IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 211061

PETER VLAMING

Plaintiff-Appellant,

v.

WEST POINT SCHOOL BOARD; LAURA ABEL, in her official capacity as Division Superintendent; **JONATHAN HOCHMAN,** in his official capacity as Principal of West Point High School; and **SUZANNE AUNSPACH,** or her successor in office, in her official capacity as Assistant Principal of West Point High School,

Defendants-Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICI 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 their members have a strong interest in the speech and free exercise claims at issue in this case, and are uniquely positioned to address them.

ARGUMENT

This case presents a narrow legal question that is tied to a particular context: a K-12 public school teacher's refusal to address a transgender student in a nondiscriminatory manner during class instruction. In this context, when a teacher addresses a student in class, the teacher's speech "is—for constitutional purposes at least—the government's own speech," *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct.

2407, 2423 (2022), and the government has a right and responsibility to determine that its students should be treated equally when addressed during instruction.[1]

Indeed, under any standard of scrutiny, a school district has a compelling governmental interest in ensuring that its own educational services are being provided to its students in a nondiscriminatory manner. A school district policy regulating the manner in which teachers address transgender students during class instruction is narrowly tailored to that compelling interest.

I. Mr. Vlaming's Refusal To Address A Transgender Male Student With Pronouns Consistent With The Student's Gender Identity Subjected Him To Harmful And Unequal Treatment.

The West Point School Board (the "School Board") prohibits discrimination against students who are transgender. Pursuant to that policy, the School Board requires its teachers to treat transgender students in a manner consistent with their gender identity, including with respect to how they are addressed by teachers during instructional time. When non-transgender students attend class, they are addressed by names and pronouns that correspond to their gender identity. The school district's

[1] To be sure, a school district's authority over the classroom is not unlimited. Students have independent First Amendment rights, including the right to receive ideas. Students also have the right to engage in their own curricular speech which can be restricted only if reasonably related to a legitimate pedagogical purpose. The Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause also prohibit schools from restricting the speech of teachers or students in a discriminatory manner or for an impermissible or discriminatory purpose. But none of those other protections is implicated here.

policy provides the same treatment to transgender students so they can focus on schoolwork without anxiety about what name or pronouns they will be called.

Consistent with its policy of providing equal treatment, the school district instructed Mr. Vlaming to "use male pronouns" when addressing a transgender male student "consistent with how you address other male students," JA058, and to "treat [the student] the same as other male students, including the use of his preferred name and using male pronouns to refer to him," JA061. The school district properly recognized that Mr. Vlaming's refusal to use any gendered pronouns when addressing the transgender student—while continuing to use gendered pronouns when addressing everyone else—did not provide the transgender student with equal treatment. Instead, "Mr. Vlaming's action had the effect of singling out the student in a way that was noticed by the student and his peers." JA068.

The school district's policy is consistent with its responsibility to provide a safe and inclusive learning environment for all students. "Transgender students face unique challenges in the school setting. In the largest nationwide study of transgender discrimination, the 2015 U.S. Transgender Survey (USTS), 77% of respondents who were known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff." *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 597 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). But "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." *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) (internal quotation marks omitted). A recent study documented that respecting transgender students' names and pronouns was associated with a 56 percent decrease in suicide attempts and a 29 percent decrease in suicidal thoughts. *See* Stephen T. Russell et al., Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Suicidal Behavior among Transgender Youth, 63 J. Adolescent Health 503, 505 (2018). In short, "transgender students have better mental health outcomes when their gender identity is affirmed." *Grimm*, 972 F.3d at 597.

The school district's policy is also consistent with its legal obligations under the Equal Protection Clause, Title IX of Education Amendments of 1972, 20 U.S.C. § 1681, Va. Code Ann. § 2.2-3900, and Va. Code Ann. § 22.1-23.3—all of which prohibit public schools from discriminating against students who are transgender. Although the risk of liability for violating these laws provides an additional reason for requiring teachers to address transgender students in a manner consistent with their gender identity, the ultimate question in this case is not whether West Point's nondiscrimination policy is legally *required* but whether the policy is legally *permissible*. As discussed below, regardless of whether it is legally required to do so, the school district has a compelling interest in protecting the wellbeing of

transgender students, and in requiring teachers to treat those students in a nondiscriminatory manner when leading classroom instruction.

II. K-12 Teachers Do Not Have A Free Speech Right To Discriminate Against Transgender Students In Their Classrooms, In Violation Of School Policies Regulating In-Class Curricular Speech.

"[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 v. York Cty. Sch. Div.*, 484 F.3d 687, 693 (4th Cir. 2007) (internal quotation marks and citations omitted). "In addition to being private citizens, teachers . . . are also government employees paid in part to speak on the government's behalf and convey its intended messages." *Kennedy*, 142 S. Ct. at 2423.

In determining the scope of a public schoolteacher's free speech rights, a critical "threshold" question is whether the teacher is speaking as a private citizen on a matter of public concern. *Id.* Under *Pickering v. Board of Education of Township High School District 205*, 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 promoting the efficiency of the public services it performs through its employees" outweighs the employee's interest in First Amendment expression. 391 U.S. 563, 568 (1968). But under *Garcetti v. Ceballos*, "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." 547 U.S. 410, 421 (2006).

