IN THE
SUPREME COURT OF VIRGINIA

Record No. 211061

PETER VLAMING,

Plaintiff-Petitioner,

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-Respondents.

BRIEF OF AMICUS CURIAE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONER PETER VLAMING

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INTEREST OF AMICUS CURIAE

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center is interested in this case because the freedom of speech is a core value vital to a free society. To that end, the Liberty Justice Center has long represented clients seeking to protect their First Amendment rights. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). *Janus*, like the current case before this Court, involved the government attempting to compel speech. As the Supreme Court stated in *Janus*, it is "always demeaning" when the government coerces individuals into betraying their convictions and thus, cannot be "casually allowed." *Id.* at 2464.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

ASSIGNMENTS OF ERROR

Amicus adopts Petitioner's assignments of error and focuses this brief on Assignment of Error 2 (Preserved at J.A. 325, 327):

> The trial court erred by dismissing Vlaming's state constitutional free-speech claims (Claims 1–3) because he sufficiently alleged the School Defendants fired him for declining to express a viewpoint he disagreed with on an issue of public concern.

SUMMARY OF THE ARGUMENT

There are certain types of speech restrictions that are especially disfavored in free speech law. Among those are restrictions on speech based on its viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination."). Another category, which is Amicus's focus here, are laws compelling speech. *Janus*, 138 S. Ct. at 2464 ("When speech is compelled, however, additional damage is done.").

Under the Constitution of the Commonwealth of Virginia, government attempts to compel speech, like those Petitioner Peter Vlaming challenges here, are uniquely pernicious violations of free speech. This is so for three reasons. First, compelled speech is uniquely

harmful because it coerces thought and invades one's freedom of thought. Second, this invasion of an individual's freedom of thought extinguishes liberty because freedom of thought is at the heart of what it means to be free. Third, invading freedom of thought undermines democracy.

The public-school setting of this case only amplifies the already egregious nature of compelled speech because it "strangle[s] the free mind at its source." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Compelling the speech of teachers has the negative externality of teaching this Nation's budding citizens that free thought is not valued. It also deprives them of the types of teachers that can help them grow into free thinkers themselves. The result will be students who lack the spirit of liberty that characterized previous generations of Americans. Not only that, but they will also grow up less informed and equipped to participate in democracy as adults. Not surprisingly, the U.S. Supreme Court has said repeatedly that "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969); *Barnette*, 319 U.S. at

637. Therefore, Petitioner Peter Vlaming's speech rights should be protected here and the lower court reversed.

ARGUMENT

Compelling public-school teachers to utter pronouns against their will is a uniquely pernicious violation of free speech rights.[1]

A. Standard of Review.

Amicus adopts Petitioner's statement of the standard of review for Assignment of Error No. 2.

B. Compelling speech is an egregious free speech violation because it invades freedom of thought.

1. The Commonwealth of Virginia led the Nation in opposing speech restrictions because they harm freedom of thought.

The history of the First Amendment and Virginia's Constitution reveals a special concern that speech regulations ultimately invade freedom of thought. Indeed, from the very beginning of its history, Virginia has viewed speech and thought as one and the same. Virginia led the resistance to the federal Sedition Act of 1798, which made it illegal to "write, print, utter or publish . . . any false, scandalous and malicious writing . . . with intent to defame the . . . government" or "to

[1] Assignment of Error No. 2.

stir up sedition within the United States.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-74 (1964). In response, Virginia's General Assembly passed the Virginia Resolutions of 1798—which Thomas Jefferson and James Madison drafted—denouncing the Sedition Act as unconstitutional and declaring it null and void. *Id.* at 274.

