

VIRGINIA:
IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

BYRON TANNER CROSS, MONICA)
GILL, and KIMBERLY WRIGHT,)
Plaintiffs,)
v.)
LOUDOUN COUNTY SCHOOL) Case No. CL-21-3254
BOARD, SCOTT A. ZIEGLER, in his)
official capacity as Interim Superintendent)
and in his personal capacity; LUCIA)
VILLA SEBASTIAN, in her official)
capacity as Interim Assistant Superintendent)
for Human Resources and Talent)
Development and in her personal capacity;)
Defendants.)

**BRIEF OF *AMICI CURIAE* EQUALITY LOUDOUN, EQUALITY VIRGINIA, SIDE BY
SIDE, HE SHE ZE AND WE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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**Pro Hac Vice Application Pending*

INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici are organizations that combat injustice against transgender children and work with families to advocate for inclusive, supportive schools where transgender youth can thrive without facing discrimination. Given their missions, *amici* have a strong interest in ensuring the right of transgender youth in Loudoun County to be treated equally in all respects at school, including use of their chosen pronouns. These organizations, and the transgender children and families with whom they work, are uniquely situated to address how Policy 8040 (the “Policy” or the “Nondiscrimination Policy”) is necessary to protect the health and safety of transgender youth.

Amicus curiae Equality Loudoun (“EQLOCO”) is a nonprofit organization that advocates, educates, defends, and builds community to support lesbian, gay, bisexual, transgender, and queer (“LGBTQ+¹”) equality in Loudoun County. For years, EQLOCO has been at the forefront of advocating for equal rights and protections for Loudoun’s LGBTQ+ community. EQLOCO was instrumental in advocating for the passage of the Nondiscrimination Policy by the Loudoun County School Board as well as participating in the community stakeholder conversations to craft the language that was ultimately adopted into the Nondiscrimination Policy. EQLOCO advocates to ensure that all children in Loudoun County are able to learn in the safest and most accepting environment possible and to ensure that transgender, non-binary, and gender-expansive students are treated with respect and dignity, and are able to live without fear of prejudice, discrimination, violence, or hatred based on their gender identity or sexual orientation.

Amicus curiae Equality Virginia (“EV”) is the leading advocacy organization in Virginia seeking equality for LGBTQ people. With over 35,000 supporters and more than 100 community-

¹ The “+” acknowledges additional identities related to sexual orientation and/or gender identity not included in this acronym.

based organizational partners throughout the Commonwealth, EV provides impactful education and programs that seek to advance knowledge and empowerment among LGBTQ Virginians and allies. EV is committed to advocating for inclusive school environments where transgender and non-binary youth feel safe, celebrated, and supported in their education.

Amicus curiae Side by Side is the largest and oldest organization in Virginia serving LGBTQ+ youth. Founded 30 years ago as ROSMY (Richmond Organization for Sexual Minority Youth), Side by Side is dedicated to creating supportive communities where Virginia's LGBTQ+ youth can define themselves, belong, and flourish. Side by Side is a national leader in working with LGBTQ+ youth on a broad range of challenges and opportunities, providing important programming and services to meet their needs and support their dreams. Programming and services include counseling and support groups, school support and trainings for school personnel, housing programs, and emergency financial assistance.

Amicus curiae He She Ze and We ("HSZW") is a statewide nonprofit organization that provides peer to peer support for caregivers of transgender and non-binary youth. The organization's mission is to educate, advocate for and empower families to navigate the complex journey of gender identity. This includes offering support groups, education of caregivers, schools and communities, and advocacy work.

Finally, *amicus curiae* the American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia—the ACLU's state affiliate in the Commonwealth—has a long history of advocating for the civil rights and civil liberties of Virginians in both state and federal courts across the Commonwealth. The ACLU of Virginia has approximately 28,000 members. As organizations that

advocate for First Amendment liberties as well as equal rights for LGBTQ people, the ACLU, the ACLU of Virginia and its members have a strong interest in and are uniquely positioned to address the speech and free exercise claims at issue in this case.

ARGUMENT

Loudoun County School Board’s Policy 8040 provides critical protections to transgender and gender-expansive students to ensure they are able to thrive at school. Among other things, the Policy states that transgender and gender-expansive students should, upon request, be addressed by school staff with the name and pronouns that reflect their gender identity. Treating students consistently with their gender identity is crucial for their mental health and wellbeing, has been shown to reduce the amount of harassment they face in school, and in turn improves their academic performance.

The Plaintiffs are three teachers who believe that “adopting a gender identity inconsistent with sex [assigned at birth] rejects God’s image and design for a person.” Pl.s’ Mem. in Supp. of Mot. for TRO & Prelim. Inj, 4 (filed Aug. 20, 2021) (hereinafter “PI”). Plaintiffs seek an injunction allowing them to address transgender and gender expansive students in their classes exclusively by their names, without using any gendered pronouns. Under Plaintiffs’ proposed “accommodation,” every other student in the classroom would be addressed with pronouns, but transgender and gender-expansive students would be treated differently and referred to only by name.

