IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 211061

PETER VLAMING,
Plaintiff-Appellant,

v.

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

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT

Zhonette Brown
Virginia State Bar No. 97507
Senior Counsel
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Email: zhonette@mslegal.org

Attorney for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (*amicus curie* in support of petitioner); *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.) (*amicus curiae* in support of petitioner); *Kennedy v. Bremerton Sch. Dist.*, — S. Ct. — (2022) (*amicus curiae* in support of petitioner).

STATEMENT OF THE CASE

Amicus defers to the statement of the case and material proceedings below and statements of fact articulated in Plaintiff-Appellant's May 23, 2022 brief to the Supreme Court of Virginia.

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

ASSIGNMENTS OF ERROR

Amicus defers to the assignments of error as articulated in Plaintiff-Appellant's May 23, 2022 brief to the Supreme Court of Virginia.

STANDARD OF REVIEW

"On appeal, [this Court] review[s] a circuit court's judgment sustaining a demurrer de novo." *Eubank v. Thomas*, 861 S.E.2d 397, 401 (Va. 2021) (citing *Glazebrook v. Bd. of Supervisors of Spotsylvania Cty.*, 587 S.E.2d 589, 591 (Va. 2003)). This Court considers the facts alleged as true and evaluates "only whether the factual allegations sufficiently plead a cause of action." *Id.* (citations omitted).

SUMMARY OF THE ARGUMENT

Peter Vlaming, a public high school French teacher, was fired by the West Point School Board ("School Board") for using a preferred name, but not using preferred pronouns, to address a transgender student. His declination to adopt pronouns reflecting non-biological gender identity is based on his religious conviction that sex is unchangeable. The School Board used the guise of its "compliance with Title IX" to fire Vlaming and its demurrer to his later filed lawsuit was sustained. JA324.

This amicus brief is submitted to address the proper interpretation and scope of Title IX. Title IX—enacted in 1972, and which bars "sex" discrimination by recipients of federal funds—contemplates a binary, objective definition of sex. Title

IX's text does not, and has never, covered differential treatment based on gender identity. Historic Title IX regulations confirm that the statute is based on a reading of sex that is both binary and objective, and construing Title IX to encompass gender identity would affirmatively undermine its original purpose. Not surprisingly then, the 2016 Title IX guidance relied upon by the School Board was enjoined and rescinded, and any renewed attempt to include gender identity as the equivalent of sex within Title IX is counter-statutory.

Separately, Mr. Vlaming's avoidance of non-biological pronouns is a far cry from harassment, or any other denial of an educational benefit that would violate Title IX as interpreted by the United States Supreme Court. This Court should therefore reverse the lower court's sustaining of the demurrer because Title IX neither mandates the expression of pronouns the School Board demanded of Mr. Vlaming nor justifies the School Board's disregard for Mr. Vlaming's sincerely-held religious beliefs.

AUTHORITIES AND ARGUMENT

I. Title IX Accommodates Freedom of Speech and Religion.

Contrary to the School Board's argument that Title IX provides a compelling reason to force speech and burden religion, JA111–18, the Department of Education has historically harmonized Title IX and freedom of speech and religion.

Title IX provides that for recipients of federal funds, like school districts in the Commonwealth of Virginia, "[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a) (emphasis added). Title IX is itself merely a Spending Clause statute, not meant to shield a government from constitutional claims. *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) ("The legitimacy of Congress' power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on whether the recipient voluntarily and knowingly accepts the terms of that contract.") (cleaned up).

Naturally then, the Department of Education—which often issues policy guidance in its capacity as an Executive Branch agency charged with enforcing Title IX—has historically emphasized the harmonization of Title IX with the free speech rights of students and teachers. *See*, *e.g.*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at 22 (2001)[2] ("In cases

[2]https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. Note that this guidance was issued after notice and comment in January 2001. *Id.* at ii. It was withdrawn after formal regulations addressing sexual harassment were promulgated in August 2020, but remains available for historical purposes.

of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved."). Going back to the Clinton Administration, Title IX guidance emphatically noted: "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. . . . [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX." *Id.*; *see id.* ("Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX . . . a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights."); *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, FIRST AMENDMENT: DEAR COLLEAGUE LETTER (2003)[3] ("OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment."); *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,142 (May 19, 2020) (codified at 34 C.F.R. pt. 106) ("The Department agrees with commenters noting that the Department has a responsibility to enforce Title IX while not interfering with principles of free speech and academic freedom, which apply in elementary and secondary schools as well as postsecondary institutions[.]").

[3]https://www2.ed.gov/about/offices/list/ocr/firstamend.html

In Mr. Vlaming's case, his religious beliefs dictate that "God created humans in His own image, 'male' and 'female,'" therefore, it is at odds with his beliefs to use non-biological pronouns to address students as the School Board demanded. JA173.[4] The School Board defends against Mr. Vlaming's claims by asserting that it had a compelling state interest in burdening his religion because allowing Mr. Vlaming to adhere to his beliefs "placed the school [] at risk of violating federal and state law prohibiting discrimination on the basis of gender identity[,]" specifically Title IX. JA094. But, as explained in greater detail below, Title IX did not mandate the School Board's policy in this case, and separately, the School Board's argument contravenes Department of Education guidance to harmonize Title IX and protected speech.

