V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE DOE,	)	
	)	
***Petitioner*;**	)	
	)	
v.	)	Civil Action No. 24-3171
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
***Respondent*.**	)	
	)	

Petitioner's Memorandum In Opposition to Demurrer

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The Petitioner Jane Doe ("the Petitioner") respectfully files this Memorandum in Opposition to Respondent's Demurrer.

FACTS

On April 21, 2022, the Respondent adopted Regulation 2603.2, which superseded Regulation 2603 with no changes to any of the language relevant to this case. Pet. for Decl., Inj., and Add'l Relief 4, ¶¶ 17–18. Regulation 2603.2 mandates that "[s]tudents who identify as gender-expansive or transgender should be called by their chosen name or pronouns, regardless of the name and gender recorded in the student's permanent pupil record." Pet. 5, ¶ 24(A). Regulation 2603.2 also requires that "[g]ender expansive and transgender students shall be provided with the option of using a locker room or restroom consistent with the student's gender identity," and provides that other students who object can use a private restroom, but in no circumstances will a transgender or gender expansive student be required to use a private restroom. *See* Pet. 5, ¶¶ 24(B)–(C).

The Respondent's Guidance Document on Regulation 2603 defines "Gender identity" as "[a] person's sense of their own identity as a boy/man, girl/woman, something in between, or outside the male/female binary. Gender identity is an innate part of a person's identity and can be the same or different than the sex assigned at birth." Pet. 6, ¶ 27. The Guidance Document does not define "Gender-expansive," but defines "Gender-expansive/gender non-conforming/gender-diverse/gender-fluid/gender-nonbinary/agender/genderqueer" as the following: "Terms that convey a wider, more flexible range of gender identity and expression

than typically associated with the social construct of a binary (two discreet and opposite categories of male and female) gender system." Pet. 6, ¶ 28. Finally, the Guidance Document defines "Transgender" as "an individual whose gender identity is different from that associated with the individual's sex assigned at birth. An individual can express or assert a transgender identity in a variety of ways such as pronoun usage, mannerisms, and clothing. Medical treatments or procedures are not considered a prerequisite for identifying students as transgender." Pet. 6, ¶ 29.

Regulation 2601.36P establishes "a booklet describing the rights and responsibilities of students are prescribed in the Code of Virginia and *Fairfax County School Board policy and regulations*." (emphasis added). *See* App. D to Ex. 4, at 1. That booklet is referred to as Student Rights & Responsibilities ("SR&R") and "states the legal rights and responsibilities of students in Fairfax County Public Schools (FCPS)." *See* App. D to Ex. 4, at 1. The SR&R also defines "the rules of conduct and disciplinary procedures applicable to the students." *See* App. D to Ex. 4, at 6.

Both the 2022–23 and 2023–24 SR&R stated that "FCPS students have the right to be called by chosen names and pronouns," which reflects the right conveyed in Regulation 2603.2. *See* Pet. 7–9, ¶¶ 35, 45. The SR&R also provides specific categories for behavior that merits discipline which, though it includes a tiered system of discipline, "will in no event limit administrators' ability to exercise discretion required to construct a response and intervention that, in their judgment, is appropriate under the totality of the circumstances presented." *See* App. D to Ex. 4, at 19.

Among the behaviors subject to a wide range of discipline and sanction are:

- "Using slurs based upon the actual or perceived gender identity (which includes, *but is not limited to*, malicious deadnaming or malicious misgendering.)" (emphasis added).[1] *See* App. D to Ex. 4, at 23.
- "Discriminatory harassment (including harassing conduct): Gender Identity." *See* App. D to Ex. 4, at 24. The SR&R defines discriminatory harassment as "unwanted conduct toward an individual based on their actual or perceived … gender identity … The conduct must be sufficiently severe such that it creates a hostile educational environment, meaning it denies or limits a student's ability to participate in or benefit from education programs or activities.[2] Discriminatory harassment may be expressed in various ways, including through physical actions or through verbal, nonverbal, electronic, or written communications. Discriminatory harassment may include conduct such as epithets, various slurs such as racial, deadnaming, and misgendering."[3] *See* App. D to Ex. 4, at 24.

