VIRGINIA: IN THE CIRCUIT COURT FOR ROCKINGHAM COUNTY

DEBORAH FIGLIOLA, et al., Plaintiffs, v. **THE SCHOOL BOARD OF THE CITY OF HARRISONBURG, VIRGINIA,** Defendant.	**CASE NO. CL22-1304**

COMBINED MEMORANDUM
IN SUPPORT OF PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT AND TO STRIKE DEFENDANT'S JURY DEMAND

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INTRODUCTION

In Virginia, school boards may not compel an employee, over her objection, to refer to a student by pronouns that don't correspond with the student's sex. *Vlaming v. W. Point Sch. Bd.*, 302 Va. 504, 521–22 (2023). But that's precisely what the Harrisonburg City School Board has done here. In a series of on-the-job trainings, the School Board directed teachers to "immediately implement" three practices: (1) ask students their preferred pronouns; (2) always use them, even when contrary to a student's sex; and, (3) do so without notifying parents or seeking their consent. These trainings arose from the School Board's nondiscrimination policy, which threatens discipline—expressly including termination—for noncompliance. A reasonable employee wouldn't miss the connection between the so-called "Best Practices" in the trainings and the policy's disciplinary threats.

Plaintiffs are three teachers employed by the School Board. They, like all School Board employees, face a choice: comply with the trainings' "Best Practices" or risk losing their jobs. But Plaintiffs object to complying. Under *Vlaming*, that's enough for this Court to conclude that the School Board is violating Virginia's Free Speech Clause. 302 Va. at 563, 574 & n.37. And because Plaintiffs' objections arise out of their sincerely held religious beliefs, *Vlaming* also teaches that they have successful claims under Virginia's Religious Freedom Restoration Act. *Id.* at 559.

Over the course of this litigation so far, the School Board has made a number of admissions that demonstrate there are no genuine disputes of fact material to Plaintiffs' claims. Among them, the School Board has admitted that dozens of students in the last few years have requested that teachers refer to them by pronouns contrary to their sex—even without parental notice or consent. And the School Board has demonstrated that, when it wishes, it knows how to disavow its intent to discipline employees for noncompliance with its "Best Practices." But it has only disavowed discipline for violating the first of the three directives above. It has refused to

disavow discipline for employees who don't use preferred pronouns or who think parents should know about and consent to students' pronoun requests.

These admissions and others show that no material factual questions remain unanswered. The only questions here are legal. And the Supreme Court of Virginia last year answered those legal questions in Plaintiffs' favor.

A trial of any kind is unnecessary—a jury trial, particularly so. The legal questions here are the Court's province, and Plaintiffs have sought no relief that would entitle the parties to a jury trial. So the Court should grant Plaintiffs' Motion for Summary Judgment and their Motion to Strike Defendant's Jury Demand.

UNDISPUTED MATERIAL FACTS

A. The School Board's nondiscrimination policy threatens employee discipline.

At the beginning of the 2021–2022 school year, the School Board added "gender identity" to the list of protected classes in Policy 401, its nondiscrimination policy. (Br. in Opp'n to Mot. for Temp. Inj. ("MTI Opp'n") at 2 (filed Sept. 28, 2022).) Policy 401 details the procedures for students and employees to report alleged discrimination at school. (Compl. Ex. 1 at 1–2;[1] *see* Compl. ¶ 94 (introducing Compl. Ex. 1); Answer ¶ 94 (admitting that Compl. Ex. 1 "speaks for itself").) Students "should" report it, whether on behalf of themselves or a peer. (Compl. Ex. 1 at 1–2.) And employees who have "knowledge of conduct which may constitute prohibited discrimination shall immediately report such conduct to one of the compliance officers." (*Id.* at 2.)

Employees must comply with Policy 401's requirements or risk facing a disciplinary investigation. Initially, the compliance officer "shall immediately authorize or undertake an investigation." (*Id.* at 2.) After "a complete and thorough

[1] Throughout this brief, citations designated "Compl." are to Plaintiffs' Complaint for Declaratory, Injunctive, and Additional Relief (filed June 1, 2022), and citations designated "Compl. Ex." are to the exhibits attached to that complaint.

investigation," the compliance officer must make "a case by case determination based on all of the facts and circumstances" about "[w]hether a particular action or incident constitutes a violation of this policy." (*Id.*) The compliance officer then issues a written report with findings. (*Id.*)

Based on that report, the superintendent or a designee must make two determinations: "(1) whether this policy was violated and (2) what action, if any, should be taken." (*Id.* at 3.) If "prohibited discrimination occurred," Policy 401 makes clear that some action is required. (*Id.*) The School Board "shall take prompt, appropriate action to address and remedy the violation as well as prevent any recurrence." (*Id.*) "Such action may include discipline up to and including expulsion or discharge." (*Id.*) An employee who fails to comply with Policy 401 can lose her job.

B. The School Board trains employees in "Best Practices" to "Immediately Implement" compliance with the nondiscrimination policy.

The School Board aims to ensure compliance with Policy 401 by training students and employees. In fact, the policy expressly requires a variety of trainings: "Training to prevent discrimination should be included in employee and student orientations as well as employee in-service training." (Compl. Ex. 1 at 4.)

Around the same time that the School Board added the term "gender identity" to Policy 401, its administration implemented new employee trainings. (MTI Opp'n at 3; *see* Plea in Bar ¶ 3 (filed June 29, 2022).) These trainings "provide[d] best-practices guidance to faculty and staff related to supporting transgender and nonbinary students." (MTI Opp'n at 5.) This included a presentation entitled "Supporting Our Transgender Students," or the "SOTS Presentation." (*Id.* at 6; *see* Compl. Ex. 3 (reproducing SOTS Presentation slide deck); *see also* MTI Opp'n at 6–7 (quoting extensively from Compl. Ex. 3 and treating it as authentic).) This presentation "was first

given to school administrators and student support teams, some of whom then shared it with the staff in their schools." (MTI Opp'n at 6.)

The SOTS Presentation based its guidance on the Virginia Department of Education's now-repealed 2021 *Model Policies for the Treatment of Transgender Students in Virginia's Public Schools*. (Compl. Ex. 3 at 2; *see* MTI Opp'n at 6.) Last year, the Department determined that the 2021 *Model Policies* "disregarded the rights of parents and ignored other legal and constitutional principles that significantly impact how schools educate students, including transgender students." Va. Dep't of Educ., *Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools* 1 (eff. July 19, 2023), https://bit.ly/3ZAuDBq.

The SOTS Presentation purported to explain what amounted to discrimination—the term also used by Policy 401 to describe prohibited conduct. Indeed, the presentation's first "Guiding Principle[]"was that "[a]ll children have the right to learn free from discrimination and ha[]rassment." (Compl. Ex. 3 at 3.) The SOTS Presentation thus provided details about conduct the School Board expected of employees to comply with Policy 401.

