IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

PETER VLAMING,

Plaintiff-Petitioner,

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,

Defendants-Respondents.

PETITION FOR APPEAL

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INTRODUCTION

Virginia's Constitution protects every Virginian's "free exercise of religion, according to the dictates of conscience," and provides that they "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." VA. CONST. art. I, § 16. A separate provision protects every Virginian's right to "freely speak, write, and publish his sentiments on all subjects." VA. CONST. art. I, § 12. The School Defendants fired Peter Vlaming, a high-school French teacher, because he declined the School's demand that he affirmatively express his personal agreement with messages that violate his religious beliefs.

This appeal asks primarily whether Vlaming sufficiently alleged the School violated his state constitutional and statutory free-exercise and free-speech rights. It also asks whether Vlaming sufficiently alleged a state due-process claim, and whether he sufficiently alleged that the School breached his contract when it fired him. These questions raise significant issues of first impression in this Court.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On December 6, 2018, the West Point School Board terminated Vlaming's employment at West Point High School because he had declined the School's demand that he use male pronouns to refer to a female student. Compl. 14–17, 23.

Vlaming sued in the King William County Circuit Court. *Id.* at 3–5. After a failed attempt to remove the case to federal court,[1] the School Defendants filed a demurrer and plea in bar, arguing that Vlaming's complaint did "not state a cause of action and fail[ed] to state facts upon which the relief demanded [could] be granted." Dem. and Plea in Bar at 1. The School did not proffer any evidence to support its plea in bar. Instead, it argued Vlaming's free-speech claims should be dismissed because his speech was part of his official duties as a teacher. *Id.* at 2.

After a motions hearing, the trial court announced it would "sustain the demurrer and the plea in bar as to Counts 1 through 3" (Vlaming's free-speech claims), "sustain the demurrer as to Counts 4, 5, 6, 7 and 8" (free-exercise, due-process, government-discrimination, and Dillon-Rule claims), and "sustain the demurrer on the breach of contract as to the individual defendants" (Count 9). 6/7/21 Tr. at 103. On Count 9, the court overruled the demurrer "with regard to the School Board only" and asked the parties to prepare an order. *Id.* at 104.

Vlaming moved to nonsuit the remaining portion of his breach-of-contract claim. Pl's Mot. for Nonsuit at 1. And the parties proffered, and the trial court entered, a corresponding final order noting their objections. 8/13/21 Final Order. Vlaming now appeals the trial court's order dismissing Claims 1–6 and a portion of Claim 9 with prejudice.

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[1] *See Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 308 (4th Cir. 2021) (holding that Vlaming could prevail "on exclusively state grounds").

ASSIGNMENTS OF ERROR[2]

1. The trial court erred by dismissing Vlaming's state constitutional and statutory free-exercise claims (Claims 4 and 5) because he sufficiently alleged the School Defendants violated his free-exercise rights when they fired him for declining to violate his religious beliefs, and because federal cases limiting federal free-exercise rights do not limit Virginia's free-exercise protections. [Compl. 25, 31–33; Pl.'s Resp. to Dem. 25–38; 6/7/21 Tr. 76–80, 87–90; Final Order 4.]

2. The trial court erred by dismissing Vlaming's state constitutional free-speech claims (Claims 1–3) because he sufficiently alleged the School Defendants fired him for declining to express a viewpoint he disagreed with on an issue of public concern. [Compl. 24–31; Pl.'s Resp. to Dem. 7–25; 6/7/21 Tr. 68–76, 86–90; Final Order 4.]

3. The trial court erred by dismissing Vlaming's state due-process claim (Claim 6) because he sufficiently alleged the School Defendants exercised unbridled discretion when they fired him for allegedly violating an unconstitutionally vague policy. [Compl. 33–34; Pl.'s Resp. to Dem. 38–40; 6/7/21 Tr. 81–82; Final Order 4.]

4. The trial court erred by dismissing a portion of Vlaming's breach-of-contract claim (Claim 9) because he sufficiently alleged the School Board breached its contract with him because it violated Virginia's Constitution and state statutes when it fired him. [Compl. 36–37; Pl.'s Resp. to Dem. 41–43; 6/7/21 Tr. 84–86; Final Order 4.]

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[2] To streamline the issues before this Court, Vlaming does not appeal the trial court's dismissal of Claim 7 (government discrimination) or Claim 8 (Dillon-Rule violation), nor does he appeal the trial court's dismissal of Claim 9 "as to the individual defendants." 6/7/21 Tr. at 103.

STATEMENT OF FACTS[3]

A. Vlaming learns female student plans to identify as male

Near the end of the 2017–2018 school year, Peter Vlaming, a high-school French teacher at West Point High School, learned that one of his female students planned to start identifying as male. Compl. 6. Vlaming had been teaching at the school for almost six years. *Id.* at 3. He had served on the Professional Learning Steering Committee, coached the school's first girls' soccer team, started the Rotary Interact Service Club, sponsored the French National Honor Society, taught the school's first Career Investigations class, managed the Sunshine Fund for staff celebrating important life events or grieving, and driven a school bus. *Id.* at 5. His teacher evaluations always had been positive. *Id.* at 6. And the School Board had granted him continuing contract status. *Id.* at 5.