[1] The SR&R defines "misgendering" as "the act of labeling others with a gender that does not match their gender identity." It defines "malicious" as "characterized by malice; intending or intended to do harm." *See* App. D to Ex. 4, at 66.

[2] Notably, the SR&R definition of discriminatory harassment does not require that the harassment be objectively offensive, whereas "Sexual Harassment" does have such a requirement. *See* App. D to Ex. 4 at 24, 28.

[3] Allegations of discriminatory harassment "are investigated by school administrators under SR&R" and it "does not require the submission of a formal complaint." Ex. 5 at 25. Rather, it is "a less formal process both investigated and decided by school administrators." Ex. 5 at 25. In situations where FCPS "determines that an informal complaint meets the definition of Sexual Harassment, it can only be investigated under the Title IX process." Ex. 5 at 25.

The Petitioner is a student at FCPS and is subject to the Fairfax County School Board policy and regulations, which require her to refer to gender-expansive and transgender students by their chosen pronouns or face disciplinary measures. *See* Pet. 8–9 ¶¶ 39, 46. To acknowledge receipt and understanding of her rights and responsibilities, the Petitioner was compelled to watch an official FCPS video confirming that students have a right to use restrooms and locker rooms consistent with their gender identity. *See* Pet. 13 ¶ 70. Following that video, FCPS attempted to compel the Petitioner to take a test that required her to either verify the policy of the Fairfax County School Board (which provides transgender and gender-expansive students the right to use the restroom of the sex with which they identify) or answer incorrectly and have her score lowered as a result. *See* Pet. 12–13 ¶¶ 69, 71. Passing the test acknowledged receipt and willingness to comply with the 2023-24 SR&R, which is required by FCPS. *See* Pet. 12–13 ¶ 69.

The Petitioner was also instructed by a teacher, at the behest of the school principal, on the official FCPS pronoun policy that requires transgender and gender expansive students to be referred to by their preferred pronouns. Pet. 14 ¶ 78. Finally, the Petitioner has been required to provide her preferred pronouns in a classroom forum with no opportunity to opt-out. Pet. 14–15 ¶¶ 79–82.

The Petitioner is a practicing Catholic who believes that God created each person as male or female, that the complementary sexes reflect the image of God, that sex cannot be altered, and that rejection of one's biological sex is a rejection of the image of God in that person. Pet. 9–10 ¶¶ 48, 50–51. The Petitioner strives to live

daily in accordance with her faith and believes that to acknowledge or endorse the idea that sex can be altered is to speak against God and her sincerely held religious beliefs. Pet. 9–10 ¶¶ 48, 52. Further, she believes that referring to another person using pronouns that do not correspond with that person's biological sex is harmful to that person because it is false and harmful to herself because it forces her to lie by denying her religious beliefs and scientific evidence.[4] Pet. 10 ¶¶ 53–54.

The Petitioner seeks to be able to speak at school in ways that conform to her sincerely held religious and philosophical beliefs, and this includes addressing others by pronouns that correspond to their biological sex of male or female. *See* Pet. 16 ¶ 88–89. However, because of the credible threat of being reported, investigated, and disciplined for either misgendering another student or simply not using pronouns at all with respect to students whose gender identity could change by the month, week, day, or even minute, the Petitioner has engaged in objectively reasonable self-censoring by refusing to use pronouns to address such students. *See* Pet. 16 ¶ 90.

The Petitioner also alleges that on May 17, 2023, she was entering a restroom when Richard Roe ("Roe"), a male student *who does not identify as female or*

[4] The Respondent asserts that, because the Petitioner supports the choice of others to use whatever pronouns that they wish or for other teachers and students to refer to them as such, her sincerely held religious beliefs are somehow fraudulent. Fairfax County Public Schools is not the arbiter of what does and does not comport with the Catholic Faith, but its assertion is telling—it is defending a policy that demands dogmatic subservience from all to its fluid and arbitrary definition of gender identity and gender expression, yet mocks one who does not ask others to bow to her religious beliefs, but only asks that she herself be able to act and speak in accordance with her faith. In any event, the sincerity of the Petitioner's religious beliefs is an issue of fact not proper for consideration on demurrer. *Vlaming v. West Point School Board*, 895 S.E.2d 705, 730 n.22 (2023).