A public schoolteacher's in-class speech falls squarely within the heartland of *Garcetti*. "[T]he school system does not 'regulate' teachers' speech as much as it *hires* that speech." *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). When teachers address students in the classroom in a compulsory K-12 setting, 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. For these reasons, every federal court of appeals to address the question has held that a public-school teacher's in-class curricular speech does not qualify as speech by a private citizen on a matter of public concern for purposes of the First Amendment. *See, e.g.*, *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 341 (6th Cir. 2010); *Mayer*, 474 F.3d at 479; *Lee*, 484 F.3d at 695; *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 n.1 (3d Cir. 1998) (Alito, J.)). "Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is

protected, her in-class conduct is not." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (citations omitted).

The Supreme Court in *Kennedy v. Bremerton* recently reaffirmed the critical distinction between a teacher's in-class instructional speech and a teacher's out-of-class non-instructional speech. In *Kennedy*, the Supreme Court held that a football coach's prayer after football games was private speech, not government speech. The Court explained that "what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach." 142 S. Ct. at 2425. The Court concluded that Mr. Kennedy's post-game prayer was private speech because "[h]e was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." *Id.* at 2424. "Simply put: Mr. Kennedy's prayers did not 'ow[e their] existence' to Mr. Kennedy's responsibilities as a public employee." *Id.* (quoting *Garcetti*, 547 U.S. at 421).

In sharp contrast to the speech in *Kennedy*, the speech in this case occurred in the course of Mr. Vlaming's duties as a teacher, in the classroom, and as part of class instruction. The school district paid Mr. Vlaming to provide class instruction, and Mr. Vlaming's in-class speech owed its existence to his responsibilities as a public employee. As a result, *Garcetti* controls the outcome of this case, and Mr. Vlaming does not have a free speech right to disregard the school district's instructions on

how he should address students when providing class instruction. *See Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 838-39 (S.D. Ind. 2020) (holding that high school teacher's refusal to address transgender students by names consistent with their gender identity was not protected as speech by a citizen on a matter of public concern).[2]

Plaintiff's attempts to distinguish *Garcetti* are meritless. Despite Mr. Vlaming's assertion to the contrary, the manner in which a teacher refers to students in the classroom is plainly part of the teacher's "official duties." Vlaming Br. 52. "[A]ddressing students is necessary to communicate with them and teach them the material" and "it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students." *Kluge*, 432 F. Supp. 3d at 839. Talking to students—including students who are transgender—"is speech [Mr. Vlaming] was expected to deliver in the course of carrying out his job." *Kennedy*, 142 S. Ct. at 2424.

Plaintiff cannot escape *Garcetti* by characterizing his claims as a challenge to "compelled speech" under the Supreme Court's decision in *Janus v. American Federation of State, County, & Municipal. Employees, Council 31*, 138 S. Ct. 2448

[2] Although *Garcetti* controls, the school district's policy in this case would survive any level of scrutiny, including the *Pickering* balancing test and the "exacting scrutiny" test proposed by Mr. Vlaming. *See infra* § III (explaining why the school district's policy is narrowly tailored to serve compelling governmental interests).

(2018). To the contrary, *Janus* reaffirmed *Garcetti* and made clear that "if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message." 138 S. Ct. at 2473 (citing *Garcetti*, 547 U.S. at 421–22); *see also Evans-Marshall*, 624 F.3d at 341–42 (rejecting the notion that "a teacher [could] respond to a principal's insistence that she discuss certain materials by claiming that it improperly compels speech") (emphasis omitted).

Plaintiff also cannot escape *Garcetti* by relying on an exception for speech related to scholarship and academic freedom. 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 did not "extend to the in-class curricular speech of teachers in primary and secondary schools.'" *Id.* at 505 n.1 (quoting *Evans-Marshall*, 624 F.3d at 334).

Plaintiff asserts that the Fourth Circuit declined to apply *Garcetti* to a schoolteacher's speech in *Lee v. York County School Division*, 484 F.3d 687, 700 (4th Cir. 2007). But *Lee* reached the same result as *Garcetti* by classifying a schoolteacher's in-class, curricular speech as categorically not a matter of public concern. *Id.* at 695; *see Evans-Marshall*, 624 F.3d at 342 (explaining that its application of *Garcetti* is consistent with *Lee* and the Fourth Circuit's pre-*Garcetti* precedent). Indeed, *Lee* held "public 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 (emphasis added).

Far from supporting Plaintiff's argument, *Lee* demonstrates why Plaintiff's claims must be rejected. The plaintiff in *Lee* was a Spanish teacher who posted articles about religion on a class bulletin board that "neither directly nor indirectly related to the Spanish curricular objectives he is obliged to teach." *Id.* at 697. The court held that the postings nevertheless constituted the teacher's curricular speech 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 they reflected "information on social or moral values that the teacher believes the students should learn or be exposed to." *Id*. at 699.

