applicable law does not violate the First Amendment irrespective of how substantially it burdens an individual's free exercise. 494 U.S. at 878–82. Although a majority of the Supreme Court has called that decision into doubt, see *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., with whom Kavanaugh, J., joins, concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."); *id.* at 1924 (Alito, J., with whom Thomas, J., and Gorsuch, J., join, concurring in the judgment) ("*Smith* was wrongly decided."), it remains the law.

This Court has, at times, invoked the federal *Smith* framework when presented with free-exercise claims briefed under the federal standards. But none of those cases definitively settles whether *Smith* governs Virginia's free-exercise clause. In *Tran v. Gwinn*, for example, this Court used *Smith* to decide a land-use

case under both the Virginia and federal Constitutions. 262 Va. 572, 578–83 (2001). But neither party presented the Court with any arguments suggesting that the test for the Virginia free-exercise clause was different from that which applies to the First Amendment. The Court therefore had no occasion to consider it. See also *Cha v. Korean Presbyterian Church of Wash.*, 262 Va. 604, 610–612 (2001).

"[T]he tendency of state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution" poses "[a] grave threat to independent state constitutions." Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of Constitutional Law 174 (2018). Accordingly, this Court has recognized that when the Virginia Constitution provides greater protection of an individual liberty—especially "rights devalued in modern federal jurisprudence" like "religious liberty"—it must be enforced. *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 587 (2017) (McCullough, J., concurring) (citing Va. Const. art. I, § 16).

The well-documented history and broad textual sweep of Virginia's free-exercise provisions demonstrate that they require an analysis distinct from *Smith* and the federal First Amendment.

2. Article I, § 16 protects an individual's free exercise of religion except when the exercise is an overt act against public peace or good order

Virginia's Constitution contains no express state-interest exception to the individual right to free exercise. It contains no language at all that would authorize the government to interfere with an individual's free exercise of religion—on the contrary, it expressly incorporates the language from the Statute for Establishing Religious Freedom that prohibits the state from "affect[ing]" in any way an individual's "civil capacities" on account of "religious opinions or belief." Va. Const. art. I, § 16. One could argue from the provision's silence on when the state may override an individual's exercise of religion that no such circumstances exist.

But this is not the best reading of section 16's silence. The framers considered and debated two state-interest proposals. "The Mason proposal was more restrictive than that adopted by any state other than Delaware; the Madison proposal was more liberal than that adopted in any other state." Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?*, 39 Wm. & Mary L. Rev. 819, 845 (1998) [hereinafter McConnell, *Freedom*]. It is unlikely that, confronted with a choice between two extreme options, the Convention opted for an even more extreme approach by forbidding the State from interfering with an individual's exercise of religion under any circumstance. The far more probable reading of the Convention's silence is "that the state's interest must fall somewhere

between 'the peace, the happiness, or safety of society'—Mason's broad formulation—and 'manifest danger' to the 'preservation of equal liberty, and existence of the State'—Madison's more limited formulation." McConnell, *Origins*, *supra*, at 1463.

This reading is consistent with Jefferson's Statute enacted only a decade later. It provided that the "officers" of the "civil government" may "interfere" with an individual's exercise of religion only when that exercise "break[s] out into overt acts against peace and good order." Code § 57-1. That the General Assembly which adopted this language would have been intimately familiar with the debates over Virginia's first Constitution, see Howard, *supra*, at 289–92, is strong evidence that the peace-and-good-order formulation was consistent with the original understanding of the free-exercise protections now enshrined in Article I, § 16. It is thus fair to read Article I, § 16 as prohibiting the state from interfering with an individual's exercise of religion unless that exercise is an overt act against civil peace and good order. When an individual's free exercise is not an overt act against peace and good order but violates some other law, the individual is entitled to an exemption from the application of that law.

This reading of Article I, § 16 is also consistent with contemporaneous state and federal practice. The majority of the thirteen original States that adopted a state-interest proviso in their free-exercise clauses "opted for the terms 'peace' or

'safety.'" McConnell, *supra*, at 1463; see also *Fulton*, 141 S. Ct. at 1901–02 (Alito, J., concurring in the judgment) (noting a majority of states adopted the peace-and-safety formulation). Congress used a similar formulation in the free-exercise provision of the Northwest Ordinance of 1787. *Fulton*, 141 S. Ct. at 1902 (Alito, J., concurring in the judgment).

Virginia's actions following adoption of its broad constitutional promise of free exercise support reading Article I, § 16 to require religious exemptions. For instance, it exempted dissenters from the requirement to pay tithes to the established Anglican Church in 1776. McConnell, *Origins*, *supra*, at 1436; see also *Fulton*, 141 S. Ct. at 1906 (Alito, J., concurring in the judgment) (discussing Revolution-era exemptions from generally applicable laws Virginia granted to religious minorities). It exempted pacifist Quakers from military service. McConnell, *Origins*, *supra*, at 1468 & n.297. The Commonwealth's courts have also granted religious exemptions since at least 1855, when the Richmond Circuit Court held that the free-exercise right of a Catholic priest required the recognition of a priest-penitent privilege as "an exemption from the general common law rule compelling a witness to 'disclose all he may know' when giving testimony." *Fulton*, 141 S. Ct. 1909 (Alito, J., concurring in the judgment) (quoting *Commonwealth v. Cronin*, 2 Va. Cir. 488, 498 (1855)). By dint of its recognition of an expansive right to free exercise, Virginia embraced these religious exemptions.