At a high level, it described the "HCPS Best Practice in Action." (*Id.* at 5.) That included "[n]ew practices regarding use of preferred names and pronouns." (*Id.*) And it detailed those new practices. For example:

- First, under "Practices to Immediately Implement," one slide told employees: "Ask preferred names and pronouns." (*Id.* at 6.)
- A second slide, this one called "Practices Regarding Preferred Names," said: "**Always** utilize a student's preferred name and pronouns." (*Id.* at 7 (emphasis in original).)
- And third, on a slide entitled "Parent Communication," the SOTS Presentation both:
    - Prohibited employees from "contact[ing] the parent/guardian to ask permission to utilize the preferred name" of a student; and,

- Required employees, "[i]f the parent/guardian is **NOT** aware," to "utilize the student's preferred name at school but not in any communication with the parent/guardian." (*Id.* at 8 (emphasis in original).)

Taken together, these slides direct employees to do three things: (1) to ask students for their preferred names and pronouns; (2) to always use them; and, (3) to neither notify parents of nor seek their consent to a student's request to use a preferred name or pronoun contrary to the student's sex.

The School Board sponsored additional trainings that contained material similar to those three directives. One such training "was offered at the October 19, 2021 meeting of the School Board." (Answer ¶ 145.) That training, "Supporting ALL Students–October Bullying Prevention Highlights," "was largely duplicative of the SOTS Presentation." (MTI Opp'n at 7; *see* Compl. Ex. 6 (reproducing October 2021 slide deck); *see* MTI Opp'n at 7–8 (quoting from Compl. Ex. 6 and treating it as authentic).) Like the SOTS Presentation, the October 2021 presentation told the School Board that employees should use students' preferred names and pronouns: "If a student shares a chosen name or pronoun different from your documentation *on day #1*: ... Always utilize a student's chosen name and pronouns." (Compl. Ex. 6 at 14 (emphasis added).) The October 2021 presentation also left no doubt that the School Board's position on "Parent Communication" was the same as the SOTS Presentation. (*Id.* at 16.) If employees "are unaware of whether the student's parent/guardian is in support of the name or pronoun change," then "[i]t is *not* appropriate" for them "to contact the parent/guardian to ask permission to utilize the chosen name." (*Id.* (emphasis added).)

The School Board also sponsored a training hosted by a group called Side By Side. (*See* Compl. Ex. 7 at 1; Answer ¶ 142 (admitting that Compl. Ex. 7 "contains training slides presented by Side-by-Side").) That training told employees that "it is illegal to out students to family." (Compl. Ex. 7 at 42.) And it cited the Virginia

Department of Education's now-rescinded 2021 model policies to say "there are no regulations requiring school staff to notify parents." (*Id.*)

Finally, the School Board began to use a form called a "Gender Transition Action Plan." (*See* Compl. Ex. 4 (reproducing a blank Gender Transition Action Plan); MTI Opp'n at 5 (quoting from Compl. Ex. 4 and treating it as authentic).) This form instructed employees that school counselors would involve families in student gender transitions "when appropriate." (Compl. Ex. 4 at 1.) And the form expressly asked questions related to parental involvement: "Are your guardian(s) supportive of your gender status?" "If no, what considerations must be accounted for in implementing this plan?" (*Id.* at 2; *see* Compl. ¶ 111 (reproducing this page); Answer ¶ 111 (admitting to the authenticity of this page).)

C. Because Plaintiffs object on religious grounds to complying with some of the School Board's "Best Practices," they filed this lawsuit.

Plaintiffs Deborah Figliola, Kristine Marsh, and Laura Nelson are all School Board employees. (*See* Answer ¶¶ 15–17 (admitting allegations in Compl. ¶¶ 15–17).) They brought this lawsuit claiming that the School Board's directives detailed in trainings like the SOTS Presentation violate Virginia law. (*See* Compl. ¶¶ 225–362.) In particular, they claimed that the School Board's actions violate Virginia's Free Speech Clause, Va. Const. art. I, § 12, by compelling them to speak a message to which they object (*id.* ¶¶ 232–54), and by discriminating against viewpoints that disagree with the School Board (*id.* ¶¶ 255–68). Plaintiffs also claimed that the School Board's actions substantially burden their religious beliefs in violation of Virginia's Free Exercise Clause, Va. Const. art. I, § 16, and the Virginia Religious Freedom Restoration Act ("VFRFA"), Va. Code § 57-2.02. (Compl. ¶¶ 269–96.) Additionally, Mrs. Nelson, her husband, and another couple claimed violations of their rights as parents with children in the School Board's schools. (*Id.* ¶¶ 297–362.)

This Court partially granted and partially denied the School Board's demurrer and plea in bar. (Op. Letter at 15 (filed Dec. 2, 2022).) The Court concluded that "Plaintiffs specifically allege that the School Board has implemented a policy requiring them to use a student's preferred name and pronouns, and to not disclose that information to parents, in a manner that contradicts their beliefs." (*Id.* at 12.) That sufficed "to state a claim of compelled speech or viewpoint discrimination in violation of Article I, § 12." (*Id.*) Similarly, because Plaintiffs had alleged they "are being forced to affirm a message that violates their sincerely held religious beliefs," they had stated a claim under VRFRA. (*Id.* at 13.)

The Court dismissed Plaintiffs' claims under the Free Exercise Clause based on its conclusion that "the right of action for a free exercise claim is set forth in Virginia Code § 57-2.02," which is VRFRA. (*Id.* at 10 n.5.) *But see Vlaming*, 302 Va. at 541, 561 (holding that Vlaming had stated claims under both the Free Exercise Clause and VRFRA); *cf. Layla H. ex rel. Hussainzadah v. Commonwealth*, 81 Va. App. 116, 130–32 (2024) (noting that other provisions of Virginia's Bill of Rights are self-executing). And the Court dismissed all the parental-rights claims.

The Court also denied Plaintiffs' motion for a temporary injunction. (Op. Letter at 14–15.) In that portion of its reasoning, the Court concluded that "Dr. Richards' unrebutted testimony indicates that, *at this time*, HCPS is not disciplining teachers for failing to ask students their preferred names and pronouns, for failing to use a student's preferred names and pronouns, or for sharing (or not sharing) such information with parents." (*Id.* at 14.) Because of that conclusion, the Court ruled that Plaintiffs were not likely to face irreparable harm at that time. (*Id.* at 15.)

D. The School Board's judicial admissions show Plaintiffs face a reasonable threat of discipline.

Since the Court's order on the School Board's demurrer, its admissions have left no doubt that Plaintiffs are likely to continue interacting with students who have

requested to use names and pronouns contrary to their sex. In a July 2024 discovery hearing, the School Board's counsel admitted to the Court that, in the time period relevant to this litigation, "50 students asked to be addressed by [a] name or pronoun that differed from their biological sex." (July 2024 Hr'g Tr. 9:12–14.[2]) Of those 50 students, "there was one student who the School Board believes the parents may not have been aware of the request." (*Id.* 9:15–18.) And two other students "changed their mind" about a name-related request "before the parents became involved." (*Id.* 9:18–20.)

Additionally, the School Board's admissions to this Court have demonstrated the reasonableness of Plaintiffs' fear of discipline. From the outset, the Court acknowledged the School Board's failure to "directly say, no, we're not doing this," referring to disciplining teachers. (Nov. 2022 Hr'g Tr. 12:9–10 (filed Jan. 3, 2023).) As the Court put it, the School Board repeatedly said only "no one *has been* disciplined for not doing it." (*Id.* 12:10–11 (emphasis added).) And when the Court directly asked whether teachers are "free to ignore the training materials that[] ask[] them to immediately ask for names and pronouns," the School Board's counsel repeated the same (non)answer. (*Id.* 78:6–9; *see id.* 78:10–80:16.)

