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 *AMICI CURIAE* THE CENTER FOR RELIGION, CULTURE, AND DEMOCRACY AND 18 SCHOLARS IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae the Center for Religion, Culture and Democracy ("CRCD") supports the creation and promotion of scholarship at the intersection of religion, culture, and democracy. *Amici curiae* scholars[2]—several of whom are fellows for CRCD—are experts in various fields, including American constitutionalism, law, and history, among other disciplines. These scholars write and teach about the fundamental maxims, doctrines, and rights that undergird our legal system. Each scholar *amicus* has an interest in remaining free to speak the truth or not speak in his or her scholarship and classroom.

CRCD and these scholars share a concern not only about the implications of this case for religious freedom in Virginia but also about its impact upon the law's general liberty of silence, which facilitates and secures a number of constitutional, statutory, and common law rights. This liberty of silence protects many interests, including: preventing

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[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici curiae*, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

[2] See Appendix to Brief *Amici Curiae* for a list of *amici* scholars.

officials from leading people to lie or to betray themselves; guarding confidential and fiduciary relationships; ensuring the sanctity of moral and religious conscience; safeguarding dissenters; promoting the efficient crafting and enforcement of contracts; disincentivizing fraud; and advancing the just administration of equity. Therefore, *amici* have an interest in the outcome of this proceeding.

STATEMENT OF THE CASE

Peter Vlaming was a well-loved French teacher at West Point High School. J.A. 1, 5.[3] In 2018, he learned that one of his female students planned to start identifying as male. *Id.* 6. Given his belief—both as a matter of human anatomy and religious conviction—that each person's sex is biologically fixed and cannot be changed, Vlaming could not affirmatively express his agreement with the student's choice. *Id.* 10. Nevertheless, Vlaming sought to accommodate the student's decision without violating his conscience. *Id.* 7-8. He consistently used the student's newly chosen masculine name, but he avoided using third-person pronouns to refer to the student in class, *id.* 7-9, because he believes that using male pronouns to refer to a female student is lying, *id.* 10-11, 15. Vlaming's conscience and religious practice prohibit him from lying. *Id.* 11.

Despite Vlaming's efforts to accommodate the student's decision by using the student's preferred name and not referring to the student

[3] Because this appeal reviews a judgment sustaining a demurrer, all factual allegations are taken as true for purposes of the appeal. *See Eubank v. Thomas*, 300 Va. 201, 206, 861 S.E.2d 397, 401 (2021).

by female pronouns in class, *id.* 7-9, West Point School District repeatedly told Vlaming that he *must* use male pronouns or potentially face termination, *id.* 9-11, 14. Eventually, the superintendent informed Vlaming that he would not be allowed to return to the classroom until he assured the student and the student's parents that he would use the student's preferred pronouns; if not, he would face termination. *Id.* 15. Unwilling to compromise his religious convictions, Vlaming was fired—not for what he said, but for what he didn't say. *Id.* 2, 15.

By order dated August 13, 2021, the King William County Circuit Court dismissed several of Vlaming's claims (free speech, free exercise, due process, and breach of contract) with prejudice. *Id.* 325. This Court granted Vlaming's petition for appeal. *Id.* 332.

ASSIGNMENT OF ERROR

This brief addresses the trial court's error in dismissing Vlaming's constitutional claims and, in so doing, failing to appreciate the critical role that the liberty of silence plays in preserving our foundational freedoms of speech and religion.

STANDARD OF REVIEW

"Because appellate review of the sustaining of a demurrer involves a matter of law, [this Court] review[s] the trial court's judgment *de novo*." *Glazebrook v. Bd. of Sup'rs of Spotsylvania Cty.*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003).

ARGUMENT

In a world full of words hastily spoken, silence is golden. American law reflects this timeless truth. Though less famous (and less audible) than its cousin freedom of expression, the right *not* to speak is equally as fundamental. Indeed, while we commonly think of the right to silence as undergirding the First Amendment's protection against compelled speech[4] and the Fifth Amendment's protection against self-incrimination, the liberty of silence appears in many other areas of the law. Some, such as the spousal testimonial privileges and the confessional seal between clergy and their religious congregants, derive directly from the same jurisprudential principles, maxims, and canons as the rights against oath-taking and self-incrimination. Others, such

[4] Because Appellant Vlaming's brief focuses on this species of the liberty of silence, *amici* focus here on that liberty's other manifestations.

as the freedom of the press not to disclose their sources and the right of privacy in personal information, derive from the absolute common law right of secrecy that gave us common law copyright. Still others, such as the right to accept tendered goods without expressly endorsing their quality, originate in other sources of law but have the added benefit of protecting the pervasive, fundamental liberty not to speak.

These rights to remain silent are justified and animated by a small number of familiar legal principles and doctrines. They are not arbitrary. They are connected. They are designed to release a person from the trilemma of falsehood, betrayal (of self or another), or legal sanction. When viewed together with many other powers, immunities, and liberties of silence that can be found throughout the law, these varied rights appear as instances of the law's general inclination—presumptive in some instances and robustly absolute in others—to favor silence and to protect those who want to leave certain things unsaid. Indeed, the right to refrain from speaking so silently and successfully pervades and holds together the entire law that it is easily taken for granted. Only when officials place it in jeopardy, as West Point school officials did in this case, do we really notice it. Rather than

compel a person to communicate a proposition that he believes to be untrue, our law is inclined to leave him free to say nothing about the matter.

