IN THE

SUPREME COURT OF VIRGINIA

Record No. 211061

PETER VLAMING,

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,

Appellees.

BRIEF OF THE BADER FAMILY FOUNDATION, ADAM KISSEL, AND HANS BADER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Amici adopt and incorporate by reference the appellant's statement of the Nature of the Case and Material Proceedings Below.

ASSIGNMENTS OF ERROR

Amici adopt and incorporate by reference appellant's Assignments of Error.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the appellant's Statement of Facts.

STANDARD OF REVIEW

Amici adopt and incorporate by reference the appellant's Standard of Review, including that this Court "review[s] a circuit court's judgment sustaining a demurrer de novo." *Eubank v. Thomas*, 861 S.E.2d 397, 401 (2021).

INTEREST OF *AMICI CURIAE*[1]

The Bader Family Foundation is a nonprofit 501(c)(3) foundation that seeks to advance civil liberties. Adam Kissel is a former Deputy Assistant Secretary for Higher Education Programs at the U.S. Department of Education, where he worked on First Amendment issues. Hans Bader handled Title IX issues in the U.S. Department of Education, including its Office for Civil Rights.

[1] No party's counsel authored any part of this brief; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*—contributed money to fund preparing or submitting the brief. None of the amici has a parent company or stockholders.

SUMMARY OF ARGUMENT

Vlaming did not engage in conduct forbidden by Title IX. Nor did he create an "intimidating, hostile, and offensive educational environment for the student," as the West Point School Board mistakenly found.[2]

Courts have found that conduct far more severe and pervasive than anything alleged in this case—including vulgar name-calling—does not create a hostile environment or violate Title IX. Here, Vlaming treated Doe in a polite manner at all times. The student's only objection is that Vlaming refused to refer to Doe with pronouns for the sex Doe identifies with. That is not a denial of educational access, nor does it rise to the level of creating a hostile educational environment, even assuming the student was in fact referred to as the "wrong" gender. *See Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021).

The Department of Education's sexual-harassment regulations confirm that Vlaming did not violate federal law, because it is violated only when conduct not only creates a hostile environment but also deprives the complainant of equal access to an education. Vlaming's conduct did neither of these things.

The Board punished Vlaming for speech that its policy did not prohibit by stretching its harassment policy beyond its plain text, to speech that does not create

[2] *See* Complaint, Exhibit 7 (letter from the Board, dated Jan. 2, 2019, explaining its rationale for dismissing Vlaming).

a hostile environment or interfere with access to an education. The Board argued that its harassment policy gave Vlaming fair notice of what was forbidden, precisely because it just incorporates "Title IX standards" and "case law."[3] But those very standards and case law make clear that conduct as mild as Vlaming's does not violate Title IX, and thus, does not violate the Board's own policy.[4]

That overbroad application of the Board's harassment policy violated Vlaming's free-speech rights. Moreover, it would do so regardless of whether his speech could be prohibited by a more narrowly drawn policy.[5] Professors are entitled to fair notice regardless of whether their speech could be validly subject to regulation.[6]

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[3] Defendants' Memorandum in Support of Demurrer and Plea in Bar (March 26, 2021) at 28, 31.

[4] *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2011) (school's "interest in complying with Title IX is not implicated by [instructor]'s decision to refer to Doe by name rather than Doe's preferred pronouns").

[5] *See, e.g., Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (overturning professor's discipline under the "nebulous outer reaches" of a college harassment policy due to its vagueness as applied to his speech, because the policy did not make clear that his longstanding teaching techniques were forbidden).

[6] *See Cohen, supra; Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975) (speech restriction adopting vague "constitutional standard" for when speech was protected was not "sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited."); *Bradley v. Univ. of Pittsburgh*, 910 F.2d 1172, 1177 (3d Cir. 1990) (due process, not just free speech, forbids vague bans on teaching techniques).

If the Board's policy did define interference with educational efforts to reach conduct that has as little impact on a student's ability to learn as Vlaming's did, then it would reach a vast array of academic speech that offends listeners and would be unconstitutionally vague and overbroad.