Plaintiffs and others in the Loudoun County community may well disagree with the Nondiscrimination Policy, but in their role as teachers addressing students in a compulsory school setting, Plaintiffs possess no right to violate it. Public schools are entitled to regulate teachers’ speech to students in the classroom, and every court to consider the question has held that K-12

schoolteachers do not have a free-speech right to refuse to address transgender students by pronouns consistent with their gender identity. Plaintiffs argue that they do not want to comply with the Nondiscrimination Policy because “[p]ronouns can and do convey a powerful message,” PI 8 (quoting *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021)), but Plaintiffs ignore the “powerful message” they would be sending to transgender students in the classroom every time they are treated differently from other students. When teachers address students in the classroom as part of their job duties, they are engaging in curricular speech and the school board has both the right and the responsibility to supervise the messages being sent to students with the school’s imprimatur. See *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007).

Likewise, Plaintiffs have no right to violate the Nondiscrimination Policy based on their free exercise of religion. The Nondiscrimination Policy is neutral as to religion, and applies to all students and staff regardless of the religious or secular nature of their objections to addressing students with pronouns consistent with their gender identity. The Policy also serves the school board’s compelling interest in protecting transgender and gender-expansive students from discrimination and the negative outcomes that follow. Plaintiffs’ alternative proposal, by contrast, would subject transgender students to facially different treatment from all of their classmates, undermining the objective of the Policy itself. Further, the Policy does not violate Plaintiffs’ due process rights, as the Policy offers fair warning as to what conduct is prohibited.

Plaintiffs are, of course, free to speak out against the Nondiscrimination Policy as public citizens. But Plaintiffs now come to the Court asking for an injunction allowing them to violate the Nondiscrimination Policy’s restrictions on them in the course of their professional duties as public teachers, speaking in the classroom. That conduct is not protected, and would have deleterious impacts on transgender and gender-expansive students in Loudoun County public

schools. While Plaintiffs may disagree with the Policy, “it is the school board, whose responsibility includes the well-being of the students, that must make such determinations.” *Id.* Given the stakes for students, and lack of precedent supporting Plaintiffs’ position, the request for a preliminary injunction should be denied.

I. The Nondiscrimination Policy Is Necessary for the Health and Safety of Transgender Students.

A. Background on Transgender and Gender-Expansive Students.

“Transgender individuals have a ‘gender identity’—a ‘deeply felt, inherent sense’ of their gender—that is not aligned with the sex assigned to them at birth. Transgender people differ from cisgender (i.e., non-transgender) individuals, whose gender identity aligns with the sex assigned at birth.” Br. of *Amici Curiae* Medical, Public Health, & Mental Health Orgs. in Supp. of Pl.-Appellee, *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, at 4 (4th Cir. Nov. 25, 2019) (hereinafter “AAP Amicus”) (quoting Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015) (hereinafter “APA Transgender Guidelines”) (footnote omitted), ECF No. 32-1.² “Just like being cisgender, being transgender is natural and is not a choice.” *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021). And not all people are either cisgender or transgender, or identify as a binary gender—“there are other gender-expansive youth who may identify as

² Available at

https://www.aclu.org/sites/default/files/field_document/brief_of_medical_public_health_and_mental_health_organizations.pdf (last accessed Sept. 30, 2021). The Fourth Circuit relied on this brief in describing transgender individuals in the *Grimm* case below. Cf. *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (“Some amicus briefs collect background or factual references that merit judicial notice.”).

nonbinary, youth born intersex who do or do not identify with their sex-assigned-at-birth, and others whose identities belie gender norms.” *Id.* at 596.

“[B]eing transgender ‘implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.’” AAP Amicus at 6 (quoting APA Transgender Guidelines at 835–36). At the same time, “[t]ransgender children often experience intensified gender dysphoria and worsening mental health as the hormonal and anatomical changes associated with puberty cause the body to develop in ways that diverge from the child’s gender identity.” *Id.* at 10. Gender dysphoria is “a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual’s gender identity and birth-assigned sex.” *Id.* at 9 (citing Am. Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013) (hereinafter “DSM-5”)). “If untreated, gender dysphoria can cause debilitating distress, depression, impairment of function, substance use, self-mutilation to alter one’s genitals or secondary sex characteristics, other self-injurious behaviors, and suicide.” *Id.* at 11 (citing DSM-5 at 455, 458).

There is a medical consensus approach to treatment for persons with gender dysphoria that includes changes in gender expression and role (or living consistently with one’s gender identity), hormone treatment therapy, sex reassignment surgery and other surgery to change sex characteristics, and psychotherapy—though the numbers and types of treatment differs between people. *Grimm*, 972 F.3d at 595–96. Special considerations are made for children and adolescents:

Treatment for children and adolescents who experience gender dysphoria includes social gender transition and physical interventions such as puberty blockers, hormone therapy, and sometimes surgery. “Social gender transition” refers to steps that transgender individuals take to present themselves as being the gender they most strongly identify with. This typically includes adopting a different name that is consistent with that gender and using the corresponding pronoun set, wearing clothing and hairstyles typically associated with their gender identity rather than the sex they were determined to have at birth, and using sex-segregated spaces and

engaging in sex-segregated activities that correspond to their gender identity rather than their birth-determined sex. For transgender individuals, an important part of social gender transition is having others perceive them as being the gender the transgender individual most strongly identifies with. Social gender transition can help alleviate gender dysphoria and is a useful and important tool for clinicians to ascertain whether living in the affirmed gender improves the psychological and emotional function of the individual.

Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522–23 (3d Cir. 2018) (relying on testimony of Dr. Scott Leibowitz, an expert in gender dysphoria and gender-identity issues in children and adolescents).

