IN THE
SUPREME COURT OF VIRGINIA

Record No. 211061

PETER VLAMING,

Plaintiff-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,

Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* WOMEN'S LIBERATION FRONT IN SUPPORT OF APPELLANT

Melvin E. "Mel" Williams
VSB NO. 43305
WILLIAMS & STRICKLER, PLC
1320 Third Street, SW
Roanoke, Virginia 24016
Phone: 540-266-7800
Fax: 540-206-3857
mel@williamsstrickler.com

Jennifer C. Chavez*
Women's Liberation Front
1802 Vernon St. NW, #2036
Washington, DC 20009
Phone: (202) 964-1127
legal@womensliberationfront.org

*Motion for admission *pro hac vice* pending

Counsel for Amicus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Books

INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae is the Women's Liberation Front ("WoLF"), a nonprofit organization of radical feminists dedicated to protecting, advancing, and restoring the rights of women and girls. WoLF has nearly 1,000 members who live, work, and attend or teach in schools across the U.S. and abroad, including more than a dozen members in Virginia. Its interest in this case stems from its mission to preserve and advance women's sex-based civil rights and liberties, including free speech and freedom from coerced speech.

WoLF agrees that "each culturally and legally disadvantaged group must be able to address its disadvantages with linguistic specificity. To that end, women need woman-specific language, especially in an area of such linguistic precision as the law." Orwoll, Andrea, *Pregnant "Persons": The Linguistic Defanging of Women's Issues and the Legal Danger of "Brain-Sex" Language*, 17 Nev. L.J. 667, 707 (2017). Identity-based language mandates undermine this need in service of a movement whose goal is to deprive the concepts of sex, male, and female of any stable meaning.

> The postmodern identity movement's reworking of sex and gender is at least partly to blame for [the] defanging of the feminist movement as a vehicle for women's liberation. At its heart, postmodernism in general "represents a challenge to the fixity of meaning." Specifically

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *amicus curiae* or their counsel contributed money intended to fund preparation or submission of this brief.

> with regard to sex and gender, the postmodern identity movement calls into question the ability of human beings to be put into sexed or gendered categories at all.

Id. at 693. Once language about sex and "gender" is destabilized, anyone is empowered to make extraordinary claims and demands based on "gender identity," and public institutions like West Point School District are pressured to support them under the guise of civility and "respect" for student preferences. *See* Jonathan Hochman, Letter to Peter Vlaming (Nov. 5, 2018) (JA057).

As a radical feminist organization, WoLF rejects gender identity beliefs because they are founded on sex stereotypes and other subjective beliefs about sex. Radical feminists locate the root source of sexual oppression in the biological differences between males and females, and they seek to address the ways in which female sexual and reproductive capacity renders women and girls vulnerable to exploitation and abuse. Those goals are thwarted when people are prohibited from speaking freely and accurately about human sex differences.

SUMMARY

This appeal centers on the decision of the West Point School Board (the "School Board") to terminate Peter Vlaming's employment after six years of exemplary teaching service, solely because Mr. Vlaming declined to use his own voice to express support for the vague, quasi-spiritual concepts of "gender identity" and "gender transition." Like him, WoLF values its right as an

organization and the rights of its members to be free from all compelled speech. WoLF sees "gender identity" ideology as inextricably regressive and sexist, and rejects all attempts to obscure the reality of human sexual dimorphism in the service of fashionable dogmas.

In accordance with that reality, this brief uses "sex" throughout to mean "the fundamental distinction, found in most species of animals and plants, based on the type of gametes produced by the individual," and the resulting classification of human beings into those two reproductive classes: female (women and girls) or male (men and boys). *See* "*Sex*," "*Male*," "*Female*," and "*Sexual dimorphism*," MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED Health (7th ed. 2003), https://medical-dictionary.thefreedictionary.com.

Contrary to the arguments of the School Board below, pronoun usage is a matter of grave public importance because it has the power to shape common perceptions about men and boys, women and girls, and the rules that govern their existence and interactions in society. Indeed, that is the very reason why proponents of this belief demand that the government use its police power to enforce their preferred identity-based language. As a practical matter, workplace pronoun mandates isolate and threaten women and men who, like Mr. Vlaming, simply want to perform their jobs without being compelled to support beliefs they do not share.

Belief in "gender identity" is powerless to reshape material reality. Nonetheless, with stunning speed and almost no open debate, this concept has entered the legal lexicon and been applied in a manner that conflicts with bedrock civil rights. This brief explains how gender identity-based laws and policies have already been applied in a manner that tramples upon the rights, privacy, and safety of women and girls. In presenting this information, WoLF urges the Court to give due attention to the broader implications of the ruling below for all females who live and work in the Commonwealth of Virginia.

STATEMENT OF THE CASE

Amicus defers to the Nature of the Case and Material Proceedings Below as articulated in the Petition for Appeal in this matter.

ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

Amicus defers to the Assignments of Error and Standard of Review as articulated in the Petition for Appeal in this matter.