As this Court considers the interpretation and application of Virginia's constitutional guarantees of free speech and free exercise of religion, understanding the place of silence in the law is critical. Given the historic roots and pervasive impact of the right to silence, along with the significant interests that this right protects—among them, freedom of speech and freedom of religion—the Court should reverse the ruling of the court below.

I. VLAMING FACES THE CLASSIC TRILEMMA THAT MOTIVATES RIGHTS TO SILENCE FOUND THROUGHOUT OUR LAW.

A. Vlaming's Trilemma

West Point School Board's mandate that Vlaming affirmatively agree to refer to a student by the student's preferred pronouns placed the teacher in the crosshairs of the classic trilemma of choosing among betrayal, falsehood, or sanctions: Vlaming could betray his religious convictions by agreeing to use the preferred pronouns. Or he could seek to maintain peace by falsely stating his assent to using the preferred

pronouns while never intending to betray his religious convictions by actually doing so. Or he could remain faithful to his religious convictions, despite the penalty of losing his job.

While this scenario may seem a far cry from that of historic dissenters who faced imprisonment, torture, or even death if they remained silent in the face of official pressure to speak, the interests at stake—those of integrity, conscience, and the freedom to dissent—are the same. As further discussed below, the common law, along with constitutional and statutory law, assiduously avoids putting a person in a position where the only way to avoid sanction is to say something he knows to be false.

B. The History of the Right to Silence

The right not to speak—or as it is better known, the right to silence—is not a recent invention but an indispensable foundation stone in the edifice of Anglo-American law and constitutionalism. For centuries, this right has been part of the common law, securing the presumption of innocence, freedom of the press, liberty of conscience, private property rights, and other fundamental liberties. Blackstone taught that the authority of the maxim justifying the right—that "no

man shall be bound to accuse himself"—lies in immemorial custom and usage. 1 William Blackstone, *Commentaries* *68 (1765).

The right extends well beyond the ancient English common law; it has long been part of the general *ius commune*—common law. Some confidential privileges such as the clergy-penitent and attorney-client privileges—in essence, rights of a witness to remain silent in legal proceedings—originated in Roman law. Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence* § 6.2.3 at 661, § 6.2.4 at 663 (4th ed. 2021).

"Roman law not only excluded confessions from evidence but also punished any priest who revealed a confession." Imwinkelried, *supra*, at § 6.2.3 at 661. What Professor Helmholz calls the private "penitential forum" behind the confessional seal came from Roman and canon law into the common law because English ecclesiastical courts took it as given. *See* R.H. Helmholz, *Roman Canon Law in Reformation England* 113-14 (1990). The privilege fell out of favor during the fervent disruptions of the Protestant Reformation, with a resulting "expansion of human conduct being punished" by courts, as "[c]onduct that had once been sorted out privately now gave rise to public controversy." *Id.*

at 113. Indeed, the loss of the penitential forum, combined with Puritan zeal to enforce Sabbath laws, duties of sexual chastity, and other religious obligations, caused all sorts of private confessions to be asserted in public courts during the tumultuous sixteenth century. *See id*. at 109-17.

The right to keep religious confessions private later re-emerged in in the early 1800s in the United States as Puritanical zeal lost its cultural dominance. *See, e.g.*, *Scott v. Hammock*, 870 P.2d 947, 951-52 (Utah 1994) (explaining history of clergy-penitent privilege); *Nestle v. Commonwealth*, 22 Va. App. 336, 342-46, 470 S.E.2d 133, 137-38 (Ct. App. Va. 1996) (same); *see generally*, Seward Reese, *Confidential Communications to the Clergy*, 24 Ohio St. L.J. 55 (1963). All fifty states now recognize the privilege by statute. *Nestle*, 22 Va. App. at 345, 470 S.E.2d at 138.

The right of the accused to remain silent in judicial proceedings originated in ancient Jewish and Christian teachings about human dignity and conscience. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2638-40 & n.52 (1996). The Talmudic principle is "that no man

may render himself an evil person." Irene Merker Rosenberg and Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. Rev. 955, 956 (1988). The Christian version appeared early in the fourth century when, in a commentary on an Epistle to the Hebrews often attributed to the first century apostle Saint Paul, John Chrysostom wrote, "I do not say to you that you should betray yourself in public nor accuse yourself before others, but that you obey the prophet when he said, Reveal your ways unto the Lord." R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune,* 65 N.Y.U. L. Rev. 962, 982 (1990). Gratian's Decretum in the twelfth century affirmed that principle, *id*., and a century later the Decretals of Pope Gregory IX stated that no one may "be forced to respond since no one is bound to betray himself," *id.* at 967 & n.26. The incorporation of the right to silence into Western law culminated in the maxim that "no man shall be bound to accuse himself." 1 Blackstone, *supra*, at *68; Alschuler, at 2639-41, 2648-49.

