IN THE

Supreme Court of Virginia

RECORD NO. 211061

PETER VLAMING,

Appellant,

v.

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

Appellees.

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR FAITH AND FAMILY, IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Constitutions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Faith and Family is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com. IFFNC is engaged in fighting laws and policies like the one challenged here. Judicial decisions in Virginia often impact similar laws and policies in North Carolina. Both states protect the free exercise of religion "according to the dictates of conscience." *See* Va. Const. Art. I, § 16 ("Free exercise of religion; no establishment of religion"); N.C. Const. Art. I, § 13 ("Religious liberty").

STATEMENT OF FACTS

Amicus curiae defers to the Nature of the Case, Material Proceedings Below, and Statement of Facts in Appellant's Opening Brief to the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

Amicus curiae defers to the Assignments of Error stated in Appellant's Opening Brief to the Supreme Court of Virginia.

[1] *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY

There is hardly a more "dramatic example of authoritarian government and compelled speech" than when King Henry commanded Sir Thomas More to sign a statement blessing the King's divorce and remarriage. Richard F. Duncan, *Article: Defense Against the Dark Arts: Justice Jackson, Justice Kennedy, and the No-Compelled Speech Doctrine*, 32 Regent U. L. Rev. 265, 292 (2019-2020), citing Robert Bolt, *A Man For All Seasons*: *A Play in Two Acts* (1st ed., Vintage Int'l 1990) (1962). Thomas More, a faithful Catholic, could not sign.

Five centuries later Vlaming's conundrum is no less momentous than Thomas More's predicament. The West Point School Board's "Pronoun Mandate" is the epitome of viewpoint-based compelled speech. As in *Barnette*, there is "probably no deeper division" than a conflict provoked by the choice of "what doctrine . . . public educational officials shall compel youth to unite in embracing." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 292, citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There are deep divisions over what public school students should be taught, particularly about sexuality and other contentious matters. These divisions impact the speech of both students and the teachers who instruct them.

Compelled speech is anathema to the First Amendment, particularly where the government mandates conformity to its preferred viewpoint. *Barnette, Wooley,*

NIFLA and other "eloquent and powerful opinions" stand as "landmarks of liberty and strong shields against an authoritarian government's tyrannical attempts to coerce ideological orthodoxy." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 266; *Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705 (1977); *NationaI Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018).

The combination of speech and viewpoint compulsion in this case is a formula for tyranny. The Pronoun Mandate cannot be salvaged by Vlaming's status as a government employee or by characterizing his words as "professional" speech. Public school instructors are not robots, but rather citizens who do not sacrifice their constitutional rights as a condition of government employment.

ARGUMENT

I. COMPELLED SPEECH AND VIEWPOINT DISCRIMINATION ARE UNIQUELY PERNICIOUS VIOLATIONS OF THE FREE SPEECH CLAUSE.

The "proudest boast" of America's free speech jurisprudence is that we safeguard "the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Gender identity may be "embraced and advocated by increasing numbers of people," but that is "all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy*

Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000). Our law also protects the right to remain silent—to *not* express thoughts or viewpoints a speaker hates. Compelled expression is even worse than merely silencing a speaker. It is difficult to discern the viewpoint of one who is silent, but compelled speech affirmatively associates the speaker with a viewpoint he does not hold.

The West Point School Board "[m]andate[d] speech that [Vlaming] would not otherwise make" and "exact[ed] a penalty"—the loss of his livelihood—because he refused. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Board demands that Vlaming make an assertion he believes is false by insisting that he use *male* pronouns to refer to a biologically *female* student. The mandate is obviously based on the *content*—the pronouns Vlaming uses when he speaks to or about his students. Worse yet, it is viewpoint-based because it requires him to endorse transgender ideology that conflicts with his conscience and religious faith.

"When the law strikes at free speech it hits human dignity . . . *when the law compels a person to say that which he believes to be untrue, the blade cuts deeper* because it requires the person to be untrue to himself, perhaps even untrue to God." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 59 (2020) (emphasis added). The School Board's mandate combines the worst of two worlds—compelled speech and viewpoint discrimination.