ARGUMENT

I. "GENDER IDENTITY" LANGUAGE MANDATES ARE A SERIOUS MATTER OF PUBLIC CONCERN.

Even the seemingly inconspicuous parts of language such as pronouns have the potential to influence social perceptions of reality. *See* Amicus Brief of the Nat'l Assoc. of Scholars In Support of Petitioner in this appeal (Nov. 12, 2021). If pronouns lacked social meaning there would have been no reason for any West

Point student to demand that Mr. Vlaming alter his own pronoun usage to suit their personal sensibilities.

In contradistinction, many feminists have discouraged the use of the generic "he" in reference to members of mixed-sex categories. They did this to promote a *more accurate* reflection of the material reality that women have distinct interests from those of any males to whom they may be related through birth or marriage. It was, among other things, an act of resistance to the pernicious lingering effects of coverture, the legal fiction under common law whereby a married woman had no "civil right [to] a legal existence . . . separate and apart from the legal personality of her husband."). *See Furey v. Furey*, 193 Va. 727, 728 (1952).

Governmental pronoun mandates do not aim to foster greater accuracy or understanding of objective facts. Instead, as with the West Point School Board's attempt to interpolate a "preferred pronouns" mandate into its antidiscrimination policy, they are instituted for the purpose of mandating ideological conformity. As such, they lack any legitimate governmental or educational purpose.

A. Sex Is Material And Immutable, And Sex Differences Matter In Some Circumstances.

The meaning of sex is both objective and longstanding. Like all mammals, in order for the species to survive our earliest human ancestors had to be able to distinguish between male and female even before they developed the relevant language. *See* Dawkins, R., THE ANCESTOR'S TALE, A PILGRIMAGE TO THE DAWN

OF EVOLUTION 135 (2005) ("[T]he gene determining maleness (called *SRY*) has never been in a female body, at least since long before we and the gibbons diverged," approximately 17 million years ago). Since then, biologists have uncovered a more sophisticated understanding of sex, but the basic biological distinctions between male and female remain. *X chromosome*, and *SRY gene - sex determining region Y*, NAT'L INST. FOR HEALTH GENETICS HOME REFERENCE, available at https://medlineplus.gov. In contrast, the earliest appearance of the term "gender identity" in any law review article maintained by the Westlaw legal database appears to have been in 1985. *See* David M. Neff, *Denial of Title VII Protection to Transsexuals: Ulane v. Eastern Airlines, Inc.*, 34 DePaul L. Rev. 553 (1985).

Sex is observed and recorded – not "assigned" – at or before birth by qualified medical professionals, and it is an exceedingly accurate categorization: an infant's sex is easily identifiable based on external genitalia and other factors in 99.982% of all cases; the miniscule fraction of individuals who have "intersex" characteristics (also known as differences or disorders of sexual development, "DSDs") are also either male or female; in vanishingly rare cases, individuals are born with a mix of male and female reproductive characteristics, but they do not constitute a third reproductive class. Sax, Leonard, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, THE JOURNAL OF SEX RESEARCH, v.39 no. 3

174-78 (2002), https://pubmed.ncbi.nlm.nih.gov/12476264/; reproduced in full at https://www.leonardsax.com/how-common-is-intersex-a-response-to-anne-fausto-sterling/.

Although people's lives and personalities are not determined by their sex, their sex is always determined by their biology. Nowhere is the immutability of sex more apparent than in the medical context. Regardless of whether any particular woman *identifies with* her reproductive capacity, it remains true that only female humans are capable of carrying eggs and gestating infants, while only males are capable of producing sperm needed to fertilize eggs. *See* MERRIAM-WEBSTER.COM DICTIONARY, "Gamete," https://www.merriam-webster.com/dictionary/gamete. Although people of both sexes are vulnerable to sexual assault, only women can be forcibly impregnated through rape. While men may be indirectly affected, only women's bodies are directly, physically regulated by laws concerning abortion, *in vitro* fertilization, and miscarriage; only men suffer testicular cancer or experience erectile disfunction. Beyond these obvious differences, researchers in the fields of biology, genetics, and medicine are constantly uncovering previously-unrealized sex differences outside of the immediate sexual reproductive system. *See, e.g.* Soldin, *et al., Sex differences in pharmacokinetics and pharmacodynamics*, CLINICAL PHARMACOKINETICS, vol. 48,3, 143-57 (2009). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3644551/.

Even for those individuals who pursue risky cosmetic surgery and health-threatening exogenous hormones, the changes are superficial. Centuries after death, human skeletal remains display telltale immutable characteristics of an individual's sex. *See* Price, Neil, *et al.*, *Viking warrior women? Reassessing Birka chamber grave Bj.581*, ANTIQUITY, 93(367):181-198 (2019), https://gemaecce.com/2019/02/20/viking-warrior-women-reassessing-birka-grave/.