B. Using Transgender Students’ Names and Pronouns Avoids Serious Physical and Emotional Harms.

Being subjected to prejudice and discrimination exacerbates the negative health outcomes of gender dysphoria. AAP Amicus at 11 (citing, *inter alia*, Jessica Xavier, et al., Va. Dep’t of Health, *The Health, Health-Related Needs, and Lifecourse Experiences of Transgender Virginians* (2007)). And discriminatory practices, such as Plaintiffs’ refusal to use transgender and gender-expansive students’ gender-affirmed pronouns, have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals. *Id.* at 19. Specifically, such policies 1) exacerbate gender dysphoria; 2) expose transgender individuals to harassment and abuse; 3) stigmatize transgender students; and 4) harm adolescent social and emotion development, with lifelong repercussions. *Id.* at 20–29.

Discriminatory policies exacerbate gender dysphoria. Exclusionary, discriminatory policies “force transgender people to disregard or deny their gender identity,” which disrupts medically appropriate treatment protocols that “provide that transgender individuals should live all aspects of their life in the gender with which they identify.” AAP Amicus at 20. Being unable to live all aspects of their life consistent with their gender identity “exacerbate[s] the risk of anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use,

homelessness, and eating disorders among other adverse outcomes that many transgender individuals face.” *Id.* at 21 (internal quotation marks omitted). According to the leading medical organizations, these are already serious risks, as “in a comprehensive survey of over 27,000 transgender individuals, 40 percent reported a suicide attempt—a rate nine times that reported by the general U.S. population.” *Id.*

By contrast, “when transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students reflect the same, healthy psychological profile as their peers.” *Boyertown Area Sch. Dist.*, 897 F.3d at 523 (internal quotation marks omitted); *see also Grimm*, 972 F.3d at 597 (explaining that “transgender students have better mental health outcomes when their gender identity is affirmed”). A recent study documented that respecting transgender students’ names and pronouns improved their mental health; proper pronoun use led to a fifty-six percent decrease in suicide attempts and a twenty-nine percent decrease in suicidal thoughts. Br. of *Amici Curiae Nat'l Medical & Mental Health Orgs.* in Supp. of Defs.-Appellees’ Pet. for Reh’g or Reh’g En Banc, *Meriwether v. Hartop*, No. 20-3289 at 4 (6th Cir. May 18, 2021) (hereinafter, “Medical & Mental Health Amicus”), ECF No. 118.³ And “[o]ther research studies have likewise found that affirming policies correlate with far lower rates of psychological distress and attempted suicide.” *Id.* at 10.

Discriminatory policies expose transgender individuals to harassment and abuse. Plaintiffs’ refusal to use chosen pronouns for transgender and gender-expansive students forces them to disclose their status, by subjecting them to pronouns “that are incongruent with their gender identity and how they live and are recognized in the world.” AAP Amicus at 21–22. This

³ Available at <https://www.nclrights.org/wp-content/uploads/2021/05/2021.05.14.-Dkt-111.-Amicus-Brief-of-Nat-Medical-Mental-Health-Orgs-ISO-Def-Appellees-Pet-for-Rehearing.pdf>.

is particularly true for students who may have transitioned before arriving at the school, so using different pronouns for them would “out” them to their peers. *Id.* at 22.

Even without discriminatory policies and practices, schools can be alienating environments for transgender and gender-expansive students. Over a third of transgender students report being bullied and harassed by students, teachers, and staff at their school, *see Medical & Mental Health Amicus* at 3, far exceeding the rates of cisgender, heterosexual peers.⁴ “[H]arassment of transgender students is also correlated with academic success: students who experienced greater harassment had significantly lower grade point averages.” *Grimm*, 972 F.3d at 597 (citing Br. of *Amici Curiae* Sch. Adm’rs from Twenty-Nine States & D.C. in Supp. of Pl.-Appellee 6). For some transgender students, school is unbearable. Fifteen percent of transgender students leave school early because of harassment, and a tragically high number commit or attempt suicide.⁵ In this context, the Nondiscrimination Policy is an indispensable measure designed to let transgender students stay in the classroom and stay alive.

Hostile teachers play an outsized role in driving negative health outcomes for transgender students, as they are more likely to report mental health difficulties when the harassment comes from a teacher. As documented by leading medical organizations, “of transgender individuals who were harassed or bullied by teachers in either K-12 schools or higher educational settings, 59% reported having attempted suicide.” *Medical & Mental Health Amicus* at 9. “[S]uicide attempts among [transgender students] rose dramatically when teachers were the reported perpetrators” of bullying and harassment. *Id.* These findings underscore the urgency of requiring school staff to

⁴ See Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, The Nat’l Gay and Lesbian Task Force and the Nat’l Ctr. for Transgender Equal., at 33 (2011).

⁵ *Id.* at 40; *see also* Jody L. Herman et al., *Suicide Attempts among Transgender and Gender Non-Conforming Adults*, Williams Institute, at 2 (Jan. 2014).

use students' chosen names and pronouns.

Discriminatory policies stigmatize transgender students. Transgender people, including transgender Virginians,⁶ face widespread prejudice and discrimination.⁷ A survey of transgender individuals in Virginia found, for example, that “50 percent of participants reported that they had experienced discrimination in healthcare, employment, or housing, and many individuals had experienced discrimination in more than one area.” AAP Amicus at 24.