When Vlaming learned that one of his female students planned to start identifying as male, he sought advice from one of his mentors—a former professor and the former superintendent of schools in Virginia. *Id.* at 6. The student had taken Vlaming's Exploratory French Class the previous school year, was close to completing his French I class, and would take his French II class starting in the Fall. *Id.* at 6.

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[3] Because Vlaming appeals the trial court's order sustaining the School Defendants' demurrer and plea in bar without hearing any evidence, this Court accepts as true the facts alleged in Vlaming's complaint. *Eubank v. Thomas*, 300 Va. 201, __ , 861 S.E.2d 397, 401 (2021); *Plofchan v. Plofchan*, 299 Va. 534, 547–48, 855 S.E.2d 857, 865 (2021).

B. Vlaming tries to accommodate the student's wishes without violating his religious beliefs

Vlaming had enjoyed having the student in class, particularly given the student's strong grasp of the topic and witty humor. *Id.* at 6, 9. And Vlaming did not want to draw unwanted attention to the student's choice to identify as male. *Id.* at 7. But Vlaming also knew that he could not affirmatively express his agreement with that choice based on his sincerely held religious and philosophical beliefs about human nature. *Id.* at 2–3, 10. Vlaming believes that our sex—not our gender identity—shapes who we are as humans. *Id.* And he believes both as a matter of human anatomy and religious conviction that each person's sex is biologically fixed and cannot be changed. *Id.* at 3, 10.

Accordingly, Vlaming believes that if he uses male pronouns to refer to a female student, he would be lying. *Id.* at 11. He would be "express[ing] the message that [the] person is, or [that he as] the speaker believes them to be, male." *Id.* at 10. And that would mean expressing ideas that Vlaming believes to be false: that "gender identity, rather than biological reality, fundamentally shapes and defines who we truly are as humans, that our sex can change, and that a woman who identifies as a man *really is* a man." *Id.* at 2. Vlaming's conscience and religious practice also prohibit him from lying. *Id.* at 11. So Vlaming cannot use male pronouns to refer to a female student without violating his religious beliefs. *Id.* at 10.

Vlaming's mentor encouraged him to speak with the student's parents to better understand the situation. *Id.* at 6. Following that advice, Vlaming met with the student, the student's mother, and a school guidance counselor. *Id.* During that meeting, the student's mother "explained the student's transition." *Id.* at 7.

When school began the following semester, Vlaming did his best to accommodate and respect the student's choice to identify as male while not violating his own conscience. *Id.* at 2, 7. For example, when Vlaming learned the student wished to be called by a culturally masculine name, he allowed his entire French II class to pick new French names for the semester so the student would not be alone in changing names. *Id.* at 7.

From the beginning of the school year, Vlaming also consistently used the student's new culturally masculine names—both French and English—and "did not ever intentionally use female pronouns to refer to the student" in the student's presence. *Id.* Instead, Vlaming avoided using pronouns to refer to the student during class altogether, which was made easier by the fact Vlaming "rarely, if ever, used third person pronouns to refer to *any* students during class or while the student being referred to was present." *Id.* at 7–9 (emphasis added). After several weeks of classes, the assistant principal met with the student to ask how things were going "with the transition," and the student responded that everything was going "fine." *Id.* at 8.

A month later, the student emailed Vlaming to ask if they could meet to discuss "something important." *Id.* Vlaming agreed, and the two met at school the next afternoon. *Id.* The student told Vlaming that other students had said Vlaming had used a female pronoun when the student had not been present. *Id.* Vlaming explained he was trying to honor the student's wishes by using the student's new preferred name and by avoiding using the female pronoun to refer to the student. *Id.* Vlaming asked for grace as he tried to accommodate the student's preferences. *Id.* The meeting ended positively, and the student seemed satisfied and comfortable with the situation. *Id.* The student did not mention or express any objections to Vlaming's practice of not using pronouns during class. *Id.*

That afternoon, Vlaming called the student's parent as a courtesy. *Id.* The parent told Vlaming the student thought the meeting had gone well. *Id.* And when the topic of the student's preferred name and pronouns came up, Vlaming said he respected the family's and the student's wishes, that he would continue to use the student's preferred name, and that he would avoid using female pronouns in class. *Id.* at 9. Unsatisfied, the parent told Vlaming to leave his principles and beliefs "out of this" and refer to the student "as a male." *Id.*

C. Principal and assistant principal side with parent and demand Vlaming refer to student using male pronouns

The next day, Vlaming met with the assistant principal and told her about his conversation with the student's parent. *Id.* He also spoke with the school principal, who told Vlaming to "do whatever the parents ask." *Id.* The next day, the assistant principal informed Vlaming that the student preferred male pronouns before handing Vlaming two documents published by the National Center for Transgender Equality—adding that Vlaming was potentially violating federal law and School Board policy by not using male pronouns to refer to his female student. *Id.* at 9–10. The two documents were based on a letter from the Departments of Justice and Education that had been repealed more than a year and a half earlier. *Id.* at 10; Compl. Ex. 2 and Ex. 3. One appeared to have been altered to remove a notation that the letter had been revoked. *Id.*

Both documents stated that schools should not discriminate against or harass transgender students. Ex. 2 and Ex. 3. But they were less clear about whether the *non*-use of pronouns would violate the organization's understanding of federal law. For example, one document stated, "If teachers and school officials refuse to use the right name and pronouns, they *may* be breaking the law." Ex. 3 at 1 (emphasis added). But the other merely discouraged "the use of names and pronouns with the intent to harass or mock." Ex. 2.

