VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

BYRON TANNER CROSS, MONICA GILL, and **KIMBERLY WRIGHT,**

Plaintiffs,

v.

LOUDOUN COUNTY SCHOOL 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.

Case No. CL-21-3254

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The Loudoun County School Board (the "Board") has fully embraced a controversial and unscientific approach to students suffering with gender dysphoria and has now decided to force that approach on all members of the school community at the expense of fundamental constitutional rights. This court should quickly enjoin the Board's unlawful demand that teachers sacrifice their rights in service of a misguided ideology that will harm all students in Loudoun County.

In May, the Board took public comments on a proposed policy, Policy 8040 (the "Policy"), that would force teachers to deny basic biological facts contrary to science and their religious beliefs. When Tanner Cross respectfully asked the Board not to adopt the Policy, the Board suspended him in retaliation for his speech. Recognizing that "Plaintiff's speech was permissible, is encouraged and is free from governmental oppression," this Court enjoined Cross's suspension. 06/08/2021 Opinion Letter Granting Temporary Injunction at 6.

Unable to silence Cross's message, Defendants now seek to compel Plaintiffs to speak the Board's message. The Policy requires Plaintiffs, at the request of any "gender-expansive or transgender student," to "use the name and pronoun that correspond to [the student's] gender identity" rather than the student's sex. Amended Complaint, Ex. A at 1. But "titles and pronouns carry a message." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). Defendants want Plaintiffs to affirm that what makes a student a boy or girl is the student's assertion of being a boy or girl, and *not* biological sex.

Plaintiffs, like many of their fellow citizens, do not believe this. Rather, bound by their religious convictions and their own understanding of biology, Plaintiffs must speak a different message. Plaintiffs believe that human beings are a two-sexed species, that a person's sex cannot be changed, that a person's sex has a meaningful relationship with every aspect of personal development, that a person's

sex determines whether that person is male or female, and that a person's sex is given by God. Am. Complaint ¶¶ 76–86.

Plaintiffs and Defendants take a different position on one of the most fundamental questions human beings consider: "what am I?" The tradition of constitutional liberty in this Commonwealth "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1967). Defendants' Policy not only adopts an orthodoxy, it conscripts Plaintiffs to recite its tenets. Because no legitimate interest justifies this deprivation of liberty, Plaintiffs ask this Court to grant their motion for a preliminary injunction.

FACTS

Mr. Cross is a resident of Hamilton, Virginia and a teacher at Leesburg Elementary. Mr. Cross has worked in the field of education for fifteen years, spending four years at Rolling Ridge Elementary in the District and three years at Leesburg Elementary, where he still teaches. Am. Complaint ¶¶ 46-47. In addition to teaching, Mr. Cross has also served as the head coach for freshman football at Loudoun County High School. *Id.* at ¶ 48. Monica Gill is a resident of Hillsboro, Virginia and has been a teacher for twenty-six years, teaching history at Loudoun County High School for the past sixteen years. *Id.* at ¶ 53. Kimberly Wright is a resident of Leesburg, Virginia and has taught English at Smart's Mill Middle School for seventeen years. *Id.* at ¶ 58.

Plaintiffs understand from their training and long experience as educators, that children do not have a fully developed capacity to understand the long-term consequences of their decisions. *Id.* at ¶ 67. Plaintiffs are committed to serving their students' best interest. Plaintiffs understand the critical role parents play in a child's education and development. Consequently, Plaintiffs work to preserve the

right of parents to direct the upbringing and education of their children and keep the importance of parental involvement in mind as they work with their students. *Id.* at ¶¶ 69-71. Plaintiffs oppose school policies that hinder parental involvement in and direction of a child's education and development, especially in view of a child's inability to fully appreciate long-term consequences. *Id.* at ¶¶ 72-73.

Plaintiffs also seek to further the best interest of their students by telling them the truth. Plaintiffs understand, based on scientific evidence, that human beings have two anatomical sex presentations. *Id.* at ¶ 76. Plaintiffs understand that some people experience profound discomfort with their biological sex or believe that their sex is somehow inconsistent with their true identity. *Id.* at ¶ 140. Plaintiffs understand that this condition is called gender dysphoria, that it can present in different stages of life, that its causes and treatment are the subject of ongoing scientific debate, that mental health professionals agree that a diagnosis of gender dysphoria requires certain conditions to be met, and that treatment should not be prescribed before a diagnosis can be made. *Id.* at ¶¶ 139-142.