II. Title IX's Prohibition on Sex Discrimination Does Not Justify Gender Identity Mandates.

The School Board's assertion that it must compel Mr. Vlaming to use pronouns based on a student's non-biological gender identity, or that the school district would violate Title IX, is unfounded. By its text, Title IX addresses and is limited to the binary categories of sex; the historic Title IX regulatory regime

[4]Nor, presumably, would he use non-traditional pronouns for gender non-binary students, such as "neopronouns" like "Ne," "Ve," "Xe, and "Ze," among many others. *See* UNC GREENSBORO DIVISION OF STUDENT AFFAIRS, INTERCULTURAL ENGAGEMENT, NEOPRONOUNS EXPLAINED (Undated), https://intercultural.uncg.edu/wp-content/uploads/Neopronouns-Explained-UNCG-Intercultural-Engagement.pdf.

assumes fixed and objective sex categories; and forcing gender identity into the Title IX umbrella would hinder the original purpose of the statute, and cause chaos. Additionally, the contrary interpretive guidance relied upon by the School Board was improperly issued, quickly enjoined, and was rescinded before being invoked by the school to fire Mr. Vlaming.

A. Title IX is limited to binary categories of sex.

1. Title IX's text and historical regulations address sex as binary.

The text of Title IX itself is not ambiguous. It disallows recipients of federal funds like schools from discriminating on the basis of sex, and treats sex as limited to the binary categories of male and female, both objective and fixed. *See Neese v. Becerra*, No. 2:21-cv-163, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'"); *see also*, *e.g.*, 20 U.S.C. § 1681(a)(2) ("[T]his section shall not apply . . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*[.]") (emphasis added); *id.* (referring once again to "one sex" and "the other sex"); *see also* 20 U.S.C. § 1681(a)(8) ("[T]his section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students

of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*[.]") (emphasis added).

Moreover, from the beginning, Title IX regulations confirmed this textual reading, establishing a binary, objective, and immutable meaning of sex within the statute's terms. *See*, *e.g.*, 34 C.F.R. § 106.34(a)(3) ("Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*.") (emphasis added); 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of *one sex* shall be comparable to such facilities provided for students of the *other sex*.") (emphasis added); 34 C.F.R. § 106.54(b) ("A recipient shall not make or enforce any policy or practice which, on the basis of sex . . . [r]esults in the payment of wages to employees of *one sex* at a rate less than that paid to employees of *the opposite sex* for equal work…") (emphasis added); *cf.* 34 C.F.R. § 106.37(c)(1) ("To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of *each sex* in proportion to the number of students of *each sex* participating in interscholastic or intercollegiate athletics.") (emphasis added).

The idea of nonbiological gender identity is not found in the text of Title IX, nor is it consistent with decades of interpretation of that statute. Indeed, in its 2020

regulations on the topic of sexual harassment in schools, the Department once again emphasized this point: "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. at 30,178.

2. Even after *Bostock*, the Department of Education recognized that Title IX's treatment of sex differed from Title VII.

Even after *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), where the Supreme Court held that sex discrimination prohibitions in Title VII provided protection against employment discrimination on the basis of transgender status, the Department of Education noted important distinctions that limited *Bostock*'s application to Title IX. Following *Bostock*, the Department of Education's Office for Civil Rights ("OCR") queried its Office of the General Counsel, asking for answers regarding the impact of the Supreme Court's analysis. The Office of the General Counsel responded with a memorandum dated January 8, 2021. *See* U.S. DEP'T OF EDUC., OFFICE OF THE GENERAL COUNSEL, MEMORANDUM FOR KIMBERLY

M. RICHEY, ACTING ASSISTANT SECRETARY OF THE OFFICE FOR CIVIL RIGHTS RE: *BOSTOCK V. CLAYTON CTY.*, 140 S. CT. 1731 (2020) (2021).[5]

In the context of Title IX and pronoun usage, the document noted that Title IX, unlike Title VII often *requires* consideration of a student's biological sex. (Equal athletic opportunities, for instance). Thus, it would be inappropriate to suggest that a recipient of federal funds such as a public school could ever affirmatively violate Title IX when using its discretion to merely *consider* biological sex in the use of a student's pronouns.

> **Question 3: How should OCR view allegations that a recipient targets individuals for discriminatory treatment on the basis of a person's transgender status or homosexuality?**
>
> **Answer:** Although *Bostock* expressly does not decide issues arising under Title IX or other differently drafted laws, the logic of *Bostock* may, in some cases, be useful in guiding OCR's understanding as to whether the alleged discrimination on the basis of a person's transgender status or homosexuality necessarily takes into account the person's biological sex and, thus, constitutes discrimination on the basis of sex. Depending on the facts, complaints involving discrimination on the basis of transgender status or homosexuality might fall within the scope of Title IX's non-discrimination mandate because they allege sex discrimination. *See Bostock*, 140 S. Ct. at 1741, 1737 ("Sex plays a necessary and undisguisable role in the decision" to fire an employee because of the employee's homosexual or transgender status).

[5]https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf. The memorandum was later withdrawn but remains available online in OCR's Correspondence portal. Its analysis is attentive to and consistent with the text and purpose of Title IX, and therefore persuasive on the issue of Title IX and pronoun usage after *Bostock*.