Despite that ambiguity, when Vlaming explained to the assistant principal that he had been accommodating the student by using the student's preferred name and by not referring to the student using female pronouns in class, the assistant principal told Vlaming not using pronouns was not enough, and that he should use male pronouns or his job could be at risk. Compl. 10. Vlaming responded that using male pronouns to refer to a female student was against his religious beliefs. *Id.* But the assistant principal was unmoved: Vlaming signed a contract with the school, so his "personal religious beliefs end at the school door" when they conflict with School Board policy. *Id.* at 11. And failure to comply could lead the school to terminate his employment. *Id.*

The next day, prompted by an email from the student's mother, the school principal met with Vlaming to instruct him on how he was to interact with the student. *Id.* The student's mother had told the principal that she wanted Vlaming to use identity-based terms to show the student that Vlaming affirmed and agreed with the student's gender identity. *Id.* So the principal gave Vlaming the same directive: use the student's preferred pronouns in any and every context or he could be terminated. *Id.* The next day, the principal and assistant principal met with Vlaming again and reiterated that command: Vlaming was to use male pronouns to refer to the female student. *Id.* at 12. If he refused, he would receive a formal letter of reprimand charging him with nonconformity with School Board policy for not using male pronouns. *Id.*

D. During class activity, Vlaming inadvertently uses a female pronoun, apologizes, and is placed on administrative leave

Late that same morning, Vlaming was supervising an activity for his French II class. *Id.* He had divided his students into teams of two: one student wore virtual reality goggles while the other gave directions to prevent the first student from walking into things. *Id.* During the activity, Vlaming noticed the female student who identified as male was about to walk into a wall. *Id.* The student's partner was not paying attention. *Id.* So Vlaming reflexively called out, "Don't let her hit the wall!" *Id.* Vlaming immediately realized he had inadvertently used a female pronoun and covered his mouth with his hand. *Id.*

After class, once the other students had left, the student approached Vlaming and told him, "Mr. Vlaming, you may have your religion, but you need to respect who I am." *Id.* Vlaming apologized, saying, "I'm sorry, this is difficult," and explained he had reacted quickly and had used the female pronoun unintentionally while trying to keep the student from getting hurt. *Id.* This was the only time since the student had started identifying as male that Vlaming had ever used a female pronoun to refer to the student in the student's presence. *Id.*

Immediately after the incident, Vlaming went to the principal and explained what had happened. *Id.* The principal retorted, "You know what you do to diffuse a situation like that? You say, 'I'm sorry, I meant to say *him*.'" *Id.*

Later that day, the student's mother emailed the principal to inform him that she was withdrawing the student from Vlaming's class. *Id.* at 13. And a few hours after Vlaming had reported the incident, the principal and assistant principal called Vlaming back to the office and gave him a letter informing him the principal was recommending the superintendent place him on administrative leave pending an investigation. *Id.*; Ex. 4. The next day, the superintendent suspended Vlaming. Compl. 13.

Several days later, when Vlaming reported back to the office, the principal gave him a reprimand and "final warning letter." *Id.* at 14; Ex. 6. In the letter, the principal recounted his previous "verbal directive to use male pronouns when referring to [the student]" and Vlaming's statement that he "would not use male pronouns and would only refer to" the student using the student's name. Ex. 6 at 1. Vlaming's "repeated refusal to follow directives," the letter continued, was "insubordination" and would "not be tolerated." *Id.* Specifically, the letter asserted that Vlaming's "failure to use male pronouns" was in "direct conflict" with two school policies: one prohibiting harassment and the other governing staff conduct and responsibilities. *Id.* And his failure to use "the appropriate male pronouns" going forward would "result in further disciplinary action up to and including termination of employment." *Id.* at 2.

E. Superintendent orders Vlaming to use male pronouns and threatens firing if he avoids using pronouns

That same day, Vlaming met with the superintendent. Compl. 14. Vlaming told her he was happy to keep using the student's preferred name, but he could not in good conscience use male pronouns to refer to a female student without violating his religious convictions. *Id.*

When Vlaming met with the superintendent again the next day, she gave him a written directive ordering him to "treat [the female student] the same as other male students." *Id.*; Ex. 7 at 2. That included using the student's "preferred name" and "male pronouns." Compl. 14; Ex. 7 at 2. "If you refuse to comply with this directive or if you have any further instances of using female pronouns or of avoiding the use of male pronouns to refer to [the student]," the letter continued, "it will be considered insubordination and will result in termination of your employment." Compl. 15; Ex. 7 at 2.

Moreover, the superintendent's letter informed Vlaming he would not be allowed to return to the classroom until he met with the student and the student's parents "to assure them" he would treat the student "the same as other male students, including using male pronouns." Compl. 15; Ex. 7 at 2. If Vlaming refused, that too would "be considered insubordination and [would] constitute additional grounds for the termination of [his] employment." Ex. 7 at 2.