Since the November 2022 hearing, the School Board has disavowed enforcement of one directive in the SOTS Presentation's "Best Practices" but not the others. At the February 2023 hearing on the School Board's motion to reconsider, its counsel admitted that "[t]he best practice guidance arguably calls for teachers, for example, to ask their students what their preferred pronouns are." (Feb. 2023 Hr'g Tr. 9:13–15 (filed Mar. 16, 2023).) Counsel continued that "[n]obody is being disciplined if they don't do that," because "that doesn't amount to discrimination." (*Id.* 9:16–18.)

[2] The transcript of the discovery hearing before this Court on July 3, 2024, is being filed contemporaneously with this brief.

Counsel did *not* similarly disavow enforcement of the SOTS Presentation's directives that employees use students' preferred names and pronouns, and that they do so without notifying parents or seeking their consent. Again, he told the Court that "nobody is being disciplined or threatened with discipline[] for not following the best practice guidance." (*Id.* 10:6–8.) But he didn't tell the Court that it "doesn't amount to discrimination" for an employee to fail to use a student's preferred name or pronouns. And he didn't tell the Court that it "doesn't amount to discrimination" to notify parents or seek their consent before using a student's preferred name or pronouns.

In response to Requests for Admission, the School Board still would not admit that employees *can* nor that employees *cannot* be disciplined for refusing to follow the instructions in the SOTS Presentation. (*See* Def.'s Resps. to Pls.' First Set of Requests for Admission.[3]) Each response echoed counsel's answers to the Court's questions: "the School Division has not threatened discipline for teachers and other staff members for not following the best practices guidance, the best practices guidance does not mention discipline of teachers or staff members, and the School Division has not disciplined any employee for refusing to ask students for preferred names or preferred pronouns." (*E.g.*, *id.* at 2 (responding to Request for Admission No. 1).) Defendants cannot refuse to disavow while simultaneously stating that there is no injury or violation.

Taken together, these statements disavow disciplining employees who refuse to ask students for their preferred names or pronouns. But they do not disavow disciplining employees who refuse to use them—or refuse to do so without parental consent. That Defendants repeatedly refused to directly answer the Court's questions does not create a genuine issue of fact. Nor does Defendant's failure to fully answer

[3] These responses are being filed contemporaneously with this brief.

Plaintiffs' Requests for Admission. Defendants cannot refuse to disavow and, simultaneously, claim that there is no injury or violation.

E. In *Vlaming v. West Point School Board*, the Supreme Court rules against a school board with a similar policy.

After discovery was well underway in this lawsuit, the Supreme Court of Virginia issued its decision in *Vlaming*, 302 Va. 504. In that case, the Court ruled against a school board that fired a teacher who "referred to a transgender student by the student's preferred name and avoided the use of third-person pronouns when referring to the student" but would not "use government-mandated pronouns *in addition to* using the student's preferred name." *Id.* at 521. Here, the School Board has always acknowledged that *Vlaming* "will inform the merits aspect of this" case. (Nov. 2022 Hr'g Tr. 87:23–24.) It even admitted that *Vlaming* would decide "whether or not a school district can discipline somebody for repeatedly not using the preferred pronouns of a child." (Feb. 2023 Hr'g Tr. 26:6–8.) And it implied that Mr. Vlaming's conduct would be "an intentional discrimination issue" that would be "dealt with by the 401 policy" in Harrisonburg. (*Id.* 10:8–10.)

In other words, the School Board has admitted that Policy 401, as explained in trainings like the SOTS Presentation, does not allow Plaintiffs to "repeatedly not us[e]" a student's preferred pronouns. But that is exactly what Plaintiffs must do, consistent with their religious beliefs. (*See* Compl. ¶¶ 202–07.) And *Vlaming* makes clear that the School Board must not punish them for acting in accordance with those beliefs and refusing to speak the School Board's preferred message. *E.g.*, 302 Va. at 541, 559, 563. As a result, Plaintiffs are entitled to summary judgment.

LEGAL STANDARD

A motion for summary judgment shall be granted "if it appears from the pleadings, the orders, if any, made at a pretrial conference, [and] the admissions, if any, in

the proceedings, that the moving party is entitled to judgment." *AlBritton v. Commonwealth*, 299 Va. 392, 403 (2021) (cleaned up). The relevant admissions include not only those made in response to requests for admission but also "judicial admissions." *Monahan v. Obici Med. Mgmt. Servs., Inc.*, 59 Va. Cir. 307, 2002 WL 1773370, at *5 (5th Judicial Cir. 2002) (per Kelsey, J.); *see Gen. Motors Corp. v. Lupica*, 237 Va. 516, 519–21 (1989) (discussing what constitutes judicial admissions, a category that includes statements made by counsel in court).

"Entitled to judgment" requires the moving party to demonstrate to the court that "no 'material facts' are 'genuinely in dispute.'" *AlBritton*, 299 Va. at 403 (quoting Va. Sup. Ct. R. 3:20). "[I]mmaterial facts genuinely in dispute or material facts not genuinely in dispute do not preclude the entry of summary judgment." *Id.* Whether a fact is "material" turns on whether it is "a matter that is properly at issue in the case." *Id.* (citation omitted). And a factual issue is "genuinely in dispute" when "reasonable factfinders could draw different conclusions from the evidence, not only from the facts asserted but also from the reasonable inferences arising from those facts." *Id.* (cleaned up).

ARGUMENT

I. By compelling speech, the School Board violates Virginia's Free Speech Clause.

According to Virginia's Free Speech Clause, "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. Its guarantee "that any citizen may freely speak, write, and publish his sentiments on all subjects" is self-executing against school boards and other government defendants. *Id.*; *see Layla H.*, 81 Va. App. at 130–32. Applying that guarantee, last year the Supreme Court of Virginia held that a high-school teacher had viable claims for compelled speech and viewpoint discrimination after his school fired him for objecting to speech requirements

substantially similar to the School Board's three directives in this case. *See Vlaming*, 302 Va. at 574 & n.37.

The School Board's admissions over the course of this litigation leave no room for it to maneuver out of *Vlaming*'s holding. There is no dispute of material fact that would distinguish Plaintiffs' compelled-speech claims from Mr. Vlaming's claims. And as a matter of law, the School Board cannot satisfy any applicable standard of review. The Court should thus render summary judgment for Plaintiffs.

A. Over Plaintiffs' objection, the School Board compels them to speak its message about gender identity.

The *Vlaming* Court "fully embrac[ed] this premise": "that the right to freedom of expression is at its apogee in compelled-speech cases." *Vlaming*, 302 Va. at 563. Like its federal counterpart, the Commonwealth's Free Speech Clause prohibits "attempt[s] by the government to 'compel an individual to create speech [he] does not believe' and to 'utter what is not in [his] mind about a question of political and religious significance.'" *Vlaming*, 302 Va. at 565 (quoting *303 Creative LLC v. Elenis*, 600 U.S. 570, 578–79, 596 (2023)) (cleaned up). Based on this principle, "in most contexts," it "would be universally condemned" to compel "individuals to mouth support for views they find objectionable." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018). This principle—often called the "fixed star in our constitutional constellation"—loses no force because some "official, high or petty," may think compelling the individual's speech would serve a laudable goal. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In our constitutional order, the government lacks the power to compel speech.