Discriminatory practices, like Plaintiffs’ requested injunction, perpetuate stigma and discrimination against transgender students by forcing them to disclose that they are transgender, thus marking them as “others,” and “convey[ing] the state’s judgment that transgender individuals are different and deserve inferior treatment.” *Id.* This can result in notable, deleterious health disparities, such as a rate of hypertension twice that of the general population, increase in psychiatric disorder diagnoses, and “greater risk for post-traumatic stress disorder, depression, anxiety, and suicidality. *Id.* at 24–25. “There is . . . every reason to anticipate that exclusionary policies will negatively affect the health of transgender individuals.” *Id.* at 25.

Teachers can, alternatively, destigmatize transgender and gender-expansive status and model behavior for students. When a teacher uses chosen names and pronouns, students are less likely to bully transgender students and subject them to hostile learning environments.⁸ For this

⁶ Jessica Xavier et al, *The Health, Health-Related Needs, and Lifecourse Experiences of Transgender Virginians*, Va. Dep’t of Health (2007), <http://www.vdh.virginia.gov/content/uploads/sites/10/2016/01/THISFINALREPORTVol1.pdf> (last accessed Sept. 30, 2021).

⁷ *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals*, Am. Psychiatric Ass’n, at 2 (2012), available at <https://www.wapsychiatry.org/assets/documents/2017/position-2012-transgender-gender-variant-discrimination.pdf> (Sept. 30, 2021).

⁸ Jonathan T. Pryor, *Out in the Classroom: Transgender Student Experiences at a Large Public University*, 56 J. Coll. Student Dev. 440, 453 (2015).

reason, leading organizations of educators recommend that schools implement policies that require teachers to refer to transgender students with their pronouns and names that are consistent with their gender identity. *See, e.g.*, Medical & Mental Health Amicus at 11. The National Education Association, for example, has posited that students “should be addressed by their preferred names and pronouns” because these simple steps “can have a profound effect on the student’s experience.”⁹

Discriminatory policies harm adolescent social and emotional development. “Discrimination and harassment of children and adolescents in their formative years may have effects that linger long *after* they leave the school environment.” AAP Amicus at 28. School environments that are not welcoming to transgender students produce particularly poor educational outcomes for them, which can lead to lower lifetime earnings and poorer health outcomes as students age. *Id.* at 28–29. Further, the stigma and discrimination that transgender students face due to policies like Plaintiffs’ proposal “is associated with an increased risk of post-traumatic stress disorder, depression, anxiety, and suicidality in subsequent years.” *Id.* at 29.

C. Treating Transgender Students Equally Requires Using Their Gender-Affirmed Names and Pronouns.

As schools across the country welcomed new students for the start of the 2021-2022 academic year, many teachers asked students simple questions like “what is your name?” and “what would you like to be called?” In a matter of minutes, Charles becomes Charlie or Chuck.

⁹ Nat’l Educ. Ass’n, *Legal Guidance on Transgender Students’ Rights*, at 6 (June 2016), available at https://www.nea.org/sites/default/files/2020-07/2018_Legal%20Guidance_Transgender%20Student%20Rights.pdf (last accessed Sept. 30, 2021); Nat’l Educ. Ass’n, *Schools in Transition: A Guide for Supporting Transgender Youth in K-12 Schools*, at 22 (2015), available at <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf?mtime=20200713142742&focal=none> (last accessed Sept. 30, 2021).

Alexis becomes Alex, Samantha becomes Sam, and Nicholas becomes Nick. Once the student's name is established, the student's pronouns flow freely. For some children, the child's name provides an accurate indicator of their gender identity; for other children, appearing in dresses and skirts, most teachers correctly assume that they identify as female; and still for other children, parents introduce their daughter or son, and teachers respond accordingly. Teachers and students make these adjustments every day out of respect for the individual child, and few see this simple act as a burden.

The Loudon County School Board's Nondiscrimination Policy ensures that transgender and non-binary students in Loudon County have the same opportunity as their peers to be addressed with names and pronouns reflecting their gender identity. For cisgender and gender binary students, the baseline is that people will use the name by which they identify and pronouns that correspond to their gender identity. The Nondiscrimination Policy provides the same opportunity to transgender and gender-expansive students so they can focus on schoolwork without anxiety about what name or pronouns they will be called. This is not special treatment—it is equal treatment.

During the initial hearing on Plaintiffs' Motion for a Preliminary Injunction, the Court asked whether the Nondiscrimination Policy treats transgender and gender expansive students more favorably than a non-transgender student who wishes to adopt a new name and pronouns as a practical joke. Transcript of Sept. 2, 2021 Oral Argument at 20:21-21:6. The answer to the Court's question is that the policy does no such thing. The Policy only allows students to be referred to by pronouns "that reflect their gender identity." Amend. Compl. Ex. A, Policy 8040 Section A. The Nondiscriminatory Policy does not allow transgender and gender expansive students—or any other student—to change their names and pronouns on a whim or for any reason

they want. Although transgender and gender expansive students do not need to provide “substantiating evidence” of their gender identity, the Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools from the Virginia Department of Education (“Model Policies”) make clear that the term “substantiating evidence” refers to medical or legal documents. Defs.’ Opp’n to Pls.’ Second Emergency Mot. for TRO & Prelim. Inj. (Aug. 27, 2021) (hereinafter “Defs’ Resp.”), Ex. 2, Model Policies at 13 (discussing “substantiating evidence, including diagnosis, treatment, or legal documents.”). Instead of requiring such documents, school administrators may consider whether there has been “uniform assertion of such an identity, indication that the identity is sincerely held as part of the student’s core identity, or that the student is not asserting such an identity for an improper purpose.” *Id.* The fact that students do not need to present medical or legal documents still requires “more than a casual declaration of gender identity.” *Id.*