Freedom of thought is the "indispensable condition" of "nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). The freedom of thought that undergirds the First Amendment merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). In this context, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These two rights are "complementary components" of the "individual freedom of mind." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 637. Together they guard "both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633-634; *id.,* at 645 (Murphy, J., concurring). A system that protects the right to promote all sorts of ideological causes "must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714; Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63.

The Pronoun Mandate is a government demand that would force Vlaming to become "an instrument for fostering . . . an ideological point of view" he finds "morally objectionable." *Wooley*, 430 U.S. at 714-715. A government edict that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018), citing *Barnette*, 319 U.S. at 633 (internal quotation marks

omitted). Even a legitimate and substantial government purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Wooley*, 430 U.S. at 716-717, citing *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). The Board cannot jump this hurdle.

A. The Pronoun Mandate is a paradigmatic example of compelled speech that is anathema to the First Amendment.

Compelled speech is even more tyrannical than compelled silence because "it invades the private space of one's mind and beliefs." Richard F. Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 275. While "ordinary authoritarians" merely demand silence, prohibiting people from saying what they believe is true, "[t]otalitarians insist on forcing people to say things they know or believe to be untrue." *Id*., quoting Professor Robert George.[2] The School Board has adopted a totalitarian mode by demanding that Vlaming acknowledge a *female* student as a *male*. Vlaming cannot in good conscience comply with the Board's demand.

B. The Pronoun Mandate transgresses liberties of religion and conscience.

The Pronoun Mandate encroaches on religious liberty and conscience in addition to speech. Indeed, religious speech is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has

[2] Robert P. George, Facebook (Aug. 2, 2017), https://www.facebook.com/RobertPGeorge/posts/10155417655377906.

so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted).

The vast majority of state constitutions expressly define religious liberty in terms of conscience.[3] Virginia's provision begins with the statement "[t]hat 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, therefore, all men are equally entitled to the free exercise of religion, *according to the dictates of conscience*." *See* Va. Const. Art. I, § 16 (emphasis added). A few states, while not using the term "conscience," provide similar rights by protecting their citizens against state compulsion. Alabama Const. Art. I, Sec. 4; Iowa Const. Art. I, § 3; Md. Dec. of R. art. 36; W. Va. Const. Art. III, § 15. Some state constitutions contain a broad description of religious liberty, limited only by licentiousness or acts that would threaten public morals, peace and/or safety. Conn. Const. Art. I., Sec. 3; Fla.

[3] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III-IV; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

Const. Art. I, § 3; Md. Dec. of R. art. 36; Miss. Const. Ann. Art. 3, § 18. Several states essentially duplicate the language of the U. S. Constitution. Alaska Const. Art. I, § 4; HRS Const. Art. I, § 4; La. Const. Art. I, § 8; Mont. Const., Art. II § 5; S.C. Const. Ann. Art. I, § 2. Oklahoma's unique language provides for "perfect toleration of religious sentiment" and mode of worship and prohibits any religious test for the exercise of civil rights. Okl. Const. Art. I, § 2.

The victory for freedom of thought recorded in the Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States,* 328 U.S. 61, 68 (1946). Courts have an affirmative "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Pronoun Mandate assaults liberty of thought and conscience, compelling Vlaming "to contradict [his] most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts"—by affirming the lie that a biological female is a male. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring); *see* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 65-66.

C. The Pronoun Mandate exemplifies the blatant viewpoint discrimination characteristic of tyrannical government.

"The possibility of enforcing not only complete obedience to the will of the State, but *complete uniformity of opinion* on all subjects, now existed for the first time." George Orwell, "1984" 206 (Penguin Group 1977) (1949) (emphasis added).

Viewpoint discrimination ushers in an orwellian system that destroys liberty of thought. As Justice Kennedy cautioned, "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal*., 535 U.S. 234, 253 (2002); *see* Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 265. The Pronoun Mandate imperils all these liberties.