Here, the School Board has transgressed this "cardinal constitutional command." *Janus*, 585 U.S. at 892. And it has done so by compelling the same speech considered in *Vlaming*. *See* 302 Va. at 568–69.

Throughout this litigation, the School Board has tried to avoid the prohibition on compelled speech primarily by minimizing Plaintiffs' fears of discipline if they refuse to speak its message. But the School Board's admissions, in pleadings and on the record in court, have made clear that there is no dispute of material fact on this issue. If the School Board or its administration receives a report of "prohibited discrimination" based on a refusal to use a preferred name or pronouns, the superintendent will "make[] a determination" on a "case-by-case basis" whether that refusal violates Policy 401. (Feb. 2023 Hr'g Tr. 8:13–23.) And the School Board's counsel expressly acknowledged that *Vlaming* would decide "whether or not a school district can discipline somebody for repeatedly not using the preferred pronouns of a child." (*Id.* 26:6–8.)

Vlaming has now answered that question. Plaintiffs have a "right not to be compelled to give a verbal salute to an ideological view that violates [their] conscience and has nothing to do with the specific curricular topic being taught." 302 Va. at 568–69. Based on that holding, Plaintiffs are entitled to judgment.

1. The School Board's "Best Practices" compel the same speech as in *Vlaming*.

By instructing employees to "[a]lways utilize a student's preferred name and pronouns," and to not "contact the parent/guardian to ask permission" (Compl. Ex. 3 at 7–8), the School Board creates the same compelled-speech problem condemned by *Vlaming*.

In *Vlaming*, the West Point School Board fired high-school French teacher Peter Vlaming "for refusing to use masculine pronouns when referring to Doe, a biologically female student." 302 Va. at 568. He "did not insist on referring to Doe with feminine pronouns." *Id.* (Similarly, Plaintiffs here would "not intentionally us[e] ... gender-specific pronouns that a student has specifically asked them not to use." (Compl. ¶ 81).) Instead, Mr. Vlaming "used Doe's preferred name" and "avoided the

use of third-person pronouns altogether either when referring to Doe or to any other students in French class." 302 Va. at 568. West Point fired Mr. Vlaming "because he refused to use the government-mandated pronouns *in addition to* Doe's preferred name." *Id.* at 565. It fired him "not because of what he said but because of what he refused to say." *Id.* And the Supreme Court held it could not do that. *Id.* at 574.

Virginia's Free Speech Clause protected Mr. Vlaming's "right not to be compelled to give a verbal salute to an ideological view that violates his conscience and has nothing to do with the specific curricular topic being taught." *Id.* at 568–69. Yet the School Board here compels the very same "verbal salute" from Plaintiffs.

i. The School Board compels Plaintiffs to use preferred names and pronouns and to not obtain parental consent.

The School Board has compelled Plaintiffs' speech in three distinct ways. These three compelled-speech directives are most clearly articulated in the SOTS Presentation: (1) a directive to"[a]sk preferred names and pronouns"; (2) a directive to "[a]lways utilize a student's preferred name and pronouns"; and, (3) a directive neither to notify a student's parents about nor to seek their consent to the student's use of a preferred name or pronouns at school when the parents are not already aware. (Compl. Ex. 3 at 6–8.)

Nothing in the SOTS Presentation indicated that compliance with these directives was optional. In fact, one slide described them as "Practices to Immediately Implement." (*Id.* at 6.) By telling Plaintiffs and others to immediately implement these directives, the School Board left them with no choice but to comply. In a prior hearing, the Court put it like this: "[W]hen your employer says, I instruct you to immediately implement, it almost seems too easy to me for an employer to say once they're in court, oh, don't worry. We're not actually implementing it. You don't have to do it." (Feb. 2023 Hr'g Tr. 15:2–7.)

The wider context surrounding these three directives supports their mandatory nature. First of all, consider Policy 401 itself, the School Board's nondiscrimination policy. That policy requires the School Board to implement "[t]raining to prevent discrimination" for both employees and students. (Compl. Ex. 1 at 4.) Pursuant to that requirement in Policy 401, the School Board developed and implemented the SOTS Presentation and the other trainings on its "Best Practices regarding both students' names and preferred pronouns, as well as communication with a transgender student's family." (Plea in Bar ¶ 3 (citing Compl. Ex. 3 at 5, 7–8); *see* MTI Opp'n at 3, 5–6.) And Policy 401 establishes procedures for reporting "conduct which may constitute prohibited discrimination." (Compl. Ex. 1 at 1–2.) Students "should" report it; employees "shall immediately report" it. (*Id.*) Then, the administration makes "a case by case determination" whether the reported conduct violates Policy 401. (*Id.* at 2.) If it does, the School Board "shall take prompt, appropriate action," which expressly "include[s] discipline up to and including expulsion or discharge." (*Id.* at 3.)

A reasonable employee would connect Policy 401's explicit threat of discipline with the "Best Practices" in trainings under Policy 401, like the SOTS Presentation. Policy 401 prohibits discrimination and harassment based on gender identity. (*Id.* at 1.) To enforce that prohibition, Policy 401 also threatens employees with professional discipline—including discharge—for engaging in discrimination. (*Id.* at 3.) Then, to implement Policy 401, the School Board held a series of trainings about students' "right to learn free from discrimination and ha[]rassment." (Compl. Ex. 3 at 3.) And in those trainings, it gave employees a list of "Practices to Immediately Implement," including the three directives above: (1) ask for students' preferred names and pronouns; (2) use them; and, (3) don't notify parents or seek their consent. (*Id.* at 6–8.)

Trainings other than the SOTS Presentation reinforce the conclusion that the "Best Practices" are mandatory. For example, the School Board hosted a training produced by a group called Side-by-Side, called "Supporting LGBTQ Youth." (Compl. Ex.

7 at 1.) And that training emphasized "the expectation" that "all school staff" will "use students' chosen name and pronoun." (*Id.* at 32.) It also cited ACLU statements that "it is illegal to out students to family." (*Id.* at 42.) Other trainings were "largely duplicative" of the SOTS Presentation. (MTI Opp'n at 7.) And the School Board's choice to repeat this information—on multiple occasions, to multiple audiences, including at a School Board meeting—underscores its commitment to the three compelled-speech directives in its "Best Practices." (*See id.* (discussing Compl. Ex. 6).)

The link between Policy 401 and the "Best Practices" trainings demonstrates that compliance with them is mandatory.

ii. Plaintiffs object to saying what the School Board compels them to say.

Plaintiffs object to complying with the School Board's remaining two compelled-speech directives. Plaintiffs also object to complying with the directive—to ask all students' "preferred names and pronouns"—because simply asking communicates an ideological view. (Compl. Ex. 3 at 6.) Just asking the question "involves a palpable 'struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.'" *Vlaming*, 302 Va. at 569 (quoting *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021)). And Plaintiffs' religious beliefs require them to affirm the biological nature of each person's sex, which "cannot be changed." *Meriwether*, 992 F.3d at 508. (*See* Compl. ¶ 76.) Plaintiffs interpret defense counsel's judicial statements as a disavowal of this directive. Assuming the School Board confirms this disavowal in response to this motion, Plaintiffs ask that the disavowal be memorialized in the order on this motion for summary judgment.