Plaintiffs also understand that gender dysphoria has medical and non-medical treatments, and that the appropriate course of treatment for gender dysphoria in adolescents is hotly debated. An example of nonmedical treatment is "social transition," in which a person uses names, pronouns, and social conventions associated with the person's gender identity rather than biological sex. Examples of medical treatments include puberty-blocking drugs, hormone replacement therapy, and sex-reassignment surgery. Yet another treatment for adolescents is watchful waiting coupled with counseling, as the overwhelming majority of adolescents who experience symptoms of gender dysphoria desist from those symptoms naturally over time. *Id.*

Plaintiffs believe that, because of the difficulty of assessing matters of gender identity and the long-term irreversible consequences of the medical treatments for

transgender-identifying people, children should not be encouraged to undertake social or medical transition because of their inability to assess long-term consequences. *Id.* at ¶¶ 140-141. Because the Policy's requirement of the use of names and pronouns and access to facilities is a requirement for social transition, Plaintiffs believe that the Policy harms children by requiring treatment "without any substantiating evidence"—that is, before any verification that the student meets any of the diagnostic criteria for gender dysphoria. *Id.* at ¶ 139. Moreover, because the Policy forces transition based on *no evidence*, it guarantees that students who would otherwise naturally desist will be pressured into conduct with harmful long-term consequences.

Plaintiffs also are Christians and they strive to act consistent with their faith at all times. *Id.* at ¶ 81. Plaintiffs have sincerely held beliefs about human nature, marriage, sexuality, morality, politics, and social issues rooted in their Christian faith. *Id.* at ¶ 82. Respecting sex and gender identity, Plaintiffs believe that God creates each person as male or female; that the two distinct and complementary sexes reflect the image of God; and that adopting a gender identity inconsistent with sex rejects God's image and design for a person and does harm to that person. *Id.* at ¶ 84.

Plaintiffs' faith commands them to tell the truth and not to tell lies. *Id.* at ¶ 85. Plaintiffs' understanding of both biology and their faith require them to use pronouns consistent with a person's biological sex since, to Plaintiffs, using pronouns inconsistent with biological sex would be lying. *Id.* at ¶ 86. Plaintiffs also believe speaking such lies would be harmful to the individual struggling with gender dysphoria.

Plaintiffs do not believe that every student or teacher in the District should have to accept their view of how best to show compassion to youth struggling with gender dysphoria or to act in accord with that view. But they also believe that

teachers should not be compelled to say things that they believe to be false and harmful to students. *Id.* at ¶ 79.

Based on their experience as educators, Plaintiffs believe that the Policy will do harm to students by encouraging social transition prior to diagnosis and without parental involvement. *Id.* at ¶ 139. Plaintiffs believe the Policy is harming teachers by compelling them to address students with pronouns inconsistent with biological sex. *Id.* at ¶ 130. And Plaintiffs believe the Policy will require them to violate their deeply held religious beliefs by speaking and affirming falsehoods. *Id.* at ¶ 85.

Plaintiffs wish to continue educating their students with the care and honesty they have always provided. Plaintiffs are willing to use any name that a student requests. Plaintiffs also are willing to refrain from using pronouns upon a student's request. But Plaintiffs cannot address a student or refer to a student using pronouns or other terms inconsistent with a student's biological sex. The Policy, however, requires Plaintiffs to do exactly that. It will force Plaintiffs to speak words they believe are false and harmful, and taken together with the Board's past treatment of Mr. Cross, chills them from speaking what their faith and understanding of science tells them is true.

ARGUMENT

This Court has authority to grant a temporary restraining order or preliminary injunction. Va. Code Ann. § 8.01-620. When determining whether to grant a temporary restraining order or injunction, this Court balances four factors: "(I) Is the movant likely to prevail on the merits of the case, (II) Is the movant likely to suffer irreparable harm absent such relief, (III) Does the balance of equities tip in favor of the movant, and (IV) Is the relief sought in the public interest." 06/08/2021 Opinion Letter Granting Temporary Injunction at 2. *See also Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *CG Riverview, LLC v. 139 Riverview, LLC*, 98 Va. Cir. 59 (2018). All four factors favor the Plaintiffs.

I. Plaintiffs are likely to prevail on the merits of their claims.

Plaintiffs are likely to prevail on the merits of their claims that Defendants are violating their constitutional rights to free speech, free exercise of religion, and due process of law by requiring them to use pronouns inconsistent with the biological sex of any requesting "gender-expansive or transgender" student.