A day or two later, the superintendent notified Vlaming he was suspended effective immediately, and that she was recommending his dismissal. Compl. 15; Ex. 8. "The reason for your suspension," the letter explained, was Vlaming's "continued insubordination with regard to [his] treatment of a student." Ex. 8. Specifically, Vlaming had been given "directives" that he was "to use male pronouns when referring to the student," and he had "repeatedly refused to do so." *Id.* And when they had met the day before, Vlaming had "again refused to comply." *Id.*

F. School Board fires Vlaming for not using male pronouns

On December 6, 2018, the School Board held a public hearing to consider the superintendent's recommendation and voted unanimously to terminate Vlaming's employment. Compl. 15. Specifically, the Board fired Vlaming in retaliation for his refusal to speak using male pronouns to refer to a female student. *Id.* In other words, Vlaming "wasn't fired for something he said." *Id.* at 2. "He was fired for what he didn't say." *Id.*[4] The School Board fired Vlaming because he would not use a male pronoun to refer to a female student because a pronoun expresses a message about a person's sex. *Id.* at 16.

[4] The School Defendants did not offer any evidence to contest Vlaming's assertion that he "was fired for what he didn't say," not "for something he said," so that assertion must be accepted as true at this stage of the proceedings. *Plofchan*, 299 Va. at 547–48, 855 S.E.2d at 865.

The next day, West Point students held a walkout to protest the Board's firing of their beloved teacher. *Id.* at 1, 16. The students understood that the School had tried to force Vlaming to express a message that violated his conscience. *Id.* at 16. But the walkout had no impact on Vlaming's employment status. And Vlaming has since been turned down for multiple teaching positions with other school divisions because the School fired him based on accusations he discriminated against one of his students. *Id.* at 23. Unable to find work here in Virginia, Vlaming has since moved his family back to France to look for work there.[5]

STANDARD OF REVIEW

On appeal, this Court "review[s] a circuit court's judgment sustaining a demurrer de novo." *Eubank*, 300 Va. at __ , 861 S.E.2d at 401. The Court "accept[s] as true all factual allegations expressly pleaded in the complaint" and does the same for reasonable "unstated inferences" from the facts alleged, interpreting them "in the light most favorable to the claimant." *Doe by & Through Doe v. Baker*, 299 Va. 628, 641, 857 S.E.2d 573, 581 (2021) (cleaned up).

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[5] While the move happened too late to become part of the record, the School may try to argue it moots Vlaming's requests for prospective relief. It does not. *See Tazewell Cnty. Sch. Bd. v. Brown*, 267 Va. 150, 157–58, 591 S.E.2d 671, 674 (2004) (school principal's resignation did not moot his claims where adverse action would remain in his personnel file absent a ruling). Moreover, Vlaming's requests for damages and retrospective relief keep each of his claims alive. *Avery v. Beale*, 195 Va. 690, 692–93, 80 S.E.2d 584, 586 (1954) (overruling motion to dismiss appeal because plaintiff's "right to damages" was "not moot").

Importantly, the Court does "not evaluate the merits of the allegations, but only whether the factual allegations sufficiently plead a cause of action." *Eubank*, 861 S.E.2d at 401. Likewise, when the court below "takes no evidence on [a] plea in bar," this Court "accept[s] the plaintiff's allegations in the complaint as true." *Plofchan*, 299 Va. at 547–48, 855 S.E.2d at 865.

SUMMARY OF ARGUMENT

This year marked the 50th anniversary of the current version of Virginia's Constitution, and the 245th anniversary of its first Constitution and Declaration of Rights. George Mason's draft of Virginia's bill of rights became a model for other states, and Thomas Jefferson borrowed from it when he composed the Declaration of Independence, making it arguably "the most influential constitutional document in American history." A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 38–39 (1974) (citation omitted). At least for a time.

More recently, courts and litigants alike have treated Virginia's Constitution as something of an also-ran behind its federal counterpart. To the extent courts have ruled on Virginia's constitutional provisions at all, they've tended to deem them "coextensive" with federal rights—giving short shrift to any broader protections they might provide while ceding the bulk of control over their development to the federal courts. Stated simply, Virginia's Constitution has been slowly vanishing.

Judicial "lockstepping," meaning the 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, and a key impediment to the role of state courts in contributing to the dialogue of American constitutional law." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF CONSTITUTIONAL LAW 174 (2018).

This appeal offers an opportunity to reverse that trend here in Virginia. The Court has not said whether Virginia's free-exercise clause is "coextensive" with the federal right. And it should hold that Virginia's Constitution offers more protection than the watered-down version of the federal right that survived *Employment Division v. Smith*. And while the Court has said generally that Virginia's free-speech and due-process rights are "coextensive" with their federal counterparts, it has not yet had occasion to map out the precise contours of those rights.