The other two directives even more clearly conflict with Plaintiffs' beliefs. Like the West Point school board in *Vlaming*, *see* 302 Va. at 521, the School Board here requires Plaintiffs to use students' preferred pronouns, even when they are contrary to a student's sex: "[a]lways utilize a student's preferred name and pronouns" and

"[r]espect the student's choice." (Compl. Ex. 3 at 7.) Plaintiffs "refus[e] to use gender-identity-based pronouns," which "reflect[s] [their] conviction that one's sex cannot be changed." *Meriwether*, 992 F.3d at 508. To refer to a child by pronouns contrary to the child's sex would harm the child, according to Plaintiffs' beliefs. (Compl. ¶¶ 76,78, 201–04.) Plaintiffs can't comply with this directive. (*Id.* ¶¶ 242–43.)

To do that without notifying a child's parents or obtaining their consent would only exacerbate that harm. Yet the School Board directs Plaintiffs to use preferred names and pronouns—even when contrary to a child's sex—without notifying that child's parents or obtaining their consent. (Compl. Ex. 3 at 8.) That directive conflicts with Plaintiffs' religious beliefs about honesty and parents' roles in their children's lives. (Compl. ¶¶ 79, 205–08.) Plaintiffs can't comply with this directive, either. (*Id.* ¶ 249.)

By compelling Plaintiffs—over their objection—to use students' preferred names and pronouns (even when contrary to a student's sex), and to not notify parents or seek their consent, the School Board compels Plaintiffs' speech related to gender identity. Because these three gender-identity speech directives closely resemble the speech compelled in *Vlaming*, the School Board can't escape *Vlaming*'s conclusion that its directives compel speech on a matter of public concern. Indeed, the very "concept of 'gender identity' is among many 'controversial subjects' that are rightly perceived as 'sensitive political topics.'" 302 Va. at 569 (quoting *Janus*, 585 U.S. at 913–14). And "[s]peech on such matters occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Id.* (cleaned up).

The School Board can't dodge constitutional scrutiny for its compelled-speech directives by claiming that they are part of Plaintiffs' "official duties" or that they fall within the "curricular-speech exception" to teachers' free-speech rights. *Id.* at 572–73. *Vlaming* rejected both arguments. As in that case, "[t]he School Board cannot

avoid this constitutional prohibition by simply declaring it [Plaintiffs'] 'official duty' to courier the School Board's ideological view of gender identity." *Id.* at 572.

Among educators, Plaintiffs aren't alone in their objections to complying with requirements like the School Board's three compelled-speech directives. Their objections echo those addressed by the Supreme Court of Virginia and the Sixth Circuit when those courts ruled in favor of educators facing similar directives. *See Id.* at 521–22; *Meriwether*, 992 F.3d at 498. This Court should follow their lead.

2. Because of the School Board's admissions, it can't avoid application of *Vlaming* to its "Best Practices."

Because of the close connection between Policy 401 and the School Board's "Best Practices," the undisputed facts show why it's reasonable for Plaintiffs to fear discipline for their conscience-based objections to the School Board's compelled-speech directives. And throughout this lawsuit, the School Board has never offered complete disavowals of enforcement against Plaintiffs. Now, the School Board's admissions show why Plaintiffs are entitled to summary judgment.

From the Court's first substantive hearing in this lawsuit, the School Board has argued that because it has not disciplined any employees—*yet*—Plaintiffs face no credible threat of enforcement of Policy 401 against them if they don't comply with the "Best Practices." (*See, e.g.*, Nov. 2022 Hr'g Tr. 78:2–4 (arguing that "[t]here's not a credible threat of discipline" because "no one has been disciplined").) But when the Court asked the School Board's counsel to disavow enforcement, he did not:

> THE COURT: So teachers, are they free to ignore the training materials that'[ve] asked them to immediately ask for names and pronouns?
>
> MR. FISHER: The training materials are not policy. It's best practice.
>
> [...]

THE COURT: Okay. Exhibit 3. Practices to immediately implement. Ask preferred names and pronouns. Always utilize the student's preferred name and pronouns.

Are teachers free to disregard that?

MR. FISHER: I'll put it to you as Dr. Richards says in his affidavit.

THE COURT: He doesn't specifically say they're free to disregard that. He says, we haven't disciplined anyone for it.

(Nov. 2022 Hr'g Tr. 78:6–11, 78:17–79:1.)

As the Court put it earlier in that hearing, the School Board would not "directly say, no, we're not doing this," referring to disciplining teachers who refuse to follow the "Best Practices." (*Id.* 12:9–10.) Later, the Court again emphasized that saying repeatedly "no one *has been* disciplined for not doing it" is not disavowing future discipline. (*Id.* 12:10–11 (emphasis added).)

The School Board has persisted in its refusal to disavow enforcement of the "Best Practices." In response to Plaintiffs' Requests for Admission, it would not admit that employees *can* be disciplined for refusing to follow those practices. But it also would not admit that employees *cannot* be disciplined for refusing to follow them. (*See* Def.'s Resps. to Pls.' First Set of Requests for Admission.) To again borrow the Court's words, without an express disavowal of discipline based on failure to comply with the "Best Practices," "How are teachers to know which of these materials they can follow or choose not to follow?" (Nov. 2022 Hr'g Tr. 79:16–18.) Such continued gamesmanship by the School Board should not be permitted.

Since then, the School Board has shown it is willing to expressly disavow enforcing one of the three compelled-speech directives but not the other two. That partial disavowal underscores the mandatory nature of the two remaining directives. At the February 2023 hearing in this lawsuit, the School Board's counsel expressly said that it "doesn't amount to discrimination" if an employee fails "to ask their students

what their preferred pronouns are." (Feb. 2023 Hr'g Tr. 9:13–18.) "Nobody is being disciplined if they don't do that." (*Id.*)

Counsel did not make a similar disavowal of enforcement against an employee who refused to use preferred pronouns contrary to a student's sex, or who refused to deceive parents about their child's use of such pronouns. Nor did he say that such conduct by an employee wouldn't amount to discrimination.

To the contrary, he said that "if a student has an issue with discrimination because they're being called things that they chose not to be called by, that might be." (*Id.* 9:19–22.) He then connected that fact-pattern with Mr. Vlaming's actions, implying that Mr. Vlaming had committed intentional discrimination that would be "dealt with by the 401 Policy." (*Id.* 9:22–10:10.) Later in that same hearing, the School Board's counsel again discussed *Vlaming*, stating that the Supreme Court would decide "whether or not a school district can discipline somebody for repeatedly not using the preferred pronouns of a child." (*Id.* 26:5–8.)

