

**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.*

---

**REPLY 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*

# TABLE OF CONTENTS

	<b>PAGE</b>
TABLE OF AUTHORITIES .....	ii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
AUTHORITIES AND ARGUMENT.....	1
I. A Recent Federal Court Decision Confirms That the School Board Improperly Relies on <i>Bostock</i> for Broad Arguments About Gender Identity Discrimination.....	2
II. The Department’s New Proposed Title IX Rule is Subject to Notice-and-Comment Rulemaking, and Would Be Invalid, if Adopted in its Current Form .....	5
CONCLUSION .....	14
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE.....	16

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>303 Creative LLC v. Elenis</i> , 142 S. Ct. 1106 (2022) (mem.) .....	1
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995).....	1
<i>Am. Legion v. Am. Humanist Ass’n</i> , 139 S. Ct. 2067 (2019) .....	1
<i>Barnes v. Gorman</i> , 536 U.S. 181 (2002).....	6
<i>Bostock v. Clayton Cty.</i> , 140 S. Ct. 1731 (2020).....	<i>passim</i>
<i>Cummings v. Premier Rehab Keller, P.L.L.C.</i> , 142 S. Ct. 1562 (2022) .....	5, 6
<i>Dobbs v. Jackson Women’s Health Org.</i> , 142 S. Ct. 2228 (2022) .....	11
<i>Doe v. Hamilton Cty. Bd. of Educ.</i> , 329 F.Supp.3d 543 (E.D. Tenn. 2018).....	12
<i>FDA v. Brown &amp; Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	11
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	11
<i>Grimm v. Gloucester Cty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020).....	7
<i>Loudoun Cty. Sch. Bd. v. Cross</i> , No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021) .....	7
<i>Meriwether v. Hartop</i> , 992 F.3d 492 (6th Cir. 2021).....	7, 8

<i>Newport News Shipbuilding and Dry Dock Co. v. EEOC</i> , 462 U.S. 669 (1983).....	11
<i>NFIB v. OSHA</i> , 142 S. Ct. 661 (2022).....	11
<i>Pennhurst State Sch. and Hosp. v. Halderman</i> , 451 U.S. 1 (1981).....	5
<i>Tennessee v. Dep’t of Educ.</i> , No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022).....	3, 4
<i>Texas v. United States</i> , 201 F. Supp. 3d 810 (N.D. Tex. 2016)).....	2
<i>West Virginia v. EPA</i> , 142 S. Ct. 2587 (2022).....	<i>passim</i>
<i>Whitman v. Am. Trucking Ass’ns</i> , 531 U.S. 457 (2001).....	10
<b><u>Regulations</u></b>	
34 C.F.R. pt. 106.....	5
34 C.F.R. § 106.34(a)(3).....	12
34 C.F.R. § 106.54(b).....	12
<i>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</i> , 86 Fed. Reg. 32,637 (June 22, 2021) (codified at 34 C.F.R. ch. 1).....	4
<i>Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance</i> , 87 Fed. Reg. 41,390 (July 12, 2022).....	5
U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016).....	2
U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (2017).....	2

## IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Mountain States Legal Foundation (“MSLF”) is a nonprofit, public-interest law firm 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 has been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Peña*, 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).

## AUTHORITIES AND ARGUMENT

Contrary to the School Board’s claim, Title IX does not “require students and staff to address students with pronouns that conform to their gender identity.” Appellee Br. at 38. The chronology of the Department of Education’s (“Department”) guidance documents, the narrow holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), a recent twenty-state injunction against a June 2021

---

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

“guidance document,” and a legally infirm Proposed Rule refute the School Board’s arguments for firing Peter Vlaming and that Title IX requires affirmatively recognizing preferred pronouns.

**I. A Recent Federal Court Decision Confirms That the School Board Improperly Relies on *Bostock* for Broad Arguments About Gender Identity Discrimination.**

A recent federal court decision reinforces MSLF’s prior argument that *Bostock* does not bear the weight the School Board places on it. Specifically, the School Board cites *Bostock* to legitimize its reliance on the Department’s enjoined and withdrawn 2016 Dear Colleague Letter as a basis for a mandatory pronoun policy. *See* Appellee Br. at 38–39 (quoting U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 3 (2016)).

The 2016 Dear Colleague Letter was enjoined by a federal court and then withdrawn by the Department’s 2017 Dear Colleague Letter. *See Texas v. United States*, 201 F. Supp. 3d 810, 830 (N.D. Tex. 2016) (enjoining the 2016 Letter because it was “legislative and substantive[,]” “not just interpretations or policy statements); *Id.* at 830–31 (“Permitting 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.”); *see also* U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (2017) (withdrawing the 2016 Dear Colleague

Letter). The 2017 Dear Colleague Letter was the operative guidance at the time the School Board fired Mr. Vlaming.