"[T]he history of authoritarian government . . . shows how relentless authoritarian regimes are in their attempts to stifle free speech." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). There is "no such thing as good orthodoxy" under a Constitution that safeguards thought, speech, conscience, and religion, even when the government pursues seemingly benign purposes like national allegiance (*Barnette*), equality, or tolerance. Erica Goldberg, *"Good Orthodoxy" and the Legacy of Barnette*, 13 FIU L. Rev. 639, 643 (2019). "Even commendable public values can furnish the spark for the dynamic that Jackson insists leads to the 'unanimity of the graveyard.'" Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. Rev. 689, 723 (2019).

Every speaker must decide "what to say and what to leave unsaid." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), quoting *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.,* 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original). An individual's "intellectual

autonomy" is the freedom to say what that person believes is true and to refrain from saying what is false. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 85. A speaker's choice "not to propound a particular point of view" is simply "beyond the government's power to control," regardless of the speaker's reasons for remaining silent. *Hurley*, 515 U.S. at 575. There is "no more certain antithesis" to the Free Speech Clause than a government mandate imposed to produce "orthodox expression." *Id*. at 579. Such a restriction "grates on the First Amendment." *Id*. "Only a tyrannical government"—or School Board—"requires one to say that which he believes is not true," e.g., that "two plus two make five." *Id*. Here, the Board requires Vlaming to make a false statement about the sex of a female student.

The Supreme Court has *never* upheld a viewpoint-based mandate compelling "an unwilling speaker to express a message that takes a particular ideological position on a particular subject." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 78. But that is precisely what the School Board attempts to do. The Pronoun Mandate darkens the "fixed star in our constitutional constellation" that forbids any government official, "high or petty," from prescribing "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." *Barnette*, 319 U.S. at 642. Regardless of how acceptable transgender ideology is in the current culture, the

Board's interest in disseminating that ideology "cannot outweigh [Vlaming's] First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. *Barnette* and *Wooley* solidify the principle that government lacks the "power to compel a person to speak, compose, create, or disseminate a message on any matter of political, ideological, religious, or public concern." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63-64. The Pronoun Mandate is even more intrusive than in *Wooley*, where the state did not "require an individual to speak any words, affirm any beliefs, or create or compose any expressive message," but rather to serve as a "mobile billboard" for an ideological message obviously attributable to the state. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63. Even this passive display violates the First Amendment because it "usurps speaker autonomy." *Id*. at 76.

D. Viewpoint-based compelled speech stifles debate and attacks the dignity of those who disagree with the prevailing state orthodoxy.

Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995). It creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). This is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

Citizens who hold competing views on public issues might use the political process to enact legislation consistent with their views, but under *Barnette*, the

government may not "insist that the victory of one side, of one creed or value, be memorialized by compelling the defeated side to literally give voice to its submission." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 278, quoting Horwitz, *A Close Reading of* Barnette, 13 FIU L. REV. at 723. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464.

The government may not regulate speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The Pronoun Mandate is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). This viewpoint-based compulsion to speak seeks not only to control the content (pronouns) but also to promote an ideology unacceptable to Vlaming. Such coerced compliance attacks his dignity. "Freedom of thought, belief, and speech are fundamental to the dignity of the human person." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59.

The Pronoun Mandate contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free

society where the government must respect a wide range of diverse viewpoints. "Struggles to coerce uniformity" of thought are ultimately futile, "achiev[ing] only the unanimity of the graveyard." *Barnette*, 319 U.S. at 640, 641. The government itself may adopt a viewpoint but may never "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The state sometimes attempts to use one person's speech to vindicate the dignity interests of others, but this is "insufficient to override First Amendment concerns." *Goldberg*, *"Good Orthodoxy"*, 13 FIU L. Rev. at 664. Even when it is appropriate to regulate harmful discriminatory conduct, the state may not require that some citizens "communicate a message of tolerance that affirms the dignity of others." *Id*. Dignity is an interest "so amorphous as to invite viewpoint-based discrimination, antithetical to our viewpoint-neutral free speech regime, by courts and legislatures." *Id*. at 665. The state may not enhance the dignity of some persons by censoring the protected expression of other persons.