The court below was mistaken to reject plaintiff's argument that the Board's harassment policy is viewpoint discriminatory. It is a content-based, viewpoint discriminatory restriction on speech.

ARGUMENT

I. Vlaming's Speech Was Not Severe or Pervasive, and Thus Did Not Create a Hostile Educational Environment.

Vlaming's conduct in not using the transgender student's preferred pronouns was not severe or pervasive, and thus did not create a hostile environment. *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) (professor did not create hostile educational environment by failing to use transgender student's preferred pronouns); *Milo v. CyberCore Techs., LLC*, No. SAG–18–3145, 2020 U.S. Dist. LEXIS 5355, at *10–11 (D. Md. Jan. 13, 2020) (no hostile environment despite occasional use of incorrect pronouns, and "comment" expressing "hatred of transgender people"; "That single comment …. while unquestionably rude, does not …. 'satisfy the severe or pervasive test.'").

It was much milder than conduct the courts have found insufficient to create a hostile environment. For example, the Fourth Circuit ruled that sexist comments

such as “fetch your husband’s slippers like a good little wife” and “We’ve made every female in this office cry like a baby. We will do the same to you. Just give us time,” and references to female employees as “slaves” were not “severe or pervasive,” and thus were insufficient to create a hostile work environment. *Hartsell v. Duplex Products*, 123 F.3d 766, 773 (4th Cir. 1997).

Similarly, the Fourth Circuit ruled that no hostile environment existed even though a black employee was told by his boss that he was “beneath him” and that he needed to address his boss as “sir,” even as white employees were permitted to address the boss by his first name; and even though the boss “yelled at” the black employee, and another superior refused to “communicate with” the black employee “directly,” even as he communicated directly with white employees. *Holloway v. State of Maryland*, No. 20-1958, 2022 WL 1207165, --- F.4th --- (4th Cir. April 25, 2022). That behavior was far more demeaning, hostile, and exclusionary than anything alleged in this case, where Mr. Vlaming was polite and did not say the transgender student was “beneath” him.

Another federal appeals court found no hostile work environment, despite the fact that the plaintiff, the first female police sergeant in her department, was publicly subjected to sexist jibes, in her union’s newsletter, which ran ten articles derogatory to women police officers, and four aimed at the plaintiff in particular. *DeAngelis v. El Paso Municipal Police Officers Ass’n*, 51 F.3d 591 (5th Cir. 1995).

The conduct was not illegal harassment, even though it was deliberately hurtful, mortifying and publicly embarrassing in a way that Vlaming's mild remarks were not.

Other court rulings likewise reject harassment claims based on worse facts and more demeaning behavior. For example, a federal appeals court dismissed a harassment claim for lack of severity or pervasiveness where a supervisor repeatedly made sexual jokes and comments about plaintiff's "state of dress," once referred to her as "Hot Lips," and offered to improve her evaluation if she performed sexual favors. *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 787 (6th Cir. 2000). And it dismissed another harassment claim, where a supervisor placed a pack of cigarettes in a worker's bra strap, handed her a cough drop saying that she "lost [her] cherry," and made a vulgar remark about her sweater. *Burnett v. Tyco Corp*., 203 F.3d 980, 986 (6th Cir. 2000).

Vlaming's conduct was far less exclusionary than conduct that courts have found not to create a hostile work environment based on sex in violation of Title VII. *See, e.g.*, *Singh v. U.S. House*, 300 F.Supp.2d 48, 54 (D.D.C. 2004) (fact that employee was frozen "out of important meetings and humiliated at those . . . she did attend" was not severe or pervasive enough to show hostile environment); *Curry v. Nestle USA*, 2000 U.S. App. LEXIS 18743, No. 99-3877, 2000 WL 1091490, *3–4 (6th Cir. Jul. 27, 2000) (supervisors referred to a female employee

as a "'f--king bitch' in front of other employees," asked if it was "her time of the month," and chastised her for returning to work after having a baby); *Swann v. Office of the Architect of the Capitol*, 73 F. Supp. 3d 20 (D.D.C. 2014) (fact that female employee, unlike other employees, did not have access to a locker room for her gender, did not create hostile environment, even coupled with offensive remarks).

