VIRGINIA: IN THE CIRCUIT COURT FOR ROCKINGHAM COUNTY

DEBORAH FIGLIOLA, et al., Plaintiffs, v. **THE SCHOOL BOARD OF THE CITY OF HARRISONBURG, VIRGINIA,** Defendant.	**CASE NO. CL22-1304**

COMBINED REPLY
IN SUPPORT OF PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT AND TO STRIKE DEFENDANT'S JURY DEMAND

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INTRODUCTION

The Supreme Court has answered the legal questions here. School boards can't compel employees, over their objections, to refer to a student by pronouns that don't correspond with the student's sex. *Vlaming v. W. Point Sch. Bd.*, 302 Va. 504, 521–22 (2023). The opposition brief makes clear there are no disputed facts material to applying *Vlaming*. In it, the School Board concedes it told employees, in a training: (1) to "[a]sk[] preferred names and pronouns"; (2) to "[a]lways utilize a student's preferred name and pronouns"; and, (3) "if a student has not shared their choice of gender identity with their parents, 'it is not appropriate' for a teacher to proactively do so." (Def.'s Br. in Opp'n to Mot. for Summ. J. & to Strike the Jury ("Opp'n"), at 4 (filed Nov. 8, 2024) (quoting Compl. Ex. 3 at 6–8).) And it concedes this training arose from its nondiscrimination policy, which threatens discipline for noncompliance. (*Id.* at 2–3.)

Until the School Board says otherwise, a reasonable teacher would feel compelled to comply with those three directives. Yet the School Board has only disavowed enforcement of the first directive. At many points—in letters exchanged before this lawsuit, during discovery, and even when pressed by this Court—the School Board has refused to answer: Would it disavow enforcement of the other two directives? Its refusal to answer is no reason to deny summary judgment. The lack of clarity itself creates a sufficient threat of enforcement to establish Plaintiffs' claims—particularly on a request for a declaratory judgment.

Because nothing in the School Board's opposition creates a factual dispute relevant to *Vlaming*'s analysis, the Court should grant summary judgment for Plaintiffs.

ARGUMENT

I. *Vlaming* resolves this case in Plaintiffs' favor and nothing the School Board raises in its opposition changes that outcome.

The School Board can't escape the inevitable; *Vlaming* resolves this case. Its only real attempt to distinguish *Vlaming* is to point out that it arose in a different

procedural posture than this case. (Opp'n at 14.) But that difference only matters if the School Board can show a factual dispute material to *Vlaming*'s analysis. *See Thurmond v. Prince William Pro. Baseball Club, Inc.*, 265 Va. 59, 65 (2003) (disputes surrounding issues of fact not material to the conclusion of law did not preclude an award of summary judgment); *Smith Dev., Inc. v. Conway*, 79 Va. App. 360, 376–77 (2024) (parties' factual dispute was immaterial and did not preclude summary judgment).

Far from showing that, the School Board's concessions (*e.g.*, Opp'n at 2–4) show there are no factual disputes for the Court to resolve. Because of that, none of the procedural arguments or new factual material that the School Board offers in response make any difference. The Court should grant Plaintiffs' motion.

A. The School Board's concessions establish each element of Plaintiffs' free-speech claims under *Vlaming*.

Vlaming held that Virginia's Free Speech Clause protects the right of teachers "not to be compelled to give a verbal salute to an ideological view that violates his [or her] conscience and has nothing to do with the specific curricular topic being taught." 302 Va. at 568–69. Here, the only question is whether the undisputed facts demonstrate that the School Board has compelled Plaintiffs to speak. The School Board doesn't argue that the speech in question here has anything to do with a curricular topic—no surprise given *Vlaming*'s clear holding to the contrary. *Id.* at 572–74. (*See* Combined Mem. in Supp. of Pls.' Mots. for Summ. J. & to Strike Def.'s Jury Demand ("MSJ Br."), at 17–18.) And although the School Board briefly argues (Opp'n at 21) that there's a factual dispute about Plaintiffs' objections here, its argument misunderstands the compelled-speech test.

This is not a case like *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015). There, the plaintiff said he objected to an image on Oklahoma's license plates. *Id.* at 944. But the court determined, as a *factual* matter, that the image communicated a message different than the one claimed by the plaintiff. *Id.* at 960. And it determined

that the plaintiff didn't object to that message. *Id.* at 963. Here, by contrast, there can be no factual dispute about the message the School Board compels Plaintiffs to communicate. *Vlaming* held that requiring teachers to use "gender-identity-based pronouns involves a palpable 'struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.'" 302 Va. at 569 (quoting *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021)).

