IN THE

SUPREME COURT OF VIRGINIA

Record No. 211061

PETER VLAMING,

Appellant,

v.

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

Appellees.

OPENING BRIEF OF PETER VLAMING

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INTRODUCTION

The School Defendants fired Peter Vlaming, a liked and well-respected high-school French teacher, simply because Vlaming declined to affirmatively express his personal agreement with messages that violate his religious beliefs. Specifically, he declined the School's and a parent's demand that he use biologically incorrect "preferred pronouns" to show a student who identified as transgender that he affirmed and agreed with that identity. JA11.

Vlaming could not affirm and agree that a person's sex is determined by their beliefs rather than biology. *Id.* He could not speak religious messages that he does not believe to be true. JA2–3, JA10–11. He could not lie to his students. JA11. So he offered—and requested—an accommodation: he would use the student's preferred name and avoid using pronouns in the student's presence altogether. JA7–9. But that wasn't good enough for the student's parent or the School. JA12–16. So they fired him. JA15–17, JA23. Vlaming "wasn't fired for something he said." JA2. "He was fired for what he didn't say." *Id.*

At its core, the overarching question presented is a narrow one: whether public school teachers can be forced to violate their religious beliefs by expressing personal agreement with the government's viewpoint on an issue of public concern. The answer is a resounding, "No." But the underlying analysis involves several broad questions of first impression about the meaning of Virginia's Constitution.

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

This appeal offers the Court an opportunity to reverse that trend. In particular, the Court should hold that our Constitution's guarantees that Virginians are "entitled to the free exercise of religion, according to the dictates of conscience" and "shall be free to profess and by argument maintain their opinions in matters of religion" without diminishing "their civil capacities," VA. CONST. art. I, § 16, are more protective than the watered-down version of the federal right. The text, structure, and history of our free-exercise provisions all support that conclusion.

And while the Court has held that our free-speech and due-process provisions are coextensive with their federal counterparts, questions remain unresolved about the scope of those rights. As the Court resolves them now, it should make clear that our Constitution forbids forcing Virginians to falsely express personal agreement with the government's preferred viewpoint on issues of public concern. In the words of Thomas Jefferson, "truth . . . is the proper and sufficient antagonist to error," and truth "will prevail" unless "disarmed of her natural weapons, free argument and debate." 12 HENING's STATUTES AT LARGE 85 (1823).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On December 6, 2018, the West Point School Board terminated Vlaming's employment at West Point High School because he declined to use male pronouns to refer to a female student. JA14–17, JA23.

Vlaming sued in the King William County Circuit Court. *Id.* at 3–5. After a failed removal attempt,[1] the School filed a demurrer and plea in bar, arguing Vlaming's complaint did "not state a cause of action and fail[ed] to state facts upon which the relief demanded [could] be granted." JA87. The School did not proffer evidence to support its plea in bar but said Vlaming's speech was part of his official teaching duties. JA88.

After a motions hearing, the trial court announced it would "sustain the demurrer and the plea in bar as to Counts 1 through 3" (free-speech claims), "sustain the demurrer as to Counts 4, 5, 6, 7 and 8" (free-exercise, due-process, government-discrimination, and Dillon-Rule claims), and "sustain the demurrer on the breach of contract as to the individual defendants" (Count 9). JA317. On Count 9, the court overruled the demurrer "with regard to the School Board only." JA318. The parties proffered, and the trial court entered, a final order noting their objections. JA324–29. And Vlaming now appeals the trial court's order dismissing Claims 1–6 and a portion of Claim 9 with prejudice.

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

ASSIGNMENTS OF ERROR[2]

1. The trial court erred by dismissing Vlaming's state constitutional and statutory free-exercise claims (Claims 4 and 5) because he sufficiently alleged the School Defendants violated his free-exercise rights when they fired him for declining to violate his religious beliefs, and because federal cases limiting federal free-exercise rights do not limit Virginia's free-exercise protections. [JA25, JA31–33, JA168–81, JA290–94, JA301–04, JA327.]

2. The trial court erred by dismissing Vlaming's state constitutional free-speech claims (Claims 1–3) because he sufficiently alleged the School Defendants fired him for declining to express a viewpoint he disagreed with on an issue of public concern. [JA24–31, JA150–68, JA282–90, JA300–04, JA327.]

3. The trial court erred by dismissing Vlaming's state due-process claim (Claim 6) because he sufficiently alleged the School Defendants exercised unbridled discretion when they fired him for allegedly violating an unconstitutionally vague policy. [JA33–34, JA181–83, JA295–96, JA327.]

4. The trial court erred by dismissing a portion of Vlaming's breach-of-contract claim (Claim 9) because he sufficiently alleged the School Board breached its contract with him because it violated Virginia's Constitution and state statutes when it fired him. [JA36–37, JA184–86, JA298–300, JA328.]

[2] To streamline the issues on appeal, Vlaming has not appealed the trial court's dismissal of Claim 7 (government discrimination) or Claim 8 (Dillon-Rule violation), nor has he appealed the trial court's dismissal of Claim 9 "as to the individual defendants." JA317.

STATEMENT OF FACTS[3]

A. Vlaming learns female student plans to identify as male

Near the end of the 2017–2018 school year, Peter Vlaming, a high-school French teacher at West Point High School, learned that one of his female students planned to start identifying as male. JA6. Vlaming had been teaching at the school for almost six years. JA3. He had served on the Professional Learning Steering Committee, coached the school's first girls' soccer team, started the Rotary Interact Service Club, sponsored the French National Honor Society, taught the school's first Career Investigations class, managed the Sunshine Fund for staff celebrating important life events or grieving, and driven a school bus. JA5. His teacher evaluations always had been positive. JA6. And the School Board had granted him continuing contract status. JA5.

When Vlaming learned that one of his female students planned to start identifying as male, he sought advice from one of his mentors—a former professor and the former superintendent of schools in Virginia. JA6. The student had taken Vlaming's Exploratory French Class the previous school year, was close to completing his French I class, and would take his French II class starting in the Fall. *Id.*

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[3] Because Vlaming appeals the trial court's order sustaining the School Defendants' demurrer and plea in bar without hearing any evidence, this Court accepts as true the facts alleged in Vlaming's complaint. *Eubank v. Thomas*, 300 Va. 201, 206, 861 S.E.2d 397, 401 (2021); *Plofchan v. Plofchan*, 299 Va. 534, 547–48, 855 S.E.2d 857, 865 (2021).

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

Vlaming had enjoyed having the student in class, particularly given the student's strong grasp of the topic and witty humor. JA6, JA9. And Vlaming did not want to draw unwanted attention to the student's choice to identify as male. JA7. But Vlaming also knew he could not affirmatively express his personal agreement with that choice based on his sincerely held religious and philosophical beliefs about human nature. JA2–3, JA10. Vlaming believes that our sex—not our gender identity—shapes who we are as humans. JA2–3, JA10. And he believes both as a matter of human anatomy and religious conviction that each person's sex is biologically fixed and cannot be changed. JA3, JA10.

Accordingly, Vlaming believes that if he uses male pronouns to refer to a female student, he would be lying. JA11. He would be "express[ing] the message that [the] person is, or [that he as] the speaker believes them to be, male." JA10. And that would mean expressing ideas that Vlaming believes to be false: that "gender identity, rather than biological reality, fundamentally shapes and defines who we truly are as humans, that our sex can change, and that a woman who identifies as a man *really is* a man." JA2. Vlaming's conscience and religious practice also prohibit him from lying. JA11. So Vlaming cannot use male pronouns to refer to a female student without violating his religious beliefs. JA10.

Vlaming's mentor encouraged him to speak with the student's parents to better understand the situation. JA6. Following that advice, Vlaming met with the student's mother and a guidance counselor. *Id.* During that meeting, the student's mother "explained the student's transition." JA7.

When school began the following semester, Vlaming did his best to accommodate and respect the student's choice to identify as male while not violating his own conscience. JA2, JA7. For example, when Vlaming learned the student wished to be called by a culturally masculine name, he allowed his entire French II class to pick new French names for the semester so the student would not be alone in changing names. JA7.

From the beginning of the school year, Vlaming also consistently used the student's new culturally masculine names—both French and English—and "did not ever intentionally use female pronouns to refer to the student" in the student's presence. *Id.* Instead, Vlaming avoided using pronouns to refer to the student during class altogether, which was made easier by the fact that Vlaming "rarely, if ever, used third person pronouns to refer to *any* students during class or while the student being referred to was present." JA7–9 (emphasis added). After several weeks of classes, the assistant principal met with the student to ask how things were going "with the transition," and the student responded that everything was going "fine." JA8.

A month later, the student emailed Vlaming to ask if they could meet to discuss "something important." JA8. Vlaming agreed, and the two met at school the next afternoon. *Id.* The student told Vlaming that other students had said Vlaming had used a female pronoun when the student had not been present. *Id.* Vlaming asked for grace as he tried to accommodate the student's new preferences. *Id.* The meeting ended positively, and the student seemed satisfied and comfortable with the situation. *Id.* The student did not mention or express any objections to Vlaming's practice of not using pronouns during class. *Id.*

That afternoon, Vlaming called the student's parent as a courtesy. *Id.* The parent told Vlaming the student thought the meeting had gone well. JA8. Vlaming said he respected their wishes, would continue to use the student's preferred name, and would avoid female pronouns in class. JA9. Unsatisfied, the parent told Vlaming to leave his principles and beliefs "out of this" and refer to the student "as a male." *Id.*

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

The next day, Vlaming met with the assistant principal and told her about his conversation with the student's parent. *Id.* He also spoke with the school principal, who told Vlaming to "do whatever the parents ask." *Id.* The next day, the assistant principal told Vlaming the student preferred male pronouns and handed Vlaming two documents published by the National Center for Transgender Equality—adding that Vlaming

was potentially violating federal law and School Board policy by not using male pronouns to refer to his female student. JA9–10. The two documents were based on a letter from the Departments of Justice and Education that had been repealed more than a year and a half earlier. JA10, JA44, JA46–49. One appeared to have been altered to remove a notation that the letter had been revoked. JA10.

Both documents stated schools should not discriminate against or harass transgender students. JA44, JA46–49. But they were less clear about whether the *non*-use of pronouns would violate the organization's understanding of federal law. For example, one document stated, "If teachers and school officials refuse to use the right name and pronouns, they *may* be breaking the law." JA46 (emphasis added). And the other merely discouraged "the *use* of names and pronouns with the intent to harass or mock." JA44 (emphasis added).