The School Board’s argument that the 2017 Dear Colleague Letter “is of little value because its interpretation of Title IX has been squarely foreclosed by the Supreme Court’s later opinion in *Bostock*” ignores that Court’s intentionally and explicitly cabined holding. Appellee Br. at 39. Although the *Bostock* Court held that an employer cannot fire an employee for being homosexual or a transgender individual, because “[s]ex plays a necessary and undistinguishable role in the decision,” the holding was by its own terms limited to Title VII. *Bostock*, 140 S. Ct. at 1737; *See Tennessee v. Dep’t of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, \*2 (E.D. Tenn. July 15, 2022). (“The Court was careful to narrow the scope of its holding.”). The Court addressed the concern that its “decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination[,]” concluding that “none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge such question today.” *Bostock*, 140 S. Ct. at 1753.

Under the Biden Administration, the Department attempted to return to its 2016 guidance, but this effort was itself recently enjoined by a federal court which also analyzed *Bostock*. On June 2, 2021, the Department issued an interpretation (“2021 Notice of Interpretation”), declaring it “interprets Title IX’s prohibition on

sex discrimination to encompass discrimination based on sexual orientation and gender identity[.]” *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).

Last month, a federal judge in Tennessee entered an injunction, invalidating the Department’s 2021 Notice of Interpretation in twenty states. *See Tennessee*, 2022 WL 2791450, at \*1, 24. The court stated, “[t]he *Bostock* decision only addressed sex discrimination under Title VII; the Supreme Court expressly declined to ‘prejudge’ how its holding would apply to ‘other federal or state laws that prohibit sex discrimination’ such as Title IX.” *Id.* at \*16 (quoting *Bostock*, 140 S. Ct. at 1753). The court distinguished between legislative and non-legislative rules under the APA, holding that “the Department’s challenged guidance documents go beyond putting the public on notice of pre-existing legal obligations and reminding affected parties of their existing duties.” *Id.* at \*21; *see also id.* (“Therefore, . . . Plaintiffs can show that the Department of Education’s guidance creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that *appear nowhere* in *Bostock*, Title IX, or its implementing regulations.”) (emphasis added). Thus, not only is *Bostock* inapplicable, but even if the Department attempted to codify *Bostock* as part of Title IX, as it does now, it would be usurping congressional authority.

## II. The Department’s New Proposed Title IX Rule is Subject to Notice-and-Comment Rulemaking, and Would Be Invalid if Adopted in its Current Form.

Nor should any interpretation of Title IX rely upon the rule proposed by the Department since MSLF’s initial brief,<sup>2</sup> because that rule exceeds the authority Congress delegated to the Department in two ways: (1) the Department did not adhere to basic contract principles under Spending Clause jurisprudence, and (2) redefining “sex” to include gender identity violates the “major questions” doctrine.

First, all schools that receive federal funds must adhere to Title IX or risk losing funding. Accordingly, “Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds. ‘[L]egislation enacted pursuant to the spending power is much in the nature of a *contract*: in return for federal funds, [the recipients] agree to comply with federally imposed conditions.’” *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568 (2022) (emphasis added) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*,

---

<sup>2</sup> On the 50<sup>th</sup> anniversary of Title IX, the Department announced details of its notice of proposed rulemaking (“NPRM”), publishing an unofficial version of a proposed rule that included a ban on gender identity discrimination., <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>. On July 12, 2022, the Department’s Proposed Rule was published in the Federal Register, which triggered a 60-day public comment period, to close on September 12, 2022. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) (“Proposed Rule”).

451 U.S. 1, 17 (1981)). “Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress’s power to legislate under the spending power rests on whether the recipient voluntarily and knowingly accepts the terms of the ‘contract.’” *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (internal brackets, ellipses, and quotation marks omitted).

But the Proposed Rule, if it were adopted as is, would breach this contractual arrangement. In the same way that forcing schools to pay out emotional damages is an unpredictable result of a contractual bargain, so too would be the liability for not enacting strict preferred pronoun policies. *See Cummings*, 142 S. Ct. at 1570–71 (“[T]o decide whether emotional distress damages are available under the Spending Clause statutes . . . we [] ask . . . [w]ould a prospective funding recipient, at the time it engaged in the process of deciding whether [to] accept federal dollars, have been aware that it would face such liability?”) (internal quotation and citation omitted).

Most importantly, when terms of great magnitude such as “gender identity” remain undefined, and a school can be liable for hostile environment harassment based on a complainant’s *subjective* feelings of harassment, Proposed Rule, at 41,569, no school district could predict the terms of its contract. *See Barnes*, 536 U.S. at 188 (“Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they

would even have *accepted the funding* if punitive damages liability was a required condition.”).