The same rules apply to students with non-binary pronouns such as they/them/their or ze/hir/hirs. While the use of the term “they” was once discouraged in writing, many people and established publications now endorse the term, including Merriam-Webster dictionary, which reports that “they has been in consistent use as a singular pronoun since the late 1300s.”¹⁰ Other non-binary pronouns such as ze/hir/hirs are established pronouns among people who are non-binary or gender-expansive. As with binary pronouns, schools make sure students are using pronouns to reflect their gender identity, and not based on a casual declaration or for an improper purpose.

¹⁰ “Definition of *they*,” Merriam-Webster, [https://www.merriam-webster.com/dictionary/they_\(last accessed Sept. 30, 2021\);](https://www.merriam-webster.com/dictionary/they_(last accessed Sept. 30, 2021);) “Words We’re Watching: Singular ‘They,’ ” Merriam-Webster, [https://www.merriam-webster.com/words-at-play/singular-nobinary-they \(last accessed Sept. 30, 2021\).](https://www.merriam-webster.com/words-at-play/singular-nobinary-they (last accessed Sept. 30, 2021).)

By contrast, Plaintiffs' proposed "accommodation" of referring to transgender and gender-expansive students by their names, while referring to all other students with pronouns, would subject transgender and gender expansive to unequal treatment. By referring to a subset of students—and only those students—solely by their names, Plaintiffs would conspicuously single out those students front of all their peers. It would be disrespectful, discourteous, and by Plaintiffs' own admission, would send a "powerful message" to the individual student and the entire class.

PI 8. When teachers engage in this conduct, it threatens the students' entire identity, ostracizes the students as "different," and deprives them of a sense of belonging and inclusion where they have the same opportunities to thrive as their peers.

II. Plaintiffs Do Not Have a Free Speech Right to Discriminate Against Transgender Students in Their Classrooms, in Violation of School Policies Regulating In-Class Speech.

"[P]ublic schools possess the right to regulate speech that occurs within a compulsory classroom setting, and . . . a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums." *Lee*, 484 F.3d at 695. In arguing that the Nondiscrimination Policy violates the free speech provisions of the Virginia Constitution,¹¹ Plaintiffs attempt to equate a teacher's out-of-class speech at a public school board meeting with a teacher's in-class speech when addressing students under her supervision. But those two different contexts are governed by different legal principles. When a teacher is speaking as "a private citizen on a matter of public concern," a school may restrict the teacher's speech only when the school's interest in the "appropriate operation of the workplace" outweighs "the employee's interest in First Amendment expression" under the balancing test forth in *Pickering v. Board of Education of*

¹¹ The Virginia Supreme Court has held that "Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment." *Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004).

Township High School District 205, 391 U.S. 563 (1968). *See Lee*, 484 F.3d at 694. But when a teacher is addressing students in her classroom, she is not speaking as a private citizen on a matter of public concern. Rather, she is speaking to a captive audience in her capacity as a school employee, and her speech necessarily bears the school’s imprimatur. *See id.* at 697–98. As a matter of law, the manner in which a teacher addresses students in her class “is curricular in nature,” and “does not constitute speech on a matter of public concern,” even if the same speech would qualify for free speech protection outside the classroom. *See id.* at 697.

Applying these principles, every court to consider the question has held that the First Amendment does not give K-12 schoolteachers a free-speech right to refuse to address transgender students by pronouns consistent with their gender identity. *See Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020); *Vlaming v. W. Point Sch. Bd.*, No. CL19-454 (Cir. Ct. King William Cty. Aug. 13, 2021).¹² Although the Sixth Circuit in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), upheld a university professor’s free speech objection to using a student’s name and pronouns, the court was explicit that its holding does not apply to schoolteachers outside the university setting, and reaffirmed its prior holding that “the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools.” *Id.* at 505 n.1 (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City*, 624 F.3d 332, 334 (6th Cir. 2010)).

Like every other court to address the question, this Court should reject Plaintiffs’ argument that their right to free speech provides them with veto power over school policies protecting transgender students in the classroom.

¹² *See also* Defs.’ Resp., Ex. 1 (attaching the *Vlaming* opinion).

A. When Addressing Students in Their Classrooms, Plaintiffs Are Engaging in Curricular Speech that Bears the Imprimatur of the School, Not Speaking as Private Citizens.