Despite those ambiguities, when Vlaming explained how he had been accommodating the student's wishes, the assistant principal told Vlaming not using pronouns was not enough, and that he should use male pronouns or his job could be at risk. JA10. Vlaming responded that using male pronouns to refer to a female student was against his religious beliefs. *Id.* But the assistant principal was unmoved: Vlaming signed a contract with the school, so his "personal religious beliefs end at the school door" when they conflict with School Board policy. JA11. Failure to comply could lead to termination of his employment. *Id.*

The next day, prompted by an email from the student's mother, the school principal met with Vlaming to instruct him on how he was to interact with the student. *Id.* The student's mother had told the principal that she wanted Vlaming to use identity-based terms to show that Vlaming affirmed and agreed with the student's gender identity. *Id.* So the principal gave Vlaming the same directive: use the student's preferred pronouns in any and every context or he could be terminated. *Id.* The next day, the principal and assistant principal met with Vlaming again and reiterated that command: Vlaming was to use male pronouns to refer to the female student. JA12. If he refused, he would receive a formal letter of reprimand charging him with non-conformity with School Board policy for not using male pronouns. *Id.*

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

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

After class, the student approached Vlaming and told him, "Mr. Vlaming, you may have your religion, but you need to respect who I am." *Id.* Vlaming apologized, saying, "I'm sorry, this is difficult." *Id.* This was the only time since the student had started identifying as male that Vlaming had ever used a female pronoun to refer to the student in the student's presence. *Id.* Immediately after the incident, Vlaming went to the principal and explained what had happened. *Id.* The principal retorted, "You know what you do to diffuse a situation like that? You say, 'I'm sorry, I meant to say *him*.'" *Id.*

Later that day, the student's mother emailed the principal to say she was withdrawing the student from Vlaming's class. JA13. A few hours after Vlaming reported the incident, the principal and assistant principal called Vlaming back to the office and gave him a letter stating the principal was recommending the superintendent place him on administrative leave pending an investigation. JA13, JA51. The next day, the superintendent suspended Vlaming. JA13.

Several days later, the principal gave Vlaming a reprimand and "final warning letter." JA14, JA57–58. In it, the principal recounted his "verbal directive to use male pronouns when referring" to the student and Vlaming's statement he "would not use male pronouns and would only refer" to the student using the student's name. JA57. Vlaming's "repeated refusal to follow directives [was] insubordination and [would] not be tolerated." *Id.* Specifically, his "failure to use male pronouns" was

in "direct conflict" with two school policies: one prohibiting harassment and the other governing staff conduct and responsibilities. *Id.* Failure to use "appropriate male pronouns" going forward would "result in further disciplinary action up to and including termination." JA58.

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

That same day, Vlaming met with the superintendent. JA14. Vlaming told her he was happy to keep using the student's preferred name but could not use male pronouns without violating his religious convictions. *Id.* When Vlaming met with the superintendent again the next day, she gave him a written directive ordering him to "treat [the student] the same as other male students." JA14, JA61. That included using the student's "preferred name" and "male pronouns." JA14, JA61. "If you refuse to comply with this directive or if you have any further instances of using female pronouns or of avoiding the use of male pronouns," the letter continued, "it will be considered insubordination and will result in termination of your employment." JA15, JA61.

The letter also informed Vlaming he could not return to the classroom until he met with the student and the student's parents "to assure them" he would treat the student "the same as other male students, including using male pronouns." JA15, JA61. If Vlaming refused, that too would "be considered insubordination and [would] constitute additional grounds for the termination of [his] employment." JA61.

A day or two later, the superintendent notified Vlaming he was suspended effective immediately, and that she was recommending his dismissal. JA15, JA63. "The reason for your suspension," the letter explained, was Vlaming's "continued insubordination with regard to [his] treatment of a student." JA63. Vlaming had been given "directives" that he was "to use male pronouns when referring to the student," and he had "repeatedly refused to do so." *Id.* When they had met the day before, Vlaming had "again refused to comply." *Id.*

F. School Board fires Vlaming for not using male pronouns

On December 6, 2018, the School Board held a public hearing to consider the superintendent's recommendation and voted unanimously to terminate Vlaming's employment. JA15. Specifically, the Board fired Vlaming in retaliation for not using male pronouns to refer to a female student. *Id.* In other words, Vlaming "wasn't fired for something he said." JA2. "He was fired for what he didn't say." *Id.*

The next day, West Point students held a walkout to protest the Board's firing of their beloved teacher. JA1, JA16. The students understood that the School had tried to force Vlaming to express a message that violated his conscience. JA16. But the walkout had no impact on Vlaming's employment status. And Vlaming has since been turned down for multiple teaching positions with other school divisions because the School fired him based on accusations he discriminated against one

of his students. JA23. Unable to find a new teaching position after his firing, Vlaming moved his family back to France to look for work there.[4]

STANDARD OF REVIEW

This Court "review[s] a circuit court's judgment sustaining a demurrer de novo." *Eubank*, 300 Va. at 206, 861 S.E.2d at 401. The Court "accept[s] as true all factual allegations expressly pleaded in the complaint" and does the same for reasonable "unstated inferences" from the facts alleged, interpreting them "in the light most favorable to the claimant." *Doe by & Through Doe v. Baker*, 299 Va. 628, 641, 857 S.E.2d 573, 581 (2021) (cleaned up).

Importantly, the Court does "not evaluate the merits of the allegations, but only whether the factual allegations sufficiently plead a cause of action." *Eubank*, 300 Va. at 206, 861 S.E.2d at 401. Likewise, when the court below "takes no evidence on [a] plea in bar," this Court "accept[s] the plaintiff's allegations in the complaint as true." *Plofchan v. Plofchan*, 299 Va. 534, 547–48, 855 S.E.2d 857, 865 (2021). "[T]he party asserting a plea in bar bears the burden of production and persuasion." *Cal. Condo. Ass'n v. Peterson*, 869 S.E.2d 893, 896 n.4 (Va. 2022).

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[4] The move does not moot Vlaming's requests for prospective relief. *See Tazewell Cnty. Sch. Bd. v. Brown*, 267 Va. 150, 157–58, 591 S.E.2d 671, 674 (2004) (principal's resignation did not moot claims where adverse action would remain in his personnel file). Moreover, Vlaming's requests for damages and retrospective relief keep each of his claims alive. *Avery v. Beale*, 195 Va. 690, 692–93, 80 S.E.2d 584, 586 (1954) (denying motion to dismiss appeal because "right to damages" was "not moot").

SUMMARY OF ARGUMENT

This past year marked the 50th anniversary of the current version of Virginia's Constitution, and the 245th anniversary of its first Constitution and Declaration of Rights. George Mason's draft of Virginia's bill of rights became a model for other states, and Jefferson borrowed from it when he composed the Declaration of Independence, making it arguably "the most influential constitutional document in American history." 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 38–39 (1974) (citation omitted). At least for a time.

More recently, courts and litigants have treated Virginia's constitutional provisions as mere redundancies, deeming them "coextensive" with their federal counterparts while ignoring any broader protections they might provide. Judicial "lockstepping" describes the tendency of state courts to "diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF CONSTITUTIONAL LAW 174 (2018). *Accord* BRYAN A. GARNER, ET AL., THE LAW OF JUDICIAL PRECEDENT 662–67 (2016). That practice poses a "grave threat to independent state constitutions." *Id.* And no constitution has a stronger claim to independent meaning than Virginia's—ours included the first bill of rights, and *it* "influenced the Federal Bill of Rights," not vice versa. Robert S. Claiborne, Jr., *Commonwealth and Constitution*, 48 U. RICH. L. REV. 415, 430–31 (2013).

"[T]he Virginia and federal constitutions [also] use different language," so naturally they should "carry different meanings." *Id.* at 436. And it is hard "to imagine the same Virginians who feared the prospect of 'uniform national standard[s] . . . imposed on the states'" would have "establish[ed] courts that would redundantly impose then-unforeseen federal standards under the name, but to the exclusion, of their Declaration of Rights." *Id.* at 475 (quoting J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights, 1789–1791*, 25 U. RICH. L. REV. 433, 465 (1991)). Indeed, the "lesson of history is otherwise." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

"If, upon a careful inquiry, some of the clauses of our Declaration of Rights are found to offer more protection than the protections found in the Constitution of the United States, including the religious liberty . . . rights devalued in modern federal jurisprudence," the Court "should do [its] duty and honor the original public meaning of those provisions." *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 587, 801 S.E.2d 414, 422 (2017) (McCullough, J., concurring).

Whether viewed from the perspective of the authors of Virginia's free-exercise provisions or the religious dissenters who deserve equal credit for making religious freedom a reality, Virginia's Constitution is more protective of free exercise than the watered-down federal right that survived *Employment Division v. Smith*.

Under our Constitution, Virginians have an absolute right not to be forced to publicly disavow their sincerely held religious beliefs—and that applies equally to public-school teachers. Even on pure speech grounds, the government cannot force its employees to falsely express their agreement with controversial messages they don't believe without identifying a compelling state interest that cannot be achieved through significantly less restrictive means. Especially at the demurrer stage, the School cannot make that showing here. This Court should reverse.

ARGUMENT

I. Vlaming sufficiently alleged that the School violated his free-exercise rights under the Virginia Constitution and Virginia RFRA.

A. Virginia's free-exercise provisions are more protective than—and thus *not* coextensive with—current federal free-exercise doctrines.

Neither the text of Virginia's free-exercise section nor the federal free-exercise clause includes any exception allowing the government to infringe free exercise in certain cases. But in *Employment Division v. Smith*, the U.S. Supreme Court read a broad exception—for "neutral, generally applicable" laws—into the text of the federal right. 494 U.S. 872, 879–80 (1990). As a result, "[e]ven if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).

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

As Vlaming argued below in response to the School Defendants' argument that "the School Board's policies are neutral and generally applicable" under *Smith*, JA108–10, the text and history of Virginia's free-exercise provisions support the conclusion they "provide[] broader protection than" the federal right as interpreted in *Smith*, JA169–71.

"[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection" than "similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). *Accord Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) (declaring it "fundamental" that state courts be "free and unfettered" in this way). And James Madison, the "Father of the Bill of Rights" and an architect of Virginia's free-exercise provisions, would have "welcome[d] the broadening by state courts of the reach of state constitutional counterparts beyond the federal model." Brennan, *State Constitutions* at 503–04.

More recently, the Commission on Constitutional Revision stated that the mere fact that "most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is . . . no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians." *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 922 (1981) (quoting the Commission's 1969 report). The Commission "believe[d] that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people's liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts." *Id.* at 922–23 (quoting the report).

And yet, this Court has never said whether our Constitution's free-exercise section offers greater protection to religious freedom than the federal Free Exercise Clause. And while the Court has said that "where possible" it "will rely on our own Constitution rather than resorting to that of the United States," *Schilling v. Bedford Cnty. Mem'l Hosp., Inc.*, 225 Va. 539, 543 n.2, 303 S.E.2d 905, 907 n.2 (1983), the Court has not yet announced a standard for deciding when specific provisions offer greater protection than their federal counterparts.

The Pennsylvania Supreme Court, by contrast, has told "litigants [to] brief and analyze" four factors in cases raising claims under their state constitution: (1) the "text of the Pennsylvania constitutional provision," (2) the "history of the provision, including Pennsylvania

case-law," (3) any "related case-law from other states," and (4) any relevant "policy considerations." *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991). While the third and fourth factors might carry some persuasive weight,[5] this Court's inquiry should focus on the first two—really three—analytical guideposts: text, history, and Virginia caselaw. *Accord City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment*, 744 N.E.2d 443, 445–50 (Ind. 2001).

1. The text of Virginia's free-exercise provisions offers more robust and explicit protection.

First, the text of Virginia's free-exercise section is "[l]onger and more inclusive than its federal counterpart," bolstering the conclusion Virginia "set higher standards for the liberty of its citizens" than the floor set by the federal right. 1 HOWARD, COMMENTARIES at 55.

Virginia's free-exercise section opens with the foundational truth "[t]hat religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." VA. CONST. art. I, § 16; 9 HENING's STATUTES AT LARGE 111 (1821). "[T]herefore," the text continues, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." VA. CONST. art. I, § 16; 9 HENING'S STATUTES at 111–12.