The Complaint states that the transgender student "had heard [Vlaming] was not using male pronouns to refer to the student when talking with other students or teachers." Compl. ¶ 104. But even if this were true, it did not create a hostile environment, because it was not "directed at" the complainant, and was only learned about "second-hand." *Gleason v. Mesirow Fin.*, 118 F.3d 1134, 1144 (7th Cir. 1997).

Moreover, Vlaming was just one of the transgender student's teachers, which further undercuts any claim of a hostile educational environment. The behavior of a single instructor has less impact than the behavior of an employee's boss. *Cf. Wills v. Brown University*, 184 F.3d 20, 27 (1st Cir. 1999) (severe act of harassment by one of plaintiff's professors "on a large campus" did not create a "continuing" hostile environment, even though similar behavior by one's boss sometimes can).

II. Vlaming's Speech Did Not Interfere with Educational Access and Thus Was Not At Odds With Title IX.

Even if it had created a hostile environment (which it did not), Vlaming's conduct did not violate Title IX, because it did not interfere with access to an education. Under Title IX, conduct must be so "severe, pervasive, and objectively offensive" as to deny "equal access" to an education. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, and 654 (1999). But nothing in the record suggests either that the complainant's grades fell or that the complainant suffered any other concrete harm. *See* Compl. ¶¶ 34–35.

Under the Supreme Court's *Davis* decision, even very offensive name-calling does not violate Title IX when it does not affect a student's grades. *E.g., Burwell v. Pekin Community High School Dist.,* 213 F.Supp.2d 917, 932 (C.D. Ill. 2003) (no Title IX claim, where repeated vulgar insults such as "slut" and "bitch" did not cause plaintiff's grades to fall, and thus did not interfere with educational access) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652–54 (1999)) (Title IX claim stated where plaintiff's grades fell in the face of severe verbal and physical harassment, establishing interference with educational access).

To deny "equal access to education," conduct "must have a 'concrete, negative effect' on the victim's education, such as "dropping grades," "becoming homebound or hospitalized due to harassment," or "physical violence." *Gabrielle M. v. Park Forest-Chicago Heights Sch. Dist.,* 315 F.3d 817, 823 (7th Cir. 2003)

(rejecting lawsuit over repeated inappropriate sexual acts, even though plaintiff was diagnosed with psychological problems and became more reluctant to go to school) (quoting *Davis*, 526 U.S. at 654).

Far worse conduct has been held not to violate Title IX. *E.g.*, *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012) (holding that harassment comprising a shove into a locker, an "obscene sexual gesture," and a "request for oral sex" did "not rise to the level of severe, pervasive, and objectively offensive conduct" forbidden by Title IX).

If repeatedly being called extremely insulting terms like "slut" or a "bitch" by multiple people does not deny equal access to an education, *see Burwell*, *supra*, then a single teacher's declining to use gender-specific pronouns for the plaintiff obviously does not. A federal appeals court ruled than an instructor's "decision not to refer to [transgender student] using feminine pronouns did not" have any evident impact on the student's "education or ability to succeed in the classroom," even though the student was deeply offended, and filed a discrimination complaint about the instructor's conduct. *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021).

Vlaming's word choices are not a "systemic" denial of educational access that satisfies Title IX's severe-and-pervasive test. *See Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (steady barrage of insults did not

violate Title IX; "the effects of the harassment [must] touch the whole or entirety of an educational program or activity" and involve "systemic" denial of access).