Under *Lee*, the manner in which Mr. Vlaming addresses students in his class is curricular speech that is not subject to *Pickering* balancing. While Mr. Vlaming argues that addressing a boy who is transgender with male pronouns would "force[] [Plaintiff] to express messages he disagrees with," Vlaming Br. 45, Mr. Vlaming ignores the stigmatizing message that is sent by his refusal to do so. Under *Garcetti* and *Lee*, when K-12 teachers address a captive audience of students in a public-

school classroom, their speech "is—for constitutional purposes at least—the government's own speech," and the government has a right and responsibility to determine that it does not want that stigmatizing message sent to students from the teaching lectern. *Kennedy*, 142 S. Ct. at 2423. "[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 determinations." *Lee*, 484 F.3d at 700.

III. K-12 Public School Teachers Do Not Have A Free Exercise Right To Discriminate Against Transgender Students in Their Classroom.

Mr. Vlaming argues that the Constitution of Virginia provides broader protection for religion than is provided by the Free Exercise Clause of the First Amendment. *Amici* do not take a position on that question because Mr. Vlaming's claims must be rejected under any standard. Whether evaluated under the federal standard set forth in *Employment Division of Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), or under strict scrutiny, Mr. Vlaming does not have a free exercise right under Article I, § 16 of the Constitution of Virginia or Va. Code Ann. § 57-2.02 to discriminate against transgender students in his classroom, in violation of the school district's generally applicable nondiscrimination policy.

The school district's requirement that teachers address students with pronouns that are consistent with the students' gender identity is a facially neutral and

generally applicable policy under *Smith*. *See Kluge*, 432 F. Supp. 3d at 836 (holding that policy requiring teachers to address transgender students by new names consistent with their gender identity was neutral and generally applicable). 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. And like the plaintiff in *Kluge*, Mr. Vlaming also has "not alleged facts showing that [the Policy] targeted or otherwise was motivated by an animus toward any particular religion or religious belief." *Id.*

Despite the policy's facial neutrality, Mr. Vlaming contends that it creates a series of individualized exceptions by giving discretion to "parents to decide on a case-by-case basis whether they are satisfied with proposed accommodations." Vlaming Br. 45. But that assertion is refuted by the documents Mr. Vlaming attached to his complaint. Far from authorizing teachers to seek case-by-case accommodations with parents, the school district made clear that Mr. Vlaming's contact with the student's parents was improper. The school district superintendent told Mr. Vlaming that his "telephone call [to the student's parent] was an inappropriate attempt to circumvent the directive that had been given to all of [the student's] teachers regarding how [the student] was to be treated." JA060. The school district further stated that it regarded Mr. Vlaming's telephone call as "an improper attempt to 'negotiate' with [the student's parents]" and that "[t]he

treatment of transgender students is not up for negotiation with their parents, with school administrators, or with me." *Id.*

The school district's facially neutral and generally applicable policy also survives any form of heightened scrutiny imposed by Va. Code Ann. § 57-2.02 or Article I, § 16 of the Constitution of Virginia. 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). School districts also have a "compelling state interest in protecting transgender students from discrimination" and a "compelling interest in protecting the physical and psychological well-being of minors." *Boyertown Area Sch. Dist.*, 897 F.3d at 528-29. 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.* at 529. In short, "[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated." *Id.*

The fact that Mr. Vlaming's discrimination occurred through speech does not lessen the school district's compelling interest. Mr. Vlaming cites cases involving public accommodations and college professors to argue that the government does not have a compelling interest in protecting people from "discriminatory," "offensive," or "hurtful" speech. Vlaming Br. 47. But the school district is not

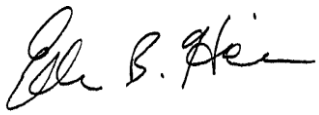
attempting to protect students from the speech of third parties. As noted above, Mr. Vlaming's speech in a K-12 classroom "is—for constitutional purposes at least—the government's own speech," and by prohibiting Mr. Vlaming from discriminating against transgender students, the school district is protecting students from discrimination *by the school district itself*. *Kennedy*, 142 S. Ct. at 2423.

The school district's policy is also the least restrictive means of furthering the school board's interests. Mr. Vlaming asserts that the school district could have allowed him simply to refrain from using pronouns when addressing transgender students. As discussed above, however, a teacher who refuses to use pronouns when addressing a transgender student treats that student differently from all other students in the class. "Not only would" Plaintiff's 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. "Adopting [Mr. Vlaming's] 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." *Id.*.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the King William County Circuit Court dismissing Mr. Vlaming's claims.

Date: July 27, 2022 Respectfully submitted,



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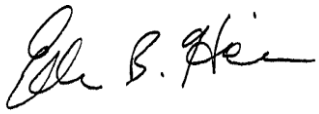
CERTIFICATE OF SERVICE

I certify that on July 27, 2022, the foregoing Brief Amici Curiae was filed with the Clerk of the Supreme Court of Virginia using the Court's VACES system, and a copy was served on counsel for the Plaintiff-Appellant and Defendants-Appellees by email pursuant to Rules 1:12 and 5:1B of the Rules of the Supreme Court of Virginia. I further certify that this brief complies with the requirements set forth in Rule 5:26.



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