The peace-and-good-order—or peace-and-safety—formulation is irreconcilable with *Smith*, which turns the First Amendment into a principle of antidiscrimination. Under *Smith*, the government may restrain the exercise of religion so long as it does so in a neutral and generally applicable way, and no one is entitled to religious exemptions from such a restraint. But the framers of the 1776 Constitution rejected mere nondiscrimination. Instead, the framers adopted a broad, inalienable right of free exercise of religion. Insofar as the government may interfere with that right at all, it may do so only if the exercise of religion is an overt act against peace and good order; all other forms of religious exercise are entitled to exemptions from laws that would restrain them.

3. The First Amendment doctrine prevailing when Article I, § 16 was re-ratified in 1971 also recognized exemptions from general laws

The text and history of Article I, § 16 make clear it was originally understood in 1776 to require religious exemptions from neutral laws in at least some circumstances. Even if the Court disagrees with this reading of the framing-era history, however, this Court should not follow *Smith* because the First Amendment doctrine prevailing in 1971 also recognized exemptions from general laws. Applying post-1971 First Amendment doctrine would effectively outsource the development of Virginia's law to the U.S. Supreme Court.

In Professor Howard's important *Commentaries* on the 1971 Constitution, he observed that "Virginia's courts, in interpreting section 16, follow the federal approach closely." Howard, *supra*, at 296. He defined the "federal approach" in the preceding paragraph as the one set out in *Sherbert*—"a 'compelling state interest' must support any legislation that indirectly inhibits religious practices." *Id.* (quoting *Sherbert*, 374 U.S. at 406–09). Professor Howard also cited *Yoder*, decided only a year after the Constitution's ratification, which stated *Sherbert*'s strict scrutiny standard in resounding terms: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215.

Thus, when Virginia ratified the Constitution in 1971, the First Amendment and Article I, § 16 alike were understood to exempt religious exercise from even neutral and generally applicable laws in the absence of a compelling government interest justifying the restraint. See *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 241 (4th Cir. 1984) ("Where free exercise rights, as measured by [the *Sherbert* and *Yoder*] tests, exist, the state is constitutionally obligated to accommodate them."). That pre-*Smith* practice should therefore guide this Court's understanding of Article I, § 16. *Smith* was decided nearly two decades *after* Virginia ratified its Constitution. The ratifying public did not vote in 1971 to tether

Virginia's free-exercise protections to the Supreme Court's interpretation of the First Amendment for the rest of time. That case therefore sheds no light whatsoever on the original public meaning of Article I, § 16 in 1971.

4. This Court should apply the compelling interest test to free-exercise claims under Article I, § 16

Smith is a highly questionable exposition of the First Amendment. See Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J. L. & Religion 99, 102 (1990) (*Smith* "appears to be inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent."). But it has no bearing on the right of free exercise under Virginia's law. This Court should therefore reject *Smith* and hold that Article I, § 16 entitles Virginians to religious exemptions from neutral and generally applicable laws in at least some circumstances. Although holding that *Smith* does not govern Vlaming's free exercise claim is sufficient to reverse,[12] the Court may wish to provide guidance on the circumstances in which the Virginia free-exercise clause requires individualized exemptions.

[12] The circuit court provided neither an oral nor written explanation for its judgment of dismissal, but the School Board relied primarily on the *Smith* rule to defend against Vlaming's free-exercise claim. See JA 108–110, 196.

The historical evidence suggests that Virginia's free-exercise clause was understood at its 1776 adoption to provide broad protection for religious exercise, including exemptions from neutral and generally applicable laws, except where such exercise constituted an overt act against peace or good order. See *supra* Part II.B.2. Founding-era evidence demonstrates that not every violation of law would constitute an overt act against peace and good order. See *Fulton*, 141 S. Ct. at 1903–05 (Alito, J., concurring in the judgment). Some scholars have argued that only violations of the peace and safety of the state, or an invasion into the rights of others, would qualify. See McConnell, *Freedom*, *supra*, at 845–46; Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J. L. & Pub. Pol'y 971, 978–99 (2019).[13]

At bottom, the historical record provides important guidance on the sort of interests that justify government burdens on free exercise under Article I, § 16, rather than an exhaustive list of overt acts subject to government regulation. The

[13] The record does not precisely delineate which violations of individual rights would justify a government restraint on the exercise of religion, particularly given that the modern understanding of individual liberty has taken on an expansive positive scope unknown to the framing generation. See, *e.g.*, 4 William Blackstone, Commentaries, at *129 ("[T]he rights of the people of England . . . may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property.").

government thus has a compelling interest in proscribing acts of violence, disturbances of the peace, and invasions into traditional liberty interests of private individuals even if those acts are motivated by religious belief.