James Madison then drafted his Report on the Virginia Resolutions defending the resolutions' legitimacy. *Id.* at 274-75. In arguing that the federal government lacked the power to police seditious speech, he referred to both "liberty of conscience" and "freedom of the press." James Madison, *Rep. on the Va. Resolutions reprinted in* 1 THE FOUNDERS CONSTITUTION Chp. 8, Doc. 42 (Philip B. Kurland & Ralph Lerner (eds. 1986)).[2] He argued that "[t]he liberty of conscience and the freedom of the press were equally and completely exempted from all authority whatever of the United States." *Id.* He then concluded that the Sedition Act was especially dangerous because it "legislates on the freedom of the press," which establishes "a precedent that may be fatal to the liberty of conscience." *Id.* Thus, he saw a close connection

[2] https://press-pubs.uchicago.edu/founders/documents/v1ch8s42.html.

between freedom of speech and freedom of thought (or "liberty of conscience," as Madison called it).

Not only that, Virginia's view that speech and thought are interrelated was evident when it rejected a state tax to support churches and adopted the Virginia Bill for Religious Liberty. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-12 (1947). In Madison's Memorial and Remonstrance, he argued against the tax based on the principle that a free society requires that "the minds of men always be wholly free." *Id.* "Madison's Remonstrance received strong support throughout Virginia" and the tax bill "died in committee." *Id.* Instead, Virginia adopted Thomas Jefferson's Virginia Bill for Religious Liberty. *Id.* Its preamble shows that Jefferson viewed compelled contributions as invading freedom of thought because he argued that "'Almighty God hath created the mind free'" and the "statute itself" prohibited compelled financial support of churches. *Id.* Thus, the U.S. Supreme Court was correct to observe in *Barnette* that the "objection" to compelled speech is "an old one, well known to the framers of the Bill of Rights." *Barnette*, 319 U.S. at 633.

And the efforts of Virginians like James Madison and Thomas Jefferson and Virginia itself shaped the modern First Amendment. *See Everson,* 330 U.S. at 11-12; *New York Times Co.*, 376 U.S. at 276; *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 790 (1961) (Black, J., dissenting) ("These views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment."). What is striking about these efforts is that they viewed restrictions on speech, including compelled speech, as especially dangerous because they invaded freedom of thought.

2. U.S. Supreme Court precedent also views compelled speech as an especially pernicious free speech violation because it compels thought.

U.S. Supreme Court precedent accords with Virginia's early concerns that compelled speech is especially dangerous because it invades freedom of thought. This is particularly relevant because the state constitution's protection of free speech is generally "coextensive" with the First Amendment. *Elliott v. Commonwealth*, 267 Va. 464, 473, 593 S.E.2d 263, 269 (2004).

In *Barnette*, the Court reasoned that compelling speech erodes "individual freedom of mind." 319 U.S. at 637. The Court concluded that

compelling students to salute the American flag "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

The Court's subsequent compelled speech cases echo the theme that compelling speech coerces thought. In *Wooley v. Maynard*, the Court held that a state compelling a motorist to have the state motto on his license plate violated the First Amendment's ban on compelled speech. 430 U.S. 705 (1977). The Court echoed *Barnette* by reiterating that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 637 (quoting *Barnette*, 319 U.S. at 645).

And in *Abood v. Detroit Board of Education*, the Court held that compelling a public school teacher to fund a union's political activities was unconstitutional compelled speech. 431 U.S. 209 (1977), *overruled on other grounds by Janus*, 138 S. Ct. at 2448. *Abood* cited freedom of thought for its rationale. It reasoned that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his

mind and his conscience rather than coerced by the State." *Id.* at 234-35.

Most recently, in *Janus*, the Court reiterated that compelled speech is uniquely harmful because it invades freedom of thought. It explained that compelling speech forced "free and independent individuals" individuals into "betraying their convictions." 138 S. Ct. at 2464. As a result, the Court held that compelling government employees, including public school teachers, to support a union in any capacity "seriously impinges on First Amendment rights" and therefore "cannot be casually allowed." *Id.* at 2464.

3. Protecting against compelled speech for the sake of freedom of thought is warranted because of the power speech has on thought.

The concern that compelled speech is especially dangerous because it invades freedom of thought is well-founded. There is a strong connection between words and thought. John Locke wrote: "Words in their primary or immediate signification, stand for nothing but the ideas in the mind of him that uses them." Patrick J. Connolly, *John Locke (1632-1704)*, Internet Encyclopedia of Philosophy.[3]

[3] https://iep.utm.edu/locke/.