> However, we emphasize that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person's biological sex, male or female. 20 U.S.C. §§ 1681(a), 1686; 34 CFR §§ 106.32(b), 106.33, 106.34, 106.40, 106.41, 106.43. 106.52, 106.59, 106.61. Consequently, we believe a recipient generally would not violate Title IX by, for example, recording a student's biological sex in school records, *or referring to a student using sex-based pronouns that correspond to the student's biological sex*, or refusing to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality.

Id. at 4 (emphasis in original) (second emphasis added); *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OCR LETTER TO CONGRESSMAN MARK GREEN, at 1 (2020) [6] ("By itself, refusing to use transgender students' preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions. To the extent any prior OCR sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative.").

Notably, the Department of Education's Office of the General Counsel also pointed out that contrary opinions in the Fourth and Eleventh Circuits—including *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020)—failed to address

[6]https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20200309-title-ix-and-use-of-preferred-pronouns.pdf

the language articulated in the preamble to the 2020 Title IX rule, which is addressed above in Section II.A.1.

Even a cursory review of *Grimm* confirms the Office of the General Counsel letter's analysis. For instance, the *Grimm* court seemed to understand that gender and sex were distinct concepts. *See id.* at 593 ("Grimm's birth-assigned sex, or so-called 'biological sex,' is female, but his gender identity is male."); *id.* at 594 ("But there have always been people who 'consistently, persistently, and insistently' express a gender that, on a binary, we would think of as opposite to their assigned sex."); *id.* at 595 ("Incongruence between gender identity and assigned sex must be manifested by at least two of the following markers[.]"). Yet, by *ipse dixit*, the court concluded that Grimm's Title IX claim succeeded because he was denied access to a bathroom that was consistent with his gender identity, even though the school district in that case had afforded him access to a bathroom consistent with his sex. *Id.* at 618 ("Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his *gender*.") (emphasis added); *id.* ("But Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his *gender identity*.") (emphasis added).

The dissent in *Grimm* thus properly criticized the majority for missing this basic fact. Noting that Plaintiff Grimm had not challenged the constitutionality of

Title IX, or the appropriateness of its regulations separating students based on sex, it stated the obvious: "As several sources make clear, the term 'sex' in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female, not the person's internal sense of being male or female, or their outward presentation of that internally felt sense." *Id.* at 632 (Niemeyer, J., dissenting); *see id.* at 634 ("Grimm's argument, however, is facially untenable. While he accepts the fact that Title IX authorizes the separation of restrooms—indeed, he seeks to use the male restrooms so separated from female restrooms—the implementation of his position would allow him to use restrooms contrary to the basis for separation.").

The Department of Education Office of General Counsel, like the dissent, found fault with *Grimm* and similar cases. *See* MEMORANDUM FOR KIMBERLY M. RICHEY, at 11 ("*Adams* and *Grimm* were decided more than two months after publication of the Title IX rule and its interpretative preamble. Yet neither discussed the Department's interpretation."); *id.* at 4 ("[W]e must give effect to the ordinary public meaning at the time of enactment and construe the term 'sex' in Title IX to mean biological sex, male or female. Congress has the authority to rewrite Title IX and redefine its terms at any time."); *see also Grimm v. Gloucester Cty. Sch. Bd.*, 976 F.3d 399, 401 (4th Cir. 2020) (mem.) (Niemeyer, J., concurring in the denial of

rehearing *en banc*) (opining that the panel decision in *Grimm* "failed to apply Title IX and its regulations").

Thus, thoughtful analysis of Title IX from OCR's Office of the General Counsel and elsewhere, consistent with the text and history of Title IX, explains why broad gender identity protections are not encompassed within the statute.

3. Sweeping gender identity into Title IX would hinder the statutory purpose.

Title IX was meant to prevent discrimination and enhance educational opportunities, but interpreting "sex" in Title IX to encompass each and every gender identity would hinder that purpose. Pronouns, for instance, have far eclipsed traditional male, female, and even plural pronouns, and often become a distraction unto themselves. *See, e.g.*, *United States v. Varner*, 948 F.3d 250, 257 (5th Cir. 2020) ("If a court orders one litigant referred to as 'her' (instead of 'him'), then the court can hardly refuse when the next litigant moves to be referred to as 'xemself' (instead of 'himself')."); *see id.* (referring to a University of Wisconsin-Milwaukee chart that includes "perself," "eirself," and "xyrs" as usable pronoun options).

In other contexts, a holding that Title IX truly required full nondiscrimination across every gender identity would cause chaos. For instance, if the Department of Education compelled schools across the country to equally support and maintain separate athletic teams for students who do not identify as either male or female, schools will ultimately be able to sustain fewer or eventually no teams or sports. By

the same token, would students who identify as gender-fluid compete as both male and female, and be counted as athletes on both athletic teams for Title IX purposes? What would stop a school or team from avoiding Title IX compliance problems by encouraging male athletes to adopt "convenient" gender fluidity, so as to ensure that expenditures on fresh equipment, new stadiums, and state-of-the-art workout rooms can be equally split among male and female sports teams?