“[S]choolteachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” but “certain limitations are placed on the free speech rights of schoolteachers . . . due to the nature of their employment by government-operated schools.” *Lee*, 484 F.3d at 693 (internal quotation marks and citations omitted). Under the Supreme Court’s decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Id.* at 421. “[A]ddressing students is necessary to communicate with them and teach them the material” and “how teachers relate to students is part of their jobs.” *Kluge*, 432 F. Supp. 3d at 839. When teachers address students in the classroom, that speech “owes its existence to a public employee’s professional responsibilities”—here, to educate and provide an inclusive learning environment for students—and so “simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Garcetti*, 547 U.S. at 421–22; *see Evans-Marshall*, 624 F.3d at 341 (collecting cases holding that the in-class curricular speech of K-12 teachers is not protected under *Garcetti*).¹³

Even before *Garcetti* was decided, the Fourth Circuit held that a teacher’s curricular speech is—as a matter of law—not speech by a private citizen on a matter of public concern. *Boring v. Buncombe Cty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (en banc). Under Fourth Circuit

¹³ *Garcetti* applies even in the context of Plaintiffs’ compelled speech claims, because “if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.” *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018) (citing *Garcetti*, 547 U.S. at 421–22).

precedent, “when a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of whether her speech involves a matter of public concern is dependent on whether or not the speech is curricular.” *Lee*, 484 F.3d at 697. The term “curricular” in this context is not limited to the specific content of lesson plans. Rather, the “definition of curriculum encompasses more than simply the objectives of a specific course of study taught by a particular teacher.” *Id.* at 698. Speech is “curricular” when it is “school-sponsored expression bearing the imprimatur of the school,” “supervised by faculty members and designed to impart particular knowledge to the students.” *Id.*¹⁴

For example, in *Lee*, the Fourth Circuit held that a Spanish teacher was engaging in curricular speech by posting articles about religion on a class bulletin board even though the articles “neither directly nor indirectly related to the Spanish curricular objectives he is obliged to teach.” *Id.* at 697. The court held that the postings bore the imprimatur of the school because “students and parents are likely to regard a teacher’s in-class speech as approved and supported by the school, as compared to a teacher’s out-of-class statements.” *Id.* at 698. The court also held that the postings were supervised by faculty and “designed to impart particular knowledge to students” because “[c]lassroom speech can readily be designed to impart particular knowledge, and yet not otherwise relate to the curricular objectives that a teacher must follow.” *Id.* at 699. The court concluded that the articles posted in *Lee* were curricular because they reflected “information on social or moral values that the teacher believes the students should learn or be exposed to.” *Id.*

Under *Lee*, the manner in which a teacher addresses transgender students in her class is curricular speech that is not subject to *Pickering* balancing. And as in *Lee*, the manner in which a

¹⁴ See *Evans-Marshall*, 624 F.3d at 342 (explaining that its application of *Garcetti* is consistent with the Fourth Circuit’s pre-*Garcetti* precedent holding that “[a] teacher’s curricular and pedagogical choices are categorically unprotected”).

teacher addresses students is “in-class speech” that necessarily bears the imprimatur of the school. *Lee* at 697. Finally, as in *Lee*, by refusing to address transgender students by pronouns that Plaintiffs believe to be inconsistent with the student’s sex assigned at birth, the teacher is communicating a message “on social or moral values that the teacher believes the students should learn or be exposed to.” *Id.* at 699. Indeed, Plaintiffs openly acknowledge that “[p]ronouns can and do convey a powerful message,” PI 8. Specifically, Plaintiffs’ refusal to address students by pronouns consistent with their gender identity conveys the message that “adopting a gender identity inconsistent with sex [assigned at birth] rejects God’s image and design for a person.” PI 4. The school board has the right and responsibility to decide that it does want that message communicated to K-12 students from the teaching lectern.

Citing cases involving university professors and public unions, Plaintiffs argue that the issues of gender identity and the use of pronouns are matters of public concern entitled to free speech protection. But *Lee* makes schools responsible for determining how matters of public concern are communicated to a captive audience of K-12 students in a public-school classroom. “[I]t is not a court’s obligation to determine which messages of social or moral values are appropriate in a classroom. Instead, it is the school board, whose responsibility includes the well-being of the students, that must make such determination.” *Lee*, 484 F.3d at 700. Indeed, “the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them.” *Boring*, 136 F.3d at 371–72 (Wilkinson, C.J., concurring); *see also Evans-Marshall*, 624 F.3d at 341.

B. Defendants’ Interest in Efficient, Equitable Public Education Outweighs Plaintiffs’ Interests.

Even if Plaintiffs’ in-class speech were subject to *Pickering*’s balancing test, the school board’s interest in ensuring the efficiency of the public education that teachers and school staff are

providing far outweighs Plaintiffs' interest in refusing to use particular students' gender-affirming names and pronouns. *Cf. Connick v. Myers*, 461 U.S. 138, 142 (1983) (restating the *Pickering* test for evaluating free speech by public employees).

Defendants have a powerful interest in "providing an equitable, safe and inclusive learning environment" for all students at Loudoun County schools. Defs.' Resp. 16. For the reasons outlined above, *see supra* Part I, treating transgender students unequally, and refusing to recognize their gender identity, can undermine their health, expose them to harassment, and exacerbate stigma. Students cannot prioritize their learning in such an environment, "disrupt[ing] the operation and mission" of Loudoun County schools. *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998). As explained in the Model Policies, "all children have a right to learn, free from discrimination and harassment." Defs.' Resp., Ex. 2 at 8.

Plaintiffs claim they treat all students equally, PI 9, but their proposed "accommodation" subjects transgender students to facially unequal treatment. Under Plaintiffs' proposal, every other student would be addressed with pronouns but transgender students would be treated differently and addressed only by name. *Id.* at 5; Pls.' Renewed Emer. Mot. for TRO & Prelim. Inj. 2 (Sept. 24, 2021). As explained above, publicly treating transgender students differently in this manner imposes a stigma on them and invites further attention, scrutiny, and harassment. *See supra* Part I. Indeed, Plaintiffs openly admit that the manner in which they address transgender students "convey[s] a powerful message." PI 8.