George Orwell's dystopian novel *1984* puts this connection between speech and thought on vivid display. There, the government created a new language called "Newspeak" to control the citizens of Oceania. George Orwell, *1984* 286 (1949). The language's "purpose was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of [English Socialism], but to make all other modes of thought impossible." *Id.* Its inventors hoped that it would make a "heretical thought . . . literally unthinkable." *Id.* "This was done partly by the invention of new words, but chiefly by eliminating undesirable words and by stripping such words as remained of unorthodox meanings, and so far as possible of all secondary meanings whatever." *Id.* at 286-87. Thus, Newspeak's vocabulary "grew smaller" each year because "the smaller the area of choice, the smaller the temptation to take thought." *Id.* at 295.

For example, "[t]he word free" was only used in the sense of "[t]his dog is free from lice" and "could not be used in its old sense of "politically free" because that concept "no longer existed . . . ." *Id.* at 287. And the Newspeak "vocabulary consisted of words which had been deliberately constructed for political purposes" and "were intended to

impose a desirable mental attitude upon the person using them." *Id.* at 290. Other Newspeak words were not intended "to express meanings but instead to destroy them." *Id.* at 291. Thus, "Newspeak was designed not to extend but to *diminish* the range of thought . . . ." *Id.* at 287 (emphasis in the original).

Orwell's account, although fictional, illustrates how the power to compel speech is the power to control thought and why compelled speech is especially pernicious.

C. Compelled speech is especially pernicious because destroying freedom of thought extinguishes liberty.

Given the power of compelled speech on freedom of thought, compelled speech is especially pernicious because coercing thought enslaves the individual.

Indeed, Virginia strongly opposed the Sedition Act because of its view that destroying freedom of thought extinguishes what it means to be free. In defending Virginia's Resolutions denouncing the Sedition Act, Madison said that "liberty of conscience" is an "essential right." Madison*, Rep. on Va. Resolutions*, *supra*. And in writing his Memorial and Remonstrance against a proposed Virginia state tax to support churches, Madison invoked freedom of thought. Madison, *Memorial and*

Remonstrance Against Religious Assessments, Nat'l Archives.[4] He stated that "[r]eligion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." *Id.*

Likewise, Jefferson viewed freedom of thought in terms of an inalienable natural right by stating in his religious liberty bill that "Almighty God hath created the mind free." *Everson*, 330 U.S. at 13. He also condemned coerced thought in the strongest terms when he said in a letter to Benjamin Rush: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man." *Letter from Thomas Jefferson to Benjamin Rush, 23 September 1800*, Nat'l Archives.[5]

Not surprisingly, the Supreme Court has called "freedom of belief" an "absolute" right. *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940)). The Court explained in *Barnette* that coerced thought is something for which "history indicates a disappointing and disastrous end." *Id.* at 637. The

[4] https://founders.archives.gov/documents/Madison/01-08-02-0163.
[5] https://founders.archives.gov/documents/Jefferson/01-32-02-0102.

Court explained that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Id.* at 641. And "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Id.* The Court also noted that coercing thought destroys the individual by invading his or her "sphere of intellect and spirit." *Id.* at 642.

Janus applied and built on these principles when it reiterated *Barnette's* statement that compelled speech is even worse than prohibiting speech. *Id.* (quoting *Barnette*, 319 U.S. at 633). *Janus* explained that compelled speech does the "additional damage" of coercing individuals into "betraying their convictions." *Id.* The Court noted that forcing "free and independent individuals" to do this is "always demeaning." *Id.*

Cases outside the First Amendment context support this idea too. In *United States v. Nobles*, the Court explained that the privilege "against compulsory self-incrimination is an 'intimate and personal one,' which protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.'" 422 U.S. 225, 233 (1975). Thus, the heart of what it means to be free is freedom of

thought, and compelled speech is especially pernicious because it directly assaults that freedom.