While the right of silence took shape in the ancient *ius commune*, it attained its present constitutional status in Anglo-American jurisprudence during the formative centuries before and after the

English Civil War. *See, e.g.*, E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949); *see also* Milton Meltzer, *The Right to Remain Silent* 21-75 (1972).[5] English lawyers invoked it as an important security against the unjust excesses of Star Chamber and the Court of High Commission. *See* Morgan, *supra*, at 6-12; Helmholz, *supra*, at 965-67, 975-80, 987-89; 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2250 at 270-91 (John T. McNaughten rev. 1961); Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. Crim. L. & Criminology 402, 407-19 (1994). Wigmore colorfully opined that the consistent assertion of the right was motivated by the rise of Archbishop Whitgift in 1583, who was "determined to crush heresy wherever its head was raised." 8 Wigmore, *supra*, at § 2250 at 279. When Sir Edward Coke rose first to Chief Justice of Common Pleas and then to Chief Justice of King's Bench in 1613, he established the right to silence in a series of contests with the Star Chamber and High

[5] *But see* John H. Langbein, *The Historical Origins of the Privilege Against Self Incrimination at Common Law*, 92 Mich. L. Rev. 1047 (1994), and Alschuler, *supra*, both arguing that the right to remain silent did not achieve its current, comprehensive form until the eighteenth or early nineteenth century.

Commission. *Id*. at § 2250 at 280-82; Morgan, *supra*, at 7-8; Meltzer, *supra*, at 54-57. By the time Parliament set aside the judgment against John Lilburn following his famous trial, English lawyers accepted his argument that it is "contrary to the laws of God, nature, and the kingdom for any man to be his own accuser … illegal and most unjust, against the liberty of the subject and law of the land and Magna Charta." 8 Wigmore, *supra*, § 2250 at 282-84; *see also* Meltzer, *supra*, at 58-75. In the centuries since, the right has proven to be one of the most important protections for civil liberty under law.

Another venerable common law source of the right to silence is the doctrine that became known as the right to privacy, which earlier was called common law copyright.[6] This right to privacy is a right to keep one's written expressions and personal information to oneself. *See* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 198-204 (1890). It is a fundamental, common law right because

[6] Today, the term "right to privacy" is associated with the judicially created doctrine of substantive due process, as laid out in cases such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973). But the fundamental common law secured a right to privacy long before the Supreme Court of the United States considered challenges to contraception and abortion laws. *See generally* Warren and Brandeis, *supra*, at 195-202.

it is grounded in immemorial usage and custom, as contrasted with the statutory privilege of copyright protection in intellectual works after publication, which is contingent upon statutory law. Indeed, English courts, which declared the right conclusively in landmark decisions in the eighteenth century, *see generally* H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 Conn. L. Rev. 1 (2014), dated its authority at least as far back as Magna Carta, *see* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 912 (1985).

The common law right to privacy did its best work following the English Revolution in establishing liberty for privacy of opinion against the incursions of powerful orthodoxies and political views. In *Entick v. Carrington* [1765] 95 Eng. Rep. 807 (C.P.), and other decisions, common law judges declared the right as an important security for political dissenters and reporters of facts or opinions that proved inconvenient to powerful elites.

C. Liberties Undergirding the Right to Silence

As the history of the right demonstrates, the chief purpose of the right to silence is to prevent officials from leading people to lie or to

betray themselves, behavior that would implicate both free exercise and free speech concerns. The right to silence enables the law to avoid what jurists have called a moral trilemma, in which telling the truth, telling a lie, or remaining silent are all equally bad outcomes. *See Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964); Helmholz, *supra*, at 983 & n.101. The right to silence also serves a number of subsidiary concerns, such as due process and the presumption of innocence, religious liberty, the sanctity of private domains within society and lawful expectations of privacy, the efficiency that results from an economy of words, the value of confidential information, and the sanctity of fiduciary relations and other relationships of trust. *See Murphy*, 378 U.S. at 55; Imwinkelried, *supra*, at § 5.3.3 at 447-511, § 6.2.3 at 662-63.

It is noteworthy that the concern motivating the development of the right to silence in the context of criminal prosecutions, where it performs its most dramatic service to civil liberty, is not a pragmatic weighing of the balance of evidence or probabilities. Rather, the primary concern is truthfulness and integrity of the soul, that a person not be forced to choose between lying and accusing himself. *See*

Helmholz, *supra*, at 982-83. So strong is the common law's insistence that it not lead an accused into speaking falsehood that, for some time, English common law courts *forbade* the accused from testifying in his own proceeding under oath, lest he perjure himself to the jeopardy of his soul. *See* Alschuler, *supra*, at 2645.

The right to silence also protects the rights of the dissenter. When the U.S. Congress considered the Bill of Rights, the common law principle that a person should not be forced to testify against himself was regarded as so self-evident that no one spoke a word against the Fifth Amendment. *See* Meltzer, *supra*, at 87. The right against self-incrimination was viewed as "the citizen's defense against government oppression. Without such fair procedure to protect the accused, a despot could crush all opposition. The pages of history reddened by the blood of heretics, dissenters, and nonconformists were argument enough for the Fifth Amendment." *Id.*

More than half a century ago, Justice Goldberg drew the connection between the right and our most cherished commitments as American heirs of the tradition of liberty under law:

> The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great

> landmarks in man's struggle to make himself civilized.'" It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play …; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" …; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy, 378 U.S. at 55 (citations omitted).

During the Medieval and early Modern eras, the right to silence most often became an issue in criminal and ecclesiastical proceedings because the threat of criminal or ecclesiastical sanction was then the most pressing threat to truthfulness and integrity. Today, people face other sanctions for refusing to speak their opinions, quite apart from any criminal prosecution. The threat of losing one's career and professional reputation looms in and out of the courtroom, as Mr. Vlaming discovered. The right to silence is capable of protecting Americans from that threat, just as it has protected minority views and opinions for centuries.