Title IX is not a requirement, much less an excuse, to punish all offensive speech by instructors, no matter how trivial or minor. *See, e.g.*, *Silva v. University of New Hampshire*, 888 F.Supp. 293 (D.N.H. 1994) (reinstating professor who was suspended for sexual harassment for using a couple sexual metaphors in class, because this was not a reasonable application of its sexual harassment policy, and thus violated the First Amendment). There is no exception to this principle for transgender students. Neither the Constitution nor the civil rights laws confer special privileges on any sex or gender, or mandate affirmative action for any sex or gender.[7]

III. The Title IX Regulation Confirms that Vlaming Did Not Violate Federal Law.

The existence of a hostile environment is typically a necessary—but not a sufficient—condition for a Title IX violation. The Supreme Court's *Davis* decision requires interference with educational "access," not merely an unpleasant or hostile atmosphere. Under Title IX, conduct must be so "severe, pervasive, and

[7] *See, e.g., Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (neither the Constitution nor Title VII preempts a ban on gender-based affirmative action); *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1519 (N.D. Cal. 1996) (Title IX did not preempt state ban on gender-based affirmative action), *rev'd in part on other grounds*, 122 F.3d 692 (9th Cir. 1997).

objectively offensive" as to deny "access" to an education. *Davis*, 526 U.S. at 633, 650, 651, 652 and 654 (saying this several times).

The Education Department confirmed this by codifying the *Davis* standard into its Title IX regulations, i.e., requiring interference with educational access, not simply the existence of a hostile environment, for Title IX liability. U.S. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*: *Final Rule,* 85 Fed. Reg. 30026, 30140–30142 (May 19, 2020). It noted that commenters agreed with its "proposed rules" requirement that speech must interfere with educational 'access' and not merely create a hostile environment," *id.* at 30140, a requirement adopted in its final rules, *id.* at 30142. It also noted that commenters concurred with this requirement as a way of avoiding potential First Amendment violations.[8]

[8] Commenters noted that "courts have struck down campus racial and gender harassment codes that banned speech that created a hostile environment, but did not cause more tangible harm to students." *Id.* at 30140. *See, e.g.*, *UWM Post v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (striking down university's hostile-environment racial/gender harassment code, and rejecting argument that it was valid because it was no broader than Title VII workplace harassment rules; "Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment").

IV. The Board Is Precluded By Its Past Representations from Using Its Harassment Policy to Punish Speech Like Vlaming's That Is Not Violative of Title IX.

The Board cannot use its harassment policy to punish speech that is not violative of Title IX. In order to obtain the dismissal of Vlaming's vagueness/fair-notice claim, it argued that its harassment policy just incorporated "Title IX standards" and "case law."[9] Such "statements in briefs" are "binding judicial admissions of fact." *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994).

Moreover, having relied on that argument in the court below, the Board is bound by it now. *Asgari v. Asgari*, 533 S.E.2d 643, 648 (Va. App. 2000) (party is forbidden to attribute "error to an act by the trial court that comported with his representations."). It is thus judicially estopped from taking the contrary position on appeal. *See Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 13 (1st Cir. 1999); *Alternative Systems Concepts v. Synopsis Inc.*, 374 F.3d 23 (1st Cir. 2004).

V. The Board's Harassment Policy Is Viewpoint-Discriminatory and Thus Should be Narrowly Construed.

The circuit court rebuffed plaintiff's argument that the Board's harassment policy was content-based and viewpoint-discriminatory. But it was content-based

[9] Defendants' Memorandum in Support of Demurrer and Plea in Bar (March 26, 2021) at 28 ("The texts of the policies, along with their express incorporation of Title IX and case law and regulations interpreting that statute, provide ample guidance as to what constitutes impermissible harassment."); *id.* at 31 (claiming policies were "incorporating by reference Title IX standards").

and viewpoint-discriminatory, and thus should have been construed narrowly. Courts have recognized that similar harassment provisions are viewpoint-discriminatory.

For example, a federal court struck down as unconstitutionally viewpoint-discriminatory a school harassment code that banned clothing that is "intended to harass . . . or demean an individual or group of individuals, because of sex, color, race, religion, handicap, national origin, or sexual orientation." *Pyle v. South Hadley School Comm.*, 861 F. Supp. 157, 170–173 (D. Mass. 1994).

The Board's policy similarly forbids "any student or school personnel to harass a student . . . . based on race, color, religion, national origin, ancestry, political affiliation, sex, sexual orientation, gender, gender identity," or other characteristics. Compl. ¶154.