B. Gender Identity Ideology Is Rooted In Idiosyncratic And Quasi-Spiritual Beliefs.

In this case the School Board asserts that the complaining student "had recently undergone a gender transition"—as if this were a straightforward matter of fact. Defs.' Mem. in Supp. of Demurrer and Plea in Bar at 2 (JA094). But the idea of "gender transition" is a quasi-spiritual concept rooted in the student's faith that her embodied femaleness is somehow separate from her mind.

A core tenet of the gender identity belief system is that the sole criterion for determining whether someone is transgender is that they say they are. As demonstrated throughout the pleadings below, the only defining characteristic of a person claiming legal transgender status is the demand to be legally recognized as one's subjective gender identity instead of one's natal sex. Any person, at any time, and for any reason may claim to possess a gender identity, so there is no inherent limit to the potential size of the transgender category, nor can gender identity or transgender status be described as stable or discrete characteristics.

WoLF is not aware of any indication that the complaining student in this matter has sought treatment or received a diagnosis of "gender dysphoria." It is relevant that activist groups like the one cited by West Point administrators advise students: "You have the right to be treated according to your gender identity. That's true even if you haven't done things like changing your ID or getting medical treatment, and your school cannot require you to show proof of these things in order to have your gender respected." NCTE, *Know Your Rights: Schools*, at https://transequality.org/know-your-rights/schools (retrieved May 17, 2022). Therefore it is WoLF's assumption that the student's claim of transgender status is based on self-declaration alone.

Because they lack grounding in material reality, claims based on gender identity must always ride on the coattails of other distinct classes of people whose status is determined by a material state of being. Sex, homosexuality or bisexuality, and "intersex" or DSD characteristics are all defined by a material and verifiable state of being that is objectively defined. Protecting people from discrimination on the basis of any of these characteristics requires a recognition that sex is real and verifiable, not subjective.

In contrast, protecting transgender status requires people to *deny* the basic fact that sex in humans is dictated by biology at the moment of conception, and remains immutable throughout life. It therefore becomes necessary for proponents

to claim that sex is "assigned at birth" (*see* Defs.' Mem. in Supp. of Demurrer and Plea in Bar at 30 (JA122))—a term that has been misappropriated from clinicians and patients dealing with DSDs. This term was coined at a time when physicians pressured parents to "assign" a sex to infants born with ambiguous genitals, often by performing surgical alterations for purely cosmetic purposes and in some cases even lying to the child about their intersex characteristics. Intersex Soc. of N. Amer., *What's wrong with the way intersex has traditionally been treated?*, https://isna.org/faq/concealment/. While that practice is now strongly disfavored (*see* InterAct Advocates for Intersex Youth, W*hat should I know about surgery on my child's clitoris, vagina, urethra, or testicles?* https://interactadvocates.org/faq/#advice), gender identity activists have revived and repurposed the phrase "sex assigned at birth" in service of a very different set of goals.

As noted below, courts sometimes invoke a diagnosis of "gender dysphoria" to validate claims of transgender status, without expressly limiting such claims to those with a diagnosis. *See* sec. I.C., *infra*. In any case, "gender dysphoria" is itself a controversial diagnosis, encompassing a disparate collection of psychiatric conditions previously described in the medical literature as transsexualism, transvestic disorder, fetishistic transvestitism, and gender identity disorder. *See* Nuttbrock, et al., *A Further Assessment of Blanchard's Typology of Homosexual Versus Non-Homosexual or Autogynephilic Gender Dysphoria*, ARCHIVES OF

SEXUAL BEHAVIOR 40(2), 247-57 (April 2011), https://www.researchgate.net/publication/40806058; *see also* Drescher, et al., *Expert Q & A: Gender Dysphoria*, https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a; and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Fifth ed.* (2013), available at https://www.academia.edu/32447322/DIAGNOSTIC_AND_STATISTICAL_MANUAL_OF_MENTAL_DISORDERS. The diagnosis applies to *anyone* who experiences significant distress at the thought of one's sex, including people who do not identify as transgender. American Psychiatric Association, *Gender Dysphoria* (2013), http://bit.ly/2Re1MA5 (discussing the diagnostic criteria contained in the DSM-5). For example, "crossdressers, drag queens/kings or female/male impersonators, and gay and lesbian individuals" commonly experience gender dysphoria. WPATH Standards at 7. In short, while doctors diagnose "gender dysphoria" using psychiatric clinical criteria, a person's "gender identity" is a subjective experience that is self-identified and unverifiable. The diagnosis is invoked when present, but dismissed as irrelevant when absent.

Importantly, a diagnosis does not mean the individual possesses an immutable characteristic of "being transgender." Quite to the contrary, "[e]vidence from the 10 available prospective follow-up studies from childhood to adolescence . . . indicates that for ~80% of children who meet the criteria for [gender dysphoria

in childhood], the [gender dysphoria] recedes with puberty." Kaltiala-Heino, et al., *Gender dysphoria in adolescence: current perspectives*, ADOLESCENT HEALTH, MEDICINE AND THERAPEUTICS 9, 31–41. (March 2, 2018), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5841333/. In other words, a diagnosis of gender dysphoria only describes an individual's subjective state of mind at the time of diagnosis; it has no bearing on that individual's vital and immutable sex characteristics.