Experience has shown how this different treatment is discriminatory in practice. In *Kluge*, an orchestra teacher followed the same practice that Plaintiffs propose here. He addressed transgender students by their names and addressed other students with pronouns. The evidence showed that this practice made the transgender students "feel targeted and uncomfortable." *Kluge*,

2021 WL 2915023 at *21. For example, one transgender student “dreaded going to orchestra class and did not feel comfortable speaking to Mr. Kluge directly” and eventually “quit orchestra entirely.” *Id.*

Contrary to Plaintiffs’ claims that their conduct would not constitute discrimination or generate harassment against transgender and gender-expansive students, it is well documented that refusal to recognize their gender identity will do just that. *See supra* Part I. Indeed, for just that reason, the Nondiscrimination Policy protects the interests of transgender and gender-expansive students, and is consistent with evidence-based practices to allow adolescents to social gender transition and present themselves as being the gender they most strongly identify with. *See id.* Finally, Defendants’ interest in promoting an environment of inclusivity and tolerance for students is not undermined by rejecting Plaintiffs’ request to discriminate against particular students, nor does it undermine the “marketplace of ideas.” PI 10–11. Plaintiffs are still free to express and debate ideas about gender identity and public policy *as private citizens*—but the school board’s interest controls when they speak in the classroom to students.

Defendants’ interest in prohibiting discrimination is both pedagogical and legally mandated. Discrimination against transgender students is prohibited under both Title IX and the Fourteenth Amendment. *See Grimm*, 972 F.3d at 611–13, 616 (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020)). The risk of liability for violating federal law provides an additional reason why the school board’s interest in equal treatment outweighs a teacher’s interest in refusing to address transgender students in a manner consistent with their gender identity. *See Kluge*, 2021 WL 2915023 at *22 (explaining that “continuing to allow Mr. Kluge an accommodation that resulted in complaints that transgender students felt targeted and dehumanized could potentially have subjected BCSC to a Title IX discrimination lawsuit brought by a transgender student.”).

III. Plaintiffs Do Not Have a Free Exercise Right to Discriminate Against Transgender Students.

A. Article I, § 16 of the Constitution of Virginia

Plaintiffs do not have a free exercise right to act in violation of a neutral and generally applicable law under the Virginia Constitution or the United States Constitution. *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).¹⁵ The Nondiscrimination Policy is a facially neutral and generally applicable policy under *Smith*. Like the policy upheld in *Kluge*, “every teacher, regardless of religious belief, [i]s required to address every student by” the name and pronouns that correspond to the student’s gender identity. 432 F. Supp. 3d at 841. Plaintiffs do not allege that the policy has been applied inconsistently or in an uneven manner.

Plaintiffs also have “not alleged facts showing that [the Policy] targeted or otherwise was motivated by an animus toward any particular religion or religious belief.” *Id.* To the contrary, the Nondiscrimination Policy would *also* prohibit school staff from refusing to use students’ designated names and pronouns for non-religious reasons, or for religious reasons distinct from the reasons Plaintiffs have offered here. “Because the Policy is neutral and generally applicable and [plaintiffs] ha[ve] not alleged facts showing that it targeted or otherwise was motivated by an animus toward any particular religion or religious belief,” Plaintiffs do not have a free exercise right to violate it. *Id.*

B. Va. Code Ann. § 57-2.02

Plaintiffs’ claim under Va. Code Ann. § 57-2.02 likewise fails. As a threshold matter, the statute is explicit that it cannot be applied to prevent a governmental entity from “maintaining

¹⁵ Article I, § 16 of the Constitution of Virginia is a “parallel provision” to its federal counterpart, *see Va. Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 626 (2000), and Virginia courts routinely look to federal free exercise jurisprudence in interpreting free exercise protections under the state constitution. *See, e.g., Roberts v. Roberts*, 41 Va. App. 513, 523 (2003).

health, safety, security or discipline.” Va. Code Ann. § 57-2.02(E). Defendants have made clear that the Nondiscrimination Policy is intended to protect the health and safety of transgender students, as well as provide for discipline of school staff. Defs.’ Resp. 23. The need for the Nondiscrimination Policy to maintain the health and safety of transgender students is further reinforced by the opinions of prominent medical professional organizations that recognize the need for such policies to protect transgender students from harassment, stigma, and harm to their health.

See supra Part I(B).

Even assuming that Va. Code Ann. § 57-2.02 applies to the Nondiscrimination Policy and that complying with the Policy would substantially burden Plaintiffs’ religious exercise, the Policy could still be validly applied because it is “(i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.” Va. Code Ann. § 57-2.02(B).