Just last Term, a majority of U.S. Supreme Court Justices recognized "serious arguments that *Smith* ought to be overruled." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring); *id.* at 1888 (Alito, J., concurring) (explaining why "*Smith*'s interpretation" of the federal Free Exercise Clause "is hard to defend"). "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 1882 (Barrett,

J., concurring). Even still, the Court stopped short of overruling *Smith*, with some justices unsure "what should replace [it]." *Id.* Meanwhile, federal courts are divided over whether and to what extent teachers forfeit their federal free-speech rights at the schoolhouse gates.[6]

But no matter what the federal courts have said about the meaning of the rights enshrined in the federal Constitution, there is no reason why this Court cannot fully enforce the independent rights that Virginia's Constitution provides to the citizens of this Commonwealth. "Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees found in their own constitutions, even guarantees that match the federal ones letter for letter." SUTTON, SOLUTIONS at 16.

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[6] Compare *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (joining the Fourth, Fifth, and Ninth Circuits in holding "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship"), and *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (declining to apply *Garcetti*'s "official duties" test in high-school teacher "case involving speech related to teaching"), with *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 198 (2d Cir. 2010) (applying *Garecetti* to public school teacher's grievance filing), *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 334 (6th Cir. 2010) (applying *Garcetti* to teacher's choice of books and methods of instruction), and *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (applying *Garcetti* to elementary-school teacher's speech opposing the war in Iraq).

The state provisions Vlaming invokes *do not* "match the federal ones letter for letter." *Id.* And it should be no surprise that the broader and more robust language in Virginia's Constitution offers broader and more robust protection. At the very least, this Court should hold that the text, structure, and history of Virginia's constitutional protections forbid forcing Virginians to express their own personal agreement with messages they oppose.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This Court should grant the petition and reaffirm that basic truth for all Virginians.

ARGUMENT

I. Vlaming sufficiently alleged the School violated his state constitutional and statutory free-exercise rights.

A. Virginia's free-exercise clause provides stronger protection than current federal free-exercise doctrine, so *Smith* doesn't apply.

Virginia's constitutional Framers built our state Constitution's free-exercise clause on the foundational truth that the "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.

Therefore, Virginia's Constitution (1) protects every Virginian's "free exercise of religion, according to the dictates of conscience," (2) provides that no one "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," and (3) ensures that Virginians "shall be free to profess and by argument maintain their opinions in matters of religion," which "shall in nowise diminish, enlarge, or affect their civil capacities." VA. CONST. art. I, § 16.

In more cursory language, the federal Constitution merely prohibits a "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

Neither contains an exception allowing the right to be infringed. But in *Employment Division v. Smith*, the U.S. Supreme Court read a broad exception—for "neutral, generally applicable" laws—into the text of the federal right. 494 U.S. 872, 879–80 (1990). In so doing, "the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice." *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring). As a result, "[e]ven if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection." *Id.* (Alito, J., concurring).

That's wrong as a matter of federal law. *Id.* at 1894–1907 (Alito, J., concurring) (detailing how "*Smith*'s interpretation conflicts with the ordinary meaning of the First Amendment's terms" and with how the "free-exercise right was understood when the First Amendment was adopted"). But the Court need not decide that question because Vlaming only raised *state* claims in his complaint. And there are strong reasons why Virginia's free-exercise clause provides greater protection than the current understanding of the federal free-exercise clause post-*Smith*.

First, the text of Virginia's provision is "[l]onger and more inclusive than its federal counterpart," bolstering the conclusion Virginia "set higher standards for the liberty of its citizens" than the floor set by the federal right. HOWARD, COMMENTARIES at 55. For example, Virginia's Constitution ensures that Virginians' religious opinions, and their right to "profess and by argument maintain" those opinions, "shall in nowise diminish, enlarge, or affect their civil capacities." VA. CONST. art. I, § 16. In *Perry v. Commonwealth*, the General Court of Virginia held that disqualifying a witness based on his religious beliefs regarding his oath would violate our Constitution's promise that one's "religious opinions shall not lessen [his] 'civil capacities.'" 3 Gratt. (44 Va.) 632, 633, 644 (1846). The witness's alleged incapacity was "not a natural" one. *Id.* at 643–44. It was derived from the civil law. *Id.* at 644. And that made it "a civil incapacity," which the Constitution forbade the government from diminishing based on the witness's religious beliefs. *Id.*

So too here. Vlaming is not naturally incapable of teaching high-school French. Quite the contrary, his teacher evaluations praised his performance. Compl. 6. The School granted him continuing contract status the year before the events in question. *Id.* at 5. And his students staged a walkout the day after his firing to protest the loss of a teacher they loved and respected. *Id.* at 1, 16. Instead, the School has deemed Vlaming incapable of teaching based on his religious belief that a man cannot be a woman, and vice versa, and based on his refusal to affirm the School's belief to the contrary. "But the Constitution says that [Vlaming's] religious opinions shall not lessen [his] 'civil capacities.'" *Perry*, 3 Gratt. (44 Va.) at 644. And this Court should so hold based on the Virginia Constitution's plain text.