II. CONSTITUTIONAL, STATUTORY, AND COMMON LAW PROTECTIONS AFFIRM THE FOUNDATIONAL ROLE OF THE RIGHT NOT TO SPEAK.

Like most maxims of fundamental law, "no man shall be bound to accuse himself" has wide application throughout the law, resulting in specific liberties of silence in what we today call criminal and civil law. The right shows up in many instances where the threat of legal sanction or liability might tempt someone to communicate what he understands to be false.

Anglo-American law secures the right to silence in three forms: First and most prominently, the law recognizes a categorical, immunized, and absolute liberty not to speak in some contexts. Second, the law recognizes a defeasible liberty not to speak, which is the absence of a duty to speak. Third, the law recognizes a power to communicate by acts of silence rather than by express affirmation or renunciation.[7]

[7] The examples in the categories below are not comprehensive, and this Court will undoubtedly call to mind examples not mentioned in this brief. Yet even this limited list demonstrates that the right to silence is not isolated but rather pervades the legal fabric of our country.

A. Absolute Rights to Silence

The right to silence is best known in its strongest form as an absolute, immunized liberty protecting the criminally accused from having to choose between perjury and self-incrimination. Yet the right to silence is not confined to the context of criminal prosecutions. Other examples include the common law copyright, testimonial privileges, and protections against religious tests and oath-taking requirements.

1. The right against self-incrimination

The most famous example of the right to silence is the right against self-incrimination, known to generations of crime drama viewers as the right to remain silent. Virginia's Declaration of Rights, adopted in 1776, marked "the first time the individual citizen's inherent rights and liberties were given the force of fundamental law." Meltzer, *supra*, at 85. Section 8 created the constitutional right that no man "be compelled to give evidence against himself," a right subsequently reflected not only in the constitutions of most other states but also in the Bill of Rights. *Id.* The Fifth Amendment to the United States Constitution extends the common law right to the entire criminal proceeding, creating "an absolute privilege, one that no evidentiary

showing can overcome." Alschuler, *supra*, at 2647. "[T]he right to silence is meant to shield innocent and guilty alike [f]rom arbitrary rule [and] official lawlessness." Meltzer, *supra*, at 16.

2. The common law right to privacy

As mentioned above, the common law privacy right is primarily a right to keep secret one's writings, papers, and other personal expressions. It cannot be abrogated without the consent of the person whose sentiments are at issue. More than a century ago, Warren and Brandeis described the breadth and strength of the right in an influential article, saying:

> It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.

Warren and Brandeis, *supra*, at 199.

The right is absolute and strongly immunized. As one of the judges of King's Bench described the right in a landmark decision that shaped both English and American law,

> It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar property; and no man can take it from him, or make any use of it which he has not authorised, without being guilty of a violation of his property.

Millar v. Taylor [1769] 98 Eng. Rep. 201, 242 (K.B.). The common law privacy right began as an "absolute immunity of certain property from search or seizure." Schnapper, *supra*, at 876. The property that enjoys this absolute immunity at common law is one's right to exclude others from one's papers, diaries, correspondence and other private, written expressions. Congress's exercise of its constitutional power to extend copyright protection *after* first publication did not diminish the older, absolute, common law right. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552-54 (1985). It remains one of the strongest rights in American law. As a New York court observed half a century after the Founding and the first Copyright Act in an influential reaffirmation, "The right is still absolute and exclusive; and so long as the manuscript may exist unpublished, and its author or his representatives may choose, perpetual." *Woolsey v. Judd*, 11 How. Pr.

49, 56 (N.Y. Super. Ct. 1855). It remains "absolute as well as unlimited." *Id*. at 58.

American law secures this right to privacy in a variety of particular legal doctrines, including the Fourth Amendment's prohibition against unreasonable searches and seizures of houses, papers, and effects, *see* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1902 at 662 (4th ed., Boston, Little, Brown 1858); Bradford Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 Wake Forest L. Rev. 1073, 1077-81 (1982), the common law freedom of the press that the Fourth Amendment declares, *see* Schnapper, *supra*, at 870-71, 928, and the common law copyright, *see generally* Zvi S. Rosen, *Common-Law Copyright*, 85 U. Cin. L. Rev. 1055 (2018).

In the early twentieth century, as technology changed rapidly and new means emerged to intrude into private communications, the right expanded along with the technology and blocked efforts to eavesdrop, access financial records, and acquire personal health information. *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389-92 (1960). The right can now be turned to meet the challenges of new technologies such

as email correspondence and Internet broadcasting. *See generally* Ned Snow, *A Copyright Conundrum: Protecting Email Privacy*, 55 U. Kan. L. Rev. 501 (2007); Rosen, *supra*, at 1100-17. It can certainly protect spoken words and private thoughts.

3. Constitutional bans on religious tests for office

While most provisions of the Constitution of the United States and various state constitutions declare fundamental rights that are long-settled in the common law, *ius commune*, and *ius gentium*, the Constitution's ban on religious tests "as a Qualification to any Office or public Trust under the United States," U.S. Const. art. VI, cl. 3, was truly innovative. The Federalists' solution to the problem of contending religious factions within a pluralistic nation was to allow a person assuming national office to remain silent concerning matters of religious conscience. *See* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 702 (1986). This provision has played a quiet part in securing the "conditions of religious

pluralism," a "key cog in the apparatus" of religious liberty in a constitutional "machine which would run by itself." *Id.* at 678-79, 720.[8]

Similarly, the Constitution's allowance for an office holder to make an affirmation rather than swear an oath, art. VI, cl. 3, was designed to accommodate the convictions of minority religious sects, such as the Quakers, by allowing them *not* to speak words that they could not speak in good conscience. *See* Note, *An Originalist Analysis of the No Religious Test Clause*, 120 Harv. L. Rev. 1649, 1657 (2007).

