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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

RODERICK E. THEIS, II,

Plaintiff,

v.

INTERMOUNTAIN EDUCATION SERVICE DISTRICT BOARD OF DIRECTORS, **MARK S. MULVIHILL**, Superintendent, and **AIMEE VANNICE**, Assistant Superintendent and Director of Human Resources, all in their official capacities,

Defendants.

Case No. 2:25-cv-00865-HL

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Request for Oral Argument

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Cases

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Local Rule 7-1 Conferral

The parties made a good-faith effort to resolve the issues presented in this Motion through emails and a Zoom conference but were unable to do so. Plaintiff's counsel notified Defendants' counsel in advance before filing this Motion.

Motion

Pursuant to FRCP 65, Plaintiff Rod Theis respectfully requests a preliminary injunction enjoining Defendants InterMountain Education Service District ("IMESD" or the "District") Board of Directors, District Superintendent Mark S. Mulvihill, and District Assistant Superintendent Aimee VanNice from violating his free exercise, free speech, due process, and equal protection rights under the First and Fourteenth Amendments to the United States Constitution.

On November 22, 2024, Defendants prohibited Plaintiff from displaying three books, *He is He* and *She is She* by Ryan & Bethany Bomberger and *Johnny the Walrus* by Matt Walsh (the "Books"), in his offices as decoration as an expression of his Christian belief that God created humans in His own image and that He created them male and female. Defendants determined Plaintiff's display violated District Board Policies ACB and ACB-AR (the "Speech Policy") and warned that "further conduct of this nature may result in discipline up to and including termination of [Plaintiff's] employment." Defendants' Speech Policy, both facially and as-applied, discriminates based on the content and viewpoint of Plaintiff's religious speech, grants unbridled discretion to Defendants, inflicts a prior restraint on that speech, and burdens the exercise of Plaintiff's religion. The Speech Policy cannot meet the

demanding requirements of strict scrutiny and is causing ongoing irreparable injury to Plaintiff's free exercise, free speech, due process, and equal protection rights.

Scope of injunction and persons bound

Therefore, Plaintiff moves this Court to order Defendants, their officers, agents, servants, employees, attorneys, and those in active concert or participation with them, to:

1. stop enforcing the Speech Policy challenged herein both facially and as-applied so as to prohibit Plaintiff from displaying the Books or similar messages in the workplace; and

2. remove any reference to the Letter of Directive and related investigations in the District's records for Plaintiff.

Reason for injunction

Absent a preliminary injunction, Plaintiff will suffer irreparable harm: the continued violation of his free speech, free exercise, due process, and equal protection rights. Plaintiff is likely to succeed on the merits of his claims, a preliminary injunction serves the public interest, and the balance of equities favors Plaintiff. In support of his motion, Plaintiff relies on any oral argument permitted and the following documents:

- Plaintiff's Verified Complaint (Compl.) (Doc. 1) and the exhibits accompanying it (Docs. 1-1 through 1-16);
- Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction (below);

- Any supplemental declaration in support of Plaintiff's Motion for Preliminary Injunction and related documents (if filed); and
- Plaintiff's Reply in Support of Plaintiff's Motion for Preliminary Injunction (when filed), and any supporting documents (if filed).

Security

Plaintiff also respectfully moves this Court to waive the security requirement under Fed. R. Civ. P. 65(c). "Rule 65(c) invests the district court with discretion as to the amount of security required, *if any*." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (cleaned up). The purpose of a bond is to "cover any costs or damages suffered by the [party sought to be enjoined] arising from a wrongful injunction[.]" *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000). The District Court "may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (approving district court's waiver of bond requirement in the absence of evidence regarding likelihood of harm). Here, Defendants will suffer no damages from a preliminary injunction. It will simply prevent them from infringing Plaintiff's speech and religious exercise rights.

Plaintiff also requests oral argument to be heard at a time and date set by the Court. LR 7-1(d)(1).