A. Defendants are violating Plaintiffs' right to freedom of speech.

The Virginia Constitution states,

> the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; [and] that the General Assembly shall not pass any law abridging the freedom of speech or of the press.

VA. CONST. art. I, § 12. This protection "is coextensive with the free speech provisions of the federal First Amendment." *Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004). Thus, Virginia courts, though not bound by federal courts' First Amendment rulings, find them persuasive when interpreting the Virginia Constitution. *Id.*

Defendants are violating Plaintiffs' Article I, Section 12 right to freedom of speech through the Policy's requirement to use pronouns inconsistent with biological sex, and in so doing, to convey a message about the nature of human sex and identity that they do not wish to convey and that they believe to be false. *See* Am. Complaint ¶¶ 204–213. The constitutional protection of free speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Public employees remain free from governmental control of their speech so long as they are (1) speaking as a citizen on a matter of public concern, and (2) their interest in speaking outweighs Defendants' interest in restricting their expression. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968).

1. The Policy compels and restricts constitutionally protected speech.

The Constitution protects Plaintiffs' decision not to use pronouns inconsistent with biological sex, including in reference to students at public school. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). High school teachers retain constitutional protection in their "speech related to teaching." *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). *See also Adams v. Trustees of the Univ. of NC-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (recognizing *Lee's* application of the *Pickering* test to speech by high school teacher); *Piver v. Pender Cty. Bd. of Educ.*, 835 F.2d 1076, 1081 (4th Cir. 1987) (applying *Pickering* where high school teacher "allowed students to discuss the issue during class time; and he allowed a petition in support of [the issue] to be circulated in his class").

Plaintiffs maintain constitutionally protected speech interests in their "speech related to teaching," *Lee*, 484 F.3d at 694 n.11. The question, then, is whether Plaintiffs address a "matter of public concern" by refusing to parrot, through the use of certain pronouns, the Board's message that expressed identity, not biological sex, determines whether a person is male or female. *Pickering*, 391 U.S. at 574.

Plaintiffs readily meet that test. The "broad conception of 'public concern,'" *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001), encompasses anything that "can be fairly considered as relating to any matter of political, social, or other concern to the community," or "of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up). Speech only falls outside this "broad conception" when it addresses "personal grievances . . .

about conditions of employment" or "complaints of inter-personal discord." *Brooks v. Arthur*, 685 F.3d 367, 372 (4th Cir. 2012) (citations omitted).

The Supreme Court has already recognized that "gender identity" is "undoubtedly [a] matter[ ] of profound 'value and concern to the public.'" *Janus v. Am. Fed'n of State, Cty. & Mun. Employees*, 138 S. Ct. 2448, 2476 (2018). It did so while listing the "controversial subjects" public employee unions can address. *Id.* When it listed "sexual orientation and gender identity," the Court cited an article on how to teach LGBT issues in first grade. *Id.* at 2476 n.20. And it indicated that speech regarding gender identity (and other issues) is of "profound 'value and concern to the public,'" occupying "the highest rung of the hierarchy of First Amendment values" and meriting "special protection." *Id.* at 2476 (quoting *Snyder*, 562 U.S. at 452–53).

The Policy requires teachers to use pronouns inconsistent with biological sex. Both the Policy and opposition to it squarely deal with matters of public concern. *See Meriwether*, 992 F.3d at 508 ("[T]he use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern."). *See also, Seemuller v. Fairfax Cty. Sch. Bd.*, 878 F.2d 1578, 1583 (4th Cir. 1989) (teachers complaining "that a public school discriminates on the basis of sex," is of public concern); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979) (protesting racial discrimination is public concern); *Adams*, 640 at 565 (speaking out on matters like "academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality.").

2. Plaintiffs' interest in speaking outweighs Defendants' interests in enforcing the Policy against them.

Defendants may only limit Plaintiffs' constitutionally protected interest in their speech related to teaching where "the interest of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees" outweighs Plaintiffs' interest in speaking. *Pickering*, 391 U.S. at 568. Because Defendants' Policy compels Plaintiffs to speak, the government's interest must be especially high. This is because,

> [w]hen speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.

Janus, 138 S. Ct. at 2464 (quoting *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943)). No legitimate interest justifies Defendants' attempt to force Plaintiffs to speak a message about sex and gender they do not wish to speak.