The very existence of this lawsuit—not to mention Plaintiffs' prelitigation correspondence with the School Board—leaves no doubt about their objection to that message. And the Board cites no authority showing that a compelled-speech claim requires demonstrating the "sincerity" of Plaintiffs' objection. (*See* Opp'n at 22.)

The only question, then, is whether the School Board has "coerced" Plaintiffs to speak. *See Vlaming,* 302 Va. at 568. Despite its contrary argument (*e.g.*, Opp'n at 17–18), the School Board has conceded enough facts for Plaintiffs to prove coercion. The School Board concedes that it amended its nondiscrimination policy, Policy 401, to include "gender identity," and that it may discipline employees for violating Policy 401. (*Id.* at 2.) It also concedes that the disciplinary consequences for violating Policy 401 include discharge. (*Id.* at 3.) It concedes that the amendments to Policy 401 led to staff training presentations, including the SOTS Presentation. (*Id.*) And it concedes that the SOTS Presentation contains the three directives challenged by Plaintiffs. (*Id.* at 4.) The School Board's brief to this Court, therefore, concedes sufficient facts to prove that a reasonable employee would feel compelled to comply with the three directives.

The School Board's statements to the Court cement that conclusion. It makes no attempt to answer the question posed by the Court in November 2022. (*See* MSJ Br. at 18–19 (quoting Nov. 2022 Hr'g Tr. 78:6–11, 78:17–79:1); *see also* Nov. 2022 Hr'g Tr. 79:16–18 (The Court: "How are teachers to know which of these materials they can follow or choose not to follow?").) Nor does it explain its willingness to expressly

disavow enforcing the directive to ask about names and pronouns, while refusing to extend the same disavowal to the other directives. (*See* MSJ Br. 19–20 (discussing Feb. 2023 Hr'g Tr. 9:13–18).) The School Board's refusal, even when directly and repeatedly asked, to disavow enforcement of the remaining two directives undermines its claim that it "has flatly denied Teachers' allegation that they are required to engage in any speech." (Opp'n at 17.)

None of the decisions cited by the School Board involved a situation like this, where an employee challenged instructions received in an on-the-job training linked to a policy expressly providing for discipline, including termination. For example, in *Henderson v. Springfield R-12 School District*, 116 F.4th 804 (8th Cir. 2024), *vacated, pet. for reh'g en banc granted*, No. 23-1374 (Nov. 27, 2024), contrary to the compelled-speech theory in that case, the school district never "state[d] or insinuate[d] that an employee's silence or dissenting views would be considered 'unprofessional' and a basis to deny credit for attendance at the training." *Id.* at 811. Similarly, in *Ibanez v. Albemarle County School Board*, 80 Va. App. 169 (2024), the Court of Appeals held that the challenged policy was "silent about any disciplinary consequences," unlike Policy 401 in this case. *Id.* at 213. *But see id.* at 227–28 (Humphreys, J., partially dissenting) (determining plaintiffs had stated a viewpoint-discrimination claim); *id.* at 259 (Beales, J., partially dissenting) (same, compelled speech).

And unlike those cases, where a school board had not "threatened or actually punished" anyone, the School Board has threatened discipline here. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005). The School Board concedes that the SOTS Presentation is part of implementing Policy 401, violations of which can lead to termination. (Opp'n at 3.) Until it disavows enforcement of that policy, the threat to Plaintiffs remains.

B. None of the School Board's counterarguments undermine the conclusion that *Vlaming* settles the legal dispute here.

The School Board acknowledges that Plaintiffs "appear to appreciate" the procedural requirements for summary judgment in Virginia. (Opp'n at 11–12.) But it proceeds to lodge a series of evidentiary attacks on Plaintiffs' motion. Yet none of its arguments can change the fact that it has conceded all the facts necessary to grant summary judgment for Plaintiffs on their compelled-speech claims.

First off, there's no question that responses to requests for admission are permissible for consideration on summary judgment. *State Farm Mut. Auto. Ins. Co. v. Haines*, 250 Va. 71, 76–77 (1995). (*See* Opp'n at 13.) And though the Board objected to Plaintiffs' requests for admission, it also responded to each request. (Def.'s Ex. G at 2–8.) In those responses, it both "denied" that employees *can* be disciplined for not following the directives and said it could "neither be admitted nor denied" whether employees *cannot* be disciplined. (*Id.*) That refusal to give an answer illustrates that the School Board still hasn't disavowed enforcement against Plaintiffs.