Introduction

The Constitution forbids the state from using public schools as a tool "to coerce uniformity of sentiment in support of some end thought essential" by the government. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," because their role is to promote "effective exercise of the rights which are safeguarded by the Bill of Rights." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (cleaned up). "America's public schools are the nurseries of democracy," *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021), and thus cannot be allowed to become "enclaves of totalitarianism." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Defendants abandoned this function and violated these crucial freedoms by adopting a Speech Policy that discriminates against private expression, not made pursuant to any job duty, on the basis of viewpoint. Defendants also "prescribe[d] what shall be orthodox" on a hotly contested matter of public concern—gender identity—and permit employees to add their voices to the chorus, so long as their views harmonize with Defendants'. *Barnette*, 319 U.S. at 642. When Plaintiff expressed a message that Defendants interpreted as discordant with that tune, they punished him. Defendants claim they can silence Plaintiff because they think his view is offensive, even though the schools they serve teach that gender is binary and dictated by biology. "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the

right to differ as to things that touch the heart of the existing order." *Id.* To vindicate Plaintiff's rights and prevent Defendants from purging his message from the workplace and school environment, Plaintiff respectfully requests a preliminary injunction.[1]

Summary of Facts

Rod Theis is a Licensed Clinical Social Worker employed by the District as an Education Specialist. Compl. ¶ 47. The District and its school districts, including La Grande School District ("LGSD"), aren't cloistered from cultural debates or political controversies. District and school employees routinely express their views about a wide range of subjects, from religion, to race, to politics by decorating their offices. *Id.* ¶¶ 51–65. They decorate their offices with books, paintings, personal photos, lights, plants, posters, inspirational quotes, and other items, including items promoting political messages. *Id.*

One especially controversial subject on which employees and teachers express their views is the relationship of human identity, sex, and gender. *Id.* They display Pride flags or posters supporting the Oregon public educators' unions in their offices and in classrooms. *Id.* Teachers and even the school library display books that celebrate or reference LGBT themes. *Id.* ¶¶ 136–139.

[1] Plaintiff recognizes that LGSD's school year ends on June 5, 2025, *see* http://bit.ly/44YL9hy. Therefore, out of respect for the Court's time and resources, Plaintiff requests an injunction that will permit him to display the Books, and similar messages, by the start of the 2025-2026 school year on August 29, 2025. *See* https://bit.ly/4jqgAVt.

Through these and other means, Defendants and their schools permit employees to embrace, endorse, and express the idea that what makes a person male or female is solely that person's subjective identity and has no relation to biology. *Id.* ¶¶ 178, 184. As a matter of policy, Defendants express the idea that, however a person identifies, that identity is "valid" and must be recognized as such by others. *Id.* ¶ 178.

On October 2, 2024, Plaintiff tried to express his message about gender in the same way that Defendants and the schools permit other employees and teachers to speak on the same issue: he displayed two books in his office, *He is He* and *She is She*. *Id.* ¶ 73. Only the covers of the Books were visible. *Id.* ¶ 74. Plaintiff's display silently, respectfully, and truthfully conveyed his view. It said, "He is He" and "She is She." *Id.* ¶¶ 75–76. Plaintiff understands that there are two sexes and that a person's gender (status as male or female) is rooted in that reality according to God's design. *Id.* ¶ 5. In Plaintiff's mind, his display of the Books' covers communicated a positive message that celebrates God's design of humans as male or female as beautiful. *Id.* ¶¶ 112–114.

Defendants, however, quickly censored Plaintiff's speech. After receiving a complaint from one school employee who thought that the Books were "transphobic," *id.* ¶¶ 158–159, Defendants instructed Plaintiff that he couldn't display the Books. *Id.* ¶ 160. Defendants also ordered Plaintiff to remove another book, *Johnny the Walrus* by Matt Walsh, *id.* ¶¶ 159–160, which Plaintiff had displayed for two years without issue. *Id.* ¶ 88. There had been no disruption of

Plaintiff's ability to do his job, the District's ability to provide services to schools or students, or the school environment, and no student conveyed any objection or even commented about the Books to Plaintiff. *Id.* ¶¶ 80–81, 187–190.

But Defendants told Plaintiff he couldn't display the Books because they "promote a binary view of gender, which excludes and invalidates an understanding of gender diversity," "communicates a message of exclusion and diminishes the validity of non-binary and transgender experiences," and "contributes to an unwelcoming environment[.]" *Id.* ¶ 178. They also warned Plaintiff "further conduct of this nature may result in discipline up to and including termination of [his] employment." *Id.* ¶ 161. Only the Books' covers were visible, but Defendant VanNice apparently read the book and called out the portion of *She is She* that discusses the Biblical and scientific definitions of a woman. And even though the Books never discuss transgender issues, VanNice interpreted them to mean that they didn't support transgender individuals. *Id.* ¶ 118–126, 140–142, 146, 159–160.

