**THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**VIVIAN GERAGHTY**,

*Plaintiff*,

v.

**JACKSON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION,** et al.,

*Defendants*.

**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

**Case No. 5:22-cv-02237**

**Judge Pamela A. Barker**

**Oral Argument Requested**

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## INTRODUCTION

Defendants' try to make it sound like they wanted to work with Ms. Geraghty and even offered to let her avoid use of pronouns *and* preferred first names as a part of social transition. (*See* Doc. No. 14, PageID# 149.) They claim Ms. Geraghty rejected this offer and resigned voluntarily. As proof, they say they did not accept her resignation for three weeks just in case she might reconsider. (*Id.* at PageID# 150.) Defendant DiLoreto claims in his sworn declaration, "I decided to hold Ms. Geraghty's resignation until" September 20, 2022 in order "to afford her the opportunity to reconsider her resignation and withdraw it if she wished to do so." (Doc. No. 14-1 ¶¶ 44–45.)

This is false. Defendant DiLoreto rushed to accept Ms. Geraghty's resignation within three *days*, not the three weeks Defendants trumpet. On August 29 he emailed Ms. Geraghty, "On behalf of the School Board, I have accepted [your] resignation effective as of the end of business, August 26, 2022." Ex. A.

Defendant DiLoreto didn't "hold" Ms. Geraghty's resignation at all. But if Defendants really mean what they say—that they *would* have allowed her to avoid using "preferred" names and pronouns associated with students' social transition by using a student's last name instead—then Ms. Geraghty is willing to accept immediate reinstatement on those terms today.

If Defendants won't reinstate Ms. Geraghty on those terms, then that just proves her story: they constructively discharged her by demanding that she surrender her constitutional rights or her job. Since all preliminary injunction factors favor Ms. Geraghty, this Court should grant her motion.

## ARGUMENT

This Court should grant Ms. Geraghty's requested preliminary injunction because Defendants ordered her to surrender her constitutional rights or tender her resignation. Defendants' arguments to the contrary depend on distorting the facts,

misconstruing Ms. Geraghty's claims to manufacture an exhaustion of remedies requirement, and rebutting arguments she did not make in order to avoid confronting the ones she actually made.

## I. Defendants' legal arguments depend on distorted facts.

Defendants arguments on the merits and procedural issues depend on (at least) four factual distortions. They claim: (1) they had no policy requiring teachers to participate in social transition, (2) that they offered Ms. Geraghty meaningful accommodations that she declined, (3) that Ms. Geraghty resigned willingly, and (4) they gave Ms. Geraghty a chance to reconsider. Each claim is untrue.

### A. Defendants' Policy requires participation in social transition by using names and pronouns inconsistent with a student's sex.

Defendants claim they have no policy requiring teachers to participate in social transition at all. (*See* Doc. No. 14-1 ¶ 32.) ("There is no official written policy regarding preferred name or pronoun usage"). However, Defendants admit that "social transition" includes "use of a different name than their given birth name and the adoption of various pronouns." (Doc. No. 13 ¶ 78.) They also admit that it is a "district-wide practice to address a student consistent with the student's request." (Doc. No. 14-3 ¶ 14.) They further admit that this "district-wide practice" is the result of official action by the schools, saying that "*Jackson Schools* will honor any student's request regarding their own name." (Doc. No. 14-1 ¶ 33, emphasis added.)

Defendants have a "district-wide practice" resulting from the direction of "Jackson Schools" to address students by the name they request, including in the context of a social transition. The absence of a written policy is immaterial. "The Supreme Court . . . has concluded that there need not be a formal policy for there to be an unconstitutional custom that amounts to a policy." *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994). Governmental entities "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though

such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). Defendants admit their practice is (1) "a consistent practice throughout the district" (2) "*Jackson Schools*' practice," and (3) is "*enforced* uniformly." (Doc. No. 14-3 ¶¶ 26, 55, 67, emphasis added.) This establishes a Policy requiring their teachers to participate in social transition. *Monell*, 436 U.S. at 690–91.