Next, the School Board offers no substantive response to its in-court admissions, through counsel, refusing to disavow enforcement of the two remaining directives against Plaintiffs. (*See* MSJ Br. 18–20 (detailing those admissions).) Instead, it argues that the Court should disregard those admissions. (Opp'n at 12–13.) But Virginia courts have held that an attorney's statement can concede a fact in question. *See Hall v. Commonwealth*, No. 1664-12-1, 2013 WL 4053219, at *3 (Va. Ct. App. Aug. 13, 2013) ("[A] party can concede a fact, ... and so, too, can a party's attorney." (citations omitted)); *Clary v. Commonwealth*, No. 3010-00-2, 2002 WL 1056371, at *2 (Va. Ct. App. May 28, 2002) (holding that "attorney's statement at trial ... establishes [a] fact on appeal"). Nothing cited by the School Board is to the contrary. *See Jones v. Ford Motor Co.*, 263 Va. 237, 254 (2002) (holding that putative admission was "illusory," and "incomplete and inconclusive"); *Va.-Carolina Chem. Co. v. Knight*, 106 Va.

674, 677–78 (1907) (rejecting argument that attorney's letter summoning witnesses to testify "was admissible as an admission on the part of the attorneys that the witnesses named were employ[ee]s of the defendant").

In addition to attacking Plaintiffs' reliance on admissions as summary-judgment evidence, the School Board makes its own affirmative evidentiary arguments. It contends that developments since the filing of the lawsuit enable it to evade *Vlaming*. But none of these developments undercut the threat of discipline against Plaintiffs.

For one thing, the mere existence of a new "Accommodation Policy" is beside the point. (Opp'n at 18–19.) The School Board has known about Plaintiffs' objections—including the specific directives to which they object—for years now; first, from letters exchanged prior to the lawsuit, and then consistently throughout this lawsuit. (*See* Feb. 2023 Hr'g Tr. 17:20–18:24.) Yet it has not reached out to offer them an accommodation. And when the topic of an accommodation arose in a prior hearing before the Court, the School Board would not say whether it would accommodate Plaintiffs. (*See id.* at 25:11–24.)

The Board's noncommittal attitude towards accommodating Plaintiffs distinguishes this case from those it cites. In both those cases, the school had *actually offered* an accommodation to the plaintiffs. *See Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 556–57 (10th Cir. 1997); *Grove v. Mead Sch. Dist. No 354*, 753 F.2d 1528, 1533 (9th Cir. 1985). Here, by contrast, the School Board has offered the mere *possibility* that it might grant someone an accommodation. And, as a belated litigation tactic at that. It does nothing to lessen the threat that Plaintiffs face.

Finally, the School Board's "Supporting ALL Students: Refresher Training" about the directives does not remove the existing threat of discipline that Plaintiffs face. (Opp'n at 6–8, 19.) This new training contains the same directives as the SOTS Presentation, with the inclusion of new qualifiers. So the directive to "[a]lways utilize

a student's preferred name and pronouns" (Compl. Ex. 3 at 7), has become a directive to "[u]tilize a student's chosen name and pronouns" (Def.'s Ex. E at 14). But this still includes a directive to "[u]se chosen names and pronouns" among other "Practices to Implement." (*Id.* at 13.) It includes no indication that this directive is optional. (*See id.* at 16 ("A student's preferred name and gender should be affirmed at school when requested.").)

On the directive surrounding communication with parents, while the emphasis on the student's confidentiality remains, the presenter's notes for the slides appear to indicate that employees will not be required to lie or withhold information from parents about their child's use of "preferred" names and pronouns at school. (*Id.* at 16–17.) But the guidance to "[b]e honest in response to the parent's question" doesn't fully address Plaintiffs' concerns. (*Id.* at 17.) For example, Mrs. Figliola has described how the School Board instructed her to complete paperwork in a "deceptive" manner so parents would remain unaware that their children had asked the school to change their names or pronouns. (Def.'s Ex. I ¶¶ 18–20.) If the School Board continues to train teachers in a similar manner, then parents won't even know to ask whether the school is using different names or pronouns for their children.

In addition to it not removing the threat of discipline Plaintiffs face, the new training does not remedy the violation of Plaintiffs' rights that have already occurred. And to the contrary, its introduction acknowledges the School Board's recognition that Plaintiffs' concerns need to be addressed.

Neither this new training nor anything else the School Board cites can change the fact that it has conceded facts sufficient to establish Plaintiffs' compelled-speech claim under *Vlaming*. And the School Board makes no effort to show that its directives would satisfy strict scrutiny—or any other standard of review. As a result, the Court should grant summary judgment for Plaintiffs.