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[8] During the state ratification debates, critics charged that Article VI rendered the Constitution insufficiently Christian and suggested allowance of a minimally theistic oath, affirming belief in God and an afterlife. *See* Bradley, *supra*, at 694-98. The Federalists replied that the best way to secure religious liberty for everyone was to prohibit everyone from imposing tests on other sects. As Professor Bradley explains,

> Federalists said, in effect: article VI prevents you from subordinating the despicable sect of your choice. So it does. But it also protects you from the oppressive designs of all the other sects, who think that your views are despicable and would subordinate you—as you would them—if an instrument of oppression such as religious tests were available.

Id. at 702. The result was a simple and unambiguous rule governing the question "when religious tests are permitted: never." *Id*. at 714.

4. Testimonial and confidentiality privileges

Other examples of the absolute right of silence include testimonial privileges. Rather than suppress the truth, these privileges protect confidential relationships and encourage candor and truthfulness in those relationships.

Spousal Privileges: The law still secures two spousal privileges—the spousal immunity privilege and the marital communication privilege—to protect the "harmony and sanctity" of a marriage. *Trammel v. United States*, 445 U.S. 40, 44 (1980); *Pryor v. Commonwealth*, 48 Va. App. 1, 9, 628 S.E.2d 47, 51 (Ct. App. Va. 2006). In some states, a similar privilege disallows testimony by an unemancipated child against his or her parents in criminal proceedings or prohibits revealing confidential parent-child communications. Imwinkelried, *supra*, at § 6.2.2.

Clergy-Penitent Privilege: The clergy-penitent privilege safeguards several fundamental civil and constitutional rights. Most obviously, it protects religious liberty. *See Mullen v. United States*, 263 F.2d 275, 277-80 (D.C. Cir. 1958); *State v. Potter*, 478 S.E. 2d 742, 754-55 (W. Va. 1996); Imwinkelried, *supra*, at § 6.2.3 at 662. The privilege

also guards the same sanctity of mind and soul that motivated the right to remain silent in criminal prosecutions. As a New York court explained in its decision to excuse the clergyman from answering to a grand jury:

> It cannot therefore, for a moment be believed, that the mild and just principles of the common Law would place the witness in such a dreadful predicament; in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath—Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience. The only course is, for the court to declare that he shall not testify or act at all.

People v. Phillips (N.Y. Ct. Gen. Sess. 1813), *as reported in* 1 Cath. Law. 199, 201, 203 (1955).

Other Confidentiality Privileges: The law also secures testimonial privileges to secure confidentiality within other relationships of trust, such as those between an attorney and client, Imwinkelried, *supra*, at § 6.2.4, accountant and client, *id.*, at § 6.2.5, and physician and patient, *id.*, at § 6.2.6. These privileges also operate as immunized liberties not to testify about communications made during the professional or consulting interactions, which secure an immunized duty on the part of the fiduciary—the lawyer, physician, or

counselor—not to disclose the communication. Unless the client or patient waives the privilege, such as by placing the communication at issue in a legal proceeding, *see City of Portsmouth v. Cilumbrello*, 204 Va. 11, 15, 129 S.E. 2d 31, 34 (1963), or by disclosing it, *see Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 126-27, 694 S.E.2d 545, 552 (2010), the liberty and duty not to disclose the confidential communications are immunized and, in some cases, absolute, *see Va. Elec. & Power Co. v. Westmoreland-LG&E Partners*, 259 Va. 319, 325-27, 526 S.E.2d 750, 754-55 (2000); *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1059-61 (N.Y. 1991) (describing difference between "absolute immunity" afforded to privileges recognized at common law, such as attorney-client privilege, and presumptive privileges such as that covering trial preparation work product).

5. Classified information and miscellaneous protections from disclosure

A person may also have a liberty not to speak where a public law imposes a duty not to speak, as where a person possesses official secrets of state. Imwinkelried, *supra*, at § 8.1; 8 Wigmore, *supra*, at § 2212a at 159. Many public and private laws at the federal and state levels prohibit the disclosure of certain sensitive information, such as national

security secrets, health care information, original birth certificates after adoption and other sealed documents, and the identities of minors enrolled in schools and programs. Those laws can work only if the person in possession of the information is at liberty to obey his or her duty of secrecy.

B. Presumptive Liberties Not to Speak

Though less robust than the absolute or immunized liberties of silence, other liberties not to speak appear throughout the law. A liberty simply is the non-existence of a duty. If one has no duty to perform an action, then one is at liberty not to perform the action. While also serving other ends, presumptive liberties not to speak disincentivize fraud, perjury, and other acts of dishonesty by removing any legal motivation to speak where speaking would be directly adverse to one's interests.

1. *Caveat emptor*

Some liberties are not merely the absence of law but have developed legal doctrines to define and protect them. One common example is the absence of a duty to make warranties about one's home or real estate to a prospective purchaser. The general rule governing

disclosures by a vendor of real property to a prospective purchaser is *caveat emptor*, or "buyer beware," a doctrine "firmly established as part of the common law of Virginia" and the common law generally. *Kuczmanski v. Gill*, 225 Va. 367, 369, 302 S.E.2d 48, 50 (1983). Someone selling real estate has no general duty to disclose characteristics of the *res* that might make it unfit for the purchaser's purposes. *See id.* at 371. Few purchases are more significant than one's purchase of land. But our fundamental common law values the liberty of silence to the extent that it places on a purchaser the duty to ensure that the *res* is fit for the purchaser's intended uses.