As *Hurley* teaches, the state must guard against "conflation of message with messenger" because "a speaker's objection to speaking or disseminating a particular ideological message is at the core of the no-compelled-speech doctrine." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 64. The trial

judge in *Hurley* erroneously reasoned that the parade organizer's rejection of a group's *message* was tantamount to "discrimination on the basis of the innate *personhood* of the group's members." *Id* (emphasis added). The First Amendment guards a speaker's autonomy to "discriminate" by favoring viewpoints he wishes to express and rejecting other viewpoints. *Id*. Rejecting a *message* is not equivalent to rejecting a *person* who prefers that message.

E. The prohibition of viewpoint discrimination, now firmly established by Supreme Court precedent, is a necessary component of the Free Speech Clause.

A century ago, the Supreme Court affirmed a conviction under the Espionage Act, which criminalized publication of "disloyal, scurrilous and abusive language" about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today, no doubt "the statute itself would be invalidated as patent viewpoint discrimination." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21 (2019). A few years after *Abrams*, the Court decided *Barnette*, "a forerunner of the more recent viewpoint-discrimination principle." *Id*. *Barnette*'s often-quoted "fixed star" passage was informed by "the fear of government manipulation of the marketplace of ideas." *Id*. Justice Kennedy echoed the thought: "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . . To permit viewpoint discrimination . . . is

to permit Government censorship." *Matal*, 137 S. Ct. at 1767-1768 (Kennedy, J., concurring). Justice Kennedy's comments "explain why viewpoint discrimination is particularly inconsistent with free speech values." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 36.

Since *Barnette*, courts have further developed and refined the concept of viewpoint discrimination. Support for the principle appeared in *Cohen v. California*, where Justice Harlan voiced concern that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." 403 U.S. 15, 26 (1971); *see* Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 22. A year later the Court affirmed that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" and "must afford all points of view an equal opportunity to be heard." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

Further development occurred in the 1980's. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), both the majority and dissent agreed that viewpoint discrimination is impermissible, with the dissent explaining that such discrimination "is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Id.* at 62 (Brennan, J., dissenting). It became apparent that the Court

considered viewpoint regulation an "even more serious threat" to speech than "mere content discrimination." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 23. Three years later, the Court struck down a viewpoint-based regulation based on coerced association with the views of other speakers. *Pacific Gas & Electric Co.*, 475 U.S. at 20-21 (plurality opinion). At the end of this decade, the Court affirmed the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down Texas statute that made it a crime to desecrate a venerated object, including a state or national flag).

Justice Scalia authored a key decision in the early 1990's striking down a Minnesota ordinance that criminalized placing a symbol on private property that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (burning cross). The Supreme Court considered "the anti-viewpoint-discrimination principle . . . so important to free speech jurisprudence that it applied even to speech that was otherwise excluded from First Amendment protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25, citing *R.A.V.*, 505 U.S. at 384-385. The ruling defined viewpoint discrimination as "hostility—or favoritism—towards the underlying message expressed" (*R.A.V.*, 505 U.S. at 385

(citing *Carey v. Brown*, 447 U.S. 455 (1980)), effectively placing the principle "at the very heart of serious free speech protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25. As Justice Scalia observed, the government may not "license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

During this same time frame, the Supreme Court held that the government may not discriminate against speech solely because of its religious perspective. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) (school premises open for social, civic, and recreational meetings could not exclude a film series based on its religious perspective); *Rosenberger*, 515 U.S. at 829 (invalidating university regulation that prohibited reimbursement of expenses to a student newspaper that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality"); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001) (striking down school community use regulation that discriminated against religious speech).

Government speech mandates often implicate viewpoint discrimination by either compelling a speaker to express the government's viewpoint (*Wooley*, *NIFLA*) or a third party's viewpoint (*Hurley*). Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 283. After the landmark *Hurley* decision, "the constitutional ideal of intellectual autonomy for speakers, artists, and parade organizers, which

originated in *Barnette*, now had the support of a unanimous Supreme Court." *Id.* at 282; *Hurley*, 515 U.S. 557. Even when the government's motives are innocent, there is a residual danger of censorship in facially content-based statutes because "future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015).