At the postsecondary level, in addition to athletics and school-sponsored single-sex activities such as sororities or fraternities, wrapping gender identity into Title IX would force colleges to create new separate and equal facilities, such as dormitories, each for men, women, intersex individuals, pansexual individuals, bi-gender individuals, and members of each of the many other currently published genders. *See Grimm*, 972 F.3d at 621 (Wynn, J., concurring) ("Yet the Board has offered no set of physical characteristics determinative of its 'biological gender' classification in the five-year pendency of this case. Nor could it, given that transgender individuals often *defy binary categorization* on the basis of physical characteristics alone.") (emphasis added).[7] Every school in the United States would

[7]It is far from clear how the *Bostock* majority would have handled a plaintiff who identified as gender non-binary, such as bi-gender or pangender. In such a fact pattern, the case's hypothetical employer who treats two employees who identify as female differently—one because the employee was born male—crumbles quickly, so long as the employer treats all bi-gender or pangender employees equally, regardless of biological sex. *Accord Neese*, 2022 WL 1265925, at *14 ("The Court

be torn between trying to fully integrate all facilities—bathrooms, dormitories, and more—without regard to sex, or having numerous equal facilities as new genders emerged.

Separately, not all "recipients" of federal funds are traditional schools. Some are juvenile justice facilities. *See* U.S. DEP'T OF JUSTICE & DEP'T OF EDUC., DEAR COLLEAGUE LETTER, GUIDANCE ON PROTECTING CIVIL RIGHTS IN JUVENILE JUSTICE RESIDENTIAL FACILITIES (2014).[8] The benefits that Title IX was meant to protect would in fact be eroded, were the Department of Education to have to force juvenile justice facilities around the country to either integrate their facilities without regard to sex, or to establish new and separate wings of their facilities for each new gender identity, as they emerge.

Moreover, pregnancy discrimination protections are within the scope of Title IX, only if they relate to sex discrimination. *See* 34 C.F.R. § 106.40(b)(1) ("A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy . . ."). If men and members of other gender

finds Plaintiffs plausibly plead Section 1557 and *Bostock* do not prohibit healthcare providers from discriminating on the basis of [sexual orientation or gender identity] — 'as long as they would have acted in the exact same manner if the patient had been a member of the opposite biological sex.'").

[8]https://www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf

identities may become pregnant, those regulations likely exceed the Department's permissible regulatory power. *See*, *e.g.*, MEMORANDUM FOR KIM RICHEY, at 3–4 ("These regulations are valid only because they effectuate Title IX's prohibition against sex discrimination. *See* 20 U.S.C. § 1682. Courts have recognized, quite correctly in our view, that discrimination on the basis of pregnancy constitutes discrimination on the basis of female physiology and is therefore prohibited under Title IX."). Interpreting Title IX to extend to gender identity would, at a minimum, weaken the legal rationale underlying such regulations implemented to prevent sex discrimination.

Despite this, on June 22, 2021, the Department of Education published a Notice of Interpretation, purporting to rely on *Bostock* for the proposition that Title IX encompasses all claims of discrimination based on sexual orientation or gender identity. *Compare Bostock*, 140 S. Ct. at 1754 (holding that Title VII's coverage encompasses firing employees who are gay or born male but identify as female) *with Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,637 (June 22, 2021) (codified at 34 C.F.R. ch. 1) ("The Supreme Court in *Bostock* held that sex discrimination, as

prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity.").

However, the Department's June 2021 Notice is, on its face, far too broad. *Bostock* was based on the assumption that sex was binary, and biologically determined. It was not based on a broad conception of "gender identity."

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

140 S. Ct. at 1741–42; *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS, at 27 (2021)[9] ("The Court's holding stated that it was assuming that sex referred to an employee's biological sex, but in fact the Court's holding in *Bostock* relies on that assumption…").

Additionally, *Bostock* was never about whether employers had to adopt, internalize, and affirmatively endorse an employee's representations about their gender identity. It was about termination of employment alone. *Bostock*, 140 S. Ct. at 1753 ("Under Title VII . . . we do not purport to address bathrooms, locker rooms,

[9]https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf

or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

Put simply, the text and purpose of Title IX do not counsel in favor of an overexpansive adoption of *Bostock.*

B. The 2016 "Dear Colleague" Letter relied upon by the School Board was procedurally improper, enjoined, and rescinded.

The School Board's reliance on a 2016 sub-regulatory guidance document as a basis to fire Mr. Vlaming is misplaced. The document contravenes Title IX, cannot establish new law, and was enjoined and rescinded prior to the events at issue.

In support of its adverse employment action and demurrer, the School Board relied on a 2016 "Dear Colleague" Letter jointly issued by the Department of Education and Department of Justice. *See* JA009–10, JA045–49, JA098, JA122–23. In pertinent part, the Letter states,

> Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and

> contractors will use pronouns and names[10] consistent with a transgender student's gender identity.

U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS at 3 (2016); JA122 (citing to the same provision).[11] The School Board refers to the Letter as authority for the definition of "gender identity" and "gender identity-based harassment," stating that gender-based harassment includes "refusing to address students consistent with their preferred gender identity." JA122–23 (citing 2016 DEAR COLLEAGUE, at 7 n.9).