2. No duty to disclose generally

Contract and tort law also privilege silence in the absence of wrongdoing. It is well-established that neither a vendor nor a vendee of land, goods, or services has a duty in tort or contract to disclose to the other extrinsic intelligence that might affect the price of goods under consideration, and a failure to disclose will constitute neither breach nor deceit. *See Laidlaw v. Organ*, 15 U.S. 178 (1817). Of course, a duty to disclose may derive from a relationship of trust between the parties or some actual disclosure by the accused or inferred from the

inaccessibility of information to one of the parties. *See, e.g.*, *Hiden v. Mahanes*, 119 Va. 116, 121-22, 89 S.E. 121, 123 (1916); *The Clandeboye*, 70 F. 631, 636-36 (4th Cir. 1895); Prosser and Keeton on the Law of Torts 738-40 (5th ed. 1984). But where negotiating parties meet on equal footing, "so long as one adversary does not actively mislead another, he is perfectly free to take advantage, no matter how unfair, of ignorance." Prosser and Keeton, *supra*, at 737-38. Nonfeasant silence is *damnum absque injuria*—damage without a legally cognizable injury. *Feuchtenberger v. Williamson, Carroll & Saunders*, 137 Va. 578, 587-88, 120 S.E. 257, 260 (1923).

3. Trade secret rights

Trade secrecy is another instance of a right to silence that enjoys the secure protection of established legal doctrines. *See* Virginia Uniform Trade Secrets Act, Code §§ 59.1-336 to 59.1-343 (2011). Though defeasible, the trade secret right is a complex and active right. Trade secrets are protected by a qualified privilege in evidence law. 8 Wigmore, at § 2212 at 155-59.

4. Thousands more liberties of silence

Caveat emptor, the right of trade secrecy, and the absence of a general duty to disclose are just three instances of a broad liberty that stretches across both public and private life and touches thousands of subject matters. Indeed, there are as many different liberties of silence as there are subject matters for the law to address. It is easy to overlook this obvious fact because the liberty of silence is characterized by the absence of any law requiring disclosure or speech on the subject, and the *absence* of law seldom attracts the attention it deserves. On the vast range of matters that human minds daily consider, no law compels a person to disclose his or her thoughts. The absence of laws requiring such disclosures reflects the common law's general, favorable posture toward freedom not to speak.

C. Silent Conduct as Legal Power

In many contexts, the law attributes a particular legal meaning to silence—either assent or a lack of assent—rather than require a person to disclose her mind. This frees a person to establish rights or duties without having to choose between expressly affirming or expressly renouncing a particular proposition.

The doctrines, maxims, and canons that deem silence to be an act of legal power serve many ends, including efficiency, reliance interests, and sanctity of conscience. But ultimately, it does not matter why a person exercises a power to act by silent conduct. Law and equity do not demand from the actor an explanation. This may be important where a person has sound reasons to accept an obligation *and* has sound reasons to reject (or simply refuse to accept) propositional truths that may be inferred from the obligation or offered by others as justification for it. Examples include implied acceptance of tendered goods, the doctrine of apparent authority, and the canon of construction that expression of one proposition in a legal instrument is the exclusion of alternatives.

1. Universal assumpsit (public accommodations)

The power to license entries is one of the essential incidents of property ownership. Property owners may create licenses not only by specific invitation, *see* Thomas W. Merrill and Henry E. Smith, *The Oxford Introductions to U.S. Law: Property* 85-87 (2010), but also by silent acts. Significantly, a property owner may convey to the entire public a universal assumpsit to enter by opening her property as a business or place of public accommodation. *See* 3 Blackstone, *supra*, at

*164; Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 Mich. State L. Rev. 643 (2016). The creation of a universal assumpsit does not require an express invitation to each individual licensee. Rather, the holding open of the business performs the legal work; the scope of the license is determined by the purposes of the business. *See* MacLeod, *supra*, at 692-700. Only if the owner wants to terminate the license for some good reason must she utter any expression. *Id*. at 700-02.

2. Implied acceptance of tendered goods

Buyers of goods may accept tendered goods by silent acts. When one party performs a contract, the other is obligated to perform. A seller of goods performs a contract for the sale of goods once the seller tenders goods and the purchaser accepts. The purchaser may of course accept the tender expressly, but acceptance also may be implied where the purchaser inspects the goods and then retains them without objecting within a reasonable period of time. *See, e.g.*, Va. Code § 8.2-602; *Flowers Baking Co. of Lynchburg v. R-P Packaging, Inc.*, 229 Va. 370, 377-78, 329 S.E.2d 462, 466-67 (1985). This power to accept the tender of goods without expressly endorsing their quality or fitness is well-established

in the law and is an indispensable legal tool by which commerce is conducted.

3. Apparent authority or agency

Generally speaking, a person cannot serve as another's agent with power to form obligations on the principal's behalf unless the principal creates the agency relationship by some communicative act. However, under long-settled doctrine, a legal or equitable agency can be created by an apparent conferral of agency, without an expression of agency to a third party, where the principal acts in such a way that a third party would reasonably infer agency. *See Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S.E. 911 (1894). As the Restatement explains, "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) Agency § 2.03 (2006).