[5] Other state courts' willingness to interpret their state constitutions to require a more protective pre-*Smith* analysis bolsters the conclusion this Court should, too. SUTTON, SOLUTIONS at 207, 271 n.19 (collecting cases); *see also James v. Heinrich*, 960 N.W.2d 350, 369 (Wis. 2021); *State v. Mack*, 249 A.3d 423, 440–42 (N.H. 2020).

The remaining two sentences "draw heavily on Thomas Jefferson's 1786 Statute for Religious Freedom and first appeared in the 1830 Constitution in the Legislature Article, where they remained until they were moved to the bill of rights in the 1971 Constitutional revision." JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 83 (2d ed. 2014).

As relevant here, the first remaining sentence contains two clauses that guarantee Virginians even more explicitly robust protections for their religious opinions, beliefs, and expression:

- "No man . . . shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief;"
- "but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities."

VA. CONST. art. I, § 16. Finally, the first clause of the final sentence states that "the General Assembly shall not prescribe any religious test whatever." *Id.*

In far more cursory language, by contrast, the free-exercise clause of the federal Constitution merely condemns laws "prohibiting the free exercise" of religion. U.S. CONST. amend. I.

Based only on their respective texts, then, two similarities and two main differences emerge. The state and federal versions are alike in that both protect the "free exercise" of religion and neither contain an

explicit exception for laws that are "neutral and generally applicable," in the words of *Smith*. Indeed, neither version contains any explicit exceptions whatsoever.

On the other side of the ledger, two main textual differences support the conclusion that Virginia's free-exercise provisions have meaning independent of their federal counterpart:

First, Virginia's right is grounded in the belief that the "duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." VA. CONST. art. I, § 16. For that reason, it protects free exercise "according to the dictates of conscience." *Id.* In the words of Virginian John Leland, the prolific late-18th-century Baptist minister,[6] "*conscience*, signifies *common science*, a court of judicature erected by God in every human breast." JOHN LELAND, THE VIRGINIA CHRONICLES 45–46 (1790). Early Virginians believed religious duties precede and operate independently of our duties to the State. And they enshrined that belief in the text.

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[6] "During his long career, Leland preached approximately 8,000 times, baptized nearly 1,300 individuals, and claimed to have traveled a distance equivalent to three trips around the world." SPREADING THE GOSPEL IN VIRGINIA: SERMONS AND DEVOTIONAL WRITINGS 452 (Edward L. Bond ed., 2004). "During his fourteen years in Virginia, he led the fight to disestablish the Episcopal Church, to secure religious freedom, and to ratify the Constitution," becoming a "friend, constituent, and important ally of James Madison" in the process. *The Rights of Conscience Inalienable, by John Leland, in* 2 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1080 (Ellis Sandoz ed., 1998).

Second, the text of Virginia's free-exercise right singles out religious opinion, belief, and expression for more robust protections, promising that no Virginians "shall be enforced, restrained, molested, or burthened in [their] body or goods" or "otherwise suffer" based on their "religious opinions or belief," and declaring that all Virginians are "free to profess and by argument to maintain their opinions in matters of religion," and that those opinions "shall in nowise diminish, enlarge, or affect their civil capacities." VA. CONST. art. I, § 16.

The broad, all-encompassing nature of the terms used—"enforced, restrained, molested, or burthened" or "otherwise suffer"—shows the Virginia right was never limited to just prohibiting direct penalties on religion. *Id.* And the Virginia right's guarantee that our religious opinions, beliefs, and expression "shall in nowise diminish, enlarge, or affect [our] civil capacities" shows that even government-imposed *civil* consequences for religious expression are forbidden. *Id.*

Taken together, these textual differences make reading an exception for "neutral and generally applicable" laws into the Virginia right even more untenable than for its federal counterpart. And the history surrounding the recognition and adoption of free-exercise rights in Virginia cements the conclusion that the original public meaning of the text of the right included no such exception.

2. History shows the Virginia right requires at least some exemptions for religious exercise and even greater protection for religious speech.

i. 1776 – Trading tolerance for free exercise

Virginia's story is remarkable. "While before the Revolution no colony more carefully protected its established church nor more aggressively discriminated against and persecuted dissenters than Virginia, by early 1786, with the adoption of [Jefferson's] statute, no state provided broader protections to religious freedom or did so in terms nearly as eloquent." JOHN A. RAGOSTA, WELLSPRING OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY 133 (2010). "The Old Dominion . . . had chosen a genuinely revolutionary course of action." THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787 173 (1977). "It granted absolute liberty of conscience, the right to believe as one wished and to practice that belief without any civil disabilities." *Id.*

That radical transformation began with one radical idea—that the "duty of every man" to his Creator "is precedent, both in order of time and in degree of obligation, to the claims of Civil society." JAMES MADISON, *A Memorial and Remonstrance, in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 162 (1865). As a result, free exercise of religion "is in its nature an unalienable right." *Id.* "[E]very man who becomes a member of any particular Civil Society [must] do it with a saving of his allegiance to the Universal Sovereign." *Id.* at 163.

For both Madison and Jefferson, "religion was an entirely personal matter between man and his Creator, a natural right antecedent to the formation of society and thus incapable of direction either by state or church." BUCKLEY, CHURCH AND STATE at 174. Madison's devotion to that idea explains how the constitutional right to "free exercise of religion" was born. "When George Mason proposed the term 'toleration' for the religious liberty clause of the Virginia Bill of Rights, Madison objected on the ground that the word 'toleration' implies an act of legislative grace, which in [John] Locke's understanding it was." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443 (1990). "Madison proposed, and the Virginia assembly adopted, the broader phrase: 'the full and free exercise of religion.'" *Id.*

"Madison himself left his commentary upon this point in a manuscript copy of the Bill of Rights." H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 45 (1910). Madison wrote that he had intended "to substitute for the idea expressed by the term 'toleration,' an 'absolute and equal right' in all to the exercise of religion according to the dictates of conscience." 1 WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 145 (1859). *Accord James Madison's Autobiography*, 2 WM. & MARY Q. 191, 199 (Douglas Adair, ed., 1945).

"The convention was willing to make the alteration in wording," but many of its members "failed to grasp its implications" and refused to disestablish the Anglican church. BUCKLEY, CHURCH AND STATE at 18. But the historic scope of the new right wasn't lost on religious dissenters. RAGOSTA, WELLSPRING at 56–60. And that makes sense: their ministers had been fined, jailed, dunked in water, harassed, and physically attacked while preaching under the previous system of "toleration," often under "laws that were neutral on their face" but still "could be used by Anglican leaders against dissenters." *Id.* at 28–36, 53.

Although diverse in their beliefs, religious dissenters shared "certain features of church-state thought." BUCKLEY, CHURCH AND STATE at 178. Like Jefferson and Madison, they "all viewed religion as voluntary and prior in its rights to the claims of civil society." *Id.* "Does a man, upon entering into social compact, surrender his conscience to that society, to be controlled by the laws thereof; or can he, in justice, assist in making laws to bind his children's consciences before they are born?" THE WRITINGS OF THE LATE ELDER JOHN LELAND 181 (L.F. Greene ed., 1845). Dissenters answered that question in the negative on multiple grounds. *Id.* To them, religion was entirely "between God and individuals." LELAND, CHRONICLES at 26. And the "legitimate powers of civil government" did not "extend so far as to disable, incapacitate, proscribe, or [in] any ways distress in person, property, liberty or life, any man" who could not "believe and practice in the common road." *Id.* at 27.

"As dissenters believed that the right to free exercise predates the social compact and takes precedence to it, exemption from otherwise valid laws for free exercise, within limits, makes sense." RAGOSTA, WELLSPRING at 154. And the same can be said for Madison, who likewise "advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of society." McConnell, *Origins*, 103 HARV. L. REV. at 1453. If as Madison and the dissenters believed "the scope of religious liberty is defined by religious duty," and "if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable." *Id.*

"Other elements from Virginia's historic struggle for religious freedom support" and may "help define a free exercise exemption." RAGOSTA, WELLSPRING at 154. During the initial "debate over Virginia's new constitution, Madison publicly grappled with the scope of free exercise in response to a provision in George Mason's draft Declaration of Rights." *Id.* Mason had proposed an exception for cases where "any man disturb the peace, the happiness, or safety of society." McConnell, *Origins*, 103 HARV. L. REV. at 1462 ((quoting S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491 (1902)).

"Madison criticized the breadth of Mason's proposed state interest limitation." *Id.* at 1463. Most likely, Madison realized it "might easily be so twisted as to oppress religious sects under the excuse that they disturbed 'the peace, the happiness, or safety of society.'" Gaillard Hunt, *James Madison and Religious Liberty*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901 166 (1902). So Madison offered "a much narrower state interest exception," proposing "that free exercise be protected 'unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered.'" McConnell, *Origins*, 103 HARV. L. REV. at 1463 (quoting S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 492 (1902)).

Ultimately the convention adopted neither, apparently because its members "could not decide between the Mason and Madison formulations and compromised through silence," *id.*, though the lack of express limits suggests that the right is absolute, at least so far as it extends. *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 242 (Mass. 1994) ("If neither exception applies, by its terms, art. 2 gives absolute protection to the manner in which one worships God."). Even a prominent dissenter like John Leland accepted the government's authority to collect taxes and to punish "crime[s]" that "disturb[ed] the peace and good order of the civil police." RAGOSTA, WELLSPRING at 156 (quoting GREENE, WRITINGS OF THE LATE JOHN ELDER at 228). That said, he also was quick to warn against laws that punished conscientious objectors "as vagrants that

disturb[ed] the peace." GREENE, WRITINGS OF THE LATE JOHN ELDER at 228. Either way, this Court need not define the outer boundaries of the broader free-exercise right here.[7]

What matters for present purposes is that the debate over the scope of any exception proves the members of the convention recognized that the right must, to some extent, "include the right of exemption from generally applicable laws that conflict with religious conscience." McConnell, *Origins*, 103 HARV. L. REV. at 1463. This history supports the conclusion that the Virginia right is not coextensive with the watered-down version of the federal right post-*Smith*.

ii. 1786 – Ending civil capacities based on religious belief and expression

A second part of that history is of a piece. While the adoption of Article 1, Section 16 ensured free exercise, it did not entirely disestablish the Anglican church. BUCKLEY, CHURCH AND STATE at 18–19. Two aspects of that establishment were especially troubling for dissenters: enlarged civil capacities for members of the established church and diminished civil capacities for religious dissenters.

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[7] If the Court decides to resolve that question, it should choose a test closer to Madison's exception for "manifestly endanger[ing]" the "equal liberty" of others or the "existence of the State" because that test more closely approximates the extent of the religious liberty the founders might have thought they had to give up as part of the social compact.

By the 18th century, "[e]ven in countries where the crucifix, the rack, and the flames [had] ceased to be the engines of proselitism, civil incapacities [had] been invariably attached to a dissent from the national religion." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, Editor's App. Note G at 4 (1803) (footnote omitted). And that was true in England, where the established church's "preferred position" subjected dissenters "to a number of civil disabilities which hampered their freedom of action and effectively cut them off from the traditional avenues of preferment." BUCKLEY, CHURCH AND STATE at 3–4. "Services such as baptism and marriage were not recognized in law unless performed by Anglican clergy." *Id.* at 4. "Dissenters were refused admission to municipal and business corporations, disqualified from holding civil and military offices under the crown, and excluded from the universities." *Id.*

Virginia, "where the Church of England was established, had followed the English model closely." *Id.* at 5. "The local religious unit was the parish," which was controlled by a vestry of 12 men "selected from the economic and political elite of the county." *Id.* at 10. These "Anglican laymen had both religious and civil functions—most prominently setting and collecting taxes to support the church and for poor relief." RAGOSTA, WELLSPRING at 16. "Vestries [also] had an obligation to present to grand juries citizens they believed guilty of fornication, adultery, whoredom, blasphemy, swearing, or drunkenness, authority that could be exercised with studied discretion." *Id.* at 17.