D. Compelled speech is a uniquely pernicious free speech violation because coercing thought undermines democracy.

Compelling speech, and thereby invading freedom of thought, also undermines democracy. Madison defended the Virginia Resolutions by citing democracy as a reason for protecting speech and what he called "liberty of conscience." Madison, *Rep. on Va. Resolutions*, *supra*. He argued that democracy requires citizens to examine "public characters and measures" so that democratic outcomes reflect the will of the people. *Id.* This examination requires "free communication" on those subjects and it "is the only effectual guardian of every other right." *Id.*

And as the U.S. Court of Appeals for the Sixth Circuit recently explained, "[i]t should come as little surprise, then, 'that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed.'" *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (quoting *Janus*, 138 S. Ct. at 2471 & n.8). The Sixth Circuit continued: "Why? Because free speech is 'essential to our democratic form of government.'" *Id.*

(quoting *Janus*, 138 S. Ct. at 2464). The court concluded that "[w]ithout genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Id.*

Today, the Supreme Court often cites democracy as a reason to protect speech and thought. In *Janus*, the Court concluded that "[w]henever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines [democracy]." 138 S. Ct. at 2464. In *Mahanoy Area Sch. Dist. v. B.L.*, the Court reiterated that "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" 141 S. Ct. 2038, 2046 (2021). It added that "[t]his free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Id.*

Thus, both the federal and state constitutions prohibit compelled speech because it erodes freedom of thought, which then undermines democracy. It is for this reason that compelled speech is especially suspect under federal and state law.

E. The public-school context only amplifies the uniquely pernicious violation that compelled speech is.

That Petitioner Vlaming's failure to utter the government's preferred message in this case occurred within the K-12 education context is more of a reason to protect his silence, not less. *See Mahanoy Area Sch. Dist.,* 141 S. Ct. at 2046; *Tinker*, 393 U.S. at 506; *Barnette*, 319 U.S. at 637; *Meriwether*, 992 F.3d at 505. The public-school setting amplifies two of the unique harms which flow from compelled speech and thought.

First, the damage that compelled speech inflicts on freedom of thought prevents public school students from developing into free and independent individuals. The seminal case on compelled speech (*Barnette*) occurred in a public school, and the Court held that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual." 319 U.S. at 637. The Court emphasized the importance of freedom of thought in public schools by stating that government must not "strangle the free mind at its source." *Id.* It also reasoned that compelling speech teaches "youth to discount important principles of our government as mere platitudes" given that the government is not living out constitutional principles in practice. *Id.*

So too here. If students see the government override teachers' freedom of thought in practice through compelled pronoun usage, students will learn that freedom of thought is not highly valued. Restricting teachers' speech in this way will teach students that there are certain ideas that are essentially "thoughtcrimes," which will "strangle the freed mind at its source." *Id.* Indeed, compelling pronouns essentially changes the language "to diminish the range of thought" and make it impossible for students to think certain thoughts. Orwell, *supra*, at 287.

And terminating a teacher for not using pronouns deprives students of teachers who think freely. But under *Barnette's* reasoning, those are exactly the types of teachers that we want teaching future citizens so that they too will learn how to think freely. Indeed, having people acting as mere robots of the state would teach public-school students to also be robots, given that "[a] student is not above the teacher, but everyone who is perfectly trained will be like his teacher." *Luke* 6:40 (New Am. Standard Version).

Not surprisingly, then, *Tinker* confirms that teachers have free speech rights in public school too, stating that "[i]t can hardly be argued

that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. *Tinker* also supports strong protections for public-school teachers' and students' freedom of thought with its statement that "state-operated schools may not be enclaves of totalitarianism." *Id.* at 511. *Tinker* also reasoned that "students may not be regarded as closed-circuit recipients." *Id.* This implies the same for teachers, given that students learn to think freely from teachers who think freely.

Second, the public-school context of this case also amplifies the harms of compelled speech because schools are training grounds for democracy. In *Tinker* the Supreme Court stated: "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" 393 U.S. at 512. The Court explained that "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). It emphasized that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* at 512.