4. *Expressio unius est exclusio alterius*

Contracting parties may by silence decline to accept certain obligations. When contracting parties want to exclude an obligation

that they might otherwise have been expected to include, they are not required to exclude it expressly. It is enough not to express the obligation where other alternatives are expressed in the instrument. The maxim that the expression of one provision is the exclusion of alternatives performs the work necessary to exclude the alternative, omitted provision from the parties' contractual relationship. *See Bentley Funding Grp., L.L.C. v. SK&R Grp., L.L.C.*, 269 Va. 315, 330, 609 S.E.2d 49, 56-57 (2005).

5. Consent to a tort by conduct, custom, or usage

A person may consent to what would otherwise be a tort by expressing his or her willingness to go along with the activity. Prosser and Keeton, *supra*, at § 18. In instances when someone simply goes along with the activity without expressing any approval of it, Prosser and Keeton taught, "Silence and inaction may manifest consent where a reasonable person would speak if he objected." *Id.* at 113. For example, a person who steps into a boxing ring or even a general melee has consented to what would otherwise be a series of batteries. *Id.* Consent can also be inferred from usage or immemorial custom, as where a local custom that allows free entry on wild land privileges what would

otherwise be a trespass. *Id*. at 113-14. To consent is not to condone but is simply to set aside one's right to argue that one has suffered a legal wrong as a result of the activity. *Id*. at 113.

6. Common law marriage

People may be married for certain legal purposes by silent acts. Marriage in common law is a special kind of contract designed to secure the rights of children who may be born as a result of the union. As Blackstone explained, the "most universal relation in nature" is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife. *See* 1 Blackstone, *supra*, at *433, *446. "The main end and design of marriage" is to "ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong." *Id*. at *455.

Because it is not the child's fault if her parents never expressed their intentions publicly or obtained a marriage license from the state, our law long-recognized marriage by conduct, known as "common law marriage." A couple may be deemed common law married to secure the legitimacy of children born to their *de facto* marriage even in states,

such as Virginia, that no longer recognize common law marriage as effective to establish all of the rights and duties of a husband and wife. *See Murphy v. Holland*, 237 Va. 212, 216-20, 377 S.E.2d 363, 366-68 (1989).

7. Creation of a bailment

Finally, persons may also create bailments by silent acts. A bailment is the delivery and acceptance of a personal good in trust. The creation of a bailment requires not only a transfer of possession and a purpose of the bailor to create the bailment but also acceptance by the bailee with an intention to possess or take custody of the thing. *See Willis v. Jensen*, 22 P.2d 220 (Utah 1933); *Barnette v. Casey*, 19 S.E.2d 621 (W. Va. 1942); Ray Andrews Brown, *The Law of Personal Property* §§ 10.2-10.4 (3d ed., Walter B. Rauschenbush, ed. 1975). The bailor must transfer custody and control of the item to the bailee. The parties may agree expressly on the purpose of the possession, or they may create the bailment by implication from their conduct. *See Armored Car Serv., Inc. v. First Nat'l Bank of Miami*, 114 So.2d 431, 434 (Ct. App. Fla. 1959); *see also K-B Corp. v. Gallagher*, 218 Va. 381, 384-85, 237 S.E.2d 183, 186 (1977); *Bunnell v. Stern*, 25 N.E. 910 (N.Y. 1890). Here,

as in so many other areas of the law, a person has power to accept rights or obligations by conduct and custom without expressing any approval of the propositions or representations that would normally be required for express consent.

III. THE LAW CONTAINS NO GENERAL DUTY TO SPEAK AND ONLY RARELY REQUIRES SPEECH.

A. The Right to Silence Contrasted with Formal Limitations on Powers to Speak

Instances of the right to remain silent are fruitfully compared to rules that require some expression to achieve a legal objective. Where important fundamental and natural rights are stake, such as the rights of children and dependents, or the natural property rights of third parties, the law sometimes requires an affirmative expression, sometimes even in writing, before it will alter a person's legal status or impose a new legal disability.

The strongest examples are rules that require an express writing in a particular form. The Statute of Wills requires a witnessed and attested writing before a testator may devise or bequest assets, altering the expectations of heirs under rules of intestate succession. The Statute of Frauds requires a particular, signed, and delivered writing to

bind a person to a promise to marry, guarantee a debt, or purchase or sell real property. Expressions of intent are also required to form a negotiable instrument, to make a gift of personal property, to disclaim one's inheritance, or to disinherit a child (omission from a will is not enough). Strong reasons support these rules; common law rights, duties of familial support and piety, and the natural property rights of third parties are at stake.

None of the aforementioned legal doctrines imposes any duty to speak. They require an affirmative expression only if the speaker wants to impose a new liability on some person—himself or someone else. Silence preserves the status quo, whether that status quo is the inheritance of the heirs, or the bilateral character of a contractual promise.

B. No General Duty to Speak

Of course, a person may undertake an obligation to speak by her own volitional conduct. A lawyer who agrees to represent a client assumes a new duty to communicate arguments or terms on the client's behalf. A military officer assumes a general obligation to pass lawful orders down to enlisted personnel. And a schoolteacher assumes a

general obligation to communicate knowledge to her students. But even the most rigorous such obligations are general and defeasible, not specific and absolute. The lawyer retains discretion to decide which arguments are best. The officer swears an oath to the Constitution and thus retains a duty not to issue orders that would violate the Constitution or the laws of war. Schools hire teachers to think and teach, not to mouth words they believe to be false.