### B. Defendants did not offer Ms. Geraghty any meaningful accommodations.

Defendants try to make it sound like they offered Ms. Geraghty multiple forms of "accommodation" on the morning of August 26, 2022. (*See* Doc. No. 14, PageID# 148.) But, on closer scrutiny, Defendants' own allegations and arguments show they did not actually offer any meaningful accommodations.

#### 1. Defendants did not actually offer to let Ms. Geraghty avoid using pronouns associated with a social transition.

First, they say in their legal argument they "suggested that it would be possible . . . to avoid the use of pronouns altogether." (*Id.* at PageID# 147.) But "suggested" could mean anything, and legal argument isn't testimony. Like their argument, Defendants' declarations are craftily qualified to avoid saying anything definitive. Instead, Defendants Carter and Myers say, "We *discussed possible* solutions," and "I *did my best* to *suggest* solutions," and "*I would have considered* any reasonable suggestion." (Doc. No. 14-2 ¶¶ 46, 81–82, emphasis added.) (*See also* Doc. No. 14-3 ¶¶ 29, 65–66.) None of these statements actually testify to what was or was not offered. Ms. Geraghty, on the other hand, verified directly: "Defendants did not even ask whether there was any possibility that Ms. Geraghty simply avoid pronouns or use last names." (Doc. No. 1 ¶ 85.)

In addition, avoiding pronouns alone is not a meaningful accommodation. As Defendants admit, Ms. Geraghty's concern was with using "preferred names *and*

pronouns in class." (Doc. 14, PageID# 147, emphasis added.) That's because using *either* the names or the pronouns that are adopted in connection with a "social transition" communicates a message about sex and gender and actively intervenes in the child's psychological development. (*See* Doc. No. 1 ¶¶ 51–52.) An offer to avoid pronouns while using first names associated with a social transition is not a real accommodation. "An employer does not fulfill its obligation to reasonably accommodate a religious belief when it is confronted with two religious objections and offers an accommodation which completely ignores one." *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994). An offer to avoid using pronouns is no "accommodation" to a religious objection to participation in social transition because it "completely ignores" half of the objectionable speech involved. *Id.*

**2. Defendants did not actually offer to let Ms. Geraghty use last names in lieu of "preferred" names associated with a social transition.**

Next, Defendants say they *may* have let Ms. Geraghty use students' last names. (*See* Doc. No. 14, PageID# 149, 172–73.) But this assertion is just as heavily qualified as the claim about pronouns. They say there were "*suggestions* that she avoid name usage altogether or use student's [sic] last names." (*Id.* at PageID# 149, emphasis added.). Later, their story changes, saying that school officials only "suggested Plaintiff refrain from the use of pronouns" and that it was "Plaintiff's union representative" who "*suggested* the use of last names." (*Id.* at PageID# 171–72, emphasis added.) Contrast this with Ms. Geraghty's straightforward account: "Defendants did not even ask whether there was any possibility that Ms. Geraghty simply avoid pronouns or use last names." (Doc. No. 1 ¶ 85.)

Union representative Deidre Disman herself admits that use of last names was not actually *offered* as an accommodation. Rather, she says she proposed that Ms. Geraghty might "avoid pronoun usage and *possibly* use the student's last names

*until she and the school could reach a compromise*." (Doc. No. 14-6 ¶ 26, emphasis added.) This is not an offer to avoid using last names; it's an express admission that use of last names would *not* be sufficient because it would be necessary to "reach" some other "compromise." (*Id.*) None of Defendants' statements actually show that they offered Ms. Geraghty the ability to avoid participation in social transition: use of last names was not offered (Doc. No. 1 ¶¶ 84–85), and avoidance of pronouns alone is not a meaningful accommodation. *Cooper*, 15 F.3d at 1379.