The non-discrimination policy serves the government’s “compelling state interest in protecting transgender students from discrimination.” *Boyertown Area Sch. Dist.*, 897 F.3d at 528–29. The Supreme Court has long recognized that governments have a compelling interest in protecting individuals from discrimination on the basis of sex. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). The government also has a “compelling interest in protecting the physical and psychological well-being of minors.” *Boyertown Area Sch. Dist.*, 897 F.3d at 528. Discrimination at school creates particularly severe risks for transgender students because “[m]istreatment of transgender students can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior.” *Id.* In short, “[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated.” *Id.*

The non-discrimination policy is also the least restrictive means of furthering the school board's interest. Plaintiffs assert that a less restrictive means would be to "let Plaintiffs refer to students by their chosen names and refrain from using pronouns." PI 13. But as discussed above, plaintiffs' proposal would subject transgender students to facially different treatment from all of their classmates. "Not only would" Plaintiffs' proposal "not serve the compelling interest that the School District has identified here, it would significantly undermine it." *Boyertown Area Sch. Dist.*, 897 F.3d at 530. Declining Plaintiffs' request to discriminate against transgender and gender-expansive students is "precisely tailored" to achieve its interest. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988). Every instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992). By seeking to refer to students by their names but not pronouns consistent with their gender identity, Plaintiffs ignore the stigma that would result from such a practice. A teacher that uses a student's name but no pronouns treats that student differently from all other students in the class. Equal treatment of *all* students requires that Plaintiffs use pronouns consistent with their gender identities. "Adopting the [Plaintiffs'] position would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school." *Boyertown Area Sch. Dist.*, 897 F.3d at 527–31; *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 593 (6th Cir. 2018), *aff'd sub nom. on other grounds Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) ("declin[ing] to hoist automatically [employer's] religious interests above other compelling governmental concerns" where employee would be harmed by employer's discriminatory practices and there is a "compelling interest in eradicating and remedying such discrimination").

IV. The Nondiscrimination Policy Offers Clear Instructions And Does Not Violate Plaintiffs' Due Process Rights.

Plaintiffs allege that the Nondiscrimination Policy violates Article I, Section II of the Virginia Constitution,¹⁶ by failing to give a person of ordinary intelligence a reasonable opportunity to know the scope of prohibited conduct. PI 13–14. But there is no risk that the Nondiscrimination Policy will “trap the innocent by not providing fair warning” of prohibited conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Plaintiffs claim the Policy does not define “gender-expansive.” PI 14. But they then acknowledge the Virginia Department of Education’s Model Policies, cited by the Nondiscrimination Policy, clarify the definition and scope of this phrase. *See* Regulation 8040, Ex. 3. Even if Plaintiffs are unsatisfied with that definition, that does not render the Policy unconstitutionally vague, as courts “may resort to ordinary meaning and common sense, considering whether the statute ‘conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.’” *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012) (quoting *United States v. Petrillo*, 332 U.S. 1, 8 (1947)).

Moreover, if Plaintiffs are unsure of whether to respect a particular student’s pronouns, they can always seek clarification from the school administration. For example, Plaintiffs’ renewed request for a TRO in this case was prompted by an email from the school guidance counselor informing Ms. Wright that she should refer to a student in her class with he/him or they/them pronouns. There is nothing vague about the guidance counselor’s message. Such guidance easily

¹⁶ Article I, Section II’s due process guarantees are “co-extensive” with the due process protections embedded in the United States Constitution’s Fifth and Fourteenth Amendments. *Shivaee v. Commonwealth*, 270 Va. 112, 119–20 (2005).

meets the lower degree of precision required in crafting civil statutes, *Manning v. Caldwell*, 930 F.3d 264, 272 (4th Cir. 2019), particularly as school administrators have “greater leeway when crafting school policy than legislatures.” *Hardwick ex. rel. Hardwick v. Heyward*, 711 F.3d 426, 442 (4th Cir. 2013).

Further, Plaintiffs overlook the usage of “gender-expansive” by judges and others in public life. For example, the Fourth Circuit has explained that “[g]ender-expansive” students have a broader understanding of gender that does not operate on a rigid “binary [of] male or female.” *Grimm*, 972 F.3d at 596. Given the definition and usage of the terms, a “practical” evaluation establishes that a person of common intelligence could understand this phrase. *See, e.g., United States v. Biocic*, 928 F.2d 112, 114 (4th Cir. 1991) (establishing that the test for vagueness “is necessarily a practical rather than hypertechnical one”). While Plaintiffs make conclusory statements about this phrase’s ostensible vagueness, they fail to explain *how* and *why* it is likely to deny reasonable notice, ignoring that the Policy is based on the Model Policies and uses similar language to numerous nondiscrimination measures across Virginia and the country.

Plaintiffs also suggest that *any* nondiscrimination policy that prohibits sex discrimination and gender identity discrimination is unconstitutionally vague, as the prohibitions are “inherently in conflict.” Am. Compl. ¶ 238. Rather than being at loggerheads, these protections work together to counter connected forms of animus. *See, e.g., Bostock*, 140 S. Ct. at 1743 (“[T]o discriminate against [people] for being . . . transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”). The Fourth Circuit likewise rejected Plaintiffs’ argument as a matter of black-letter law, recognizing that gender identity-based discrimination is a type of sex-based discrimination. *Grimm*, 972 F.3d at 616. Indeed, Plaintiffs’ argument seemingly would invalidate nondiscrimination ordinances and laws across the country

that protect against sex and gender-identity discrimination—including the state law of Virginia. *See, e.g.*, Va. Code Ann. § 2.2-3900 (safeguarding “all individuals within the Commonwealth from unlawful discrimination because of . . . sex . . . [and] gender identity . . . ”).

CONCLUSION

Plaintiffs’ motion for a preliminary injunction or temporary restraining order should be denied, and claims five through nine of their Amended Complaint should be dismissed.

Date: October 13, 2021

Respectfully submitted,



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I certify that on October 13, 2021, I served the foregoing by email and by mailing a true and correct copy of the same to:

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