Second, the historical evidence refutes any contention that a *Smith*-like exception should be judicially superimposed onto the text of Virginia's free-exercise clause. For one thing, Virginia's Constitution promises more than mere tolerance of religion: "When George Mason proposed the term 'toleration' for the religious liberty clause of the Virginia Bill of Rights, Madison objected on the ground that the word 'toleration' implies an act of legislative grace . . . ." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443 (1990). "Madison proposed, and the Virginia assembly adopted, the broader phrase: 'the full and free exercise of religion.'" *Id.*

For another, at Madison's urging the Virginia legislature rejected George Mason's proposed free-exercise exception for circumstances where "any man disturb the peace, the happiness, or safety of society." *Id.* at 1462. "Madison criticized the breadth of Mason's proposed state interest limitation," offering "a much narrower state interest exception" in its place. *Id.* at 1463. By adopting neither, the legislature apparently "could not decide between the Mason and Madison formulations and compromised through silence." *Id.* "It is fair to assume, however, 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." *Id.* Either way, the debate over the scope of the exception proves that Virginia's Framers recognized that the right they were creating "include[s] the right of exemption from generally applicable laws that conflict with religious conscience." *Id.*

Third, "[s]o many of the milestones of religious liberty, such as Jefferson's Bill for Religious Liberties and Madison's Memorial and Remonstrance, have sprung from Virginia sources that it is not surprising if the Virginia courts see Virginia's religious guarantees as having a vitality independent of the Federal Constitution." HOWARD, COMMENTARIES at 303. "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. Common-*

wealth, 185 Va. 335, 343, 38 S.E.2d 444, 448 (1946). And that explains why our "provision has been applied on occasion with even more strictness than comparable federal applications of the First Amendment—a result reflecting Virginia's historic approach to questions of church and state since the time of Madison." HOWARD, COMMENTARIES at 55.

Fourth, other courts' willingness to interpret their state constitutions to require something like a pre-*Smith* strict-scrutiny analysis bolsters the conclusion this Court should, too. *Id.* at 207, 271 n.19 (collecting cases); *see also James v. Heinrich*, 960 N.W.2d 350, 369 (Wis. 2021); *State v. Mack*, 249 A.3d 423, 441–42 (N.H. 2020); *Fortin v. The Roman Cath. Bishop of Portland*, 871 A.2d 1208, 1228 (Me. 2005); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043–45 (Ohio 2000); *Swanner v. Anchorage Equal Rts. Comm'n*, 874 P.2d 274, 280–81 (Alaska 1994) (per curiam); *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 235–37 (Mass. 1994); *Hill-Murray Fed'n of Tchrs., St. Paul, Minn. v. Hill-Murray High Sch., Maplewood, Minn.*, 487 N.W.2d 857, 864–65 (Minn. 1992); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185–88 (Wash. 1992) (en banc).

Finally, resolving Vlaming's free-exercise claim is made easier by his allegation he was fired "for what he didn't say," not "for something he said." Compl. 2. As other courts have recognized, state-interest exceptions to state free-exercise clauses rarely, if ever, justify compelling a person to act in violation of his or her religious beliefs. Such exceptions typically apply "to acts committed, not to acts omitted." McConnell,

Origins at 1505 (quoting *People v. Philips*, Court of General Sessions, City of New York (June 14, 1813)). *See also* SUTTON, SOLUTIONS at 164–65 (discussing West Virginia flag-salute case where court distinguished between "active violations of negative laws," like polygamy, and merely "remaining passive when active participation is required").

"Where 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." *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985) (emphasis added).[7] In the words of Thomas Jefferson's Bill for Religious Freedom, drafted in 1776 and enacted 10 years later, "[I]t 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." VA. CODE § 57.1 (emphasis added). No such "overt acts against peace and good order" or "grave and immediate public danger" justify the School's attempt to force Vlaming to affirmatively express his agreement with messages that violate his religious beliefs.

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[7] For many of the same reasons, firing Vlaming for occasionally using female pronouns to refer to the student outside the student's presence would constitute a violation of Vlaming's free-exercise (and free-speech) rights under the Virginia Constitution. But this Court can resolve this appeal without deciding those issues because Vlaming sufficiently alleged the School fired him "for what he *didn't* say." Compl. 2 (emphasis added). And at this stage, that must be accepted as true. *Eubank*, 861 S.E.2d at 401; *Plofchan*, 299 Va. at 547–48, 855 S.E.2d at 865.

B. Even applying federal caselaw, the School violated Vlaming's state constitutional free-exercise rights.

1. The School tried to force Vlaming to confess his agreement with messages that violate his religious beliefs, so the *Smith* test doesn't apply.

The Supreme Court has stated as a "general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But even under federal caselaw, *Smith*'s test does not fully delineate the limits on the government's power to intrude on free-exercise rights.

As the Supreme Court recently emphasized, it is *not* the case "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). For example, the Court has distinguished *Smith* as a case involving "government regulation of only *outward physical acts*." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) (emphasis added). And even *Smith* allowed that the government cannot "punish the expression of religious doctrines it believes to be false . . . or lend its power to one or the other side in controversies over religious authority or dogma." 494 U.S. at 877 (citations omitted). The School Defendants have done both here.

"The free exercise of religion means, first and foremost, the right to believe *and profess* whatever religious doctrine one desires." *Id.* (emphasis added). Forcing Vlaming to use biologically and (for him) theologically incorrect pronouns forces him to profess religious and ideological viewpoints he fundamentally opposes. Thus, even under federal caselaw, it does not matter whether the School's policies are neutral and generally applicable. They are unconstitutional just the same.