In addition to being inconsistent with Title IX for the reasons identified above, the 2016 Dear Colleague Letter improperly attempted to re-write the text of Title IX and replace the binary, biological definition of "sex" with an amorphous one. But this Title IX sub-regulatory guidance document could not establish law and in any event was enjoined and appropriately rescinded *before* Vlaming was disciplined, and therefore could not have served as the alleged compelling reason to violate Vlaming's religious freedom. *See also Varner*, 948 F.3d at 256 ("As Judge Sykes pointed out in her *Hively* dissent, Congress has expressly proscribed gender identity discrimination in laws such as the Violence Against Women Act, 34 U.S.C.

[10]"From the beginning of the school year, [] Vlaming referred to the student by her new preferred names (both French and English)—even though it had not yet been legally changed." JA007.

[11]https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

§ 12291(b)(13)(A), the federal Hate Crimes Act, 18 U.S.C. § 249(a)(2)(A), and elsewhere.); *Neese*, 2022 WL 1265925, at *13 ("As noted above, the ordinary public meaning of 'sex' turned on reproductive function when Congress enacted Title IX. Legislators tried to amend Title IX to include 'sexual orientation' and 'gender identity' on multiple occasions, but those attempts failed.").

1. The 2016 Letter did not have binding legal effect.

The Department of Education is a federal agency governed by the Administrative Procedure Act ("APA"). Under the APA, an agency that promulgates a rule with binding legal effect must follow a notice-and-comment process. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 92 (2015) ("So-called 'legislative rules' are issued through notice-and-comment rulemaking, *see* §§ 553(b), (c), and have the force and effect of law[.]") (quotation and citation omitted).

"'Interpretive rules,'[12] by contrast, are issued . . . to advise the public of the agency's construction of the statutes and rules which it administers, . . . do not require notice-and-comment rulemaking, and do not have the force and effect of law[.]" *Id.* (quotations and citations omitted); *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 89 (D.D.C. 2016) ("[I]nterpretative rules merely *clarify* a statutory or regulatory term, *remind* parties of existing statutory or regulatory duties, or 'merely track'

[12]Certain non-substantive agency actions are exempt from typical notice-and-comment rulemaking such as "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice[.]" 5 U.S.C. § 553(b)(3)(A).

preexisting requirements and explain something the statute or regulation already required[.]") (emphasis added) (quotations and citations omitted).

The Letter undeniably did not follow a notice-and-comment process, and so could not be the source of a legislative or substantive rule. *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER, at 1 (2017)[13] ("The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of *policy and guidance* reflected in [the 2016 "Dear Colleague" Letter.]") (emphasis added). Additionally, because the Letter was inconsistent with the text of Title IX, it also cannot serve as persuasive authority or a basis to defer to the Department's interpretation of the statute. *See Peyton v. Reynolds Assocs.*, 955 F.2d 247, 251 (4th Cir. 1992) ("If a regulation reflects an administrative interpretation which is inconsistent with the plain language of the statute under which it is promulgated, we do not defer to the agency's interpretation.").

2. The 2016 Letter was later enjoined and rescinded.

The 2016 Letter was also enjoined. A federal court in the Northern District of Texas issued a nationwide injunction, concluding that the 2016 Letter "failed to comply with the Administrative Procedure Act by: (1) foregoing the Administrative Procedure Act's notice and comment requirements; and (2) issuing directives which

[13]https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf

contradict the existing legislative and regulatory texts." *Texas v. United States*, 201 F. Supp. 3d 810, 815 (N.D. Tex. Aug. 21, 2016). The court found the Letter to be "legislative and substantive[,]" "not just interpretations or policy statements because they set clear legal standards." *Id.* at 830. In fact, "[p]ermitting the definition of sex to be defined in this way would allow [the agencies] to create de facto new regulation by agency action without complying with the proper procedures. . . . This is not permitted." *Id.* at 830–31 (quotation and citation omitted).

The 2016 Letter was then withdrawn on February 22, 2017. *See* 2017 DEAR COLLEAGUE LETTER, at 1 ("These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process."); *see id.* ("[A] federal district court in Texas held that the term 'sex' unambiguously refers to biological sex and that, in any event, the guidance was 'legislative and substantive' and thus formal rulemaking should have occurred prior to the adoption of any such policy.").

Title IX does not sweep gender identity into the meaning of sex, and interpreting Title IX to do so would hinder its purpose. The Department of Education did not have the power to use the 2016 Letter to change the substance of Title IX, and the 2016 Letter was properly enjoined and withdrawn before Mr. Vlaming's interactions with the student in this case. The School Board did not, therefore, have

a compelling reason to invoke the Letter, or to invoke Title IX, to overcome Mr. Vlaming's religious freedom and speech interests. For that reason, the opinion sustaining the demurrer should be reversed so that Vlaming may proceed on the merits.

III. General Avoidance of and One Accidental Misuse of a Pronoun is Not Harassment Under Title IX.

Even if Title IX could be construed to encompass gender identity as the equivalent to "sex," Mr. Vlaming's conduct did not rise to the level of harassment under Title IX, did not otherwise interfere with the student's education, and therefore did not justify Mr. Vlaming's termination.