This ever-present disconnect between the material and the metaphysical reveals the quasi-spiritual nature of the transgender belief system. "Gender identity" is akin to the religious concept of a soul: "the principle of life, feeling, thought, and action in humans, regarded as a distinct entity separate from the body, and commonly held to be separable in existence from the body; the spiritual part of humans as distinct from the physical part." *Soul*, Dictionary.com, based on RANDOM HOUSE UNABRIDGED DICTIONARY (2021), https://www.dictionary.com/browse/soul.

It is no exaggeration to say that the current wave of "gender identity" advocacy involves an explicit rejection of objective scientific fact. That was on full display earlier this month when a coalition of lawyers led by the Transgender Law Center filed a motion to intervene in WoLF's lawsuit challenging California's SB 132, a law that allows male inmates, including convicted rapists and murderers, to

be housed in women's facilities. In their motion, Proposed Intervenors, Transgender Gender-Variant & Intersex Justice Project et al., "deny the allegation that 'it is precisely a combination of anatomy, genitalia, and physical characteristics that differentiate men from women,'" and further "deny the allegation that 'human beings' are 'sexually dimorphic, divided into males and females each with reproductive systems, hormones, and chromosomes that result in significant differences between men[] and women[.]'" Proposed Answer to Plaintiffs' Complaint for Declaratory and Injunctive Relief, *Chandler, et al. v. California Dept. of Corrections and Rehabilitation, et al.*, No. 1:21-cv-01657-JLT-HBK, Dkt. 19-8 (E.D. Cal., May 9, 2022), available at https://www.womensliberationfront.org/chandler-v-cdcr-press. While people are free to engage in this type of science denialism in the privacy of their homes, it has no place in public schools.

Spiritual beliefs provide many people with a sense of purpose and a way to understand the world. But these beliefs can neither be imposed on the public nor used to justify profound changes in the analysis of free speech rights.

C. Pronoun Mandates Trivialize And Misappropriate Legal Protections Against Sex Discrimination And Harassment.

There is an open question as to whether the Board could reasonably deem Mr. Vlaming's choice to avoid identity-based pronouns as a form of discrimination or harassment, given the specific wording of the school's nondiscrimination policy.

WoLF submits that the School Board's interpretation is wholly unreasonable and undermines the purpose of laws and policies aimed at combatting sex discrimination.

West Point School Board Policy GBA/JHFA states as follows:

> It is a violation of this policy for any student or school personnel to harass a student or school personnel based on race, color, religion, national origin, ancestry, political affiliation, sex, sexual orientation, gender, gender identity, age, marital status, genetic information or disability as defined by law, or based on a belief that such characteristic exists.

Complaint Ex. 11 at 21 (JA073). It is no coincidence that when school administrators set out to "educate" Mr. Vlaming about identity-based pronouns, they did not attempt to pinpoint the source of their authority in the language of the foregoing policy. That was because the policy neither prohibits the use of accurate sex-based pronouns nor mandates the use of inaccurate identity-based pronouns; it is silent. *Id.*

Nor did school officials attempt to explain the pedagogical or curricular value of identity-based pronouns. Instead, they presented two documents that appear to have been found through an *ad hoc* internet search. One of them is styled as a "fact sheet" purporting to interpret a 2016 U.S. Department of Education opinion letter, written by the activist organization National Center for Transgender Equality ("NCTE"). *Id.* Ex. 3 (JA046-49); Defs.' Mem. in Supp. of Demurrer and

Plea in Bar at 3 (JA095). To the extent this document was offered to support the school's interpretation of its policy it fell far short of the mark, as the agency's opinion letter had already been withdrawn, rendering the activist document obsolete. In any event, neither document carried any legal or persuasive relevance to the School Board's actual anti-discrimination policy, Policy GBA/JHFA.

Despite the absence of written policy justification, the Board insists that compliance with its identity-based pronoun mandate was "part of Vlaming's official duties as a public school teacher." The following thought experiment helps illustrate the key defect in the School Board's approach: West Point School Board Policy GBA/JHFA prohibits harassment and discrimination on the basis of religion. Complaint Ex. 11 at 21 (JA073). We can imagine a student whose sincere religious convictions led her to request that everyone address and describe her (whether directly or indirectly, in her presence or absence), as "Druidess" in front of her legal name. A teacher should reasonably expect that the Policy GBA/JHFA prohibits him from making degrading or insulting remarks or treating the student differently based on her personal identity as a Druidess. The student is entitled to her private beliefs, and a teacher has no authority to constrain or penalize her private exercise of religion when it is irrelevant in the classroom. At the same time, it is readily apparent that the student has no reasonable expectation and the teacher

has no obligation to comply with her demand for a special honorific—particularly when the student's religious belief may conflict with the teacher's own.