Defendants' other statements and arguments further show why use of last names was not offered: Defendants repeatedly claim that use of "preferred names" is *necessary* to avoid discrimination based on gender identity in violation of (their interpretation of) their own policies and Title IX. Defendants claim, "to *avoid* committing acts that could constitute harassment or discrimination on the basis of gender identity . . . Jackson Schools' employees are asked to respect a student's wishes regarding the use of a preferred name . . . ." (Doc. No. 14-1 ¶ 31; Doc. No. 14-2 ¶ 20; Doc. No. 14-3 ¶ 13, emphasis added.) Defendants interpret Title IX and their own harassment policies to *require* the "district-wide practice to address a student consistent with the student's request." (Doc. No. 14-2 ¶ 21.)

Defendants' legal arguments take the same tack. On the free speech issue, they claim "a compelling interest in the adoption of policies that acknowledge use of a student's preferred name and pronoun." (Doc. No. 14, PageID# 169.) Defendants' free exercise argument is more of a giveaway on this point, relying on *Kluge v. Brownsburg Community School Corp.*, 548 F. Supp. 3d 814 (S.D. Ind. 2021), in which the court held that the school could *not* offer the teacher the accommodation of using last names without incurring an undue hardship, in part because (in line with Defendants' repeated assertions) doing so might "increase the possibility that the school would be subject to litigation." (Doc. No. 14, PageID# 175.) This explains

their waffling accounts in the declarations. Defendants cannot credibly claim they offered to let Ms. Geraghty do what they claim in the same breath is illegal.

Ms. Geraghty's Verified Complaint tells the truth: she proactively came to Defendant Carter "in the hope of reaching a solution that would allow her to continue teaching without violating her religious beliefs and constitutional rights." (Doc. No. 1 ¶ 68.) Defendant Carter admitted that his own practice was to avoid pronouns, but would consult with others to see what Ms. Geraghty should do. (*Id.* at ¶ 69.) Then, in two subsequent meetings, Defendants Myers and Carter told Ms. Geraghty that, unless she would use the preferred first names consistent with the "district-wide practice" they instituted, she would be in "insubordination" and "she must resign effective immediately." (*Id.* at ¶¶ 75, 78.) Ms. Geraghty's account is backed up by the documentation she sent to Ms. Disman on August 28, 2022 (two days after the constructive discharge). *See* Ex. B. Defendants offered no accommodation and they ordered Ms. Geraghty to participate in social transition or be treated as in "insubordination," Ex. B, at 2, even though Ms. Geraghty would have been willing to accept an arrangement allowing her to avoid pronouns *and* use last names. (*See* Doc. No. 1 ¶¶ 64–65.)

### C. Defendants constructively discharged Ms. Geraghty by giving her no choice but to resign.

Defendants claim Ms. Geraghty "indicated she wanted to resign," that she was the first to broach that topic, (*id.* at PageID# 149), and that "she was insistent upon tendering her resignation." (Doc. No. 13 ¶ 86.) Again, none of this is true: Defendants told Ms. Geraghty she had no choice but to resign and the only thing Ms. Geraghty insisted upon was maintaining her constitutional rights. And again, Defendants' own version of the facts is incoherent, and much of it is legal argument, while Ms. Geraghty's is internally consistent and supported by contemporaneous, documentary sworn evidence.

Defendants paint Ms. Geraghty as volunteering to resign out of the blue. But the only specific statement in their telling comes from Ms. Disman, who reports that Ms. Geraghty relayed that "Dr. Myers then asked: 'What do you want to do, resign?'" (Doc. No. 14-6 ¶ 25.) This question makes no sense if Ms. Geraghty had already offered to resign. It only makes sense if Ms. Geraghty's version is true: Defendants gave her an all-or-nothing choice of participating in social transition or being in "insubordination." (Doc. No. 1 ¶ 75); Ex. B, at 2. As Defendants also admit, it was *Myers* who responded to Ms. Geraghty's unwillingness to "use the student's preferred names" by asking "Are you really prepared to draw that line in the sand?" (Doc. No. 14-3 ¶¶ 34, 39.) Describing this as a "line in the sand" told Ms. Geraghty that there *was* no accommodation, and that she had to choose between using the names or being removed from her position. (*Id.* at ¶ 34.) Defendants' own version of the events shows they gave Ms. Geraghty no choice but to resign.