Statements like these do not disavow the link between Policy 401's disciplinary provisions and the "Best Practices" of using student pronouns without parental notification or consent. Just the opposite: Counsel's admissions to this Court imply that, if Mr. Vlaming lost his appeal, the School Board would indeed have treated Plaintiffs' refusal to comply with the compelled-speech directives as prohibited discrimination. But Mr. Vlaming did not lose his appeal. And the Supreme Court's decision in his favor does not allow the School Board to discipline Plaintiffs for refusing to comply with the compelled-speech directives in the "Best Practices" guidelines.

B. The School Board's conduct fails any standard of review applicable under Virginia's Free Speech Clause.

Once *Vlaming* determined that West Point had compelled Mr. Vlaming's speech, that was the end of its free-speech analysis. 302 Va. at 574 & n.37. "Because the gravamen of Vlaming's free-speech claims involves an allegation of compelled

speech on an ideological subject," the Court did not ask whether the school board could justify compelling his speech. *Id.* at 574. In other words, it did not mandate strict scrutiny and in fact, implied that a higher standard of review should apply. *See id.* at 567 ("the government has a higher burden to justify compelled speech").

Based on this discussion, this Court should conclude that Virginia's Free Speech Clause simply prohibits the government from compelling speech. The U.S. Supreme Court has reached similar holdings under the federal Constitution. *See 303 Creative*, 600 U.S. at 586–87 (holding that, generally, "the government may not compel a person to speak," without mentioning strict scrutiny). Under this approach, no justification offered by the School Board could rescue its compelling of speech.

Whether or not the School Board's actions are unconstitutional *per se*, at a minimum, it must show that they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of" Plaintiffs' free-speech rights. *Janus*, 585 U.S. at 894 (cleaned up). Because the School Board can't meet this standard, Plaintiffs are "entitled to judgment as a matter of law." *Ranger v. Hyundai Motor Am.*, 302 Va. 163, 169 (2023).

At prior stages of this litigation, the School Board has asserted three interests to justify compelling Plaintiffs' speech: (1) ensuring student safety and confidentiality, (2) preventing discrimination, and (3) compliance with federal and state law. (MTI Opp'n at 34–37.) But these interests resemble those that the U.S. Supreme Court considered in *303 Creative* and held could not justify compelling an individual to speak.

That case involved a graphic designer who wanted to begin designing websites for soon-to-be-married couples. She could not do so in a way that would "convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman." *303 Creative,* 600 U.S. at 580. Colorado argued that it could compel her to convey such messages, because they "somehow implicate[] a

customer's statutorily protected trait." *Id.* at 589. The Court agreed that Colorado *generally* had a "'compelling interest' in eliminating discrimination in places of public accommodation." *Id.* at 590. But the Court rejected the idea that such an interest could justify compelling a citizen to speak. *See id.* at 592 ("[T]his Court has also recognized that no public accommodations law is immune from the demands of the Constitution.").

The Supreme Court of Virginia has also rejected a school board's attempt to justify actions based on interests similar to those presented by the School Board here. *See Loudoun Cnty. Sch. Bd. v. Cross*, Record No. 210584, 2021 WL 9276274, at *8 (Va. Aug. 30, 2021). In *Cross*, a school board placed a teacher on administrative leave after he spoke publicly at a school board meeting in opposition to directives similar to those challenged by Plaintiffs here. *Id.* at *1–2. And that school board attempted to justify its actions based on its "interests in ensuring student wellbeing and that its employees support and comply with existing and proposed gender identity policies and corollary anti-discrimination laws." *Id.* at *8. In part because the school board "never attempted to specify how" the teacher's "continuing to teach" actually threatened those interests, the Supreme Court held that they "appear[ed] pretextual." *Id.*

The same is true here. The School Board has never tried to connect its stated concerns with Plaintiffs' objections. They are thus insufficient grounds to justify compelling Plaintiffs' speech.

One final note on the directive not to notify parents or seek their consent, in particular. As to this directive, "[i]t is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns." *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-cv-04015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). It's simply "illegitimate to conceal

information from parents for the purpose of frustrating their ability to exercise a fundamental right." *Id.* at *8 n.12. As a matter of law, this directive can't even survive rational-basis review.

II. The School Board violates Virginia's Religious Freedom Restoration Act, because it compels Plaintiffs to violate their religious beliefs.

The Supreme Court also ruled in favor of Mr. Vlaming's religious-liberty claims, one under Virginia's Free Exercise Clause, Va. Const. art. I, § 16; and the other under the Virginia Religious Freedom Restoration Act ("VRFRA"), Va. Code § 57-2.02. *Vlaming*, 302 Va. at 541, 559. Mr. Vlaming's religious-liberty claims closely resemble Plaintiffs' own. When considering the School Board's demurrer, and prior to *Vlaming*, this Court dismissed Plaintiffs' free-exercise claims under the Virginia Constitution and Va. Code § 57-1. (Op. Letter at 10 n.5; *see id.* at 5, 15.) But Plaintiffs' VRFRA claim remains live, and this Court should render summary judgment for Plaintiffs under VRFRA.

Vlaming laid out a burden-shifting framework for VRFRA claims. Under that framework, Plaintiffs have "the initial obligation to show that the government 'substantially burden[ed]' the 'free exercise of religion.'" *Vlaming*, 302 Va. at 560 (quoting Va. Code § 57-2.02(B)) (brackets in *Vlaming*). Because they've made "that prima facie showing" here, the School Board "then has 'the burdens of going forward with the evidence and of persuasion under the standard of clear and convincing evidence.'" *Id.* (quoting Va. Code § 57-2.02(A)). And to meet its burden, the School Board must "show that the specific 'application of the [government's] burden to'" Plaintiffs is both: "essential to further a compelling governmental interest"; and, "the least restrictive means of furthering that compelling governmental interest." *Id.* (quoting Va. Code § 57-2.02(B)) (alteration in *Vlaming*).

The undisputed facts show that Plaintiffs have made a prima facie showing that the School Board's "Best Practices" substantially burden their free exercise of

religion. And those facts also show that the School Board can't mount "clear and convincing evidence" that applying those "Best Practices" *to Plaintiffs in particular* is essential to a compelling governmental interest. As a result, the Court should grant Plaintiffs' motion for summary judgment.

A. The School Board's "Best Practices" substantially burden Plaintiffs' free exercise of religion.

Under VRFRA, Plaintiffs' burden is not great. To show a "substantial burden," they must show only that the School Board has committed "any act that 'inhibit[ed] or curtail[ed]' the[ir] 'religiously motivated practice.'" *Vlaming*, 302 Va. at 560 (quoting Va. Code § 57-2.02(A)) (first and second alterations in *Vlaming*).

Plaintiffs meet this burden for the same reasons as Mr. Vlaming. "[H]e was fired as a French teacher for referring to a biologically female student only by the student's preferred name instead of by both the preferred name and government-mandated masculine pronouns." *Id.* at 561. And "he could not comply with this compelled-speech mandate because it coerced him into violating his conscience by endorsing an ideology at odds with his sincerely held religious beliefs." *Id.* That sufficed to shift the burden to the West Point school board to justify substantially burdening his religious exercise. *Cf. Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1218 (S.D. Cal. 2023) (granting preliminary injunction on federal free-exercise claim based on similar objections to similar school-board requirements).