In its effort to counter this point, the School Board *admits* that its policy does not preclude facially-absurd student demands such as a demand for "regal pronouns" like "your Majesty" because, according to the Board, such an "imagined exception" "trivializes the School Board's important interest in preventing sex discrimination (and complying with federal and state laws that prohibit it)." Defs.' Reply in Support of Demurrer at 8 (JA199). However, it is the School Board's own actions that trivialize sex discrimination and sex-based harassment, by invoking Title IX to punish school teachers for ideological nonconformity. *See id.* at 11-12 (JA202-03).

WoLF submits that a belief in "gender identity" should be treated as analogous to a religious belief for purposes of interpreting how nondiscrimination laws and policies apply to speech. That is, while teachers must not harass students or treat them differently from the others because they believe in "gender identity," they have no obligation to voice an affirmative belief in the same. Just as it would be unreasonable for a school to mandate special religious honorifics, it is unreasonable to mandate special "gender pronouns."

The validity of this conclusion is not altered by the Fourth Circuit's ruling in *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), or the Supreme

Court's ruling in *Bostock v. Clayton Cnty*., 140 S.Ct. 1731 (2020). As an initial matter, neither of those courts purported to interpret Virginia's constitutional guarantees of free speech and free exercise, so their rulings are not persuasive or binding on this Court in the present matter.

Moreover, both opinions confirm the nature of "gender identity" as an individual's personal, subjective belief about one's sex. In *Bostock*, the Supreme Court entirely neglected to define this core concept of its ruling, failing to explain its own understanding of what it means to "be transgender" or to have a "gender identity." *See Bostock*, 140 S.Ct. 1731, 1739. We are left to infer that the court either equated the Title VII claimant's psychiatric diagnosis of "gender dysphoria" with "transgender status," or that the Court simply accepted the claimant's subjective belief that he would "live and work full-time as a woman," by wearing a skirt to work. *Id*. at 1738. This is not only unclear but unworkable, given that these are two very different definitions of what it means to "be transgender."

The Fourth Circuit's ruling in *Grimm* is more detailed but no less equivocal. It refers to the female student plaintiff as a "transgender male," perhaps based on the court's implicit acceptance that the student's "gender identity is male," *Grimm*, 972 F.3d at 593, or perhaps based on the student's diagnosis of "gender dysphoria," also cited by the Court. *Id.* at 595 (reciting a list of subjective feelings that form the factors for diagnosis, such as "[a] *strong desire* to be rid of one's

primary and/or secondary sex characteristics," "[a] *strong desire* to be treated as the other gender" [sic] and "[a] *strong conviction* that one has the typical feelings and reactions of the other gender" [sic]) (emphasis added) (quoting the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013), *supra*), As the Fourth Circuit also said that "many [i.e., not 'all'] transgender people are clinically diagnosed with gender dysphoria," *Id.* at 594, it is likely that the court did not intend to equate "transgender status" with the possession of a clinical diagnosis.

None of this is satisfactory, even setting aside the federal courts' failure to state clearly which version of "gender identity" underlies their rulings. Whether it is determined by subjective feelings alone or by a clinically-diagnosed mental disorder, the notion that an individual's subjective desires and convictions have any effect on material reality is nothing more than an article of faith in the quasi-spiritual "gender identity" belief system. As to these types of faith-based beliefs, government must remain officially neutral.

II. "GENDER IDENTITY" LANGUAGE MANDATES UNDERMINE VALID EDUCATIONAL GOALS.

In some settings, accurate speech about sex is relevant to a student's learning experience. If left to stand, the circuit court's order is likely to be applied in a manner that deprives teachers, administrators, and students of the ability to freely discuss pertinent facts and opinions about sex without fear of punishment.

A. Schools Lack A Legitimate Interest In Favoring Gender Identity Beliefs Over Competing Facts, Ideas, And Beliefs.

The Virginia Department of Education has identified "critical thinking" as one of five "core skills that students and educators should possess." Virginia Dept. of Ed., *Virginia LEARNS: Navigating Education in Uncertain Virginia Times*, https://www.doe.virginia.gov/instruction/learns/virginia-learns.pdf. Achieving that goal is only possible if students and teachers are allowed to discuss thorny issues freely, without fear of punishment or retaliation, and without being compelled to express agreement with another person's subjective beliefs. Students must also understand that there is a crucial difference between their subjective feelings and beliefs on one hand, and objective verifiable facts on the other.

At the same time, schools lack any legitimate interest in promoting gender identity beliefs over competing facts and ideas. In this case, the school's written directive to "treat [a female student] the same as other male students" was based on the questionable notion that the student has "undergone a gender transition" that purportedly makes her "the same as other males." *See* Complaint Ex. 9 at ¶¶ 5, 28 (JA066-68); *id.* Ex. 7 (JA060). This reveals that the goal of the School Board's policy (as interpreted and applied to Mr. Vlaming) is to enforce compliance with the student's own subjective beliefs. That is not a legitimate educational goal.