Ms. Geraghty's contemporaneous documentation confirms this. Ms. Disman acknowledges that Ms. Geraghty emailed her on August 28, seeking advice about whether "her rights were violated." (Doc. No. 14-6 ¶ 2.) In fact, the subject line of Ms. Geraghty's email is: "Forced resignation under duress from Jackson Local Schools." Ex. B, at 1. The attached "Timeline of Events" reports that Defendants told Ms. Geraghty that she was "required to resign effective" immediately. *Id.* at 2. Similarly, Ms. Geraghty's own resignation letter says, "I am saddened that I have been *asked to resign over this issue*" and that "this is not the result that I was hoping for," all the while concluding that her choice "was an easy decision" because "there is nothing that will supersede" her religious convictions, a position the Constitution guarantees. (Doc. No. 1-2, emphasis added.)

Defendants next claim that, even if Carter and Myers ordered Ms. Geraghty to resign that doesn't matter, because "Plaintiff must establish ***both*** that her working conditions were objectively intolerable and that Jackson Schools intended

her to quit." (Doc. No. 14, PageID# 156.) That's not the law. Defendants ignore that "There are *two* types of constructive discharge cases." *MPC Plating, Inc. v. NLRB*, 912 F.2d 883, 887 (6th Cir. 1990) (emphasis added). "The first is the 'classic' case where the working conditions are so intolerable that the employee is effectively discharged." *Id.* But "[t]he second involves a situation in which 'an employer confronts an employee with the Hobson's choice of either continuing to work or foregoing the rights guaranteed him under'" law. *Id.* (quoting *Remodeling by Oltmanns, Inc.*, 263 NLRB 1152, 1162 (1982)).

Ms. Geraghty's suffered the second type of constructive discharge. Defendants' Policy required her to participate in students' social transition. *See supra* Part I.A. Ms. Geraghty explained that her religious beliefs prohibited her from doing so, and that avoiding pronouns would not solve that problem because use of names is still a central part of social transition. *See supra* Part I.B.[1] Defendant Myers cast Ms. Geraghty's need to adhere to her conscience as "draw[ing a] line in the sand" and told her it would put Ms. Geraghty "in insubordination and would not work in a district like Jackson." Ex. B, at 2. Then they told her that, if this was her "final decision" then she was "required to resign effective . . . August 26, 2022." *Id.* That is a constructive discharge. *See Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 335 (E.D. Pa. 2016) (constructive discharge occurs where the employer gives the employee "a Hobson's choice between

[1] Defendants also make much of their allegation that Ms. Geraghty rejected their offer to avoid pronouns because she would "'still know what's behind it.'" (Doc. No. 14, PageID# 148.) This is consistent with Ms. Geraghty's account of social transition: avoiding pronouns *while still using names* associated with the transition does not solve the problem, because the use of the new name is designed to "validate" the newly adopted gender identity inconsistent with sex. (*See* Doc. No. 1 ¶ 51–52.) It isn't that Ms. Geraghty rejected any accommodations, it's that any ongoing practice that involved continued use of names associated with social transition was no accommodation at all. *See Cooper*, 15 F.3d at 1379.

continuing to work under conditions that offended plaintiff's beliefs or ending his employment"). *See also Laster v. City of Kalamazoo*, 746 F.3d 714, 728 (6th Cir. 2014) (constructive discharge occurs where "an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns") (cleaned up).