Beyond the unique role of the vestries, church membership affected early Virginians' civil capacities in countless other ways. "Anglican clergy had the exclusive right to baptize and consecrate marriages, leaving children of those married by dissenting ministers subject to claims of bastardy, with resulting legal implications . . . ." *Id.* at 16. "Members of the governor's council and general court had to be Anglican." *Id.* at 17. And "schoolmasters had to be licensed by the Bishop of London and conform to the Church of England." *Id.* While often ignored, Anglican ministers still used the law to harass dissenting ministers. *Id.* at 18.

What is more, a conviction for blasphemy meant further diminishing of a religious dissenter's civil capacity. "Those who denied the Trinity or inspiration of the Scriptures were to be disabled from all official capacities on the first offense and imprisoned on the second." MICHAEL FARRIS, THE HISTORY OF RELIGIOUS LIBERTY 331 (2015). A second offender was also to "be disabled to sue in any Court of Record, or to be a Guardian, or Executor, or Administrator, and incapable of any Gift, or Legacy, or of any Office." GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 61 (1736).

"For both rationalists and dissenters, the pressure to conform to the 'approved' faith created an intolerable violation of man's freedom," and they spent the years after 1776 "elaborating and publicizing their arguments against it." BUCKLEY, CHURCH AND STATE at 18. Those efforts culminated in 1785 and 1786 in the defeat of a general assessment for

the support of Christian teachers, *id.* at 145–53, in the passage of legislation transferring to non-religious bodies all the "secular functions which the vestries had previously held," *id.* at 161, and in the passage of Jefferson's Act for Establishing Religious Freedom, *id.* at 155–65.

The "enacting clause" of Jefferson's Act—almost completely unchanged from when he'd proposed it years earlier—was brief:

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

Id. at 47; 12 HENING's STATUTES at 86. The preamble was much longer, presenting Jefferson's "philosophical justification for the measure" in "sweeping phrases," BUCKLEY, CHURCH AND STATE at 47, the vast majority of which ultimately became law, RAGOSTA, WELLSPRING at 133–34.

"In essence, the bill set down restrictions; it told the government what it must not do." BUCKLEY, CHURCH AND STATE at 164. "The state could not coerce conscience." *Id.* "It could not tell any man what he must or must not believe, nor require of him any religious practice or financial support." *Id.* "The possibility of a general assessment was definitely excluded, along with *any civil discrimination on the basis of religious profession*." *Id.* (emphasis added).

Since the federal government never had to disestablish a national church, this part of Virginia's constitutional history—and text—is uniquely hers. Indeed, 100 years after the passage of Jefferson's Act in Virginia, it remained black-letter law in the broader United States that blasphemy could be prohibited, "depend[ing] largely for its definition and application upon the generally accepted religious belief of the people." THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 207 (1880).

Not so in Virginia. Writing in his manual for justices of the peace in 1795, William Waller Henning happily proclaimed that blasphemy laws "are now entirely done away with by that bulwark of our religious rights, the act *establishing religious freedom*:–an act which deserves to be translated into every language in the world, and to be deeply impressed on the mind of every citizen. WILLIAM WALLER HENNING, THE NEW VIRGINIA JUSTICE 93 (1795) (emphasis in original).

During the years-long struggle to disestablish the Anglican church, many opponents of Jefferson's Act sounded alarm bells that would echo centuries later in *Smith*. In "somewhat hysterical fashion," one opponent writing in the *Virginia Gazette* had "attacked Jefferson's bill" for undermining "the coercive powers of the state by making each man's opinion a law unto himself." BUCKLEY, CHURCH AND STATE at 60 (citing VIRGINIA GAZETTE (CLARKSON & DAVIS), Nov. 6, 1779, at 2–3 (available at perma.cc/NAL4-9DVY and perma.cc/GAN5-DDFT)).

More than two centuries later, the *Smith* majority insisted in similar terms that leaving minority faiths at the mercy of the political process "must be preferred to a system in which each conscience is a law unto itself." 494 U.S. at 890. In Virginia, and especially for religious opinion and expression, that once majority opinion became a dissent.

3. Virginia caselaw proves Virginia's free-exercise right operates independently of the federal right.

This Court's caselaw interpreting and applying Virginia's protections for religious liberty is in accord with the text and history. As Professor Howard has observed, the Court has "tended to place greater reliance on the Virginia Constitution in cases calling for religious protection." 1 HOWARD, COMMENTARIES at 296 (discussing cases). "This may be at least in part a recognition of Virginia's role as the national leader in religious liberty." *Id.* "So many of the milestones of religious liberty, such as Jefferson's Bill for Religious Liberties and Madison's Memorial and Remonstrance, have sprung from Virginia sources," that it is "not surprising" if our courts "see Virginia's religious guarantees as having a vitality independent of the Federal Constitution." *Id.* at 303.

As this Court wrote in a case reversing a requirement that children convicted for rock throwing attend church for a year, "[n]o State has more jealously guarded and preserved the questions of religious belief and religious worship as questions between each individual man and his Maker than Virginia." *Jones v. Commonwealth*, 185 Va. 335, 343, 38

S.E.2d 444, 448 (1946). Between the Virginia right's "[l]onger and more inclusive" text and "Virginia's historic approach to questions of church and state," it's no surprise that our "provision has been applied on occasion with even more strictness than comparable federal applications of the First Amendment." 1 HOWARD, COMMENTARIES at 55.

B. Vlaming has an absolute right not to disavow his religious opinions about sex and gender identity—and being a public-school teacher doesn't change that.

On the merits, Vlaming sufficiently alleged the School violated his right to "the free exercise of [his] religion, according to the dictates of conscience," even assuming the Court chooses to read some limited exceptions into the text of Article 1, Section 16. But Vlaming's claim he was fired for declining to disavow his religious beliefs about sex and gender identity—and for declining to express messages he believes are untrue—implicates the even stronger protections that Article 1, Section 16 provides for religious expression. Under that part of the provision, Virginians are "free to profess and by argument maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities." VA. CONST. art. I, § 16.

1. An absolute right to religious expression

Like the broader free-exercise provision, the text of this religious-expression provision is stated in absolute terms. But unlike the free-exercise provision, there is no evidence the General Assembly ever came

close to including any exceptions or limitations on the right to religious expression. That makes sense. This part of the right protects opinions, belief, and expression—not conduct. RAGOSTA, WELLSPRING at 152 ("It was clear in Virginia after adoption of Jefferson's statute that free exercise meant that the government could not penalize mere religious opinion; *actions alone* could be regulated.") (emphasis added). As the preamble of Jefferson's Act explained, "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into *overt acts* against peace and good order." 12 HENING's STATUTES at 85 (emphasis added). Not speech.

Indeed, in the Act's initial draft, Jefferson debated excluding from protection "any seditious preaching or conversation against the authority of the civil government." RAGOSTA, WELLSPRING at 230 n.33 (quoting 1 THE PAPERS OF THOMAS JEFFERSON 353 (Julian P. Boyd, et al. eds., 1950)). He later substituted "seditious behavior" in place of seditious expression before dropping the exception altogether. *Id.*

Ultimately, the Act's preamble declared unequivocally that "proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has *a natural right*." 12 HENING's STATUTES at 85 (emphasis added).

"[T]o suffer the civil magistrate to intrude his powers into the field of opinion," the preamble continued, "and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty." *Id.* And lest there be any doubt about the right's absolute nature, the Act concludes with a final section declaring "that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, *or to narrow its operation*, such act will be an infringement of natural right." *Id.* at 86 (emphasis added).

To say that the right is absolute as far as it extends is not to say that it is unlimited in its scope. Jefferson, Madison, and Virginia's dissenters recognized that the rights they were asserting were limited in scope by the natural rights of others. *See, e.g.*, *Memorial and Remonstrance, in* 1 LETTERS AND OTHER WRITINGS at 164 (calling it an "offence against God" for "this freedom [to] be abused" by denying an "equal freedom to [those] whose minds have not yet yielded to the evidence which has convinced us"); Virginia Gazette (Purdie), Nov. 8, 1776, at 1 (available at perma.cc/H7AE-W2PU) (declaring it "evident" that "in a state of nature, any man, or collection of men, might embrace what doctrines of faith, and worship the deity in what form they pleased, *without interfering with the same, or any other natural right of their neighbours*") (emphasis added). But in cases where, as here, the religious expression at issue does not infringe on another person's rights

to life, liberty, property, or the free exercise of religion, the right must be protected absolutely. *E.g.*, *Desilets*, 636 N.E.2d at 242 ("No balancing of interests, the worshiper's, on the one hand, and the government's, on the other, is called for when neither exception applies.").

2. Teaching is a civil capacity.

Vlaming's employment as a public-school teacher doesn't undermine any of these arguments—it confirms them. By firing Vlaming for declining to express personal agreement with messages that violate his religious beliefs, the School diminished his civil capacity in retaliation for his exercising his freedom to "maintain," through his silence, his "opinions in matters of religion." VA. CONST. art. I, § 16. *Accord Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to *refrain from speaking* are complementary components of the broader concept of 'individual freedom of mind.'") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (emphasis added).

While no public schools existed in late-eighteenth-century Virginia, the various ways in which membership in the established church before 1786 enlarged some Virginians' civil capacities, *supra* at 30–31, support the conclusion that a public-school teaching position would have qualified. Indeed, even though they would have been private, "all schoolmasters had to be licensed by the Bishop of London and conform to the Church of England." RAGOSTA, WELLSPRING at 17.

On the other side of the coin, the same 1736 manual that listed being "disabled to hold any Office" as the punishment for first-offense blasphemy, WEBB, JUSTICE OF THE PEACE at 61, labeled the following positions as "Offices" elsewhere in the text: constable, *id.* at 94; coroner, *id.* at 97; justice of the peace, *id.* at 202; Sheriff and Under-Sheriff, *id.* at 294–99; Clerk of Court, *id.* at 307; tobacco inspector, *id.* at 332; chancellor, treasurer, judge, and justice, *id.* at 343.

Allegedly, there were no "profess'd Dissenters" in Virginia yet, "except Quakers," and the law dealt with them harshly: "No Quaker shall be permitted to give Evidence in any Criminal Cause, or serve in Juries, or bear any Office, *or Place of Profit, in the Governmen*t." *Id.* at 133 (emphasis added). If public-school teachers had existed, Quakers would have been ineligible based on their beliefs. "All the good such tests do, is to keep from office the best of men . . . ." LELAND, CHRONICLES at 24 n.‡. "Good men cannot believe what they cannot believe; and they will not subscribe to what they disbelieve, and take an oath to maintain what they conclude is error . . . ." Greene, WRITINGS OF THE LATE JOHN ELDER at 183. This is the problem Jefferson's Act was to designed to remedy. And School Boards across the Commonwealth are trying to bring that problem back.