In recent years, *Matal* "is the Court's most important decision in the anti-viewpoint-discrimination line of cases." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 29. As this case illustrates, "[g]iving offense [to Vlaming's transgender student] is a viewpoint." *Matal*, 137 S. Ct. at 1763. The School Board may not escape the charge of viewpoint discrimination "by tying censorship to the reaction of [Vlaming's] audience." *Id*. at 1766. Shortly after *Matal*, the Court struck down a provision forbidding "immoral or scandalous" trademarks because the ban "disfavors certain ideas." *Iancu v. Brunetti*, 139 S. Ct. at 2297. The Court's approach "indicated that governmental viewpoint discrimination is a per se violation of the First Amendment." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 33. The viewpoint-based Pronoun Mandate is also a "per se violation of the First Amendment."

II. VLAMING'S STATUS AS A GOVERNMENT EMPLOYEE DOES NOT JUSTIFY THE SCHOOL BOARD'S VIEWPOINT-BASED SPEECH MANDATE.

Vlaming's use of pronouns is an integral part of common, everyday speech practice. He uses pronouns for his students based on objective biological reality concerning each student's sex, coupled with his personal belief that each person is created immutably male or female. This aspect of Vlaming's speech is not part of his official duties as a public employee, nor can it be regulated as professional speech. It does, however, touch a matter of intense public concern and debate. Vlaming does not accept the culturally popular "gender identity" concept nor does he believe that a person can transition from one sex to the other. The First Amendment safeguards Vlaming's right to speak according to his beliefs on these matters, even in the public school where he teaches.

Neither students nor teachers shed their constitutional rights at the schoolhouse door. Students not only need to learn how the Constitution guards their own rights—they must also learn to respect the constitutional rights of others, even their teachers. Teachers can respect the dignity of each student without sacrificing their own rights to thought, conscience, and speech.

A. Government employees are citizens—not robots.

All citizens, whether employed by a private or public employer, have a fundamental right to speak on matters of public concern. In America today, there is

hardly a more contentious "matter of public concern" than gender identity, "a controversial [and] sensitive political topic[] . . . of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up). The School Board's policy "use[s] pronouns to communicate a message" that Vlaming believes is false, namely that "[p]eople can have a gender identity inconsistent with their sex at birth." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). "Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id*. at 508.

In *Pickering*, the Supreme Court crafted a test that balances "between the [free speech] interests of [a] teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Township High School District 205*, 391 U.S. 563, 568 (1968). *Pickering*'s balancing test does not warrant the School Board's compelled expression of Vlaming's *personal* agreement on a controversial public issue where citizens are deeply divided. *Janus*, 138 S. Ct. at 2471 ("prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed").

Even as an employer, *the government is still the government*, subject to constitutional constraints. Even as a government employee, *a citizen is still a citizen*. Government employees "do not surrender all their First Amendment rights by reason

of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The Constitution does not permit the School Board to "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id*. at 419; see *Perry v. Sindermann,* 408 U.S. 593, 597 (1972); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government"). Neither students nor *teachers* "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

The doctrine of unconstitutional conditions further condemns the School Board's position. "[A] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Garcetti,* 547 U.S. at 413; *see Connick*, 461 U.S. at 142; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering*, 391 U.S. 563; *Perry v. Sindermann*, 408 U.S. at 597; *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980). There was a time when "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Garcetti*, 547 U.S. at 417, quoting *Connick,* 461 U.S. at 143. That theory has been "uniformly rejected." *Pickering*, 391 U.S. at 568); *Keyishian*, 385 U.S. at 605-606. As the Supreme Court confirmed in

Lane v. Franks, "public employees do not renounce their citizenship when they accept employment, and . . . public employers may not condition employment on the relinquishment of constitutional rights." 573 U.S. 228, 236 (2014).

B. Vlaming's use of specific pronouns does not constitute *government* speech, spoken as part of his teaching duties.

Government (public) speech occurs where a public employee speaks in his or her capacity as a public employee and "there is no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 424. There is an obvious analogue here because pronouns are a common and nearly unavoidable feature of everyday language. Speech in every context, public or private, inevitably includes pronouns.