Defendants may claim an interest in nondiscrimination. But Plaintiffs are willing to treat all students equally. The Policy does not allow for common ground. It could allow Plaintiffs not to use pronouns that convey a message they believe is false and harmful. Instead, it requires, "staff *shall . . . use* the name *and pronoun* that correspond to [the requesting student's] gender identity." Am. Complaint Exhibit A at 1.

Defendants may claim an interest in avoiding harassment. But Plaintiffs will continue to treat all students equally, with dignity and respect. Plaintiffs are willing to use a student's requested name. Plaintiffs only want to refrain from using pronouns that would convey a message they wish not to convey. This in no way constitutes unlawful harassment. *See Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 651 (1999) (defining harassment as conduct "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school").

Defendants may claim an interest in protecting the interests of trans-identifying students. But their Policy, which allows students to command teachers

to use pronouns inconsistent with their sex "without any substantiating evidence," goes far beyond this by requiring teachers to engage in a student's social transition even where the student has not met the diagnostic criteria for any condition. Am. Complaint at 139.[1] Rather than protecting the rights of trans-identifying students, the Policy harms students and violates Virginia law because it is not "in accordance with evidence-based best practices." Va. Code § 22.1-23.3.

Defendants may claim an interest in avoiding disruption. But Defendants can identify no specific evidence of disruption. Defendants can only point to the receipt of some email complaints about Mr. Cross's speech, none of which actually disrupted the school's operation. And the evidence shows that Defendants' allies were the ones soliciting these complaints[2]. "The mere 'fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' *Meriwether*, 992 F.3d at 511 (quoting *Tinker*, 393 U.S. at 508). *See also Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 355 (4th Cir. 2000) ("generalized and unsubstantiated allegations of 'disruptions,' and predictions thereof, must yield to the specific allegations" of the employee); *Piver*, 835 F.2d at 1081 (rejecting school's claim where, in "contrast to the weighty interests supporting Piver's speech, the school board asserted only a threat of 'turmoil' at the school").

Defendants may claim an interest in "foster[ing] an environment of inclusivity, acceptance, and tolerance." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 529 (3d Cir. 2018). But it is the Plaintiffs' solution that furthers an interest in inclusivity and tolerance, not the one-way approach required by the Policy. Indeed,

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[1] *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020) ("today's question is limited to how school bathroom policies implicate the rights of transgender students who '*consistently, persistently, and insistently*'" identify as transgender) (emphasis added).

[2] *See* https://dailycaller.com/2021/07/30/facebook-group-anti-racist-loudoun-county-gym-teacher-tanner-cross/ (last visited 8/20/21)

the questions surrounding the relationship between sex and gender and how public policy should address those questions have roiled the country, and Loudoun County in particular, in recent days. This makes it essential that the schools allow diverse views on these topics. "The classroom is peculiarly the marketplace of ideas. The 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." *Keyishian*, 385 U.S. at 603 (cleaned up).

Plaintiffs' interest in speaking on matters as fundamental as human identity, and their interest in avoiding the "additional damage" caused by being "coerced into betraying their convictions" dramatically outweighs any interest Defendants may attempt to invoke. *Janus*, 138 S. Ct. at 2464. Consequently, they are likely to prevail on their claims under Article I, § 12 of the Virginia Constitution.

B. Defendants are violating Plaintiffs' right to free exercise of religion.

The Virginia Constitution provides, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." VA. CONST. art. I § 16. For that reason, "[n]o man shall . . . be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief," and each person's religion "shall in no-wise diminish, enlarge, or affect their civil capacities." *Id.* At minimum, this prohibits the government from singling out any Virginian for disfavored treatment based on their religious views.[3] *See*

[3] In addition, the Virginia Constitution's free exercise clause is more protective than the interpretation of the federal Constitution's First Amendment currently allows. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1463 (1990) (discussing Virginia's unique free exercise clause). For the purposes of the instant motion, the neutrality requirement alone is sufficient to establish Plaintiffs' likelihood of prevailing.

Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) ("The Free Exercise Clause forbids even 'subtle departures from neutrality' on matters of religion.") (citation omitted). And, no "principled rationale for the difference in treatment of . . . two instances [can] be based on the government's own assessment of offensiveness." *Id.* at 1731.