### D. Defendants did not give Ms. Geraghty an opportunity to reconsider or withdraw her resignation.

Defendants attempt to substantiate their claim that Ms. Geraghty was the one who wanted to resign by saying they gave her an "opportunity to reconsider." (Doc. No. 14, PageID# 150.) In his sworn statement, Defendant DiLoreto says, "I decided to hold Ms. Geraghty's resignation until the next regularly-scheduled board meeting" in order "to afford her the opportunity to reconsider her resignation and withdraw it if she wished to do so." (Doc. No. 14-1 ¶¶ 44–45.) This is not true. In fact, Defendant DiLoreto emailed Ms. Geraghty on *August 29*, the first business day after her compelled resignation, "*On behalf of the School Board*, I have accepted [your] resignation effective as of the end of business, August 26, 2022." Ex. A. There was no period to give Ms. Geraghty an "opportunity to reconsider"—Defendants rushed to accept her resignation because it was the end they sought to achieve. It's much easier to pressure a young teacher into resignation than to deal with termination or a potential union grievance. *See* Ex. B, at 3–4 (noting "I fully realize I was taken advantage of in how the situation was handled.").

## II. None of Ms. Geraghty's claims require exhaustion of remedies.

Defendants claim Ms. Geraghty had to exhaust remedies under the collective bargaining agreement before filing suit. (*See* Doc. No. 14, PageID# 153–55.) This is incorrect. The general rule is that there is no exhaustion of remedies requirement for claims under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 500–01

(1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position").

Exhaustion may be required where the benefit in question comes from some law other than the Constitution. So, Defendants rely on cases involving attempts to squeeze claims under other laws into a Section 1983 cause of action. (*See* Doc. No. 14, PageID# 154–55) (discussing *Sorah v. Tipp City Exempted Vill. Sch. Dist. Bd. of Educ.*, No. 3:19-cv-120, 2020 WL 1242882 (S.D. Ohio Mar. 16, 2020)). But their application of this principle shows their error. They say, "Plaintiff seeks relief only available through her collective bargaining agreement." (Doc. No. 14, PageID# 155.) This is not true, because even at-will government employees can raise claims for an employer's retaliation against their exercise of constitutional rights. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977) ("Even though [plaintiff] could have been discharged for no reason whatever . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."). Every citizen has a right to a remedy for a constitutional deprivation. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988). If the deprivation comes in the form of adverse employment action, backpay and reinstatement are "presumptively favored" remedies.[2] *Id.*

The rule is straightforward: where the benefit is secured by the Constitution, exhaustion is not required prior to bringing a § 1983 claim, and the government is

[2] Defendants claim that Ms. Geraghty seeks "transfer of [her] teaching assignment" as part of her relief and use this as evidence that her claim truly arises under the collective bargaining agreement and not the Constitution. But she does not raise this in any of her requests for relief either in her Complaint or Motion for Preliminary Injunction. (*See* Doc. No. 1, 31–32; Doc. No. 2, PageID# 2.) The transfer issue is only relevant to Ms. Geraghty's argument on the merits, because the feasibility of transfer illustrates that Defendants have no interest in forcing Ms. Geraghty to speak in violation of her conscience. (*See* Doc. No. 1 ¶ 86.)

prohibited from seeking to impose an exhaustion requirement through a collective bargaining agreement. *See Tierney v. City of Toledo*, 917 F.2d 927, 940 (6th Cir. 1990) (holding that a collective bargaining agreement's "exhaustion clause" which "unduly implies a limitation" on pursuing constitutional claims "must be deleted"). Since the Constitution independently secures Ms. Geraghty's right to be free from *any* adverse action in retaliation for exercising her constitutional rights, she is not required to exhaust any remedies prior to filing suit to vindicate those rights. *Id.*

## III. Defendants violated Ms. Geraghty's constitutional rights by ordering her to participate in her students' social transition.