transgender but rather "gender expansive," entered the bathroom behind her. Pet. 17 ¶¶ 91–92, 95. Because sharing a restroom with a male would be "contrary to [her] sincerely held philosophical and religious beliefs and her desire for modesty and privacy as a woman," she exited the bathroom. Pet. 17 ¶ 94. When the Petitioner's mother brought this to the attention of the principal, he said that Roe was permitted by the SR&R to use the bathroom that corresponded with his gender identity. Pet. 17–18 ¶¶ 97–98. The Petitioner was given the option of using a private restroom if she desired, but she opted to avoid using school restrooms unless absolutely necessary. *See* Pet. 18–20 ¶¶ 102, 107–08. Roe continued to use both the male restroom and the female restroom. Pet. 20 ¶ 109. Roe stated that he used the female restroom because he had been treated poorly in the male restroom. Pet. 20 ¶ 112.

STANDARD OF REVIEW

"A demurrer admits the truth of all material facts properly pleaded, including facts expressly alleged, fairly viewed as impliedly alleged, and those which can be fairly and justly inferred from the facts expressly alleged. In determining whether the pleading states a cause of action, the court may also examine any exhibits accompanying the pleading." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). Thus, "a demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Id.* In ruling on a demurrer, the Court must accept as true all factual allegations expressly pleaded in the complaint and interpret those allegations in the light most favorable to the plaintiff." *Coward v. Wellmont Health System*, 295 Va. 351, 358 (2018). Finally, Virginia courts require

notice pleading, which has been defined by the Supreme Court of Virginia as "sufficient if it clearly informs the opposite party of the true nature of the claim." *Allison v. Brown*, 293 Va. 617, 624 (2017).

ARGUMENT

I. The Petitioner has pled injury in fact: the Respondent's pronoun policy violates her rights guaranteed by Article I, §§ 12 and 16 of the Virginia Constitution.

Regulation 2603.2 and its accompanying disciplinary rubric compel the Petitioner to engage in speech with which she disagrees by affirming the Respondent's and other students' controversial and sensitive ideological viewpoints. As a result, the Petitioner has been chilled in her rights of the free exercise of religion and freedom of expression in violation the Virginia Constitution.

A. The Petitioner's speech merits the highest level of constitutional protection.

The Supreme Court of the United States has clearly stated that government cannot "force an individual to utter what is not in her mind about a question of political and religious significance … [nor] may [it] affect a speaker's message by forcing her to accommodate other views [and that] no government may alter the expressive content of her message, and no government may interfere with her desired message." *303 Creative LLC v. Elenis,* 600 U.S. 570, 586 (2023) (cleaned up). Further, anti-discrimination public accommodations laws are not "immune from the demands of the Constitution" and when an anti-discrimination "public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.* at 592.

As the Virginia Supreme Court recently held, where religious liberty merges with free-speech protections, as is the case here, "the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. A lawful government is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose might strike the government." *Vlaming v. West Point School Board,* 895 S.E.2d 705, 724 (2023).

Further, the "freedom to speak or not speak generally endures 'regardless of whether the government considers the speech misguided and likely to cause anguish or incalculable grief'" and that "'if liberty means anything at all, it means the right to tell people what they do not want to hear.' All the more, it means the right to disagree without speaking at all." *Id.* at 738 (quoting *303 Creative LLC,* 600 U.S. at 586) (cleaned up). The Court stressed that the Virginia Constitution not only "protects the right to harbor religious beliefs inwardly and secretly [but] [i]t does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Id.* at 726 (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022)) (internal quotations omitted).