While the Proposed Rule does not *explicitly* discuss the required usage of preferred pronouns or the consequences for misgendering students, its provisions seem to broadly address such issues. For instance, the Proposed Rule suggests that “the current regulations should be amended to provide greater clarity regarding the scope of sex discrimination, including obligations not to discriminate based on . . . sexual orientation[] and gender identity.” Proposed Rule, at 41,390.

It is one thing to say that schools must allow biological females to use the men’s restroom. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 n. 18 (4th Cir. 2020) (“[T]he Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination.”). It is quite another to say that a school must strictly compel all teachers (and students) to use every student’s preferred pronouns—no matter what those pronouns are or how frequently they vary—or violate federal civil rights laws. *Loudoun Cty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274, \*8 (Va. Aug. 30, 2021) (“In *Meriwether v. Hartop*, the Sixth Circuit emphatically held that a university professor stated viable free speech and free exercise claims based on his university’s disciplining him for refusing, based on his Christian faith, to use a student’s

preferred pronouns.”) (citing *Meriwether v. Hartop*, 992 F.3d 492, 509–17 (6th Cir. 2021)).<sup>3</sup>

Indeed, a rule relying on “gender identity” for preferred pronouns poses a hopelessly in-administrable rule; students can change their identities numerous times, with little or no warning, and with no limit to the types of gender identities available.<sup>4</sup> Additionally, it would be strange to argue that Title IX always requires preferred pronoun usage, when students may vacillate multiple times between preferences. See Kate Jerkovich, “‘Nobody’s Perfect’: Disney Star Demi Lovato Explains Why She’s Going Back to ‘She/Her’ Pronouns”, DAILY WIRE (Aug. 2, 2022), <https://www.dailywire.com/news/nobodys-perfect-disney-star-demi-lovato-explains-why-shes-going-back-to-she-her-pronouns> (“Everyone messes up

---

<sup>3</sup> Commentators, too, have noticed that the Proposed Rule would apply to pronoun usage. See Steven McGuire, *Title IX, Pronouns, and Campus Freedom*, REAL CLEAR POLICY (Aug. 12, 2022), [https://www.realclearpolicy.com/articles/2022/08/12/title\\_ix\\_pronouns\\_and\\_campus\\_freedom\\_847586.html#!](https://www.realclearpolicy.com/articles/2022/08/12/title_ix_pronouns_and_campus_freedom_847586.html#!) (“Is refusing to use someone’s preferred pronouns harassment or free speech? The courts have so far sided with free speech, but the Biden administration seems determined to push the issue and threaten free expression on American campuses by applying Title IX to gender identity.”).

<sup>4</sup> Claimed gender identities extend far beyond traditional “male” and “female” monikers. See, e.g., *Cakegender*, LGBTQA+ WIKI, <https://www.lgbtqia.wiki/wiki/Cakegender> (last visited Aug. 24, 2022) (“Cakegender is a gastrogender that is related to cake which is soft and fluffy like cake. ... One who is cakegender may also feel their gender, or ‘flavors,’ are layered, similar to a layered cake. Similar genders include cakeinac.”).

pronouns at some point[.]”). Against this backdrop, schools could never have predicted the terms of the Title IX “contract” to change so dramatically.

Second, the Department’s proposed broadening of the scope of Title IX runs afoul of the major questions doctrine. If Congress wanted the Department to interpret the word “sex” to include all forms of gender identity, it would have said as much. The major questions doctrine establishes that “administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (internal citation and quotations omitted); *see also* 142 S. Ct. at 1628 (Kagan, J., dissenting) (the Court rejected Justice Kagan’s alternative view, that “[a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems”).

A judicial rule that Congress must speak clearly on “major questions” ensures a strict separation of powers between the Executive and Legislative branches. *Id.* at 2617. Most recently, in *West Virginia v. EPA*, the Supreme Court emphasized, “[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.” *Id.* at 2609 (majority opinion) (internal quotation and citation

omitted). The same principles utilized in *West Virginia v. EPA* would invalidate the Proposed Rule if it were adopted in its present form.

Congress authorized the Department to carry out provisions of the Education Amendments of 1972. Encompassed within these Amendments is Title IX. The Department is not authorized to create sweeping new interpretations of terms in derogation of Congress's intent, particularly when such interpretations have vast economic and political impact. If Congress intended for sex to be non-binary, it wouldn't have "hid[den] elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Compare Proposed Rule at 41,571 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.") with *Wilcox v. Lyons*, 970 F.3d 452, 459 (4th Cir. 2020) ("[S]ex, like race and national origin, is an *immutable characteristic* determined solely by the accident of birth, therefore the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system[.]") (emphasis added) (internal quotations and citation omitted).