Plaintiffs suffer the same substantial burden as Mr. Vlaming, for reasons similar to those discussed in the context of Plaintiffs free-speech claims. *See supra* pp. 11–23. The School Board's "Best Practices" direct them to "[a]lways utilize a student's preferred name and pronouns"—even when those pronouns are contrary to a student's sex. (Compl. Ex. 3 at 7.) And the School Board directs them to use preferred names and pronouns without notifying parents or seeking their consent. (*Id.* at 8.) But Plaintiffs can't comply with those directives because compliance would violate

their sincerely held religious beliefs about sex, gender identity, and honesty, among other topics. (Compl. ¶¶ 76–79, 201–08, 242–43, 249.) Plaintiffs' religiously motivated inability to comply, however, puts them at risk of an investigation under Policy 401 and, ultimately, "discipline up to and including expulsion or discharge." (Compl. Ex. 1 at 2–3.)

The undisputed facts establish "a prima facie claim of a statutory violation of Code § 57-2.02(B)," so the burden shifts to the School Board to justify its actions. *Vlaming*, 302 Va. at 561.

B. The undisputed facts show, as a matter of law, that the "Best Practices" are not essential to or the least restrictive means of furthering a compelling governmental interest.

Because the School Board can't meet its "burdens of going forward with the evidence and of persuasion under the standard of clear and convincing evidence," Plaintiffs are entitled to judgment. *Vlaming*, 302 Va. at 560 (quoting Va. Code § 57-2.02(A)). It must show that applying the "Best Practices" to Plaintiffs is "essential to" and "the least restrictive means of furthering [a] compelling governmental interest." *Id.* (quoting Va. Code § 57-2.02(B)). And that requires the School Board "to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 561 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)).

The School Board has only ever asserted "broadly formulated interests" to "justify[] the general applicability" of its "Best Practices." *O Centro*, 546 U.S. at 431. The only interests it has ever asserted are in student safety and confidentiality, antidiscrimination, and compliance with federal and state law. (MTI Opp'n at 34–37.) But it has never explained—nor can it explain—"the asserted harm of granting specific

exemptions to" Plaintiffs. *O Centro*, 546 U.S. at 431. And the failure to explain that harm means the "application of" the "Best Practices" to Plaintiffs is neither "essential to" nor "the least restrictive means of furthering" those three broadly formulated interests. Va. Code § 57-2.02(B).

Separately, the School Board has attempted to invoke an exemption in VRFRA: "Nothing in this section shall prevent any governmental institution or facility from maintaining health, safety, security or discipline." *Id.* § 57-2.02(E). (*See* MTI Opp'n at 31–32.) The School Board bears the burden of production and persuasion on Subsection E's exemption. *See Vlaming*, 302 Va. at 562 n.31 (holding that it is "implausible" that Subsection E is "a negative element of the claimant's prima facie case," rather than "an affirmative defense"). And *Vlaming* forecloses the School Board's ability to meet that burden. It held that Subsection E's "wholesale exemption" did not apply to "fir[ing] Vlaming because he had referred to a student only by the student's preferred name, avoided the use of any third-person pronouns, and refused to use the government-mandated pronouns." *Id.* at 563. Similarly, the School Board's threat to discipline Plaintiffs under Policy 401 for noncompliance with the directives in the "Best Practices" is not exempt from VRFRA. *See Mirabelli*, 691 F. Supp. 3d at 1222 (calling similar actions by a California school board a "trifecta of harm").

III. Plaintiffs are entitled to a declaratory judgment that requiring them to comply with the "Best Practices" would violate the Virginia Constitution and VRFRA.

The School Board's ongoing violations of the Virginia Constitution and VRFRA entitle Plaintiffs to an injunction to stop the irreparable harm they're suffering. *See Carbaugh v. Solem*, 225 Va. 310, 314 (1983) (requiring "irreparable harm" to obtain an injunction). But injunctive and declaratory relief are not mutually exclusive remedies. *See Leggett v. Sanctuary at False Cape Condo. Ass'n*, 303 Va. 128, 132–33

(2024). And the underlying controversy about the constitutionality of the School Board's "Best Practices" guidance also entitles Plaintiffs to a declaratory judgment.

For the reasons discussed in Parts I–II, *supra*, the School Board's directives in its "Best Practices" violate the Virginia Constitution and VRFRA. But the School Board has argued elsewhere that Plaintiffs must *actually* experience discipline before they may obtain a declaratory judgment. In the November 2022 hearing in this lawsuit, the School Board's counsel discussed *Vlaming*. (Nov. 2022 Hr'g Tr. 8:17–23.) He noted that Mr. Vlaming refused "to use gender preferred pronouns" after he had been "warned that if he didn't do so he might be disciplined or fired." (*Id.*) Because "he went ahead and did so, ... he was fired." (*Id.*) According to the School Board, "[t]hat gets you standing." (*Id.*)

Applying that standard to Plaintiffs' request for a declaratory judgment would gut the declaratory-judgment statute. Under that statute, courts "have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed." Va. Code § 8.01-184. This "statute[] permit[s] the declaration of [a party's] rights before they mature." *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 55 (2018) (cleaned up) (third alteration in original). It permits judgments that "may guide parties in their future conduct in relation to each other," to "reliev[e] them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests." *Id.* (cleaned up).

This lawsuit is "a challenge to the constitutionality" of the School Board's "Best Practices" under "self-executing provisions of the Virginia Constitution" and VRFRA, which expressly allows Plaintiffs to seek declaratory relief. *Daniels v. Mobley*, 737 S.E.2d 895, 901 (2013). And "a declaratory judgment action could challenge a school board policy when there is an 'antagonistic assertion and denial of right'—whether

that right be derived from statutes, common law, or constitutional law." *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 362 (2017).

As the Court put it early in the case, Plaintiffs are "not required to wait around for an actual harm, as long as they have a right of action to proceed." (Nov. 2022 Hr'g Tr. 17:17–19.) Because the School Board is violating the Constitution and VRFRA, Plaintiffs have a right of action, the Court should grant Plaintiffs' motion for summary judgment and issue their requested declaratory judgment.

IV. The Court should strike the School Board's jury demand.

For the reasons detailed above, the Court should not hold any trial at all in this matter. There are no disputes of material fact, only legal questions require answers, and Plaintiffs are entitled to judgment. No trial is necessary. The Court should render summary judgment for Plaintiffs.

For different reasons—albeit not totally unrelated ones—holding a *jury* trial is particularly unwarranted. Although Plaintiffs have not demanded one, the School Board has. (Answer at 45.) But the Court should strike that demand.

The Virginia Constitution's jury-trial provision does not mirror the Seventh Amendment to the U.S. Constitution. It provides only "[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." Va. Const. art. I, § 11. Virginia's courts interpret that language to not extend to "those proceedings in which there was no right to jury trial when the Constitution was adopted," specifically, in 1776. *Ingram v. Commonwealth*, 62 Va. App. 14, 26 (2013) (per Kelsey, J.) (quoting *Stanardsville Volunteer Fire Co. v. Berry*, 229 Va. 578, 583 (1985)). "Since the constitutional guarantee of jury trial in civil cases attaches only to common law actions as they existed in 1776, statutes creating a new cause of action need not provide for trial by jury." *Id.* at 27 (citation omitted).