Applying those precepts to speech on the concept of "gender identity," the *Vlaming* Court held that it is "among the many controversial subjects that are rightly perceived as sensitive political topics" and that "[s]peech on such matters occupies the highest rung of the hierarchy of First Amendment values and merits special

protection." *Id.* at 740 (quoting *Janus v. American Federation of State, County, and Mun. Employees, Council 31, et al.,* 585 U.S. 878, 913-14 (2018)).[5] Moreover, "[t]he ideological nature of gender-identity-based pronouns involves a palpable struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence of the sexes" and that compelling "speech or silence on such a divisive issue would cast a pall of orthodoxy over the classroom on a topic that has produced passionate political and social debate." *Id.* (quoting *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021) (internal quotations omitted). Thus, "whether at the highest or lowest level, the government has no inherent power to declare by ipse dixit that controversial ideas are now uncontroversial." *Id.*

[5] The Respondent tries to equate this case to *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). That case upheld the school's right to discipline a student who created a website devoted to attacking another student with comments accusing her of "having herpes," being "a slut," and posting pictures of the victim's pelvic area with the depiction of a sign which stated "Warning: Enter at your own risk" while labeling her portrait as that of a "whore." *Id.* at 572-73. Arguing that the freedom of expression protects the vicious personal attacks at issue in *Kowalski* is in no way comparable to arguing that government may compel a student to speak against their religion and conscience. The Respondent's reliance on *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019) is equally unpersuasive. First, that case has been abrogated by the Supreme Court of the United States's decision in *Kennedy*. Second, the Petitioner recognizes that a school can require students to answer a question in class that is purely factual and uncontroversial. *303 Creative,* 600 U.S. at 596. The student in *Wood* was not asked to affirm the tenets of the Muslim faith, but rather provide the historical fact of what those tenets are as part of a world history class. Affirming that sex is fluid and non-binary cannot be considered a well-known and uncontroversial fact, whether in a history class, literature class, or science class.

B. The Petitioner has sufficiently alleged actual harm.

In this case, the Petitioner has pled actual harm—namely, that she engaged in self-censorship of her constitutionally protected rights of free exercise and free speech.

As the Supreme Court of the United States has held, where a prohibition on protected speech exists, "self-censorship [is] a harm that can be realized even without actual prosecution" and is sufficient to confer pre-enforcement standing. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988). *See also Cooksey v. Futrell*, 721 F.3d 226, 235-36 (4th Cir. 2013) ("In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression.").

In *Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 160 (4th Cir. 2023) (cited by *Ibanez v. Albemarle County School Board*, 80 Va. App. 169, 209 (2024)), which the Respondent cites, the plaintiffs sued on behalf of their children alleging that their free speech rights had been chilled by the school board's bias reporting system, which encouraged students to anonymously report other students to the administration for "incidents of perceived bias." The parents alleged that their children "wish[ed] to speak out on [Critical Race Theory], race, and gender identity, and other controversial political issues within the LCPS community, but that their views are not shared by others in the community." *Id.* at 165 (internal quotations omitted). As a result, the children were concerned that if they "share their views about political or social issues, including those touching on [Critical Race Theory], religion, race, human sexuality,

and other controversial political issues, they will be reported and investigated for 'bias incidents'." *Id.*

The Court in *Menders* analyzed the parents' standing under the following test: "First, they may show they intend to engage in conduct a least arguably protected by the First Amendment, but also proscribed by the policy they wish to challenge, and that there is a 'credible threat' that the policy will be enforced against them when they do so." *Id.* Next, "they may make a sufficient showing of self-censorship, establishing a chilling effect on their free expression that is objectively reasonable." *Id.* The Court determined that it was objectively reasonable for the children to self-censor because, as a result of their arguably protected speech, they could be reported by fellow students accusing them of bias and this could cause the administration to open an investigation. *Id.*

In this case, Regulation 2603.2 requires that all "students who identify as gender-expansive or transgender should be called by their chosen name or pronouns, regardless of the name and gender recorded in the student's permanent pupil record" and this policy applies to students.[6] Therefore, the Respondent is compelling the

[6] The Respondent spills much ink arguing that Regulation 2603.2 only applies to staff because, in addition to providing a right to transgender and gender expansive students in one sentence, in a separate sentence it encourages staff to work with students should they request being called a different name or referred to by a different pronoun. This argument fails for several reasons as evidenced by the Respondent's own policies and regulations, of which the Court can take judicial notice. *See* Va. Code § 8.01-388; *Fleming v. Anderson*, 187 Va. 788, 794-95 (1948) (judicial notice can be taken at any point in the proceedings). First, the SR&R (which is required by Regulation 2601) states that "the rights and responsibilities of students are prescribed in the Code of Virginia and *Fairfax County School Board policy and regulations*." Second, the Respondents policies and regulations concerning rights and

Petitioner to suppress expression of her viewpoint in order to affirm and accommodate the Respondent's contrary viewpoint and the contrary viewpoint of transgender and gender expansive students—that the male and female gender system is a "social construct," and that individuals can decide their own gender "in between, or outside the male/female binary," and that such identity can change from "day to day" based on how that individual expresses themselves through a variety of choices.