A Title IX violation occurs when harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Accidentally calling a student a pronoun based on biological sex and generally avoiding pronouns altogether, particularly when using the student's new chosen name as a general practice, do not amount to a Title IX violation that is "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Id.* at 652. *See also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, FIRST AMENDMENT: DEAR COLLEAGUE LETTER (2003)[14]

[14]https://www2.ed.gov/about/offices/list/ocr/firstamend.html

("Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."). Indeed, the only Federal Court of Appeals to confront this precise question found that avoidance and an accidental misuse of a pronoun could not justify invoking Title IX to discipline the speaker. *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) ("[The university's] purported interest in complying with Title IX is not implicated by [the professor's] decision to refer to [the student] by name rather than [the student's] preferred pronouns.").[15]

A. In *Meriwether* and *Vlaming*, both educators were disciplined for single instances of "misgendering" a student and for avoiding pronoun usage.

In *Meriwether*, a public university professor used the term "sir" to address a student during class discussion. 992 F.3d at 499. According to the professor, "no one . . . would have assumed [the student] was female based on the student's

[15]A federal district court recently declined to enter a preliminary injunction regarding a "preferred pronoun policy" only because a school district represented to the court that a plaintiff was free not to use any pronouns whatsoever, without facing discipline. *See Ricard v. USD 475 Geary Cty. Sch. Bd.*, No. 5:22-cv-04015, 2022 WL 1471372, at *3 (D. Kan., May 9, 2022). That court did, however, enter a preliminary injunction on Free Exercise grounds against a policy that required educators to withhold information from parents about a student's preferred pronouns if they differed from a student's biological sex. *Id.* at *10 (noting that plaintiff had satisfied the factors for a preliminary injunction and that "this is a difficult and complex area of the law that continues to develop.").

outward appearances." *Id.* (quotation and citation omitted). The student confronted the professor after class, stating that he identified as a woman and demanded the professor use feminine pronouns when addressing him—threatening to get the professor fired if he did not comply. *Id.* As a compromise, the professor "would keep using pronouns to address most students in class but would refer to [the student] using only [his] last name." *Id.* One day the professor accidentally used the title "Mr." when he called on the student in class "before immediately correcting himself." *Id.* at 500. After many attempts to find an accommodation to the policy, and more complaints from the student, the school launched a Title IX investigation against the professor. *Id.* at 500. The professor was disciplined for addressing the student by his last name and avoiding pronouns when addressing the student, combined with one mistaken "misgendering."

A grievance challenging the warning letter was denied, appealed, and denied again. *Id.* at 501–02. The professor filed suit for fear he would "be fired or suspended without pay if he [did] not toe the university's line on gender identity" and to protect the professor's future employment opportunities by invalidating the warning letter. *Id.* at 502 (quotation and citation omitted).

The Sixth Circuit in *Meriwether* reiterated the *Davis* standard when it evaluated the alleged Title IX violation: "'the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational

program or activity.'" *Id.* at 511 (quoting *Davis*, 526 U.S. at 652). The Sixth Circuit stated, "[the professor's] decision not to refer to [the student] using feminine pronouns did not have any such effect. . . . [T]here is no indication at this stage of the litigation that [the professor's] speech inhibited [the student's] education or ability to succeed in the classroom." *Id.* In fact, the student "was an active participant in class and ultimately received a high grade." *Id.* The Title IX analysis concluded with the statement that "Title IX is not implicated by [the professor's] decision to refer to [the student] by name *rather than* [the student's] preferred pronouns." *Id.* (emphasis added).[16] Vlaming's case contains nearly identical facts that warrant the equivalent analysis under Title IX.

In the case before this Court, Vlaming learned of a biological female student's intention to identify as a male. JA006. Vlaming, "[t]o avoid drawing unwanted attention to the student . . . allowed his entire . . . class to pick new French names for the semester . . . so that the student would not be the only one changing names."

[16]The *Meriwether* case recently settled out of court, with the University paying Professor Meriweather $400,000. *See* Jonathan Franklin, *A university pays $400K to professor who refused to use a student's pronouns*, NPR (Apr. 20, 2022, 5:30 AM), https://www.npr.org/2022/04/20/1093601721/shawnee-state-university-lawsuit-pronouns ("A public university professor in Ohio who was disciplined four years ago for refusing to use a transgender student's pronouns is being awarded $400,000 following a lawsuit against the university.").

JA007. He also "referred to the student by her new preferred names (both French and English)—even though it had not yet been legally changed." JA007.

One day, while the students were using virtual reality goggles, Mr. Vlaming "noticed that the student in question was about to walk into a wall but her partner was not paying attention. He called out, 'Don't let her hit the wall!'" JA012. Importantly, "[t]his one excited utterance is the *only time* [] Vlaming used the female pronoun to refer to the student in her presence after she announced her intent to socially identify as a male." JA013 (emphasis added). Mr. Vlaming was suspended the following day. JA013. Vlaming was later fired even though he "used the student's preferred (traditionally male) name, while avoiding the use of pronouns altogether." JA002.

The School Board's "purported interest in complying with Title IX is not implicated by [Vlaming's] decision to refer to [the student] by name rather than [the student's] preferred pronouns" and one instance of mistaken speech. *Meriwether*, 992 F.3d at 511.

B. Mr. Vlaming's conduct does not rise to the level of severe, pervasive, and objectively offensive under Title IX, or even the lower standard of severe-or-pervasive under Title VII.