The majority mentions what Justice Gorsuch dives deeper into in his concurrence in *West Virginia v. EPA*.<sup>5</sup> Justice Gorsuch elucidates a few ways the Supreme Court has historically flagged major questions doctrine issues. Importantly, “[t]he Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance,’ or end an ‘earnest and profound debate across the country[.]’” *Id.* at 2620 (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). Also, if the content of bills rejected by Congress are now the content of the agency’s regulation, that can be a telling sign. *Id.* at 2620–21.

To address the “history and breadth of the authority that [the agency] has asserted,” *id.* at 2608, the idea of nonbiological, non-binary gender identity is not found in the text of Title IX, nor is it consistent with decades of interpretation of that statute. *Accord Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (“[O]nly women can become pregnant[.]”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2346 (2022) (dissenting opinion of JJ. Sotomayor, Kagan, and Breyer) (“Withdrawing a woman’s right to choose whether

---

<sup>5</sup> “[O]ur precedent teaches that there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

to continue a pregnancy does not mean that no choice is being made. It means that a majority of today’s Court has wrenched this choice from *women* and given it to the States.”) (emphasis added); *see also Doe v. Hamilton Cty. Bd. of Educ.*, 329 F. Supp. 3d 543, 580 (E.D. Tenn. 2018) (Title IX is designed to protect against “insidious forms of discriminatory harassment that occurs on the basis of some *immutable characteristic*, such as biological sex”).<sup>6</sup>

From the beginning, Title IX regulations have confirmed the 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. § 106.54(b) (“A recipient shall not make or enforce any policy or practice which, on

---

<sup>6</sup> The School Board admits that “no court has squarely confronted whether a secondary school teacher’s failure to use pronouns that conform with a student’s gender identity constitutes a Title IX violation[.]” Appellee Br. at 39. But even the idea of a “failure” to use preferred pronouns is ambiguous. Some sources say that an accidental instance of “misgendering” ought to be followed by an immediate succinct apology and correction. *See* Sabara L. Katz-Wise, *Misgendering: What it is and why it matters*, HARVARD MEDICAL SCHOOL, HARVARD HEALTH PUBLISHING (Jul. 23, 2021), <https://www.health.harvard.edu/blog/misgendering-what-it-is-and-why-it-matters-202107232553> (“Misgendering will happen. What’s most important is how you handle it when it does. The best way to handle misgendering someone who is present is to apologize and try harder next time (‘I’m sorry, I meant [correct name/pronoun/honorific]’). Keep your apology brief so that it doesn’t become about you and your mistake.”). But in the absence of a perfectly succinct apology and promise to do better, does the accidental misgendering become malicious?

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).

Furthermore, Title IX’s Proposed Rule would end an earnest and profound policy debate across the country about the meaning of “sex” discrimination. *Bostock* merely addressed whether a biological man who identifies as a woman can be fired for such identification consistent with Title VII; it is too much, however, to suggest that sex discrimination includes all forms of gender identify discrimination, when the Court expressly disclaimed any such holding.

The Proposed Rule also follows in the wake of failed legislation; Congress unsuccessfully attempted to pass the Equality Act, which “prohibits discrimination based on sex, sexual orientation, and gender identity in areas including . . . education[.]” Equality Act, H.R. Res. 5, 117th Cong. (as passed by House, Feb. 25, 2021); *see also West Virginia*, 142 S. Ct. at 2610 (“And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”); *id.* at 2620–21 (“[T]his Court has found it telling when Congress has considered and rejected bills authorizing something akin to the agency’s proposed course of action. . . . That [] may be a sign that an agency is attempting to work [a]round the legislative process to resolve for itself a question of great political significance.”) (internal quotations

and citations omitted). Thus, even if the Proposed Rule were enacted in its present form, it would violate the major questions doctrine.

## CONCLUSION

The School Board cannot cite a single operative Title IX guidance document supporting its 2018 firing of Peter Vlaming for not using a transgender student’s preferred pronouns. Furthermore, even in 2022, such an interpretation of Title IX is inappropriate. The original understanding of the term “sex” was binary and based on biology when Congress passed the Education Amendments of 1972. Even if the Department attempts to grossly overinterpret the term “sex,” no clear congressional authority exists to do so. Thus, to the extent that the School Board has relied on Title IX for its conduct, this Court should hold that it provides no refuge.

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](mailto:zhonette@mslegal.org)

*Attorney for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Reply Brief of Amicus Curiae* complies with the type-volume limit of Virginia Supreme Court Rule 5:26(b) because the substantive portion of this document is 14 pages in length. This brief complies with Rule 5:26(b) because the portion subject to that limit does not exceed the longer of 15 pages or 2,625 words.

This document complies with the typeface and tpestyle requirements of Virginia Supreme Court Rule 5:6 because this document has been prepared in Times New Roman using Microsoft Word in 14-point font.

DATED this the 24th day of August 2022.

/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 August 24, 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  
cschandeval@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