The Respondent enforces Regulation 2603.2 by investigating and disciplining students who have been reported for (1) engaging in discriminatory harassment on the basis of gender identity by subjecting that student to purely subjective "unwanted conduct" by either misgendering (even accidentally) or refusing to use preferred pronouns when addressing them, or (2) "intending" to harm through the use of a slur (pronoun that corresponds to biological sex),[7] or (3) accidentally using a slur, i.e., a pronoun that corresponds to the student's biological sex.

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responsibilities of students are all numbered in the 2000's. This includes "Dress Code," "Student Employment," "Requirements for Graduation," "Rights and Responsibilities of Students," "Student Absences and Attendance Regulations," and "Grade Point Average and Class Rank," to name a few. Conversely, policies and regulations numbered in the 4000's details the rights and responsibilities of staff. Regulation 2603.2 undeniably applies to the Petitioner and other students.

[7] The Respondent essentially attempts to equate "intent to harm" as motivated by spite, ill-will, or an evil purpose. Yet, transgender and gender expansive individuals consider the very act of being "misgendered," even if based on reason, religion, or legal argument, to be calculated to cause "harm." Thus, the general intent to speak assumes an evil motive and the harm occurs the minute words are spoken or not spoken. *See* Chan Tov McNamarah, *Misgendering As Misconduct*, 68 UCLA L. Rev. Discourse 40, 43 (2020) (intentional misgendering, even in court documents, is "at a minimum" a "demeaning act" that "inflicts measurable psychological and physiological harm.").

As a result of Regulation 2603.2 and the Respondent's related enforcement scheme, the Petitioner has ceased the use of pronouns altogether so as not to be reported, investigated, and disciplined.[8] This act of self-censorship is objectively reasonable in light of Regulation 2603.2 and the Respondent's enforcement scheme that subjects the Petitioner being reported, investigated, and disciplined for the exercise of her constitutionally protected rights. Consequently, the Petitioner has sufficiently alleged injury-in-fact.

II. The Petitioner has pled a claim for a violation of Va. Code § 57-2.02.

As the Respondent correctly states, the VRFRA defines the exercise of religion coextensive with Art. I., § 16. The Petitioner has clearly articulated her constitutional cause of action and has thus articulated a cause of action under the VRFRA. Moreover, contrary to the Respondent's claim, the Virginia Supreme Court made clear in *Vlaming* that interpreting Subsection E of Va. Code § 57-2.02 in a manner that the Respondent asserts—a wholesale exemption to the VRFRA based on the Commonwealth's police power—"would render it a dead letter and defeat its essential

[8] The Respondent claims, however, that Vlaming does not apply here because that case only held that the government has a "constitutional duty of accommodation" for the free exercise of religion and that the Petitioner has not pointed to a lack of accommodation. Assuming, *arguendo*, that the Respondent's narrow reading of *Vlaming* was correct, the Respondent neglects to acknowledge is that Regulation 2603.2 *requires* students to address transgender and gender expansive students by their preferred pronouns and *excludes* the very accommodation that the school board in *Vlaming* deemed a violation of a similar policy—not addressing transgender and gender expansive students by pronouns altogether. Therefore, based on the Petitioner's allegations and as supported by the plain language of Regulation 2603.2 and the Respondent's enforcement powers, the Petitioner has sufficiently alleged that no such accommodation is provided.

purpose." *Vlaming*, 895 Va. at 736.[9] Thus, the *Vlaming* Court held that the teacher had stated a cause of action under the VRFRA for the same reasons as he had stated a cause of action under the Virginia Constitution. The same holds true here, and the Petitioner has a cause of action under the VRFRA.

III. The Petitioner has adequately pled that Regulation 2603.2 and its enforcement scheme are facially unconstitutional.

As the Supreme Court of the United States has routinely held, "in the First Amendment context, litigants are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the very statute's existence may cause others not before the court to refrain from constitutionally protected speech or expression." *American Booksellers Ass'n, Inc.*, 484 U.S. at 392-93 (cleaned up).