3. Public-school teachers retain their rights.

But this isn't the first time something like this has happened. "In early March 1924, the lower house of the assembly overwhelmingly passed, 83 to 5, a bill to require the daily reading of five verses of the King James version of the scriptures." THOMAS E. BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM: JEFFERSON'S STATUTE IN VIRGINIA 248 (2013). "If a teacher or school administrator should ignore or prevent such reading, anyone could bring disciplinary charges to the local school board." *Id.* "Teachers were explicitly forbidden to add their own comments, and children whose parents objected would be excused." *Id.*

Despite overwhelming support in the House of Delegates and broad support from the state's educational establishment, one prominent Baptist minister, George White McDaniel, took a public stand against the bill, arguing "the case for church-state separation based on the right to religious freedom." *Id.* at 249–50. "When the Senate deferred action on the bill in 1924, the issue moved out of the assembly and provoked statewide controversy." *Id.* at 249.

When the bill "to provide for the reading of the King James Version of the Holy Bible in the public free schools" finally came back to the Senate in February 1926, a committee representing the General Association of Virginia Baptists presented a memorial in opposition drafted by John Garland Pollard. *Id.* at 250–51. Pollard was a former delegate to the constitutional convention of 1901–02, a former attorney

general, and then-director and professor at William and Mary School of Law. *Id.* at 251. "In eight carefully crafted paragraphs, the petition reviewed the multiple ways in which the Bible bill violated Virginia's constitutional guarantees of religious freedom embodied in the sixteenth article of the Declaration of Rights and Jefferson's statute." *Id.*

Of relevance here, Pollard's memorial argued that to "compel the numerous Catholic and Jewish teachers in our schools to read a Bible which they do not consider the true Bible is not only an invasion of their right, but also of the rights of the non-Protestant pupils and their parents." *Religious Liberty Strongly Urged by State Baptists*, RICHMOND TIMES-DISPATCH, Feb. 7, 1926, at 19; Add.2.[8] "Moreover, while the proposed act seeks to have some discretion to the pupils, none is left to the teacher who is commanded by law to read the Bible and presumably, will be punished for failing to do so." Add.2.

Echoing Jefferson, Madison, and thousands of founding-era religious dissenters, Pollard proclaimed that the right of conscience "is an indefeasible natural right of man which no free government can deprive him," and that the state "should never interfere unless men under the guise of conscience *commit acts* which violate the good order of society." Add.2 (emphasis added).

[8] An enlarged copy of this article, in its entirety, is included in an addendum to this brief. Add.1–3.

"The issue came to a climax at a crowded hearing before a Senate committee on February 25, 1926." BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM at 251. After hearing several speakers—including a plea from McDaniel highlighting the free-exercise principles at stake and the potential for harming teachers and students—the committee voted 10 to 4 to postpone the bill indefinitely. *Id.* at 251–52. "Teachers in the public schools of Virginia [would] not be required to read the Bible to their pupils." *Bill for Compulsory Bible Reading is Killed*, RICHMOND TIMES-DISPATCH, Feb. 26, 1926, at 1; Add.4.[9] Conscience rights had prevailed.

This victory for conscience for public-school teachers provides strong historical evidence that Vlaming's employment in the same position did not negate his Article I, Section 16 rights. Nor can the infringement be waved away as too "infinitesimally small" to count. Add.3. "The matter is in truth one of tremendous import . . . because it is a violation of principle, and one violation leads to another until the principle itself is in danger." Add.2–3.

4. An incapacity of the School's making

The closest Virginia case supports the same conclusion. In *Perry v. Commonwealth*, the General Court of Virginia held that disqualifying a witness based on his religious beliefs regarding his oath would violate our Constitution's promise that one's "religious opinions shall not lessen

[9] An enlarged copy of this brief article, in its entirety, also is included in the addendum. Add.4.

[his] 'civil capacities.'" 3 Gratt. (44 Va.) 632, 633, 644 (1846). The witness's alleged incapacity was "not a natural" one. *Id.* at 643–44. It was derived from the civil law. *Id.* at 644. And that made it "a civil incapacity" based on religion, which the Constitution forbade. *Id.*

So too here. Vlaming is not naturally incapable of teaching high-school French. His evaluations praised his performance. JA6. The School granted him continuing contract status. JA5. And his students staged a walkout to protest the loss of a teacher they loved. JA1, JA16.

Instead, the School deemed Vlaming incapable of teaching based on his religious belief that a man cannot be a woman, and vice versa, and his refusal to affirm the School's belief to the contrary. Under the promise of our Constitution, Vlaming's "religious opinions shall not lessen [his] 'civil capacities.'" *Perry*, 3 Gratt. (44 Va.) at 644. And he sufficiently stated a claim that the School violated that guarantee.

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

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

The U.S. Supreme Court has stated as a "general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

But it is *not* true "that any application of a valid and neutral law of general applicability is necessarily constitutional." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). *Barnette* remains good law even though the flag-salute requirement there was neutral and generally applicable. 319 U.S. at 635.[10]

More recently the Court has distinguished *Smith* as a case involving "government regulation of only *outward physical acts*." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) (emphasis added). And even *Smith* allowed that the government cannot "punish the expression of religious doctrines it believes to be false . . . or lend its power to one or the other side in controversies over religious authority or dogma." 494 U.S. at 877 (citations omitted). The School Defendants have done both here.

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

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[10] In *Barnette*, "votes essential to the majority filed concurring opinions based on the Free Exercise Clause." Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 63 n.253 (1990).

2. Vlaming sufficiently alleged non-neutrality and that the School's ad hoc pronoun policy is not generally applicable.

Vlaming also sufficiently alleged that the School's policies are not neutral or generally applicable as applied to him and fail strict scrutiny. The federal free-exercise clause "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534). And that "guarantee[s] that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732. When Vlaming raised a religious objection to being forced to express messages he disagrees with, School Defendants told him his "personal religious beliefs end at the school door" and fired him. JA11. At this stage of the proceedings, that was enough to allege a claim for non-neutrality. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 168 (2d Cir. 2020) (holding similar statements, though "subject to various interpretations," sufficiently alleged non-neutrality to survive a motion to dismiss).

The School Defendants also allow parents to decide on a case-by-case basis whether they are satisfied with proposed accommodations like the one Vlaming proposed here. Granting parents that discretion creates a system of individualized assessments and make the School's policy not generally applicable. *Fulton*, 141 S. Ct. at 1878 (holding that "the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement

not generally applicable"). And the School does not have any compelling interest in "denying an exception" to Vlaming that would have allowed him to avoid expressing the School's viewpoints on sex and gender identity as if they were his own, nor is such compulsion "narrowly tailored to achieve" the School's desired ends. *Id.* at 1881. These facts are enough to state a free-exercise claim even under the federal tests.

D. The School violated Vlaming's right to be free from substantial burdens on his religion under Virginia's Religious Freedom Restoration Act.

In 2007, the General Assembly enacted Virginia Code § 57-2.02 in response to the U.S. Supreme Court's decision in *City of Boerne v. Flores*, striking down the federal Religious Freedom Restoration Act, which itself was a "direct response" to *Smith*. 521 U.S. 507, 512 (1997). Under Virginia's state RFRA, "No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest." VA. CODE § 57-2.02(B).

In the nearly 15 years since 2007, Virginia's appellate courts have never construed this provision. As a result, the School relied mainly on a federal district court opinion for its argument that forcing Vlaming to use biologically incorrect pronouns does not substantially burden his

religion. JA112–14 (citing *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 439 (E.D. Va. 2020)). That's wrong. The School Defendants repeatedly directed Vlaming to express his personal agreement with messages that violate his religious beliefs. And that's enough to state a claim that the School substantially burdened his religion. *Horen v. Commonwealth*, 23 Va. App. 735, 745, 479 S.E.2d 553, 558 (1997) (stating that a "substantial burden [under the federal RFRA] is imposed on the free exercise of religion where governmental action compels a party to affirm a belief they do not hold").

The School's application of its policies also cannot survive Code § 57-2.02's strict-scrutiny analysis. The question "is not whether the [School] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" to Vlaming. *Fulton*, 141 S. Ct. at 1881. And "regulating speech because it is [allegedly] discriminatory or offensive is not a compelling state interest, however hurtful the speech [or choice not to speak] may be." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019).[11]

[11] *Accord Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021) (explaining why the "university's interest in punishing" a professor's speech for declining to use biologically incorrect pronouns was "comparatively weak" when the professor had "proposed a compromise" to only use the student's last name).

Likewise, the School hasn't shown that applying its policies to force Vlaming to speak messages that violate his beliefs is the "least restrictive means" of furthering its interests. *See Taking Offense v. State*, 281 Cal. Rptr. 3d 298, 319 (Cal. Ct. App. 2021) (holding that a law mandating use of "preferred pronouns" was "overinclusive" because "[r]ather than prohibiting . . . actionable harassment or discrimination," the law criminalized mere "occasional" pronoun violations).

Finally, it cannot be that subsection (E) creates an exception so broad it swallows the rule, as the School's arguments below suggested. JA111–12. *See Covel v. Town of Vienna*, 280 Va. 151, 158, 694 S.E.2d 609, 614 (2010) ("An absurd result describes situations in which the law would be internally inconsistent or otherwise incapable of operation.") (cleaned up). As the Commonwealth explains in its *amicus* brief, the legislative history of subsection (E)'s inclusion refutes any suggestion it was intended or understood to gut the otherwise strong free-exercise protections the law's supporters had achieved. Br. of *Amicus Curiae* Commonwealth of Virginia at Part I.B.4. A better reading of the exception would limit its application to cases involving emergency situations. *Id.* No such circumstances justified the School's actions here. And Vlaming sufficiently alleged a claim under Virginia's RFRA.

II. Vlaming sufficiently alleged that the School violated his free-speech rights under the Virginia Constitution.

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

This Court has said generally that our free-speech provisions are "coextensive" with the federal right. *Elliott v. Commonwealth*, 267 Va. 464, 473, 593 S.E.2d 263, 269 (2004).[12] And unlike with Virginia's free-exercise provisions, that conclusion makes sense given that an explicit free-speech right appeared first in the federal Constitution—whereas Virginia's Constitution only mentioned freedom of the press until 1830. 1 HOWARD, COMMENTARIES at 251. Still, this Court has not yet defined the precise contours of that right, particularly in a case like this one involving teacher speech.

[12] *Accord Finney v. Hawkins*, 189 Va. 878, 884, 54 S.E.2d 872, 875 (1949) (stating that "the challenged provisions of the Virginia and Federal Constitutions," including the free-speech provisions in both, "are quite similar," and that "if the act does not offend the Federal Constitution, then it will not offend the Virginia Constitution") (cleaned up).

Vlaming's free-speech claims implicate three of the worst forms of government abuse of the right to free speech: compelled speech, JA25–26, viewpoint discrimination, JA27–29, and retaliation, JA29–30. And Vlaming sufficiently alleged facts to support all three.

The Court can resolve Vlaming's free-speech claims in three steps. First, since this case involves a high-school teacher's "speech related to scholarship or teaching," *Garcetti*'s official-duties test does not apply. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). And regardless, using pronouns is not an official duty because it does not "owe[] its existence to a public employee's professional responsibilities." *Id.* at 421.

"Second, the *Pickering* framework" that normally governs public-employee speech "fits much less well where the government compels speech." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018). Instead, "exacting scrutiny" applies. *Id.* at 2472, 2472 n.9, 2477, 2483.

And third, especially given Vlaming's willingness to use the student's chosen name while simply avoiding pronouns, the School's demand that he "do whatever the parents ask" fails exacting scrutiny. JA9.