The line between public and private speech may be fuzzy. "[W]hen public officials deliver public speeches . . . their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). Vlaming's view of biological sex is "embedded within" the pronouns he speaks. Under *Garcetti*, the "critical question" is whether a public employee's speech is "ordinarily within the scope of [his] duties." *Lane*, 573 U.S. at 240 (2014). *Garcetti* held that "when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421

(emphasis added). This applies to speech "the employer itself has commissioned or created." *Id*. at 422. But *Garcetti* acknowledged that "expression related to . . . classroom instruction" might not fall within "customary employee-speech jurisprudence." *Id*. at 425; *see Meriwether*, 992 F.3d at 506. Vlaming is not teaching students about the proper use of pronouns, as an English teacher might do, nor is he teaching about gender identity in a sex education class. He uses pronouns as an integral part of everyday speech but at the same time sends a message about his view of sexuality.

C. The Pronoun Mandate cannot be salvaged by classifying Vlaming's used of pronouns as *professional* speech.

The School Board could not salvage its mandate by characterizing Vlaming's speech as "professional." The Supreme Court has explicitly declined to recognize "professional speech" as a separate category entitled to diminished First Amendment protection. *NIFLA*, 138 S. Ct. at 2372. The only exceptions are for factual, non-controversial disclosures or a regulation of conduct that incidentally impacts speech. Vlaming's speech does not fit either exception. On the contrary, he uses pronouns consistent with the *fact* of each student's biological sex, and the Pronoun Mandate is solely about speech—not conduct. As noted in *NIFLA*, "[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech." *Id*. at 2374. Content-based restrictions "pose the inherent risk that the

Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting,* 512 U. S. at 641.

The First Amendment embraces not only the freedom to believe but also "the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736-737 (2014) (Kennedy, J., concurring). The "larger community" includes a citizen's place of employment.

D. Teachers can and should affirm the dignity of every student without sacrificing their own constitutional liberties.

It is a "critical part of a professor's job" to "affirm[] the equal dignity of every student," so as to create the best environment for learning. Goldberg, *"Good Orthodoxy"*, 13 FIU L. Rev. at 666. At the same time, "students need to tolerate views that upset them, or even disturb them to their core, especially from other students, and perhaps *even from professors*." *Id*. (emphasis added). Students must learn to endure speech that is offensive or even false as "part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. at 590. Indeed, public school students attending required classes are exposed to "ideas they find distasteful or immoral or absurd or all of these." *Id*. at 591.

Our Nation's deep commitment to "safeguarding academic freedom" is "a special concern of the First Amendment, which does not tolerate laws that cast a pall

of orthodoxy over the classroom." *Meriwether*, 992 F.3d at 504-505, 509, quoting *Keyishian*, 385 U.S. at 603. Teachers are asked "to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens" but "[t]hey cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). Public schools have a role in "educat[ing] youth in the values of a democratic, pluralistic society." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378 (6th Cir. 1999); *id*. at 377 ("public schools are particularly important to the maintenance of a democratic, pluralistic society"). Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so that we do not "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. at 487. That "community" includes both students and faculty. The First Amendment facilitates the free flow of information and ideas. "The Nation's future depends upon leaders trained through wide exposure" to a "robust exchange of ideas" that "discovers truth out of a multitude of tongues" rather than "authoritative selection." *Keyishian*, 385 U.S. at 603. The government may not "contract the spectrum of available

knowledge." *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866 (1982), quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). This is particularly true in education, where students are exposed to a broad range of subjects. Public schools are not "enclaves of totalitarianism" and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Pico*, 457 U.S. at 877 (Blackmun, J., concurring), quoting *Tinker*, 393 U.S. at 511.

CONCLUSION

Amicus curiae urges the Virginia Supreme Court to reverse the ruling of the trial court dismissing Vlaming's Claims 1, 2, 3, 4, 5, 6, and 9, reinstate Appellant Vlaming's claims, and allow the case to proceed.

Dated: May 23, 2022

Respectfully submitted,

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I further certify that I have filed an electronic PDF version of the foregoing with the Clerk via the Virginia Appellate Courts eBriefs System.

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