The Board's policy elsewhere indicates that conduct is only "harassment" if it is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the educational program." Compl. ¶162. The failure to include a requirement of severity or pervasiveness in a school's discriminatory harassment policy generally renders it unconstitutionally overbroad. *Saxe v. State Coll. Area School District*, 240 F.3d 200, 217 (3d Cir. 2001) ("because the Policy's 'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech

about some enumerated personal characteristics the content of which offends someone . . . Such speech . . .is within a student's First Amendment rights.").

But as discussed above at pp. 4–6, Vlaming's conduct was not "severe or pervasive," so Vlaming should not have been terminated under the policy.

In any event, even if the Board's policy was aimed at preventing a hostile environment, that does not change the fact that it is viewpoint discriminatory.

Hostile-environment regulations are inherently content-based and viewpoint discriminatory, *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 206-07 (3d Cir. 2001) (so stating); *DeAngelis v. El Paso Mun. Police Officers Ass'n,* 51 F.3d 591, 596–97 (5th Cir. 1995) (recognizing that hostile-environment sexual harassment law is content-based and viewpoint-discriminatory) (citing Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992); *Weller v. Citation Oil & Gas Corp.,* 84 F.3d 191, 194–95 n.6 (5th Cir. 1996) (same)).

Hostile-environmental regulations are content-based, because whether a hostile environment exists turns on listeners' reaction to speech, and whether they find it offensive enough to create a hostile environment. *Harris v. Forklift Systems*, 510 U.S. 17, 21–22 (1993) ("If the victim does not subjectively perceive the environment to be abusive . . .there is no Title VII violation"); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("any sexual harassment claim" requires proof that the conduct was "unwelcome"). "Listeners' reaction to speech is not a content-

neutral basis for regulation." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

As content-based regulations, hostile-environment regulations need to be narrowly-tailored, to restrict the least amount of speech necessary to avoid unlawful discrimination[10]—rather than restricting speech that does not violate Title IX, the way defendants have done in applying the Board's policy. As explained above (see pp. 7–11), Vlaming's speech does not violate Title IX, so he should not have been terminated under the policy.

If school systems like the Board can define "harassment" more expansively than Title IX, and thus punish speech as "harassment" just because it offends a student, speech about a wide array of racial and sexual issues could be banned, including "much 'core' political and religious speech." *Saxe*, 240 F.3d at 217.

Many people are offended by core political speech about racial and sexual issues, and want to silence opposing viewpoints. Commenters note that "under schools' hostile learning environment harassment codes, students and campus newspapers have been charged with racial or sexual harassment for expressing commonplace views about racial or sexual subjects, such as criticizing feminism, affirmative action, sexual harassment regulations, homosexuality, gay marriage . . . or discussing the alleged racism of the criminal justice system." U.S. Department

[10] *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*: *Final Rule*, 85 Fed. Reg. 30026, 30140 (May 19, 2020); *see also Speech First, Inc. v. Cartwright*, No. 21-12583, 2022 WL 1301853, --- F.4th --- (11th Cir. May 2, 2022) (under university's overly broad discriminatory harassment policy, its lawyer said the following statements might trigger discipline: "(1) 'abortion is immoral'; (2) 'unbridled open immigration is a danger to America on a variety of levels'; and (3) 'the Palestinian movement is antisemitic.'").

Labeling speech as "harassment" or a "hostile environment" merely because it offends listeners would result in a vast amount of censorship.

But it is vital that such debate about racial and sexual topics not be suppressed. Suppressing it would undermine our educational system, which has a "compelling interest in the unrestrained discussion of racial problems." (*Belyeu v. Coosa Cnty. Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993).

CONCLUSION

For the foregoing reasons, and those stated by the appellant, the court below should be reversed.

Respectfully submitted,

/s/ Robert G. Rose

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CERTIFICATE

I hereby certify that there has been compliance with Va. S. Ct. R. 5:26.

I further hereby certify, pursuant to Va. S. Ct. R. 5:1B(c), that on May 23, 2022, I will electronically file the foregoing with the Court using VACES system and serve a copy of via email on all parties, including:

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