Furthermore, none of those defeasible obligations to communicate are part of the fundamental law. They do not apply to everyone. They cannot be forced on anyone. They are undertaken for particular reasons as part of the general obligations associated with particular offices and roles. There is no universal, much less absolute, legal duty to utter an expression.

C. Even the Duty to Testify is Narrowly Circumscribed

Perhaps the closest thing to a duty to speak is the general obligation to testify truthfully in judicial proceedings. "The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence." *Kastigar v. United States*, 406 U.S. 441, 443

(1972). But relative to the right *not* to speak, the duty to testify is a newcomer to the law. Prior to the sixteenth century, no right or duty to testify existed in common law. 8 Wigmore, *supra*, at § 2190 at 62-65.

Unlike rights to silence, which can be found throughout the law, the duty to testify is narrowly circumscribed. It arises only when a judicial officer or other authorized official compels testimony. *Id.* at § 2195 at 78-80. Under current law, no one owes a duty to testify whenever a statement is demanded. *Compare* Meltzer, *supra*, at 29, 40, 44, 45, 53 (detailing how oath *ex officio* prompted development of the right to silence). Professor Wigmore noted, "The testimonial duty is without effect unless there is *power to compel* its performance." 8 Wigmore, *supra*, at § 2195 at 78 (emphasis original). "Inherently and primarily, the power belongs to the judiciary, because the application of the law to facts in litigation requires a finding of the facts." *Id.*[9]

Even in the context of legal compulsion, the duty to testify does not extend to opinions, views, or sentiments, but only to events and occurrences that are relevant to a particular case or controversy.

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[9] Wigmore acknowledged that administrative officials may have legal power to compel testimony when performing what he called "judicial acts." 8 Wigmore, *supra*, at § 2195 at 87-88.

Indeed, theological and political opinions are protected by qualified privileges. *Id.* at § 2213-14 at 159-65. And above all, the duty is to testify *truthfully*, to speak what one understands to be the truth, not to communicate what one understands to be false. The duty is to provide knowledge and evidence in one's possession, *id.* at § 2192 at 70-74, and is "not performed by an answer that is *false*," *id.* at § 2194 at 76 (emphasis original).

Furthermore, even the duty to testify in judicial proceedings is only a general obligation; it is defeasible. It is defeated when it runs up against any number of testimonial privileges and immunized liberties not to speak, such as: the spousal privilege against compelled testimony; the spousal privileges against disclosing spousal communications; privileges for confidential communications involving lawyers, physicians, and clergy; the right of privacy in private papers and writings; and the rights to remain silent and not to incriminate oneself. When those privileges and liberties are lawfully invoked, the law sides with candor and truthfulness against disclosure and publicity. As these and other instances of the right to silence demonstrate, the law

frequently accommodates silence to privilege truth over coerced expression.

D. In Sum, the Law Privileges Silence

Neither law nor equity compels men and women to speak. The law takes particular pains to avoid coercing or motivating people to communicate propositions they do not believe to be true. It makes all sorts of accommodations to silence. Most dramatically, our fundamental law and constitutions secure the right to silence in both criminal and civil contexts. Less dramatically, but no less importantly, the law secures liberties of silence and powers to act without speaking, preferring to draw inferences rather than force people to face the trilemma among saying something they don't believe, paying the cost for speaking the truth, or suffering loss for remaining silent. When in doubt, the law privileges silence.

Whatever the motivation for not speaking, the law does not inquire. Reasons may be entirely idiosyncratic. For example, spousal privileges are generally justified on the ground that they help support the privacy and integrity of the marriage. But spouses may exercise them without any showing that their marriage would be jeopardized by

disclosure or testimony. To take another example, the U.S. Constitution's prohibition against religious tests applies equally to all persons regardless of their religion and regardless of their willingness to share their religious convictions publicly. Where the law empowers a person to act silently it also allows the person to keep his reasons hidden. He may be silent about his silence.

Particular rights to silence pervade the law. They show up in constitutional, criminal, and civil law. They take the form of absolute liberties, immunities, presumptive liberties, legal powers, and claims. They protect silence in grave matters, such as criminal prosecutions, and in relatively mundane matters, such as acceptance of a shipment of tendered goods. It would be surprising and out of character with Virginia's tradition of civil liberty under law were this Court to empower government-run school officials to compel a teacher to use particular pronouns in reference to a particular person rather than leave him at liberty to remain silent on the matter. Indeed, it would be far more consistent with the authoritarian zeal of Archbishop Whitgift and the Puritans who coerced public confessions of alleged spiritual

offenses in the sixteenth century than with the "benevolent and just principles" of the common law and American constitutions.

The law protects the freedom of the mind and conscience by securing rights to silence. When people speak, they must be free to speak deliberately, and to say what they understand to be true. The law frees people to choose between speech and silence to save them from the temptations of choosing between truth and falsehood.

CONCLUSION

The Court should reverse the decision of the lower court and remand for further proceedings.

Respectfully submitted,

May 23, 2022

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CERTIFICATE

Undersigned counsel certifies that on the 23rd day of May, 2022, the foregoing Brief *Amici Curiae* 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 Appellant and Appellees' counsel by email pursuant to Rules 1:12 and 5:1B of the Rules of the Supreme Court of Virginia.

Undersigned counsel further certifies that this brief complies with the requirements set forth in Rule 5:26.

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APPENDIX

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