Relatedly, the School Board has failed to demonstrate how Mr. Vlaming's

choice to refrain from using male pronouns to describe the female student related to the content of his French language lessons or his methods of teaching. Indeed, the initial student complaint stemmed from an incident when the student was entirely absent and Mr. Vlaming unconsciously referred to her using female pronouns, inadvertently revealing that he did not share the student's subjective belief that she is male. Complaint ¶ 55 (JA008); *Id.* Ex. 9 at ¶¶ 9-10 (JA066). Mr. Vlaming's inadvertent speech and his good-faith attempt to avoid male pronouns were a far cry from the type of harassment or discrimination contemplated by the School Board's policy.

The School Board's characterization of what is "discriminatory" versus "non-discriminatory language" is an exercise in question-begging. Likewise, the School Board's claim that Mr. Vlaming's speech (or his silence) "significantly disrupted the school's functioning" is self-serving, as it assumes the conclusion that the school has a legitimate interest in compelling classroom speech that expresses an endorsement of gender identity beliefs. Imposing the private subjective beliefs of one individual upon another is not an appropriate educational or governmental aim.

The School Board's arguments in support of its disruption claim reveal that it was not Mr. Vlaming's conduct but rather the Board's fear of adverse legal action that motivated the Board to adopt an extreme interpretation of its policy, and

then to terminate Mr. Vlaming's employment when he declined to comply. Defs.' Mem. in Supp. of Demurrer and Plea in Bar, sec. I.B.2 (JA106-08). That is not sufficient justification as none of the authorities cited by the School Board compelled the Board to deprive Mr. Vlaming of his state constitutional right of free speech.

B. If The Ruling Below Stands It Will Be Used To Punish Students Who Decline To Use "Gender Identity"-Based Speech.

As the School Board claims that its policy is supported or compelled by the federal statutory provisions in Title IX, the Court should also consider how its ruling in this matter may be weaponized against students using Title IX procedures.

Approximately 100 students from West Point schools organized a walkout and rally in support of Mr. Vlaming's free speech. Complaint at 1-2 (JA001-02). Several students spoke supportively about the complaining student while also calling on the school to uphold their teacher's rights. Having seen Mr. Vlaming lose his job, those students are now likely to suppress their own opinions for fear of adverse consequences. If the ruling below stands, students will be receive the message that they must cater to the subjective but popular beliefs of others, while suppressing their own views and preferences.

This is not idle speculation. Just days before the submission of this brief, school administrators in Wisconsin filed a Title IX complaint against three eighth

grade students, who they have "charged with sexual harassment under Title IX for 'mispronouning.'" Wisconsin Inst. for Law & Liberty Letter to Brad Ebert, Superintendent, et al. (May 12, 2022), available at https://will-law.org/wp-content/uploads/2022/05/KASD-Title-IX-Mispronouning-Letter.pdf. According to the boys' attorneys, "[t]he District's position appears to be that using what the District calls 'incorrect pronouns' 'after being informed that a student's preferred pronouns were 'they/them' automatically constitutes punishable sexual harassment under Title IX." *Id.* (internal quotation marks omitted). This is a blatant misapplication of Title IX, yet it is a logical extension of the West Point School Board's interpretation of its own policy.

Despite recent incursions (*see*, generally, *Grimm*, *supra*), students still have a material interest in accessing safe and dignified accommodations for performing intimate bodily functions on school premises, such as using the toilet, undressing, and showering. Unfortunately, some Virginia schools have disrespected and harmed students by forcing them to share communal bathrooms and shower rooms with members of the opposite sex, at the behest of a miniscule number of students who claim to have undergone a "gender transition." *Id.*

If the ruling below stands, it is highly probable that Virginia will see a sharp increase in punishments meted out to teachers and students who voice disagreement with any aspect of gender ideology, or even merely decline to lend

their full-throated support to that belief system. Even absent overt punitive actions, the circuit court ruling will have a chilling effect on student and teacher speech. Those who feel uncomfortable being partially clothed, toileting, and/or showering with members of the opposite sex will not only be required to suffer the experience, but suffer it in silence. Schools will be unable to track the material effects of this policy because those harmed will be too afraid to voice their objections. This creates an illusion of consent, and the illusion of a harmless and beneficial policy.

III. HARMFUL AND ABSURD RESULTS FOLLOW WHEN COURTS DENY MATERIAL SEX DIFFERENCES.

Courts have long recognized that the sexes are "not similarly situated in certain circumstances," due to innate and enduring physical differences between male and female physiology. *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996). Throughout history and across the globe, the biological distinctions between men and women have been invoked to justify discrimination against women, exclusion of women and girls from major aspects of public life, disenfranchisement of women, as well as exploitation, enslavement, and sexual abuse. Violent and sexist men do not ask individual women how they identify themselves before deciding which ones to abuse.

When courts and other government decisionmakers ignore this ongoing history and adopt a sex-blind approach, the results are not only absurd but they tend to have disproportionate adverse effects on women and girls.

A. Vulnerable Populations Are At Risk When Courts Give Undue Deference To Medical Fads.

Popular but harmful medical fads appear regularly throughout modern history. In the 1800s to early 1900s, physicians experimented with attempts to "treat" unwanted mental conditions or behaviors by interfering with their patients' fertility. "Labeling a young woman feeble minded was often an excuse to punish her sexual immorality. Many women were sent to institutions to be sterilized solely because they were promiscuous or had become pregnant out of wedlock." Roberts, *Killing the Black Body*, 2nd ed. at 69 (2017).