Here, the Petitioner has alleged facts that Regulation 2603.2 and its enforcement scheme compel students to speak in accordance with both the Respondent's and other students' beliefs on sensitive and controversial political topics and that it is a reasonable inference that other students, not before the Court, will almost certainly refrain from constitutionally protected speech or expression in a

[9] The Respondent seemingly adopts the same position as the school board in *Vlaming* and claims that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 505, 513 (1969) stands for the proposition that it can regulate any and all speech that "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school and collides with the rights of others." In other words, the Respondent is asking the Court to ignore the Virginia Supreme Court and hold that its disciplinary authority is a wholesale exception to the constitutional and statutory protections of the rights of free exercise and free expression.

manner similar to the Petitioner. Therefore, the Petitioner has pled facts that are more than sufficient at the demurrer stage.

IV. The Respondent discriminated against the Petitioner on the basis of sex by allowing a male to use female restrooms to "feel safe" while not providing the same right to "feel safe" to females.

Pursuant to Art. I, § 11, the Petitioner's "right to be free from discrimination upon the basis of religious conviction, race, color, *sex*, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination." (emphasis added).

Article I, § 11 is coextensive with the equal protection and due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. *Willis v. Mullett*, 263 Va. 653, 657 (2002). To state a claim for discrimination under Art. I, § 11, the Petitioner "must plead that [s]he has been treated from others with whom [s]he is similarly situated and the differential treatment was intentional." *Ibanez*, 80 Va. App. at 196. For sex discrimination cases brought pursuant the Equal Protection Clause, intermediate scrutiny applies. Thus, where "official action closes a door or denies opportunity to women" while opening that same door and opportunity to a man, the government must show that the disparate treatment serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996).

In this case, the Respondent opened the door to Roe to feel safe and comfortable in female common restrooms, while at the same time closing the door to the Petitioner

to feel safe and comfortable in female common restrooms. It cannot be disputed that the Respondent treated a female differently than a male by providing a benefit to the male (Roe) that it did not provide to a similarly situated female (the Petitioner). Thus, the Respondent must show that its official action was motivated by important governmental objectives and that its discriminatory action was substantially related to the achievement of those objectives. It attempts to do so by claiming that limiting Roe to the restroom of his biological sex or providing him a private restroom would constitute sex-based discrimination as a matter of law. In support, it cites *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

Grimm does not help the Respondent. First, the Court in *Grimm* was not addressing any claims made under the Virginia Constitution, but rather claims made pursuant to Title IX and the federal Constitution. Second, the only federal court whose decisions are binding on the Virginia court system is the Supreme Court of the United States. *Toghill v. Commonwealth*, 289 Va. 220, 227 (2015). Third, unlike the student in *Grimm*, Roe *does not identify as transgender or female*; he uses the female restroom because he doesn't want to use the male restroom.

"The mere separation of the sexes shall not be considered discrimination." Art. I, § 11. In 1971, when the Virginia Constitution was amended to prohibit discrimination based on sex, the ordinary meaning of the term "sex" meant biological sex.[10] Even in 2020, when the legislature amended the Virginia Human Rights Act,

[10] Where a word is not defined by the legislature, courts can look to the dictionary definitions at the time to supply the ordinary meaning of the word. *Davenport v. Utility Trailer Manufacturing Company*, 74 Va. App. 181, 196 (2022). Both before and

it recognized that "sex" and "gender identity" were separate concepts by listing them separately.

The Virginia constitution makes clear that it is not discrimination to maintain separate bathrooms based on biological sex. Thus, the Respondent's claimed interest in preventing discrimination by engaging in the non-discriminatory practice of separating restrooms on the basis of biological sex is nonsensical and fatally flawed.

V. The Respondent discriminated against the Petitioner on the basis of religion by allowing a male to use female restrooms.