Equipped with this historical guidance, this Court should begin where the U.S. Supreme Court left off. It should hold that the government may burden religious exercise only if it shows that the burden is essential to furthering a compelling government interest which the government could not vindicate by less restrictive means. *Sherbert*, 384 U.S. at 403–04; *Yoder*, 406 U.S. at 214. Unless the government makes such a showing, it must provide individual exemptions to the person whose religious exercise is burdened by the government's policy.

The strict scrutiny regime of *Sherbert* and *Yoder* is the appropriate standard for two reasons. First, it was the governing standard for First Amendment and Virginia free-exercise claims when the Commonwealth adopted the 1971 Constitution. See *supra* Part II.B.3. It almost certainly informed the ratifying public's understanding of the scope of Article I, § 16 in 1971, and therefore supplies the most plausible original public meaning of Virginia's free-exercise clause. See *supra* Part II.B.3; see also Stefanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55, 113–17 (2020) (arguing that *Sherbert*/*Yoder* strict scrutiny is largely consistent with courts' original understanding of the scope of free-exercise exemptions); Jud Campbell, *Natural Rights and the First*

Amendment, 127 Yale L.J. 246, 314–17 (2016) (making a similar argument about the federal Free Speech Clause). And the test was at least generally consistent with the historical understanding of the scope of the government's power to restrain the exercise of religion. See *Yoder*, 406 U.S. at 230 (holding that government may not restrain the exercise of religion unless it "posed some substantial threat to peace, safety or order" (quoting *Sherbert*, 374 U.S. at 403)).

Second, the compelling-interest test is workable. The *Smith* Court warned that permitting religious-exercise exemptions to neutral laws would "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)). But this has not been the case. For one thing, courts across the country apply the compelling-interest test in religion cases every day.[14] Congress and nearly half the states adopted the standard in statutes after the U.S. Supreme Court decided *Smith*. See *supra* Part I.A. Other states have interpreted their own constitutions to impose the compelling-interest test. *E.g.*, *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 301–02 (2019); Baumgardner & Miller, *supra*, at 1392–93. All told, the federal government and more than half the states apply the compelling-interest test to free-exercise claims. Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163,

[14] Courts have long applied the compelling-interest test in free-speech cases. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657–58 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577 (1995).

164 (2016). But *Smith*'s predicted "anarchy" has not ensued. *Smith*, 494 U.S. at 888. The compelling-interest regime of the state RFRAs has provided meaningful protection for religious minorities, see Lund, *supra*, at 165–70, even as government interests prevail more often than they do not, see Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under* Smith *and after* Smith, 2020 Cato Sup. Ct. Rev. 33, 44–45 & nn. 66–67.

The compelling-interest analysis tracks the analysis proposed for the VRFRA above. See *supra* Part I.B. The School Board must show that "some compelling state interest"—not simply "some colorable state interest," but "the gravest abuses, endangering [a] paramount interest"—justified terminating Vlaming for his religiously motivated conduct. *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); see *supra* Part I.B.2. That interest must entail restraining "some substantial threat to public safety, peace, or order." *Sherbet*, 374 U.S. at 403. Moreover, the required showing must be particularly strong because Vlaming's religious exercise entailed a failure to act, rather than overt action. See *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985) (observing that when "the religiously grounded 'action' is a refusal to act rather than affirmative, overt conduct, the State's authority to interfere is virtually non-existent except only in the instance of the grave and immediate public danger"). Further, even if supported by a compelling interest, the School Board must show that there was no way to pursue that

interest that was less intrusive on Vlaming's religious liberty than firing him. *Sherbert*, 374 U.S. at 407 ("[I]t would plainly be incumbent upon the [the government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."); see *supra* Part I.B.3. As discussed above, the School Board has not made, and cannot make, these showings. See *supra* Part I.B.

* * *

Ultimately, the School Board asks this Court to decide the scope of the right to free exercise of religion under Virginia law by relying on a U.S. Supreme Court precedent interpreting the federal First Amendment decided more than two hundred years after Virginia first adopted its free-exercise protections (and more than two decades after it most recently re-ratified them). This Court can do so only by ignoring the text of Virginia's free-exercise provisions and the Commonwealth's long history as a foremost champion of the individual right of free exercise—a history that is impossible to reconcile with the U.S. Supreme Court's decision in *Smith*. This Court therefore should not outsource Virginia's unique laws to the U.S. Supreme Court. It should apply the compelling-interest test rooted in the specific history of Virginia's own laws and traditions.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's judgment dismissing Vlaming's complaint and remand for further proceedings.

Respectfully submitted,

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May 23, 2022

CERTIFICATE

I certify that on May 23, 2022, in accordance with Rules 5:30(b)(ii), 5:1B, and 5:26(g), this document was filed electronically with the Court through VACES. Copies were electronically mailed to:

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I further certify that this brief complies with Rule 5:26(b) because it does not exceed 50 pages, excluding the cover page, table of contents, table of authorities, signature blocks, and certificate.

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