Because Plaintiffs here seek only "equitable relief," the parties have "no right to a jury trial." *Norfolk S. Ry. Co. v. E.A. Breeden, Inc.*, 287 Va. 456, 467 (2014). This is undisputable regarding Plaintiffs' requests for injunctive relief. (Compl., Prayer for Relief, at 55 ¶¶ C–D.) For "when a party seeks injunctive relief, he must sue in equity." *Wright v. Castles*, 232 Va. 218, 222 (1986). And litigants have "no constitutional right to trial by jury" for suits "[i]n equity." *Id.*

Equally, neither Plaintiffs' requests for declaratory relief nor for nominal damages entitles the School Board to a jury trial. So the Court should grant Plaintiffs' motion to strike the School Board's jury demand.

A. Plaintiffs' request for declaratory relief is equitable in nature, so the School Board has no right to a jury trial.

Plaintiffs also seek declaratory relief. (Compl., Prayer for Relief, at 54–55 ¶¶ A–B.) And certain issues related to a declaratory judgment may be tried to a jury. *See* Va. Code § 8.01-188. But the Supreme Court has said that this section "addresses only the form in which an issue of fact may be submitted to a jury, and does not provide a party in a declaratory judgment suit a separate right to a binding jury verdict." *Angstadt v. Atl. Mut. Ins. Co.*, 254 Va. 286, 292 (1997). The Court has thus held that a declaratory-judgment action "may be proceeded in either at law or in equity." *Carr v. Union Church of Hopewell*, 186 Va. 411, 416 (1947). Whether a party has a right to a jury trial in a declaratory-judgment action will depend on whether the action proceeds at law, where "either party has a right to a jury trial," or in equity, where neither party does. *Wright*, 232 Va. at 222.

Plaintiffs' declaratory-judgment claims are best characterized as equitable, because the underlying controversy is an equitable one: whether the School Board's actions violate the Virginia Constitution. Compare this lawsuit with *Dean v. Paolicelli*, 194 Va. 219 (1952). In that case, a group of Virginians challenged "[t]he constitutionality of the act under which [an] incumbent asserted his right to occupy [his] office"

on a county board. *Id.* at 238. They also challenged "his power to act as a board member, and thereby legislate for the public, and his right to receive and dispense public funds." *Id.* The circuit court "treated the bill of complaint as a bill for a declaratory judgment" and allowed the case to "proceed[] ... on the equity side of the court." *Id.* The Supreme Court held that this "procedure was entirely proper." *Id.*

As in *Dean*, Plaintiffs seek a declaration that certain government action is unconstitutional. So their declaratory-judgment claims are equitable. That they also request injunctive relief reinforces that conclusion. *See id.* at 239 (noting that "[a]ward of the injunctive relief sought was not forbidden by" the declaratory-judgment statute).

Federal courts apply a similar rule that looks to the nature of the underlying controversy to determine whether a declaratory-judgment action is legal or equitable. *See* Wright & Miller, *Federal Practice & Procedure* § 2769 ("There is no right to jury trial if, absent the declaratory procedure, the issue would have arisen in a proceeding in equity or in admiralty." (footnote omitted)). Thus, if a party "would have been entitled to a jury trial" absent the other party's declaratory-judgment lawsuit, then "it cannot be deprived of that right merely because [respondent] took advantage of the availability of declaratory relief to sue ... first." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959). Conversely, "[s]eeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist." *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 662 (6th Cir. 1996). Because the School Board would have no right to a jury trial on Plaintiffs' claims for injunctive relief, it has no right for a jury trial on their claims for declaratory relief.

B. Because nominal damages are akin to a declaratory judgment, they also do not entitle the School Board to a jury trial.

Finally, it also makes no difference that, along with seeking injunctive and declaratory relief, Plaintiffs have requested "[n]ominal damages for the violation of

Plaintiffs' constitutional, statutory, and common-law rights." (Compl., Prayer for Relief, at 55 ¶ E.) Unlike so-called "actual damage[s]," nominal damages are not "compensatory" in nature. *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 159 (2018) (cleaned up). Nominal damages are thus "awarded by default." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021). At common law, a "prevailing plaintiff" could be "entitled to nominal damages as a matter of law even where [a] jury neglected to find them." *Id.* (citing 1864 English decision).

In this way, a nominal-damages award more closely resembles a declaratory judgment than actual damages. Nominal damages don't depend on a factual assessment of a plaintiff's injuries. Instead, nominal damages represent "a legal declaration that the plaintiff has been wronged and that the judicial system recognizes that the defendant has been shown culpable under the applicable elements of a claim and burdens of proof." *Kerns*, 296 Va. at 160 (cleaned up).

If a defendant has violated a plaintiff's rights, then that plaintiff is entitled to nominal damages—regardless of a jury's factual assessment of the amount of the plaintiff's injuries. "The role of a jury is to settle questions of fact." *Supinger v. Stakes*, 255 Va. 198, 203 (1998). And that of course includes "the assessment of damages." *Id.* (quoting *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 96 (1989)). But when a plaintiff requests *only* nominal damages and not actual damages, the only question is a legal one: whether the defendant violated the plaintiff's rights. There are no fact questions related to damages for a jury to decide.

Because Plaintiffs here seek only nominal damages, there are "*only* disputes [that] concern pure questions of law, not questions of fact." *Belmont Glen Homeowners Ass'n v. Sainani*, 107 Va. Cir. 61, 2020 WL 129918884, at *3 (Loudoun Cnty. Dec. 17, 2020). In *Sainani*, the circuit court granted the plaintiffs' motion for summary judgment and awarded them $200, without "determin[ing] whether the damages are

compensatory or nominal." *Id.* at *5. The undisputed facts in that case supported either theory.

The Court of Appeals affirmed that portion of the circuit court's judgment because it expressly concluded those were nominal damages. That's because "the prevailing rule, well established at common law, was that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage." *Sainani v. Belmont Glen Homeowners Ass'n*, Record No. 0049-23-4, 2024 WL 157551, at *10 (Va. Ct. App. Jan. 16, 2024) (quoting *Uzuegbunam*, 141 S. Ct. at 800) (cleaned up). By concluding that the plaintiffs in *Sainani* had their rights invaded, the circuit court concluded that they "were entitled to nominal damages." *Id.* And because they were entitled to nominal damages, "it was unnecessary for the [plaintiffs] to prove any actual damage." *Id.* So the Court affirmed the summary judgment awarding nominal damages to the plaintiffs.

The same principle applies here. Plaintiffs do not ask the Court to determine any "questions of fact" about their damages. *Sainani*, 107 Va. Cir. 61, 2020 WL 129918884, at *3. Their claims present only "pure questions of law": whether the School Board's actions violate the Virginia Constitution and VRFRA. *Id.* As a result, there are no questions for a jury to decide. And Plaintiffs thus ask the Court to strike the School Board's demand for a jury trial.

CONCLUSION

Plaintiffs respectfully ask this Court to grant their motion for summary judgment and render judgment against the School Board as detailed in that motion. Alternatively, Plaintiffs respectfully request that the Court grant their motion to strike the School Board's demand for a jury trial.

Dated: October 4, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2024, I caused the foregoing to be served by email on the following, who have agreed to accept service by email:

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