II. For similar reasons, the School Board has not created any issues of fact material to Plaintiffs' VRFRA claims.

As in *Vlaming*, the facts here establish both successful compelled-speech claims and successful claims under VRFRA. *See* 302 Va. at 541, 559. The only unique argument the School Board makes under VRFRA is about the sincerity of Plaintiffs' religious beliefs. (Opp'n at 22.) But it offers no evidence putting their sincerity into dispute. A genuine dispute of material fact cannot be so easily manufactured to preclude summary judgment. Additionally, the Board's focus on sincerity under VRFRA highlights that sincerity is not an element of Plaintiffs' compelled-speech claim. *Vlaming*, 302 Va. at 568.

The School Board's other VRFRA argument also relies on its new Accommodation Policy. But the existence of that policy, standing alone, can no more defeat Plaintiffs' VRFRA claim than it could defeat their compelled-speech claim. *See supra* p. 6.

III. The School Board does not even address Plaintiffs' entitlement to declaratory relief.

Along with entitling Plaintiffs to summary judgment on the merits of their compelled-speech and VRFRA claims, the undisputed facts demonstrate that the Court should render a declaratory judgment for Plaintiffs. Although Plaintiffs included this request under a separate heading of their opening brief (MSJ Br. at 26–28), the School Board entirely fails to address this argument. That failure at least partly stems from the Board's continued misunderstanding of *Vlaming*. It has consistently focused on the fact that, in that case, "the school ultimately terminated the teacher." (Opp'n at 15.) But the purpose of declaratory judgment actions is to grant relief before an injury like a termination occurs. *Pure Presby. Church of Wash. v. Grace of God Presby. Church*, 296 Va. 42, 55 (2018). Because there is a concrete dispute between Plaintiffs and the School Board, and *Vlaming* settles the legal questions in Plaintiffs' favor, this Court should render a declaratory judgment for Plaintiffs.

IV. The School Board does not identify fact questions for a jury to decide.

Plaintiffs' claims do not entitle the School Board to a jury trial. As it acknowledges, a declaratory-judgment action "can proceed in law or at equity." (Opp'n at 23.) As Plaintiffs already explained (MSJ Br. at 29), the Declaratory Judgment Act—including Virginia Code § 8.01-188—"does not provide a party in a declaratory judgment suit a separate right to a binding jury verdict." *Angstadt v. Atl. Mut. Ins. Co.*, 254 Va. 286, 292 (1997). Whether a party has a right to a jury trial depends on whether the underlying claims are legal or equitable. *See Wright v. Castles*, 232 Va. 218, 222 (1986). And Plaintiffs have also already explained why their declaratory-judgment claims are best characterized as equitable instead of legal. (MSJ Br. at 29–30.) But the School Board offers no response. (*See* Opp'n at 23–24.)

Similarly, Plaintiffs explained why their nominal-damages request does not entitle the School Board to a jury trial. (MSJ Br. at 30–32.) But the School Board refuses to engage with that explanation. Instead, it accuses Plaintiffs of "provid[ing] no authority" for the point. (Opp'n at 24.) Not only does that fail to refute Plaintiffs' point, it's wrong. The Court of Appeals' decision in *Sainani v. Belmont Glen Homeowners Ass'n* supports Plaintiffs' argument. *See* Record No. 0049-23-4, 2024 WL 157551 (Va. Ct. App. Jan. 16, 2024). If a plaintiff can "always recover nominal damages without furnishing any evidence of actual damages," as *Sainani* held, *id.* at *10 (citation omitted), then there is no damages question for the jury to decide.

Finally, the School Board claims that, because the Court has already scheduled this case for a jury trial, Plaintiffs have lost their chance to object. (Opp'n at 24.) But Plaintiffs properly noted their objection to the Pretrial Scheduling Order and filed a separate motion as instructed by the Court. (*See* Pretrial Scheduling Order at 6 (filed Aug. 1, 2024) (noting Plaintiffs' objection).) The School Board's argument that the entry of that order precludes Plaintiffs' motion to strike the jury demand ignores the Court's directions.

CONCLUSION

Plaintiffs respectfully ask this Court to grant their motion for summary judgment and render judgment against the School Board as detailed in that motion. Alternatively, Plaintiffs respectfully request that the Court grant their motion to strike the School Board's demand for a jury trial.

Dated: December 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2024, I caused the foregoing to be served by email on the following, who have agreed to accept service by email:

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