Defendants, through their Policy and treatment of Mr. Cross, favor—indeed, mandate—the view that being male or female is a matter of self-determined identity and not sex. Defendants enforce that view through the Policy's pronoun mandate. And Defendants prohibit expressions of the alternate view, and any decision to refrain from using Policy-mandated pronouns, based on their assessment of the offensiveness of that decision. Defendants' decision to suspend Mr. Cross less than two days after expressing his opposition to the Policy before its adoption, along with Defendants' choice to require *use* of pronouns rather than allowing some accommodation, shows that the Policy is animated by hostility toward Plaintiffs' religious beliefs, rather than neutral pursuit of a legitimate governmental interest. Therefore, Plaintiffs are likely to prevail in showing that the Policy does not meet even the constitutional minimum for free exercise protection.

Plaintiffs also are likely to prevail on their claims under Va. Code § 57-2.02. Section 57-2.02(B) prohibits any "government entity" from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability." When the government imposes such a burden, it has the burden to "demonstrate[] that the application of the burden is essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest." *Id.*

The Policy substantially burden's Plaintiff's exercise of religion by forcing them to say what they believe is false. *See* Am. Complaint ¶¶ 235-242. Therefore, the burden shifts to the government to justify imposing the burden. Va. Code § 57-

2.02(B). The Policy fails both parts of the test. First, no legitimate governmental interest justifies the Policy's compulsion to speak the government's message. *See supra* Part I.A.2. Second, the Policy is not "the least restrictive means of furthering" any "compelling governmental interest," since an obviously less-restrictive means is available: let the Plaintiffs refer to students by their chosen names and refrain from using pronouns inconsistent with sex. Because Defendants have no compelling interest in compelling Plaintiffs to speak and because Defendants have ignored less-restrictive means of achieving any interests they have, Plaintiffs are likely to prevail on their claims under Va. Code § 57-2.02.

C. Defendants are violating Plaintiffs' right to due process of law.

Article I, Section 11 of the Virginia Constitution provides, "no person shall be deprived of his life, liberty, or property without due process of law." "Because the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." *Shivaee v. Commonwealth*, 613 S.E.2d 570, 573 (Va. 2005). If a law is so vague that it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," it contravenes the constitutional guarantee of due process of law. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The degree of specificity required depends on whether the law restricts constitutionally protected activity. Indeed, "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Since the Policy directly compels speech, it must meet the highest standard of specificity.

The Policy fails this standard. The Policy's required use of pronouns applies to "gender-expansive or transgender students." But neither the Policy nor the Virginia Department of Education's Model Policies define the term "gender-expansive."[4] In the absence of any definition, Plaintiffs have no clear expectation of which requests by students (including very young students) they must follow. The Policy therefore fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and violates Plaintiffs' right to due process of law. *Grayned*, 408 U.S. at 108.

II. Plaintiffs will continue suffering irreparable harm without an injunction.

Defendants' Policy is depriving Plaintiffs of their rights to speak, act consistently with their sincere religious beliefs, and to understand what their state employer requires of them. Because the "loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Plaintiffs are suffering irreparable harm that should be enjoined. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsom ex rel. Newsom v. Albemarle Cty.*, 354 F.3d 249, 261 (4th Cir. 2003) (same).

III. The balance of equities favors Plaintiffs.

Enjoining an unconstitutional Policy does no harm to Defendants, whose interest is also in following the Virginia Constitution. *See id.*, ("[Defendant] is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional").

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[4] The Model Policies only note that "gender-expansive" is one of six terms that "convey a wider, more inclusive range of gender identity and/or expression than typically associated with the social construct of a binary (two discrete and opposite categories of male and female) gender system." *See* Am. Complaint ¶ 65. But this is no more a definition of what "gender-expansive" *means* than it would be to point out any list of six terms and identify one thing they share in common.

And any interest that Defendants can invoke would not be undermined by the Plaintiffs' requested accommodation. *See supra* Part I.A.2.

IV. Granting the injunction will serve the public interest.

"The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. Surely, upholding constitutional rights serves the public interest." *Newsom*, 354 F.3d at 261. So too here, especially where the constitutional right at stake is the ability to address fundamental matters like the relationship between sex, gender, and human identity. Indeed, the public's interest is in preserving diversity of thought in the public schools and disbursing any "pall of orthodoxy over the classroom" cast by government restrictions on expression. *Keyishian*, 385 U.S. at 603.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court grant Plaintiffs' motion and furnish all just and equitable relief.

Respectfully submitted,

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I hereby certify that on August 20, 2021, I served the foregoing by e-mailing and mailing a true and correct copy of the same to:

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