Defendants claimed the display constituted a "bias incident," defined as "a hostile expression of animus toward another person relating to their actual or perceived gender identity." *Id.* ¶186. The Speech Policy defines broadly "[p]ersons impacted by a bias incident" as "includ[ing] persons directly targeted by an act, as well as the community of students as a whole who are likely to be impacted by the act." *Id.* ¶ 42.

Defendants didn't identify any students or individuals "targeted" by Plaintiff's display. *Id.* ¶ 188. Nor did Defendants claim that Plaintiff's expression

disrupted any District or school activities. *Id.* ¶ 187. Indeed, they admitted that they didn't need to. *Id.* ¶ 189. Further, the District and its schools' English and Science classes teach "a binary view of gender" through lessons that impart how biology dictates gender and the correct usage of traditional gender pronouns. *Id.* ¶¶ 179–182.

Rather, Defendants explained that their determination was based on the hypothetical and subjective "potential impact" of the display on students and staff who "may interpret that the [B]ooks send a message of bias and exclusion" at some point in the future. *Id.* ¶ 190. Thus, Defendants use the Speech Policy to censor and threaten Plaintiff for expressing his views regarding sex (or gender), but they don't punish employees who express opposite views on the same subject. *Id.* ¶ 278. Defendants take no disciplinary action against employees who support and endorse the viewpoint that gender is fluid, gender is on a spectrum, or there are more than two genders, but they take disciplinary action against employees, like Plaintiff, who express what Defendants interpreted to be a contrary view. *Id.* ¶ 279.

Defendants continue enforcing their Speech Policy to prohibit Plaintiff from expressing his view about gender (while permitting other employees to express their views). *Id.* Plaintiff wants to communicate his view by displaying the Books and books with a similar message, but is refraining from doing so out of fear that he will be punished again. *Id.* ¶¶ 201–202. Because Plaintiff is suffering ongoing harm from the loss of his constitutional rights and from losing the opportunity to speak his message, Defendants' censorship must end. *See id.* ¶ 200.

Legal Standard

To obtain a preliminary injunction, Plaintiff must establish that (1) he is "likely to succeed on the merits"; (2) he is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's "sliding scale" approach, the elements "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017).

When, as here, the hardship balance "tips sharply toward the plaintiff[s]" and the other two *Winter* factors are met, Plaintiff needs only show "serious questions going to the merits." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 683–84 (9th Cir. 2023) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32, 1134–35 (9th Cir. 2011)). Plaintiff needn't "prove his case in full, or show that he is more likely than not to prevail"; "[r]ather, the moving party must demonstrate a fair chance of success on the merits or raise questions serious enough to require litigation." *Harman v. City of Santa Cruz*, 261 F. Supp. 3d 1031, 1041 (N.D. Cal. 2017) (cleaned up). "Serious questions" are ones that "'cannot be resolved one way or the other at the hearing on the injunction' because they require 'more deliberative investigation.'" *Manrique v. Kolc*, 65 F.4th 1037, 1041 (9th Cir. 2023) (quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc)). "Serious questions need not promise a certainty of success, nor even present a probability of success, but rather must

involve a fair chance of success on the merits." *Marcos*, 862 F.2d at 1362 (cleaned up).[2]

Argument

I. Plaintiff is likely to succeed on the merits of his claims.

The Ninth Circuit considers the "'likelihood of success on the merits' as 'the most important *Winter* factor[.]'" *Nat'l Rifle Ass'n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 928 (C.D. Cal. 2019) (quoting *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)). Plaintiff is likely to succeed on the merits of his claims. Defendants' Speech Policy, both facially and as applied, burdens the exercise of Plaintiff's religion, discriminates based on the content and viewpoint of Plaintiff's speech, imposes a prior restraint, and grants unbridled discretion to Defendants. Since Defendants' interpretation and enforcement of their Speech Policy show that they're censoring Plaintiff's religious speech on the basis of viewpoint, strict scrutiny applies. Defendants' Speech Policy cannot meet its exacting requirements. Plaintiff thus has much more than a fair chance of success on the merits.

A. Defendants violated Plaintiff's Free Exercise right by targeting his religious speech and because the Policy is not neutral or generally applicable.

The First Amendment "doubly protects religious speech[.]" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly." *Id.* at 524. "It

[2] The injunction requested will return the parties to the status quo ante litem, so it is prohibitory. *Faison v. Jones*, 440 F. Supp. 3d 1123, 1131 (E.D. Cal. 2020).