The conclusion reached by the Sixth Circuit in *Meriwether* is consistent with the Supreme Court's opinion in *Davis*. The *Davis* Court created the framework for

Title IX cases. First, it took the text of Title IX[17] and parsed out the word "discrimination," noting that "'sexual harassment' is 'discrimination' in the school context under Title IX[.]" *Davis*, 526 U.S. at 650. Second, the Court provided an illustration of the most obvious Title IX violation—this would include "overt, physical deprivation of access to school resources" such as "male students physically threaten[ing] their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab[.]" *Id.* at 650–51. Third, the Court went beyond the obvious example and stated:

> It is not necessary . . . to show physical exclusion . . . [r]ather a plaintiff must establish sexual harassment of students that is so *severe, pervasive, and objectively offensive*, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.

Id. at 651 (emphasis added).

1. Title IX Severe, Pervasive, and Objectively Offensive Test

Even if this Court disagrees with *Meriwether*, the *Davis* severe, pervasive, and objectively offensive standard, coupled with Mr. Vlaming's one mistake, do not amount to a Title IX violation that put the school at risk of depriving the student of educational opportunities. For Vlaming, "[t]he only complaint by the student was

[17]"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to *discrimination* under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a) (emphasis added).

regarding the one excited utterance to keep her from hitting the wall and that she heard he was not using male pronouns when referring to her in conversations with others." JA013. Mr. Vlaming's utterance was purely by accident—he "realized that he had inadvertently used the female pronoun and put his hand to his mouth." JA012. One accidental use of a student's biological pronoun is not so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633.

First, pervasive connotes a pattern—this was one occurrence. A single negative incident or conduct that does not result in *deprivation or impact* of one's education does not qualify as harassment under Title IX. *See*, *e.g.*, *Hall v. Millersville Univ.*, 22 F.4th 397, 401, 411–12 (3d Cir. 2022) (genuine dispute of fact about whether a black eye sustained by domestic assault coupled with missing class and rarely leaving the dorm room was "sufficiently severe and pervasive so as to deprive [the victim] the benefit of her education"); *Lam v. Curators of the Univ. of Mo. at Kan. City Dental Sch.*, 122 F.3d 654, 656–57 (8th Cir. 1997) ("This single exposure to a distasteful videotape is not severe or pervasive enough to create a hostile education environment."); *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 823 (7th Cir. 2003) (citations omitted) ("Examples of a negative impact on access to education may include dropping grades, . . . becoming homebound or hospitalized due to harassment, . . . or physical violence[.]"); *see also*

Burwell v. Pekin Cmty. High Sch. Dist. 303, 213 F. Supp. 2d 917, 932 (C.D. Ill. 2002) (plaintiff was unable to make a Title IX claim because she "missed very little school that semester, took all of the classes she wanted and received her highest grades during this semester of high school").

Second, even if a single use of a student's biological pronoun was considered harsh enough to rise to the level of "severe," an urgent misstatement driven by the need to physically protect the student and a choice to abstain from using pronouns generally is not "*objectively* offensive." *See*, *e.g.*, *Davis*, 526 U.S. at 653 ("The harassment was not only verbal; it included numerous acts of objectively offensive touching[.]"); *Doe v. Miami Univ.*, 882 F.3d 579, 591 (6th Cir. 2018) ("[O]ne incident of allegedly non-consensual kissing—while unacceptable—does not rise to the level of sexual harassment [that is] so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school.") (quotation and citation omitted). Mr. Vlaming's conduct does not rise to the level of severe, pervasive, and objectively offensive under the *Davis* standard.

2. Title VII Severe-or-Pervasive Test

Although applicable to Title VII rather than Title IX, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding pronouns that somewhat mirrors *Davis* (despite changing "severe *and* pervasive" to "severe *or*

pervasive") and is worth examining. The EEOC posed the question: "Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?" U.S. EEOC, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (2021).[18] The answer was,

> Yes, in certain circumstances. . . . To be unlawful, the conduct must be *severe or pervasive* when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. . . . [A]lthough *accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII*, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Id.

Unlike the egregious and pervasive workplace harassment cases, Mr. Vlaming was willing to use the student's new name in French and English, accommodated the student by having his entire French class choose new names, and avoided pronouns altogether. JA007. In one exigent circumstance, he slipped up and used the wrong pronoun. JA012. Omission of pronouns and an accident are a far cry from harassment. *See*, *e.g.*, *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 748, 758 (S.D. Ohio 2018) (discussing colleagues purposely "misgendering" another

[18]https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender

colleague; discussing being "subjected to constant and continuing harassment due to her gender transition") (quotation and citation omitted); *Tay v. Dennison*, 457 F. Supp. 3d 657, 683 (S.D. Ill. 2020) ("Plaintiff has been subject to frequent and ongoing harassment based on her gender identity[.] . . . Prisoners and correctional officers call her derogatory names[, and] . . . staff constantly misgender Plaintiff . . . even though they are aware that she is a transgender woman."); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *25–27 (D. Minn., Mar. 16, 2015) ("Plaintiff alleges [he was] purposefully and deliberately [given] [] a hospital bracelet that incorrectly identified his gender even after he explained [] he had transitioned . . . [Since] the clerk was aware of Plaintiff's preferred gender, [the hospital's] misgendering . . . could be considered objectively offensive behavior.").