A. *Garcetti*'s official-duties test does not apply to high-school teachers' speech, and pronoun usage does not qualify as an "official duty" regardless.

The School Defendants argued below they could force Vlaming to express messages he disagrees with because using whatever pronouns a student demands is part of Vlaming's "official duties" as a government employee. JA101–03 (citing *Garcetti*). But *Garcetti* made clear it was *not* deciding whether the official-duties test applies to "speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425. And the Fourth Circuit has correctly held it does not—even for high-school teachers. *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (declining to apply *Garcetti* to high-school teacher's "speech related to teaching").

Preserving academic freedom and the marketplace of ideas are important objectives at the university level. *Meriwether*, 992 F.3d at 504–07. But society's interests in those objectives don't suddenly materialize when students begin college. Even at lower levels, the "American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). And just like for university professors, if high-school teachers "lacked free-speech protections when teaching," school boards "would wield alarming power to compel ideological conformity." *Meriwether*, 992 F.3d at 506. This Court should hold that *Garcetti*'s official-duties test does not apply to high-school teachers' speech related to teaching. *Id.* at 507.

In the alternative, even if the Court concludes *Garcetti* does apply to high-school teachers' speech, Vlaming's use or nonuse of pronouns is not "pursuant to his official duties" because pronoun usage does not "owe[] its existence to [Vlaming's] professional responsibilities." 547 U.S. at 421. Everyone uses pronouns every day in every aspect of our speech. There was nothing special about Vlaming's job that made his pronoun usage unique—nor did the School ever tie its demand he use certain pronouns to the curriculum Vlaming was assigned to teach. Instead, Vlaming's pronoun usage was more like "the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by *numerous citizens every day*." *Garcetti*, 547 U.S. at 422 (emphasis added). As a result, *Garcetti* does not apply to the speech at issue here.

B. Exacting scrutiny—not *Pickering* balancing—applies when the government forces its employees to mouth its messages on issues of public concern.

The framework for assessing a public employee's free-speech claim enunciated in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968), also does not apply in cases where, as here, "the government compels speech." *Janus*, 138 S. Ct. at 2473. That's because "*Pickering* is based on the insight that the *speech* of a public sector employee may interfere with the effective operation of a government office." *Id.* (emphasis added).

"When speech is compelled, however, additional damage is done." *Id.* at 2464. "In that situation, individuals are coerced into betraying their convictions." *Id.* "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *Barnette*, 319 U.S. at 633).

As a result, "[w]hen a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different." *Id.* at 2473. Aside from cases where *Garcetti* applies, "it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree." *Id.* The Supreme Court has "never applied *Pickering* in such a case," *id.*, and this Court should not either. Instead, the Court should hold that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Id.* at 2472 n.9 (quoting *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 259 (1977) (concurring in judgment)). And the facts alleged here certainly qualify.

Not only did the School try to force Vlaming to express personal agreement with the School's viewpoint, it tried to force that expression on one of the most "sensitive political topics," gender identity, a topic

that is "undoubtedly" a matter of "profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up). "[G]ender-specific titles and pronouns" have "produced a passionate political and social debate." *Meriwether*, 992 F.3d at 508. Speech on such a topic "occupies the highest rung of the hierarchy of First Amendment values and merits special protection," *Janus*, 138 S. Ct. at 2476 (cleaned up), which is all the more reason to apply exacting scrutiny here.

Under that test, the School's attempt to compel Vlaming to speak messages that violate his beliefs "must serve a compelling state interest that cannot be achieved through means significantly less restrictive" of his right to free speech. *Id.* at 2465 (cleaned up). And the School's do-whatever-the-parent-asks mandate fails that test.[13]

C. Especially given Vlaming's willingness to respect and accommodate his student's wishes, the School's refusal to accommodate Vlaming fails exacting scrutiny.

Speech restrictions on government employees are especially hard to defend at the pleadings stage because the court must "accept as true all factual allegations expressly pleaded in the complaint," along with the reasonable "unstated inferences" from the facts alleged. *Baker*, 299 Va. at 641, 857 S.E.2d at 581.

[13] The School's mandate also would fail "the more rigorous form of *Pickering* analysis" the U.S. Supreme Court applied in the alternative in *Janus*. 138 S. Ct. at 2477. But *Janus*'s exacting-scrutiny standard is the better test for compelled-speech cases on issues of public concern.

For example, in *Ridpath v. Board of Governors Marshall University*, the Fourth Circuit allowed that, "[o]nce a factual record [was] developed through discovery, the evidence *could*" have supported the inference that the plaintiff's "workplace was impaired as a result of his comments and that he simply had to be terminated from his adjunct teaching position." 447 F.3d 292, 318 (4th Cir. 2006) (emphasis added). "Such a question, however, [was] not to be assessed under Rule 12(b)(6) but in Rule 56 summary judgment proceedings." *Id.* The plaintiff had alleged "that he was relieved of his adjunct teaching position for protected statements that had no impact on his workplace whatsoever." *Id.* "Accepting those allegations as true and giving [him] the benefit of the reasonable factual inferences," that was enough at the motion-to-dismiss stage. *Id.* at 318–19.

So too here. Vlaming alleged that he consistently used the student's culturally masculine names—both French and English—and "did not ever intentionally use female pronouns to refer to the student" in the student's presence. JA7. And that arrangement seemed to satisfy the student. JA7–8. It was the student's parent—not the student—who complained about his nonuse of pronouns. JA8–9. The student "seemed satisfied and comfortable with the situation." JA8.[14] But the student's

[14] "The only complaint by the student was regarding the one excited utterance to keep [the student] from hitting the wall" and that the student had "heard he was not using male pronouns when referring to [the student] in conversation with others." JA13. But Vlaming wasn't

parent demanded Vlaming leave his "principles and beliefs out of this" and refer to the student as a male to show the student that Vlaming "affirmed and agreed" with the student's gender identity. JA9, JA11. The assistant principal deferred to that demand, telling Vlaming to "do whatever the parents ask." JA9. And when Vlaming explained that he couldn't use male pronouns without violating his religious beliefs, the School fired him. JA2, JA14–17.

On these facts, Vlaming sufficiently alleged that the School's attempt to force him to speak did not "serve a compelling state interest" that could not "be achieved through means significantly less restrictive" of Vlaming's speech rights. *Janus*, 138 S. Ct. at 2465. The School did not have "a compelling state interest" in forcing Vlaming to use male pronouns in place of the student's chosen name. And even if some state interest was implicated, compelled speech isn't an appropriate answer when "significantly less restrictive" means exist. Vlaming's proposed accommodation offered the School "a win-win." *Meriwether*, 992 F.3d at 510–11. Vlaming "would not have to violate his religious beliefs, and [the student] would not be referred to using pronouns [the student] finds offensive." *Id.* at 511.

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fired for that one excited utterance or for his use of pronouns outside the student's presence. JA2, 15–17. "He was fired for what he didn't say," namely his avoiding pronouns altogether when referring to the student in the student's presence. JA2, JA15–17.

By rejecting Vlaming's proposal out of hand, the School violated the most clearly "fixed star in our constitutional constellation," that no government entity "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. "Any attempt by a governmental authority to induce belief in an ideological conviction by forcing an individual to identify himself intimately with that conviction through compelled expression of it is prohibited by the First Amendment." *Opinions of the Justs. to the Governor*, 363 N.E.2d 251, 254 (Mass. 1977). That core truth applies just as clearly under our Constitution as it does under the federal version, and it applies to public-school teachers just as clearly as to their students. *See id.* ("In our view, the rationale of the *Barnette* opinion applies as well to teachers as it does to students."); *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 633–34 (2d Cir. 1972) (holding high-school teacher had free-speech right to stand silently during classroom pledge of allegiance).

In *Russo*, the Second Circuit held that "the state's interest in maintaining a flag salute program was well-served" in the plaintiff's classroom, "even without her participation in the pledge ceremonies." *Id.* at 633. The plaintiff merely had "provided her high school students with a second, but quiet, side of the not altogether new flag-salute debate: one teacher led the class in recitation of the pledge, the other remained standing in respectful silence." *Id.*

Vlaming has done the same here. Without a doubt, other teachers, students, and school officials used masculine pronouns to signal that they affirmed and agreed with the student's gender identity. Vlaming could not do that. So he provided "a second, but quiet, side" of the new debate over gender identity. *Id.* When it came to using pronouns, he "remained . . . in respectful silence." *Id.* And under our Constitution, silence was his to keep.

III. Vlaming sufficiently alleged that the School violated his due-process rights under the Virginia Constitution.

Virginia's constitutional due-process clause, like its federal counterpart, provides that "no person shall be deprived of his life, liberty, or property without due process of law." VA. CONST. art. I, § 11. Under that clause, a government requirement "is unconstitutionally vague if persons of common intelligence must necessarily guess at the meaning of the language and differ as to its application." *Tanner v. City of Va. Beach*, 277 Va. 432, 439, 674 S.E.2d 848, 852 (2009) (cleaned up).[15] The constitutional problem with such laws is that they "impermissibly delegat[e] policy considerations to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* (cleaned up).

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

The School's policies here, and its application of those policies against Vlaming, suffer from those exact constitutional defects and raise precisely those concerns. Persons of common intelligence differ as to what the School's policies mean and how they apply. None of the School's policies expressly state that a teacher *must* use biologically incorrect pronouns at a student's request. Proving that point, the School did not even identify which policies it thought required that result until *after* it had suspended Vlaming. JA14. In the interim, officials delegated their unbridled enforcement authority to the student's parents, telling Vlaming to "do whatever the parents ask." JA9. And that subjected Vlaming's request for an accommodation to "resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application," the exact result Virginia's due-process clause forbids. *Tanner*, 277 Va. at 439, 674 S.E.2d at 852.

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

Finally, because Vlaming sufficiently alleged that the School Board violated his state constitutional and statutory rights by firing him for declining to speak messages he disagrees with in violation of his religious beliefs, he also sufficiently alleged that the School Board breached its contract with him.

As the U.S. Supreme Court stated just last Term, that Court has "never suggested that the government may discriminate against religion when acting in its managerial role." *Fulton*, 141 S. Ct. at 1878. *See also Maddox v. Maddox's Adm'r*, 11 Gratt. (52 Va.) 804, 815 (1854) (voiding a restriction in a will requiring the recipient to be a member of a specific religious sect as a violation of conscience rights). Nor did Vlaming's employment status justify the School in violating his free-speech and due-process rights. When it fired Vlaming, the School Board acted unconstitutionally, arbitrarily and capriciously, and without good cause. *See Sch. Bd. of City of Norfolk v. Wescott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997). And the trial court erred by dismissing his breach-of-contract claim on that basis at the demurrer stage.

CONCLUSION

This Court should 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,

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By: */s/ Christopher P. Schandevel*

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CERTIFICATE OF TRANSMISSION AND SERVICE

Undersigned counsel certifies that on May 23, 2022, an electronic version of this brief was filed with the Clerk of the Supreme Court of Virginia via the Court's VACES system, and a copy was served on each of Appellees' counsel by email the same day. This brief complies with the length requirement set forth in Rule 5:26(b) because it does not exceed 60 pages,[16] excluding the cover page, table of contents, table of authorities, signature blocks, certificate, and addendum.[17]

Appellant desires to present oral argument in this case.

/s/ Christopher P. Schandevel

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[16] On May 23, 2022, this Court entered an Order granting the parties' motion for extension of the page limit for Appellant's opening brief and Appellees' response brief. Both were granted an extension to 60 pages.