The Virginia Constitution protects the right "to act or not act based upon one's religious sincerely held opinions or beliefs." *Vlaming*, 895 SE.2d at 725. By denying the availability of common female restrooms that exclude biological males, Respondent's action burdened the Petitioner's right to conduct her daily life in a manner that is based upon her religious beliefs, which includes being able to maintain modesty. Thus, the burden is on the Respondent to demonstrate that her requested accommodation of being able to use a common female restroom without the presence of male students "invariably posed some substantial threat to public safety, peace or

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after the 1971 amendments to the Virginia Constitution the ordinary meaning of the word "sex" was "biological sex." *See, e.g.*, *Sex*, *American Heritage Dictionary of the English Language* (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex, Webster's New World Dictionary* (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); *Sex, Female, Male, Webster's Seventh New Collegiate Dictionary* (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function").

order." *Id.* at 723. That is not a burden that the Respondent can meet at the demurrer stage.

VI. The Respondent's bathroom policy is facially unconstitutional.

"Gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause." *Riley v. Commonwealth*, 21 Va.App. 330, 336 (1995) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994)) (internal quotations omitted). Such discriminatory classifications "serve to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.* (quoting *J.E.B*, 511 U.S. at 130-31).

Regulation 2603.6 authorizes any student to use the restroom of the opposite sex solely by "identifying" as that opposite sex through the adoption and expression of gender-based stereotypes. According to the Respondent's own Guidance Document, "gender identity" is a person's "sense of their own identity as a boy/man, girl/woman" and that "person represents or expresses their gender identity or role to others, often through appearance, clothing, hairstyles, behavior, activities, voice, or mannerisms." In other words, if a male student at FCPS wants to identify as a female and use a female restroom, all he needs to do is dress like the stereotype of a female, wear his hair like the stereotype of a female, behave like the stereotype of a female, and speak like the stereotype of a female. The same action of stereotyping a male could get a female student male status for the use of a male restroom. It could not be clearer – Regulation 2603.2 officially authorizes impermissible gender stereotypes, and it is an egregious violation of the Equal Protection Clause.

But Regulation 2603.2 also violates the Equal Protection Clause in another way. In *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020), the Supreme Court of the United States held that firing a man who identified and expressed himself as a transgender woman was impermissible discrimination because of sex. *Id.* at 683.[11] The Court reasoned that terminating the employee because of his transgender status was inextricably tied to sex in that his expressed transgender identity differed from the "sex identified at birth." *Id.* at 669. The Court also made clear that intentional discrimination because of the expression of transgender identity could not be defended by the fact that discrimination on transgender status applied equally to males and females. *Id.* Finally, the Court held that when discrimination is motivated by the difference between expressed sex identity and biological sex, "it necessarily and intentionally discriminates" because of sex. *Id.* at 665.

In this case, by providing an open bathroom policy to a student who identifies and expresses as a female despite "the sex identified at birth" being male, Regulation 2603.2 discriminates based on sex by not providing the same benefit to the similarly situated male student who identifies and expresses himself consistent with his "sex identified at birth." In the same vein, providing an open bathroom policy to a student that identifies and expresses as a male despite "the sex identified at birth" being

[11] The fact that *Bostock* was decided under Title VII rather than the Equal Protection Clause does not change the causation requirement. A regulation or policy is actionable under the equal protection clause where a discriminatory purpose has been "a motivating factor," even if not the "dominant" or "primary" one. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).

female, Regulation 2603.2 discriminates based on sex by not providing the same benefit to the similarly situated female student that identifies and expresses herself consistent with her "sex identified at birth." That is unlawful discrimination based on sex as clearly set forth by the Supreme Court of the United States.

Again, Art. I, § 11 explicitly states that the mere separation based on biological sex is *not discrimination*. The Respondent cannot credibly claim that its bathroom policy advances a compelling government interest in preventing discrimination by ending a practice (sex-segregated restrooms) that, as a matter of constitutional law in Virginia, is not discrimination. Consequently, the Petitioner has sufficiently stated a claim that the bathroom policy articulated in Regulation 2603.2 is facially unconstitutional under Art. I, § 11.

CONCLUSION

For the reasons stated herein, the Court should overrule the Respondent's Demurrer.

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2024, the foregoing was electronically filed with the Clerk of Court using the File & ServeXpress System, and that a true copy was delivered by electronic mail to counsel for the Respondent, Fairfax County School Board at:

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