The School Board's statement that it has "a compelling interest in complying with [] obligations under state and federal law prohibiting discrimination" relies on factually distinct and inapplicable case law under Title VII.[19] JA116; JA122. Mr. Vlaming's conduct does not rise to the level of severe-or-pervasive under the Title VII standard.

[19]It's understood that "[a]lthough *Bostock* interprets Title VII of the Civil Rights Act of 1964, . . . it guides [courts'] evaluation of claims under Title IX." *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

C. The School Board's alleged "compelling interest" here is distinct from the Title IX transgender bathroom cases.

The School Board, in its analysis for why it has "a compelling interest in complying with [its] obligations under state and federal law prohibiting discrimination[,]" relies upon three cases addressing disputes over transgender bathrooms. JA116. *See*, *e.g.*, *Grimm*, 972 F.3d at 593 (finding a Title IX violation when the school board prohibited a transgender student from using a bathroom corresponding to their preferred sex and for not updating the student's school records with their new sex); *Whitaker by Whitaker v. Kenosha Unif. Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) ("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."); *Adams by and through Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1327 (M.D. Fla. 2018) (injunction issued forcing school board to allow a transgender student to use the bathroom of their preferred sex).

For the reasons articulated above, *Grimm* was incorrectly decided and failed to take into account the Department of Education's preamble to the 2020 Title IX which explained why Title IX is based on a binary, biological definition of sex. Nevertheless, even on its own terms, *Grimm* does not control the outcome of this case. Denying a student access to the bathroom of their choice based on their sex is fundamentally different than requiring Mr. Vlaming to daily and repeatedly express

an affirming belief about a student's appropriate pronoun—especially when he might be able to conduct his class using no pronouns at all.

In other words, *Grimm* simply stands for the proposition that under *Davis*, the inability to use a restroom of the student's choice because of the student's sex would "effectively bar the [students'] access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. On the other hand, a teacher who simply declines to use pronouns does not cause a Title IX violation, even taking *Grimm* on its own terms.

Similarly, *Whitaker* and other cases relied upon a theory of discrimination based on sex stereotyping that is simply inapplicable to a complaint about non-use of pronouns. *See Whitaker*, 858 F.3d at 1047–49 (adopting sex stereotype theory developed in Title VII context to Title IX issue of transgender bathrooms/conduct, reasoning alleged discrimination stems from individual's non-conformance with sex stereotypes); *Adams*, 318 F. Supp. 3d at 1324 (citing *Whitaker* and other sex stereotype cases). General avoidance of pronouns does not reflect sex-based treatment similar to using sex to mandate bathroom selection.

CONCLUSION

Gender identity is distinct from, not encompassed within, "sex" as that term is used in Title IX. Moreover, Vlaming's avoidance of pronouns and accidental misstatement could not inhibit a student's education or ability to succeed in the classroom thereby implicating Title IX concerns. The School Board's firing of Mr.

Vlaming was not pursuant to a compelling interest driven by Title IX, its demurrer should not have been sustained, and the case should be reversed and remanded to proceed on the merits.

Respectfully submitted,

/s/ Zhonette Brown
Zhonette Brown
Virginia State Bar No. 97507
Senior Counsel
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Email: zhonette@mslegal.org

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Brief for Amicus Curiae* complies with the type-volume limit of Virginia Supreme Court Rule 5:26(b) because this document contains 8,337 words. This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages or 8,750 words.

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/s/ Zhonette Brown

Zhonette Brown
Virginia State Bar No. 97507
Senior Counsel
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Email: zhonette@mslegal.org

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I certify under Rule 5:1B(b) and (c) that on May 23, 2022, this document was filed electronically with the Court through VACES. A copy was electronically mailed to:

CHRISTOPHER P. SCHANDEVEL
Virginia State Bar No. 84412
TYSON C. LANGHOFER
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
cschandevel@ADFlegal.org
tlanghofer@ADFlegal.org

J. CALEB DALTON
Virginia State Bar No. 83790
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393-8690
Facsimile: (202) 34 7 -3622
cdalton@ADFlegal.org

SHAWN A. VOYLES
Virginia State Bar No. 43277
MCKENRY DANCIGERS DAWSON, P.C.
192 Ballard Court, Suite 400
Virginia Beach, VA 23462
Telephone: (757) 461-2500
Facsimile: (757) 461-2341
savoyles@va-law.com

STACY L. HANEY
Virginia State Bar No. 71054

ANDREW P. SELMAN
Virginia State Bar No. 91060
HANEY PHINYOWATTANACHIP PLLC
11 South 12th Street, Suite 300C
Richmond, VA 23219
Telephone: (804) 500-0301
Facsimile: (804) 500-0309
shaney@haneyphinyo.com
aselman@haneyphinyo.com

ALAN E. SCHOENFELD*
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY
Telephone: (212) 230-8800
Facsimile: (212) 230-8888
alan.schoenfeld@wilmerhale.com

TANIA FARANSSO*
EDWARD WILLIAMS
Virginia State Bar No. 88102
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
tania.faransso@wilmerhale.com
ed.williams@wilmerhale.com

* Admitted pro hac vice

/s/ Zhonette Brown

Zhonette Brown
Virginia State Bar No. 97507