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

ADDENDUM

Full Associated Press Reports—Final Markets—Complete Sport News

Richmond Times-Dispatch

1903, at the Post-Office at ... as Second-Class Matter. RICHMOND, VIRGINIA, SUNDAY, FEBRUARY 7, 1926—SEVENTY-FOUR PAGES

...TON INTERESTED ...NDOAH NATIONAL ...PLAN REALIZATION

...jects 700 Square Mile Area Turned Over to ... Cost—Only After Acceptance, Will Fed- ... to Virginia in Playground Development.

...—Official ... interested ... the Shen- ... project ... expect the ... rned over ... cut cost. ... the park ... into Vir- ... it of the ... ayground ... y of the ... over the ... National ... will be ... feature ... already ... most pro- ... Barton ... of the In-

terior, former director-general of railroads, and now national chairman of the American Red Cross, is another unqualified supporter of the Shenandoah National Park.

Secretary Work has, on innumerable occasions, voiced his sentiments in regard to the beautiful Blue Ridge region. Today he reiterated what he has said before, emphasizing, however, that the success or failure of the projects rests solely with the people of Virginia.

No matter how much he desires to see a great eastern park, Secretary Work knows the futility of asking Congress to establish a precedent calling for Federal appropriations to purchase land for parks, however, meritorious.

"The people of today are turning back to the simpler pleasures

(Continued on Nineteenth Page.)

RELIGIOUS LIBERTY STRONGLY URGED BY STATE BAPTISTS

Committee Protests Compulsory Bible Reading in Public Schools.

PROPOSAL CONTRARY TO BILL OF RIGHTS

Vigorously Worded Memorial Is Sent to General Assembly.

A memorial addressed by the Baptist General Association of Virginia to the General Assembly of Virginia protesting against compulsory reading of the Bible in the public schools was sent to the General Assembly yesterday by a committee of which Dr. R. H. Pitt, editor of the Religious Herald, is chairman.

The memorial addressed by the Baptists insists that law rests on force whereas "religion is voluntary." The statement was adopted after many of the twenty-nine Baptist district associations in the State had expressed themselves in resolutions. Later, at the Virginia Baptist General Association held in Roanoke last November, an address on "Soul Liberty—With Some of Its Implications" was, by request, delivered by Dr. Pitt.

A vigorous protest against the intervention of the State in any authoritative way in matters of religion was voiced in the address, following which the General Association unanimously adopted resolutions protesting against any law compelling reading of the Scriptures in the public schools.

The resolution further appointed a committee to memorialize the General Assembly. The committee consisted of seven from the city of Richmond and vicinity and twenty-nine from the State at large. They adopted the following paper:

Text of Baptist Memorial.

"The undersigned committee, on behalf of the Baptist General Association of Virginia, composed of 1,175 white churches with a total membership of 219,166 citizens of this Commonwealth, having been informed that a renewed and concerted effort will be made by numerous citizens and organizations to have your honorable body at its next session pass the bill defeated at the last session, or any similar bill compelling teachers in public schools of this State to read the Bible daily in schools, hereby enters its solemn protest against the passage of any such measure, and in support of its protest presents the following facts and considerations and recurs to the following fundamental principles:

"1. The Bible is distinctly a religious book and when properly read is an act of worship which cannot rightfully be enforced by

(Continued on Nineteenth Page.)

SENATE WAVERS IN ITS ATTITUDE ON COAL STRIKE

Defeats Copeland Intervention Resolution Again by 5 Majority.

FEDERAL BOARD NOW IS PROPOSED

Senator Robinson, of Arkansas, Urges Body for Industrial Adjustments.

[By Associated Press.]

WASHINGTON, Feb. 6.—For a second time within two days the Senate refused today to consider a proposal that it request President Coolidge to invite the miners and operators to the White House in an effort to end the anthracite suspension. The majority against the resolution today was only five, as compared with twenty recorded yesterday.

The vote was forty-three to thirty-eight, and was taken after considerable debate, which revolved around a bill offered by Senator Robinson, of Arkansas, the Democratic floor leader, proposing creation of a Federal board of industrial adjustments, charged with fixing responsibility for coal strikes. This measure was referred to the Committee on Education and Labor after Senator Robinson had urged for speedy action in committee, so the Senate might take it up after the tax bill has been passed.

Copeland Again Pushes Resolution.

At the end of the debate, Senator Copeland, Democrat, New York, moved that the Senate consider his resolution for a White House conference, which would have had the effect of displacing the tax bill. Senator Edge, Republican, New Jersey, countered with a motion to lay the Copeland motion on the table, but that was voted down, forty-one to thirty-eight.

On the direct vote on the Copeland motion, which followed, ten Republicans joined with twenty-seven Democrats and the one Farmer-Labor Senator in support and three Democrats joined with forty Republicans in opposition.

Roll Call Shows Gain.

The roll call follows:

For consideration—Republicans: Brookhart, Couzens, Frazier, Howell, Johnson, LaFollette, McMaster, McNary, Norris and Nye. Total, ten.

Democrats: Ashurst, Bayard, Blease, Broussard, Bruce, Caraway, Copeland, Dill, Edwards, Ferris, George, Gerry, Harris, Harrison, Heflin, Kendrick, McKellar, Mayfield, Overman, Ransdell, Sheppard, Simmons, Smith, Trammell, Tyson, Walsh and Wheeler. Total, twenty-seven.

Farmer-Labor: Shipstead. Total, one.

Grand total, thirty-eight.

Against consideration—Republicans: Bingham, Borah, Butler, Cameron, Capper, Dale, Deneen,

STILLMANS, RECON... GO TO EUROPE T... BOTH RADIANT

Their Children Lodestones Bringing Couple Together Again.

TO START LIFE ANEW

Wife Takes Husband to British Psychologist for Spiritual Rebuilding.

By John K. Winkler,
Universal Service Staff Correspondent.

NEW YORK, Feb. 6.—Standing in stateroom No. 98, on C deck of the liner Olympic, a moment or two after midnight this morning, James A. Stillman, his rugose countenance beaming contentment, turned to the starry-eyed wife at his side and said:

"You are right. We have nothing to conceal. Let's accept advice and admit the public into our confidence."

Then "Jimmy" Stillman did the pluckiest thing, I think, he has ever done in his whole life. He threw aside the attitude of aloof-

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SHIPS IN CRASH, PICK UP S O S

The American Tank Steamer Gulf of Mexico Reports Collision.

[By Associated Press.]

NORFOLK, VA., Feb. 6.—The American tank steamer Gulf of Mexico, reported by radio tonight shortly after 9 o'clock that she had been in collision. Her position was given as latitude 27:07 north and longitude 87:26 west, which would put her about 700 or 800 miles east of Key West. The name of the other ship figuring in the collision was not given.

The message picked up at the naval communications here said the Gulf of Mexico had been "rammed on the bow." There was no indication as to how bad the damage to the ship was. The tanker, according to local records, was last reported at New York, January 26, where she arrived from Port Arthur, Texas. She carries a crew of forty-five.

Shortly before 10 o'clock it was stated at the naval station that the S O S sent out by the Gulf of Mexico had been cleared up and broadcasting halted when the message was flashed, resumed. It was explained that the tanker had been in conversation by wireless with the Barbadoes radio station and reported her mishap to that station. The fact the additional calls for help were not received was taken as an indication that neither the Gulf of Mexico nor the ship with which she collided were in imminent danger.

Pick Up Distress Call.

JAKE WELLS MAKES $1,000,000 DEAL

Richmond Man and Associate Sell Country Club Near Hendersonville.

Confirmation of a $1,000,000 sale of property at Hendersonville, N. C., by Jake Wells, prominent theater owner, of Richmond, and an associate, to the Country Club Estates, Incorporated, was received by telegram last night from Asheville, Mr. Wells told The Times-Dispatch.

The property—800 acres of land, including a partly developed golf course—was sold to the syndicate of North Carolina men who expect to spend another million in developing a $100,000 Country Club and golf course, with attractive residential sites centered around the course.

Mr. Wells, who has been for some time interested in the development of Hendersonville as a summer resort, acquired acreage in the vicinity and developed a nine-hole golf course. Later with an associate, bought up adjoining property, bringing the joint holdings up to over 1,000 acres.

The Country Club Estates had, some time ago, secured an option on the 800 acres, paying $10,000 for it, Mr. Wells said.

Mr. Wells, in Richmond, is interested in a half-dozen movie theaters, the Academy of Music and

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RELIGIOUS LIBERTY STRONGLY URGED BY STATE BAPTISTS

(Continued From First Page.)

law. Law rests on force. Religion is voluntary. Any attempt to promote religious worship by force of law is, in the language of our statute of religious liberty, 'a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in His almighty power to do.'

Many Different Versions.

"2. There are many versions of the Bible. One of these commonly used by Protestants, is known as the King James Version, another used by Catholics, is known as the Douay Version, which contains entire books not appearing in the King James Versions. These two versions differ in many particulars considered material by the respective sects. Our Jewish fellow citizens do not consider the New Testament as a part of their Bible. If the law is to compel the reading of the Bible, the question at once arises,—Shall the Protestant, Catholic or Jewish Bible be read? The proponents of the proposed law would doubtless answer—'The Protestant Bible should be read because it is the Bible of the majority.' To compel the numerous Catholic and Jewish teachers in our schools to read a Bible which they do not consider the true Bible is not only an invasion of their right, but also of the rights of the non-Protestant pupils and their parents.

Must Concede Rights of Other.

"We may best realize the wrong involved, by imagining our own feeling of protest, should the law compel the reading of the Roman Catholic Version to our Protestant children. Protestants can claim nothing on the score of conscience that they are unwilling to concede equally to others. It is not a question of majorities, for if the conscience of the majority is to be the stanrdard, there is no such thing as the right of conscience at all. It is against the power of majorities that the right of conscience is protected. This right is an indefeasible natural right of man which no free government can deprive him. There are some rights which even the majority cannot take away and the right of conscience is the most sacred of these. Government should never interfere unless men under the guise of conscience commit acts which violate the good order of society.

Differences Fundamental.

"To the Protestant, the Catholic Bible is a sectarian book. To the Catholic, the Protest Bible is a sectarian book. To the Jew, the New Testament is a sectarian book. To the citizen who has no religion, all versions are sectarian. To select the textbook of any sect to be read in the public schools is to confer a peculiar advantage upon that sect. This is expressly prohibited by the Constitution of the State (section 56). It is a mistaken idea that the Protestant religion, or even Christianity, has in Virginia any peculiar rights. Christianity may have been once a part of the common law, but this has long since been changed in Virginia, both by statute and constitution. The Supreme Court of Appeals has said that the ancient law on the subject 'was wholly abrogated by our Bill of Rights and the act for securing religious freedom, subsequently engrafted in the amended Constitution, which wholly and permanently separated religion, or the duty which we owe to our Creator from our political and civil government: putting all religions on a footing of perfect equality; protecting all; imposing neither burdens nor civil incapacities upon any; conferring privileges upon none. Placing the Christian religion where it stood in the days a measure of justice to such, their children may withdraw from the classroom. But this does not correct the injustice, for it is unkind and inconsiderate to subject the children of the small minority to the embarrassment of excluding themselves from a stated school exercise, especially because of apparent hostility to that version of the Bible which the majority have been taught to revere. The excluded pupil will lose caste with his fellow students and is liable to be the object of reproach and perhaps of insult. Such a course would tend to destroy the equality of the pupils, which the law ought to maintain and protect.