2. Vlaming sufficiently alleged the School did not show neutrality toward his religion.

Vlaming also sufficiently alleged that the School's policies are not neutral or generally applicable as applied to him and fail strict scrutiny. The federal free-exercise clause "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534). And that "guarantee[s] that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732. When Vlaming raised a religious objection to being forced to express messages he disagrees with, School Defendants told him his "personal religious beliefs end at the school door" and fired him. Compl. 11. At this stage of the proceedings, that was enough to allege a claim for non-neutrality. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 168 (2d Cir. 2020) (holding similar statements, though "subject to various interpretations," sufficiently alleged non-neutrality to survive a motion to dismiss).

C. The School also violated Vlaming's statutory right to be free from substantial burdens on his religion.

In 2007, the General Assembly enacted Virginia Code § 57-2.02. Under that code section, "No government entity shall 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." VA. CODE § 57-2.02(B). In the nearly 15 years since, Virginia's appellate courts have never construed that provision. So Vlaming's statutory free-exercise claim presents a significant issue of first impression.

For example, relying mainly on a federal district court opinion by Judge Arenda Wright Allen addressing COVID-related church closures, the School argued below that forcing Vlaming to use biologically incorrect pronouns does not substantially burden his religion. Mem. in Supp. of Dem. at 20–22 (citing *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418 (E.D. Va. 2020)). That's wrong. *Horen v. Commonwealth*, 23 Va. App. 735, 745, 479 S.E.2d 553, 558 (1997) (stating that a "substantial burden [under the federal RFRA] is imposed on the free exercise of religion where governmental action compels a party to affirm a belief they do not hold"). And this Court should grant Vlaming's petition and say so.

The School's application of its policies also cannot survive Code § 57-2.02's strict-scrutiny analysis. The question "is not whether the [School] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" to Vlaming. *Fulton*, 141 S. Ct. at 1881. And "regulating speech because it is [allegedly] discriminatory or offensive is not a compelling state interest, however hurtful the speech [or choice not to speak] may be." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019).[8] Likewise, the School hasn't shown that applying its policies to force Vlaming to speak messages that violate his beliefs is the "least restrictive means" of furthering its interests. VA. CODE § 57-2.02(B).

Finally, it cannot be the case that subsection (E) creates an exception so broad it swallows the rule, as the School's arguments below suggest. Mem. in Supp. of Dem. at 19–20. *See Covel v. Town of Vienna*, 280 Va. 151, 158, 694 S.E.2d 609, 614 (2010) ("An absurd result describes situations in which the law would be internally inconsistent or otherwise incapable of operation.") (cleaned up). But until this Court says otherwise, lower courts may feel free to read it that way.

[8] *See also Meriwether*, 992 F.3d at 510 (explaining why the "university's interest in punishing" professor's speech for declining to use biologically incorrect pronouns was "comparatively weak" when the professor had "proposed a compromise" to only use the student's last name).

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

Virginia's free-speech clause recognizes that "the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments." VA. CONST. art. I, § 12. Accordingly, the clause provides that "any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right," and that "the General Assembly shall not pass any law abridging the freedom of speech or of the press." *Id.*

This Court has said generally that Virginia's free-speech clause is "coextensive" with the federal right. *Elliott v. Commonwealth*, 267 Va. 464, 473, 593 S.E.2d 263, 269 (2004). But the Court has not yet defined the precise contours of that right, nor has it identified which federal authorities it finds persuasive, particularly in a case like this one involving teacher speech. This case provides an ideal vehicle to begin to resolve some of these issues of first impression.

A. The School tried to compel Vlaming to speak, discriminated against him based on his viewpoint, and retaliated when he chose not to speak.

Vlaming's free-speech claims implicate three of the worst forms of government abuse of free speech: compelled speech, Compl. 25–26, viewpoint discrimination, Compl. 27–29, and retaliation, Compl. 29–30. And Vlaming sufficiently alleged facts to support all three claims.

By attempting to force Vlaming to express personal agreement with religious and ideological messages he disagrees with—and by firing him for resisting that attempt—the School violated the most clearly "fixed star in our constitutional constellation," namely that no government entity "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. As the Sixth Circuit recently confirmed in an almost identical university case, "If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity." *Meriwether*, 992 F.3d at 506.

The same principle applies here. *See Russo v. Cent. Sch. Dist. No. 1, Towns of Rush, Et Al., Monroe Cnty., State of N.Y.*, 469 F.2d 623, 633–34 (2d Cir. 1972) (holding that a high-school teacher had a free-speech right to stand silently during classroom pledge of allegiance). And just like in *Meriwether*, "the First Amendment interests are especially strong here because [Vlaming's] speech also relates to his core religious and philosophical beliefs," and because this case also involves "compelled speech on a matter of public concern." 992 F.3d at 509–10. "And '[w]hen speech is compelled . . . additional damage is done.'" *Id.* at 510 (quoting *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)).

B. Neither *Garcetti*'s official-duties test nor *Pickering*'s balancing test applies to the School's attempt to force Vlaming to express his personal agreement with the School's viewpoint on issues of public concern.