Additionally, Justice Breyer's recent majority opinion in *Mahoney* explains that "America's public schools are the nurseries of democracy." 141 S. Ct. at 2046. *Id.* And democracy only works if the marketplace of ideas is robust. *Id.* Given that the marketplace of ideas requires the protection of unpopular ideas to thrive, Justice Breyer explained that "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Thus, the public-school context amplifies the corrosive effects that compelling speech and thought has on democracy because it limits the types of ideas that students are exposed to. This increases the likelihood that they will grow up less informed and devoid of the critical thinking skills that produce a strong democracy.

This case highlights uniquely dangerous aspects of compelled speech in public schools. Compelling teachers to utter pronouns may seem a small matter to some, but *Meriwether* shows otherwise. 992 F.3d at 505. The court there explained that "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.* at

508. The court noted the university in that case wanted the professor to communicate the pronouns "to communicate a message: People can have a gender identity inconsistent with their sex at birth." *Id.* at 507.

This desire to compel a message is also a desire to compel thought, as the above-cited authorities show. Specifically, the fictional government in *1984* changed and eliminated words "not to extend but to *diminish* the range of thought." Orwell, *supra*, at 287 (emphasis in original). Indeed, the rise of words like "birthing people," "pregnant people," and pronouns like "ze" is a type of "Newspeak" seen in *1984*. Jessica Bennet, *She? Ze? They? What's in a Gender Pronoun*, N.Y. Times (Jan. 30, 2016);[6] Molly Kaplan, *The Culture War Over "Pregnant People,"* The Atlantic (Sept. 17, 2021).[7] The aim of compelling the use of such words is to "impose a . . . mental attitude upon the person using them" that the government considers "desirable." Orwell, *supra*, at 290. This compulsion seeks to gain a "linguistic supremacy" over those who believe that sex (male and female) is biological and immutable. Massjid

[6] https://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html.
[7] https://www.theatlantic.com/politics/archive/2021/09/pregnant-people-gender-identity/620031/.

Nawaz, *Jordan Peterson: Why I Refuse to Use Special Pronouns For Transgender People*, LBC (May 21, 2018).[8]

This purpose is on full display in this case given that Vlaming agreed not to call transgender students by pronouns that accorded with their biological sex. J.A. 010. Instead, he told the school that he would not use pronouns at all for transgender students. J.A. 014. Nonetheless, the school insisted that he use pronouns that did not accord with students' biological sex. J.A. 010-11, 015, 057, 063. Thus, it was not enough for Vlaming to be sensitive to students' feelings by not using pronouns. Only his complete capitulation to the school's view that its ideological view of transgenderism is morally right and true was enough for Vlaming to keep his job.

When government compels such "Newspeak," it is nothing less than an attempt to control thought, which carries with it the negative consequences of destroying the individual and what it means to be free. Such destruction of freedom of thought ultimately undermines our democracy. And, as explained above, treating Vlaming's refusal to say

[8] https://www.lbc.co.uk/radio/presenters/maajid-nawaz/jordan-peterson-why-i-refuse-to-use-special-pronou/.

the pronouns as a "Thoughtcrime" will have negative effects on the students in Virginia's public schools. Orwell, *supra*, at 19. Therefore, this Court should continue Virginia's venerated tradition of acting with "eternal hostility against every form of tyranny over the mind of man" by holding that the state constitution's free speech provisions protected Vlaming's refusal to utter the government's message.

CONCLUSION

The Court should reverse the lower court's decision and hold that the Virginia Constitution's free speech provisions protect the rights of teachers like Vlaming to think freely and lead their students to do the same by example.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the length requirement set forth in Rule 5:26(b) because it does not exceed 50 pages, excluding the cover page, table of contents, table of authorities, and certificates.

/s/ Jeffrey D. Jennings
Jeffrey D. Jennings
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on May 23, 2022, the foregoing was filed with the Clerk of the Supreme Court of Virginia via the Court's VACES system, and a copy was served on each of Defendants-Respondents' counsel by email the same day.

/s/ Jeffrey D. Jennings
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