The 1927 Supreme Court case of *Buck v. Bell* remains a shameful stain on our country's history, with Justice Holmes declaring that the young woman Carrie Buck, having been involuntarily committed to the Virginia State Colony for Epileptics and Feeble Minded and dubiously diagnosed as an "imbecile," "may be sexually sterilized without detriment to her general health and that *her welfare* and that of society *will be promoted by her sterilization*." 274 U.S. 200, 207 (1927) (emphasis added).

These were not fringe practices; they enjoyed support from medical associations and institutions generally regarded as progressive. *See* Cohen,

Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (2016); *see also* Farber, *U.S. Scientists' Role In The Eugenics Movement (1907-1939): A Contemporary Biologist's Perspective*, ZEBRAFISH, 5(4), 243–245 (2008), https://doi.org/10.1089/zeb.2008.0576.

Given this history, it is imperative that legislatures and courts serve as a crucial check against harmful medical fads.

B. Women And Girls Lose Legal Protections When Courts Deny Material Sex Differences.

While many people are affected by transgender ideology, its demands consistently and disproportionately undermine the legal rights and interests of women and girls. The following examples provide only a cursory summary of those effects.

1. Loss of single-sex spaces

Gender activists demand that women's and girls' single-sex spaces be given over to men and boys who claim to identify as transgender. *See* Complaint Ex. 3 at 1 (JA046). Consequently, women and girls across the country have lost access to safe single-sex bathrooms and locker rooms under policies dictating that access to such spaces be granted on the basis of gender identity rather than sex. *See, e.g.*, *Grimm, supra*; *see also* U.S. Dept. of Ed. Letter to Dr. Daniel E. Cates, *In re Township HS Sch. Dist. 211* (Nov. 2, 2015), at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-

a.pdf (documenting how the U.S. Dept. of Ed. Office of Civil Rights pressures public schools to grant male students and teachers access to women's and girls' restrooms and locker rooms).

While Congress has not taken action to prohibit the establishment of single-sex emergency women's shelters, the U.S. Department of Housing and Urban Development has ordered federally-regulated shelters to determine eligibility based on "gender identity" rather than sex. HUD, *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64763 (Sept. 21, 2016), 24 C.F.R. Part 5. With the stroke of a federal agency pen, vulnerable women who flee domestic violence, drug addiction, and homelessness have been forced to share sleeping areas and showers with men.

Perhaps the most egregious example of such policies is California's SB 132, "The Transgender Respect, Agency, and Dignity Act," and similar policies and court rulings under which incarcerated women have been forced to share prison and jail cells with men who claim special gender identities, including violent men who are convicted murderers, rapists, and child molesters. *See, e.g.*, Miller, *California Prisons Grapple With Hundreds Of Transgender Inmates Requesting New Housing*, LOS ANGELES TIMES (April 5, 2021), https://www.latimes.com/california/story/2021-04-05/california-prisons-consider-gender-identity-housing-requests; Shaw, *Male Convict Moved to Women's Jail*, WOMEN ARE HUMAN,

https://www.womenarehuman.com/male-convict-moved-to-womens-jail-unit-plans-class-action-lawsuit-for-inmates-seeking-similar-move/.

As noted above, WoLF is pursuing a lawsuit challenging SB 132 on behalf of four incarcerated women. *Chandler, et al. v. Calif. Dept. of Corrections and Rehab.*, Case No. 1:21-cv-01657 (E.D. Cal., Nov. 17, 2021). One of the plaintiffs "was sexually assaulted by a man transferred to her unit under S.B. 132." *Id.*, Complaint at ¶ 70, available at https://www.womensliberationfront.org/chandler-v-cdcr-press. She "filed a grievance and requested single-sex housing away from men; the prison's response to [her] grievance referred to her assault by a 'transgender woman with a penis.'" *Id.* As a result, the ongoing "psychological distress caused by her assault is exacerbated by the prison's refusal to acknowledge the sex of her perpetrator." *Id.* Other plaintiffs include a survivor of domestic violence and an observant Muslim, both of whom are harmed by the state's decision to lock them up with convicted violent male criminals who claim to have some form of "gender identity." *Id.* ¶¶ 70-72.

Extreme though these examples may be, they are real, and they are founded on the very same belief system that informed and motivated the West Point School Board's actions in this case.