Defendants' merits arguments rely on their mischaracterizations of the facts and fail to engage with her actual arguments. Most glaringly, they pretend that Ms. Geraghty sought to *continue* using students' legal names instead of seeking to *avoid* using their new preferred names as a part of their social transition. (*See* Doc. No. 14, PageID# 23 ("Plaintiff . . . addressed her students by their 'deadnames,'"), PageID# 24 (claiming that using "preferred names or pronouns is employee speech"), (PageID# 30) (arguing the school's interests "outweigh Plaintiff's private interests in *using* a student's given name or pronoun") (emphasis added.) What Ms. Geraghty actually argued was that she has a constitutional interest in not being *compelled* to participate in social transition. She is substantially likely to prevail on those claims.

### A. Defendants' Policy unconstitutionally ordered Ms. Geraghty to speak a message on a matter of public concern.

Defendants agree that public employee speech is governed by the *Pickering-Garcetti* analysis, and do not contest the "public concern" element of that test. (*See* Doc. No. 14, PageID# 160–61 & n.131.) They dispute whether their Policy implicated Ms. Geraghty's interests as a citizen and whether her interests outweigh the school's. (*Id.* at 160–71.) But all of their arguments depend on recasting her

claim as seeking a right to *use* the students' legal names, rather than her actual request not to use preferred names or pronouns. *See supra* Part III. This misdirection leads them to overlook the ways their Policy does violate Ms. Geraghty's interests as a citizen in a fashion that no governmental interest justifies.

**1. Defendants' Policy compelling Ms. Geraghty to participate in students' social transition implicated her interest as a citizen.**

Defendants spend all their time explaining why Ms. Geraghty has no interest in "address[ing] her students by their 'deadnames' during class." (Doc. No. 14, PageID# 160.) Not only is this incorrect factually, it also causes them to miss two areas where Ms. Geraghty's interests are implicated.

First, their Policy is a "*district-wide* practice to address a student consistent with the student's request." (Doc. No. 14-2 ¶ 21, emphasis added.) That means that "Defendants' Policy governs the way a teacher interacts with a student undergoing social transition in any setting, including in settings where the teacher would be otherwise free to engage in personal expression or attend to personal matters." (Doc. No. 1 ¶ 93.) When a Policy applies that broadly, it burdens the employee's speech *outside* the context of her official duties. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424–25 (2022). As a result, none of Defendants' arguments about official duties or classroom speech justify a Policy as broad as theirs.

Second, Defendants' mischaracterization of Ms. Geraghty's objective leads them to ignore the distinction between compelled speech and restricted speech. They even cite the same section of *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010), that Ms. Geraghty used to explain this distinction without interacting with her explanation at all. (*Compare* Doc. No. 2-1, PageID# 67–69 *with* Doc. No. 14, PageID# 165–66.) The truth remains, that when the government seeks to *restrict* an employee's speech at work, that generally does not implicate the

employee's interest as a citizen because the employee remains free to speak "on his own time." *Evans-Marshall*, 624 F.3d at 340. But when the government seeks to *compel* the employee to say something the employee would never say "on his own time," even where the compulsion occurs at work, the government implicates the employee's interest as a citizen by (1) harming the employee's conscience, and (2) undermining the employee's ability to consistently spread his own message outside of work. (*See* Doc. No. 2-1, PageID# 69.) As Ms. Geraghty alleged, Defendants' order to participate in her students' social transition has this precise effect on her. (*Id.*) (*See also* Doc. No. 1 ¶¶ 60–61.)

**2. Defendants have no interest that can outweigh Ms. Geraghty's interest in avoiding state compulsion to speak a message her conscience prohibits her from speaking.**

Defendants also root their discussion of the interests at stake in their incorrect assumption that Ms. Geraghty wishes to continue "using a student's given name or pronoun." (Doc. No. 14, PageID# 167.) They also claim that doing so would constitute discrimination and generate Title IX liability. Neither is true. *Supra* Part III.A.1.