May Submit in Silence.

"It is probable that a great number of non-Protestant parents, rather than subject their children to the embarrassment of separating them from their fellow pupils during the reading of the Protestant Bible, will submit to the injustice in silence, hoping for the day when minorities shall grow into majorities. In this connection it may be well for Protestants to remember that in some of the States, the Catholics are already, or soon may be in a majority. May we reasonably expect from them better treatment than we accord them? It will be a sad day for the cause of public education, when religious sects begin to vie with one another for the control of the schools. We must not drive the entering wedge of dissension into a system which is the bed-rack of our republican institutions.

"Moreover, while the proposed act seeks to have some discretion to the pupils, none is left to the teacher who is commanded by law to read the Bible and presumably, will be punished for failing to do so.

Complete Equality First Principle.

"4. The right to worship God according to the dictates of one's conscience is firmly established throughout America. But this is not all of religious liberty. It is broader. It means complete and absolute equality before the law of all religions. The State should have no favorites in manners of religion. Its only relation to religion is to protect all of its citizens in the sacred rights of conscience just as it protects them in their rights of person and property. If there is one teaching which history makes clear, it is that Christianity prospers most under those governments which as such seek to held it least. A false religion may need the peculiar recognition of the law, but it is beneath the dignity of the true religion to ask or accept it. From the early days of the Christian era down to the present time, some of Christ's zealous followers have, in violation of His teachings, sought to promote His cause by force, first by burning at the stake, later by stripes or imprisonment and by taxing other to promote a religion in which they did not believe and today we have the last faint glimmer of that hoary fallacy remaining with those good people who erroneously think they can aid religion by invoking the strong arm of the law to compel the reading of the Bible. How blind to the teaching of history and the principles of Him who said, 'My Kingdom is not of this world!'

Regarded as Literature.

"5. Some agree that the law should compel the reading of the Bible not as a religious book, but simply as literature. But this is evidently not the viewpoint of the proponents of this bill, for, as if to minimize the wrong done sects who do not accept our Bible, they limit the reading to five verses, prohibit comment and excuse pupils from attendance upon the reading. The truth is that the Scriptures cannot be separated from their sacred religious character and any move to advance their acceptance through secular authority under pressure of law, is an unworthy attempt to shift upon the State a solemn duty divinely commissioned to the church. The realm of religion is entirely beyond the scope of the State. True, it is sadly neglected, but the remedy is the reestablishment of the family altar and a redoubling of the efforts of the churches.

"6. We wish it distinctly under- one violation leads to another until the principle itself is in danger. The mere reading of five verses of Scripture without comment will not and cannot satisfy those who believe that religious training should be given in the public schools. The next step will be the actual teaching of the Bible, and when this is established, how strong the argument will be that inasmuch as the Protestants are teaching their Bible at public expense, therefore, the Catholics should be permitted to do the same—hence, public school funds should be appropriated to Catholic schools so as to give them an equal opportunity to teach their Bible at public expense. Such a division of school funds has already been accomplished in some parts of Canada and will come in this country if success meets the efforts of those who insist on injecting matters religious with their inevitable sectarianism into our public school system. The dismemberment of that system will be the natural fruitage of the adoption of the pending bill.

Appeals for Liberty.

"We, therefore, appeal to your honorable body to adhere to the doctrine, peculiarly bound up with the history of this Commonwealth, which completely separates church and State, which refuses to exercise force in the realm of religion, and which places all religions on a plane of absolute equality before the law."

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religion, or the duty which we owe to our Creator from our political and civil government; putting all religions on a footing of perfect equality; protecting all; imposing neither burdens nor civil incapacities upon any; conferring privileges upon none. Placing the Christian religion where it stood in the days of its purity, before its alliance with the civil magistrate; when its votaries employed for its advancement no methods but such as are congenial to its nature; . . . proclaiming to all our citizens that henceforth their religious thoughts and conversation shall be as free as the air they breathe; that the law is of no sect in religion; has no high priest but justice. Declaring to the Christian and the Mahometan, the Jew and the Gentile, the Epicurean and the Platonist (if any such there be amongst us), that so long as they keep within its pale, all are equally objects of its protection." Perry's Case, 3 Grat., 641.

All On Equal Plane.

"Not only does the Constitution place all sects on the plane of absolute equality before the law, but, as if forever to banish the force of law from the realm of religion, it actually protects the individual from the church of his own choosing by prohibiting the General Assembly from authorizing any religious society to levy a tax even on themselves,—again recognizing that the law must not be used to enforce any religious duty.

"History teaches us that the principle here contended for was established after centuries of struggle marked by persecution and bloodshed, culminating here in Virginia whose government was the first in the world to proclaim complete and absolute religious equality before the law. Jefferson, who led the movement, declared it to be the bitterest fight in which he was ever engaged. Truly it is a blood-bought blessing and we consider it our duty to seek to protect it against the slightest encroachment.

Shows Inherent Weakness.

"3. The bill as proposed contains two provisions intended to protect the rights of conscience, but which disclose the inherent weakness of the whole proposition. It provides that at least five verses must be read without comment. It compels reading, but prohibits study. It also provides that pupils may be excused from the classroom during the reading of the Bible upon written request of either parent. This provision is a recognition of the fact that any version of the Bible used will be looked upon by some as a sectarian book, and as solemn duty divinely commissioned to the church. The realm of religion is entirely beyond the scope of the State. True, it is sadly neglected, but the remedy is the re-establishment of the family altar and a redoubling of the efforts of the churches.

"6. We wish it distinctly understood that we are in full accord with the proponents of the bill in their belief in the importance of training our children in the great religious truths taught in the Bible. Its importance cannot be overstated. The only difference between us is one of method, but that method involves a great underlying principle which is a part of our religious as well as our political faith. Our public school system belongs to the members of all religious denominations, and those who are attached to none, and we must respect each other's rights in common property of us all. Religious training our children must have, but it should be given in our homes and churches, and not at the expense of those who do not believe in our Bible. We maintain that each Christian body should advance its own religion by its own efforts and at its own expense, and that any attempt to get the force of the State behind our religion, even to the extent of compelling the reading of five verses from our version of the Scriptures, begets a suspicion that our religion cannot stand on its own merits. We are unwilling to admit, but on the other hand emphatically deny, that the text book of our religion needs the strong arm of the law to support it.

Religious Instruction Vital.

"We fully agree that the religious instruction of the child should be given along with its secular training, but it by no means follows that it must be given by the same persons and in the same place. Our Catholic fellow-citizens do not agree on this proposition and maintain separate schools where religion may be taught, but it will hardly be maintained that their children are better than others or grow up to make better citizens. The important thing is for our children to have religious instruction, and it is not essential that any part of such instruction be given in the day schools under governmental control and at public expense.

"7. Baptists in this State would suffer no direct injury from the proposed law, for the Bible which would be read in the schools is the version which the Baptists use, but the Baptists of Virginia know historically what discrimination against their religion means. Not many generations ago, when they were few in number, their ministers here in Virginia were punished and imprisoned for preaching the Gospel, and now that they have grown to be the largest religious denomination in the State, they would be unworthy of the suffering and sacrifices of their forefathers and would lay themselves open to the charge that their love of right is for themselves only if they did not seek to protect the religious rights of others.

Would Pilfer Rights.

"8. This matter seems trivial to some, who argue that the compelling of our teachers to read five verses of the Bible each day involves an infringement of their right so infinitesimally small that the law may well disregard it, but to say the least, such a law would be a piece of petty pilfering of the rights of the minority sects which would make us none the richer but would brand us as offenders against sacred rights of others and render us easy marks for retaliation when circumstances are reversed. The matter is in truth one of tremendous import, not perhaps in itself, but because it is a violation of principle, and

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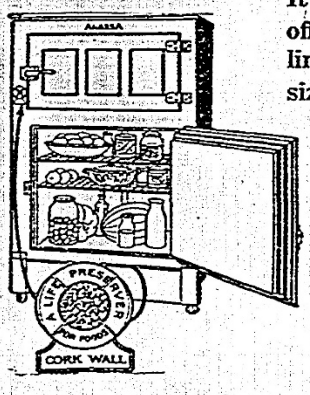

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Dr. Copeland.

Works would distribute the funds to the best advantage, but that if ward allocation were determined upon the city would resemble a checker-board with scattered improvements and no generally acceptable results.

The question of creating a fund from the school appropriation for the purpose of paying interest and redemption on school bonds was discussed at some length. Members of the city school board, Superintendent A. H. Hill and Clerk Charles P. Walford took part in the discussin, which was led by Chairman W. Floyd Reams, of the board. Superintendent Hill stated that the schools could hardly be

(Continued on Eleventh Page.)

HEAVY FALL OF SNOW

Gale Piles Up Huge Drifts in Wisconsin.

[By Associated Press.]

MILWAUKEE, Feb. 25.—A heavy snowstorm was developing in Wisconsin today with reports from the western and central sections of the State telling of a fall of from six inches to a foot. A heavy gale was piling it into huge drifts. In Milwaukee the snow was preceded by a rainstorm.

Winona, Minnesota, reported snowfall of eight inches after a week of spring-like weather.

Storm Warnings Changed.

WASHINGTON, Feb. 25.—The Weather Bureau tonight issued the following storm warning:

"Advisory warnings changed to southwest 10 P. M., north of Block Island, R. I., to Portland, Me."

profit tax return for 1919 disclosed an additional tax due amounting to $76,876.12.

The second suit filed carries a claim of $138,262.15 against the collector. It is identical with the first suit, but concerns the company's income tax return for 1920.

The summonses issued are made returnable at the March rules.

BACKS COMMISSION

Coolidge Affirms Rulings as to Tacna-Arica Dispute.

[By Associated Press.]

WASHINGTON, Feb. 25.—President Coolidge today affirmed rulings of the Tacna-Arica plebiscitary commission on all points involved in pending appeals by Chile and Peru involving registration and voting regulations.

Chief interest was attached to the denial of Peru's appeal against a ruling that would permit employees of the railroad in the provinces to vote. A considerable number of votes in the plebiscite, which is to determine whether Chile or Peru has sovereignty over the provinces, may be made possible under this ruling.

Mexican Will Be Extradited.

NEW YORK, Feb. 25.—Antonio Hernandez Ferrer, a Mexican lawyer, was arrested today at his hotel by a United States marshal with a warrant calling for his extradition to San Antonio, Texas, where he and seven others are under indictment for conspiracy to overthrow the Calles government in Mexico. He waived extradition proceedings.

BILL FOR COMPULSORY BIBLE READING IS KILLED

Teachers in the public schools of Virginia will not be required to read the Bible to their pupils.

This question was settled yesterday afternoon when the Senate Committee on Public Institutions and Education passed by indefinitely the bill presented by John M. Parsons, which would have placed this duty upon instructors. The vote was 10 to 4. Nathaniel B. Early, Jr., of Greene County, is chairman of the committee.

The hearing on the measure was held in the Senate chamber. The room was jammed almost to capacity, and a fair-sized crowd listened from the gallery. Dr. George E. Booker, formerly pastor of Monument Methodist Church, now presiding elder of the district, was the principal proponent of the bill. He expressed surprise that Dr. George W. McDaniel, of the First Baptist Church, whom he described as "the fundamentalist of the fundamentalists," appeared in opposition to the measure.

The "Bible bill" was sponsored by various fraternal organizations, representatives of which were present yesterday.

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