The School Defendants argued below they could force Vlaming to express messages he disagrees with because using a student's preferred pronouns is part of Vlaming's "official duties" as an employee. Mem. in Supp. of Dem. at 9–11 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). But the U.S. Supreme Court made clear in *Garcetti* it was not deciding whether the official-duties test applies to "speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425. The Fourth Circuit has correctly decided it does not. *Lee*, 484 F.3d at 694 n.11 (*Garcetti* does not apply to high-school teacher's "speech related to teaching"); *see also Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (same for university professors). And this Court should hold the same, especially for compelled speech that forces an expression of personal agreement with a school's viewpoint on issues of public concern.

The framework for assessing a public employee's federal free-speech claim enunciated in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968), also does not apply in cases where, as here, "the government compels speech." *Janus*, 138 S. Ct. at 2473. "When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different." *Id.*

Finally, even assuming *arguendo* that *Pickering* does apply, the School still violated Vlaming's free-speech rights because speech about "gender identity" is speech on a "sensitive political topic[]" that is "undoubtedly" a matter of "profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up). "[S]uch speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Id.* (cleaned up).

Requiring teachers to express their own personal agreement with the government's viewpoint on such issues is not "curricular speech," subject to the government's full conscription and control, because expressions of personal agreement do not "constitute school-sponsored expression bearing the imprimatur of the school." *Lee*, 484 F.3d at 697. Nor can a school's interest in compelling such expressions of personal agreement outweigh a teacher's constitutional interest in remaining silent. Vlaming's proposed accommodation offered the School "a win-win." *Meriwether*, 992 F.3d 510–11. Vlaming "would not have to violate his religious beliefs, and [the student] would not be referred to using pronouns [the student] finds offensive." *Id.* at 511. By rejecting that accommodation out of hand, the School violated Vlaming's free-speech rights under the Virginia Constitution.

III. Vlaming sufficiently alleged the School violated his state constitutional due-process rights.

Virginia's constitutional due-process clause, like its federal counterpart, provides that "no person shall be deprived of his life, liberty, or property without due process of law." VA. CONST. art. I, § 11. Under that clause, a government requirement "is unconstitutionally vague if persons of common intelligence must necessarily guess at the meaning of the language and differ as to its application." *Tanner v. City of Va. Beach*, 277 Va. 432, 439, 674 S.E.2d 848, 852 (2009) (cleaned up).[9] The constitutional problem with such laws is that they "impermissibly delegat[e] policy considerations to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* (cleaned up).

The School's policies at issue here, and its application of those policies against Vlaming, suffer from those exact constitutional defects and raise precisely those concerns. Persons of common intelligence differ as to what the School's policies mean and how they apply. None of the School's policies expressly state that a teacher *must* use biologically incorrect pronouns at a student's request. Indeed, the School did not even identify which policies it thought required that result until *after* it had suspended Vlaming. Compl. 14. In the interim, officials delegated

[9] This Court has said that the "due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution." *Morrisette v. Commonwealth*, 264 Va. 386, 394, 569 S.E.2d 47, 53 (2002).

their unbridled enforcement authority to the student's parents, telling Vlaming to "do whatever the parents ask." Compl. 9. And that subjected Vlaming's request for an accommodation to "resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application," the exact result Virginia's due-process clause forbids. *Tanner*, 277 Va. at 439, 674 S.E.2d at 852.

IV. Vlaming sufficiently alleged the School Board breached its contract when it fired Vlaming for exercising his rights.

Finally, this Court also should grant the petition and reverse the trial court's dismissal of a portion of Vlaming's breach-of-contract claim against the School Board. As explained above, the School Board violated Vlaming's state constitutional and statutory rights when it fired him for declining the School's demand that he speak messages he disagrees with in violation of his religious beliefs. As the Supreme Court stated just last Term, that Court has "never suggested that the government may discriminate against religion when acting in its managerial role." *Fulton*, 141 S. Ct. at 1878. Nor did Vlaming's employment status justify the School in violating his free-speech and due-process rights. When it fired Vlaming, the School Board acted unconstitutionally, arbitrarily and capriciously, and without good cause. *See Sch. Bd. of City of Norfolk v. Wescott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997). And the trial court erred by dismissing his breach-of-contract claim on that basis at the demurrer stage.

CONCLUSION

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

Vlaming desires to state orally in person, before a panel of this Court, why the petition for appeal should be granted.

Respectfully submitted,

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CERTIFICATE

Under Rule 5:17(i), the undersigned certifies that Plaintiff-Petitioner is Peter Vlaming, and Vlaming is represented by the following counsel:

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Undersigned counsel further certifies that Defendants-Respondents are 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. Defendants-Respondents are represented by the following counsel:

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Finally, undersigned counsel certifies that on November 12, 2021, the foregoing Petition for Appeal was filed with the Clerk of the Supreme Court of Virginia via the Court's VACES system, and a copy was served on each of Defendants-Respondents' counsel by email the same day. This brief complies with the length requirement set forth in Rule 5:17(f) because it does not exceed 35 pages, excluding the cover page, table of contents, table of authorities, and certificate.[10]

Vlaming desires to state orally in person, before a panel of this court, why the petition for appeal should be granted.

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[10] This brief uses true double-spacing, which means that because the brief is set in 14-point font, the line spacing is set to Exactly 28 points.