But in addition to the fact that Ms. Geraghty did not ask to continue addressing students by their legal names and using pronouns consistent with their sex, this would not amount to prohibited discrimination under Title IX regardless. That is because treatment consistent with sex is *not* discrimination based on "gender identity." *See Adams v. Sch. Bd. of St. Johns Cnty.*, __ F.4th __, 2022 WL 18003879 at *10–11 (11th Cir. Dec. 30, 2022) (en banc) (finding that treatment "based on biological sex" does not "necessarily entail[ ] discrimination based on transgender status"). Absent a request for different treatment, Ms. Geraghty's practice is to treat students consistent with their sex. (Doc. No. 1, PageID# ¶¶ 63–65.) As a result, "[t]ransgender status and gender identity are wholly absent from"

Ms. Geraghty's "classification" of students. *Adams*, 2022 WL 18003879 at *11. Her reference to students consistent with their sex *is* a sexual classification, but it's a permissible one, since the state is permitted to acknowledge that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Therefore, Defendants' entire assumption that their Policy is required "to avoid" prohibited discrimination is wrong. (Doc. No. 14-1 ¶ 31.)

Since Ms. Geraghty seeks even less—to simply avoid using names and pronouns associated with a social transition—all of Defendants' arguments about the weight of their interests are either legally or factually wrong.

### B. Defendants' Policy unconstitutionally burdened Ms. Geraghty's right to free exercise of religion

Defendants' free exercise arguments are premised on their false characterization of the "accommodations" they offered, (Doc. No. 14, PageID# 172–73), and a faulty analysis of whether any accommodation would impose an "undue burden to Jackson Schools." (*Id.* at PageID# 172–75.) In reality, Defendants did not offer any meaningful accommodations, and Ms. Geraghty only rejected proposals that would have continued requiring her to violate her beliefs—proposals that she is not required to accept. *See Supra* Part I.B–C.

The "undue burden" standard is inapplicable to constitutional free exercise claims. It comes from Title VII, which creates a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). That standard is far friendlier to the government than the strict scrutiny that is required where a policy fails to be neutral and generally applicable, as Defendants' does. Ms. Geraghty explained how, within two hours of learning that her religion made her unable to participate in students' social transition, they

forced her to resign and escorted her out of the building. (*See* Doc. No. 1 ¶¶ 68–89); Ex. B, at 2. Then, in response to Defendant DiLoreto's remarkable assertion that he waited three weeks to accept her letter of resignation, Ms. Geraghty can show that he actually rushed to accept it within three days. Ex. A. Defendants' hostility to Ms. Geraghty's religion has gone from "masked" to "overt." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). This means it must withstand strict scrutiny, which it cannot do. (Doc. No. 2-1, PageID# 74–75.)

## IV. All other preliminary injunction factors favor Ms. Geraghty.

Defendants claim Ms. Geraghty is not suffering irreparable harm, (Doc. No. 14, PageID# 176), but they ignore the Sixth Circuit's holding that "claims for reinstatement are prospective in nature and appropriate subjects for *Ex parte Young* actions." *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002). And *Ex parte Young* actions are premised on an "ongoing violation of federal law." *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 965 (6th Cir. 2013) (cleaned up). Since Ms. Geraghty's claim for reinstatement is predicated on a violation of her constitutional rights, her claim is to rectify an ongoing violation of her constitutional rights, which is an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Defendants agree that, in a First Amendment case, "'likelihood of success on the merits often will be the determinative factor.'" (Doc. No. 14, PageID# 153) (quoting *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014)). Since Ms. Geraghty is likely to succeed on the merits, the remaining factors favor her.

## CONCLUSION

This Court should enter the requested preliminary injunction to stop Defendants' ongoing violation of Ms. Geraghty's constitutional rights.

Respectfully submitted this 1st day of February, 2023.

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