2. Loss of free speech and free association

For crucial political organizing, women depend heavily on their Constitutionally-protected rights of free speech and free association. Gender activists who aim to restrain those rights have targeted WoLF and other women's organizations with harassment, violence, and bomb threats when they attempted to hold public meetings to discuss how the gender movement adversely affects women's lives. *See* Hamm, *Women's Liberation Front Holds Sold-Out Event At Seattle Public Library Despite Bomb Threat, Interruptions, Arrests,* FeministCurrent.com (Feb. 3, 2020), https://www.feministcurrent.com/2020/02/03/womens-liberation-front-holds-sold-out-event-at-seattle-public-library-despite-bomb-threat-interruptions-arrests/. Such threats have also extended into women's workplaces and other associational activities. In addition to the violent protests and bomb threats aimed at their events, several staff, board members, and other volunteers of WoLF have lost employment and other paid opportunities, been threatened with professional censure, and received phone calls to their homes including death threats. However, only rarely are these types of threats halted under the First Amendment, as in government employment cases. *See Loudon County Sch. Bd. v. Cross*, Record No. 210584 (Aug. 30, 2021) (reinstating elementary school teacher after Loudon School Board placed him on leave because of his comments at a public hearing that were critical of a proposed

policy on mandating "gender pronouns," among other things). *See also Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (striking down the action of Shawnee State University under the First Amendment of the U.S. Constitution, after the University punished a philosophy professor who declined to use female pronouns for a male student).

Without an unequivocal affirmation by this Court that the Virginia state constitution prohibits schools from interpreting and applying policies like the one in this case, Virginia school districts will continue threatening the livelihoods and educational opportunities of teachers and students who do not subscribe to the gender identity belief system.

3. Loss of fairness and opportunities in competitive athletics

As with single-sex spaces, gender activists demand that women's and girls' athletic opportunities be given over to men and boys who identify as transgender. *See, e.g. Hecox v. Little*, No. 20-35813 (9th Cir.) (suit filed by a male runner demanding eligibility for the Boise State Univ. women's cross country team based on his gender identity). Under such policies, young women have been robbed of elite statewide championship titles and financial scholarship opportunities. *See Soule v. Connecticut Assoc. of Sch., Inc., et al.,* Appeal No. 21-1365 (2nd Cir. 2021). This March a male college swimmer displaced several NCAA records and titles in the women's college swimming championships. Martin, Will, et al.,

Swimmer Lia Thomas beat 2 Olympic medalists amid protests to make history as the first trans athlete to win an NCAA title, INSIDER (Mar. 18, 2022), https://www.insider.com/trans-swimmer-lia-thomas-beats-olympic-medalists-wins-ncaa-title-2022-3.

Through all these examples, which represent only the tip of the iceberg, there runs a common thread. Schools and universities and other public institutions have abandoned fact and reason in favor of a fashionable but completely irrational and harmful ideology. In doing so, they have elevated the subjective beliefs and interest of a very few over the competing interests and free speech rights of all others, particularly the rights of vulnerable women and girls. We urge this Court to consider all perspectives and interests involved in this dispute, reverse the School Board's action, and restore the free speech rights of public school teachers.

CONCLUSION

For the reasons stated above, the Women's Liberation Front respectfully requests that this Court 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.

Respectfully submitted this 23rd day of May, 2022.

/s/ Melvin E. Williams

Melvin E. Williams
VSB No. 43305
WILLIAMS & STRICKLER, PLC
1320 Third Street, SW
Roanoke, Virginia 24016
Phone: 540-266-7800
Fax: 540-205-3857
mel@williamsstrickler.com

Jennifer C. Chavez*
Women's Liberation Front
1802 Vernon St. NW, #2036
Washington, DC 20009
Phone: (202) 964-1127
legal@womensliberationfront.org

*Motion for admission pro hac vice pending

Counsel for Amicus

CERTIFICATE OF COMPLIANCE

Pursuant to Virginia Supreme Court Rule 5:26(g), I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Virginia Supreme Court Rule 5:26(b). Exclusive of the exempted portions, this brief contains 6,591 words.

/s/ Melvin E. Williams
Melvin E. Williams
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2022, I served electronic and paper copies of the foregoing MOTION OF THE WOMEN'S LIBERATION FRONT FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT and PROPOSED ORDER by electronic mail and first-class mail, respectively, on the following parties:

Christopher P. Schandevel
Tyson C. Langhofer
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
cschandevel@ADFlegal.org
tlanghofer@ADFlegal.org

J. Caleb Dalton
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
cdalton@ADFlegal.org

Shawn A. Voyles
McKENRY DANCIGERS DAWSON, P.C.
192 Ballard Court, Suite 400
Virginia Beach, VA 23462
savoyles@va-law.com

Stacy L. Haney
Andrew P. Selman
Virginia State Bar No. 91060
HANEY PHINYOWATIANACHIP PLLC
11 South 12th Street, Suite 300C
Richmond, VA 23219
shaney@haneyphinyo.com
aselman@haneyphinyo.com

Alane. Schoenfeld
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY
alan.schoenfeld@wilmerhale.com

Tania Faransso
Edward Williams
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
tania.faransso@wilmerhale.com
ed.williams@wilmerhale.com

I hereby further certify that I have filed the foregoing MOTION OF THE WOMEN'S LIBERATION FRONT FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT with the Clerk via the Virginia Appellate Courts eBriefs System, this 23rd day of May, 2022.

/s/ Melvin E. Williams
Melvin E. Williams (VSB # 43305)