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." *Id.*

To raise a Free Exercise claim, Plaintiff must show his display was "motivated by sincerely held religious beliefs." *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1285 (D. Ariz. 2020). Plaintiff's beliefs govern his views about all aspects of life, including human nature, sex, and gender and he strives to live out his Christian faith at work. Compl. ¶¶ 2–3. His faith compels him to speak on many topics from a Christian worldview. *Id.* ¶ 4. He displayed the Books as a private expression of his religious beliefs about God's design for the two sexes, either male or female. *Id.* ¶¶ 79, 88, 248. By decorating his office, Plaintiff "was not engaged in speech 'ordinarily within the scope' of his duties" as an Education Specialist. *Kennedy*, 597 U.S. at 529 (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014)). He "did not speak pursuant to government policy" and he "was not seeking to convey a government-created message." *Id.* at 529. By declaring Plaintiff's religious beliefs as offensive and discriminatory, and threatening to terminate him because of his beliefs, Defendants stripped Plaintiff's "'constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 531 (quoting *Tinker*, 393 U.S. at 506).

Defendants' actions violated the Free Exercise Clause because they (1) weren't neutral, (2) showed hostility toward Plaintiff's religion, and (3) weren't generally applicable. Any state action that is not neutral or generally applicable, and is hostile toward the plaintiff's religion requires the government to satisfy at least strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

508 U.S. 520, 531 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617, 639 (2018).

1. Defendants' actions were not neutral.

Government actions directed at a religious practice or exercise are not neutral. *Kennedy*, 597 U.S. at 526. Defendants' actions targeted Plaintiff's religious views. *Lukumi*, 508 U.S. at 537 (neutrality considers the "interpretation given" by the government). Defendants determined that Plaintiff "introduced materials into the public school environment" that "communicate[] a message that is excluding on the basis of gender identity" and thus "undermine[] the inclusive environment" at LGSD and the District. Compl. ¶ 184. Then they threatened him with punishment for future violations. *Id.* ¶¶ 20, 24. Defendants targeted Plaintiff's religious beliefs—they chose which viewpoints to allow, violating Plaintiff's free exercise rights. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021).

2. Defendants demonstrated hostility towards Plaintiff's religious beliefs.

Defendants showed openly hostility to Plaintiff's beliefs. "[T]he government … cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment on or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece*, 584 U.S. at 638. Defendant VanNice interrogated Plaintiff about his beliefs and the Books' contents. Compl. ¶¶ 116–147. She asked whether the Bible supports "they/them" and

demanded to know how the Books support transgender students. *Id.* ¶¶ 121, 126. VanNice asked these questions in an "accusatory and leading" manner, "much like a prosecuting attorney[.]" Ex. M at 9.

Government officials may not convey "official expressions of hostility" toward religious exercise. *Id.* at 639. Defendants denigrated Plaintiff's beliefs, labeling his display as "transphobic" and "a hostile expression of animus toward another person relating to their actual or perceived gender identity," *id.* ¶¶ 158–160; stating that the display "contributes to an unwelcoming environment," *id.* ¶ 178, and "undermines the inclusive environment" at LGSD and the District, *id.* ¶ 184; and determined that by merely displaying the Books, Plaintiff was subject to discipline. *Id.* ¶ 161. In *Masterpiece*, the Supreme Court reversed a decision of the Colorado Civil Rights Commission when the Commission made hostile statements that "cast doubt on the fairness" of the adjudication. 584 U.S. at 636. The Commission said that "religion has been used to justify all kinds of discrimination throughout history," and suggested that the defendant used religion as a pretext for discrimination. *Id.* at 636–637. That was certainly the same message here.

3. Defendants' actions were not generally applicable and the Speech Policy creates a system of individualized assessments.

Defendants' actions were not generally applicable. The District and its schools permit viewpoints contrary to Plaintiff's and determine on an ad hoc basis which speech they deem offensive to students and employees. The Speech Policy permits Defendants to prohibit any speech or conduct that it determines is "likely to [] impact[]" a group, Ex. F at 1, based on "perceived race, color, religion, gender

identity, sexual orientation, disability or national origin[.]" Ex. E at 1. According to Defendant Mulvihill, the District's "executive officer ... responsible for implementing Board policy," Ex. D, the Speech Policy allows Defendants to silence speech that staff "may interpret" to "send a message of bias and exclusion" at some point in the future. Compl. ¶ 190.

District employees display political messages in their offices, Compl. ¶ 56. So do school faculty. *Id.* ¶¶ 61–65 (describing classrooms containing political slogans, Pride flags, and Black Lives Matter posters). But when Plaintiff displayed the Books, Defendants ordered their removal and threatened Plaintiff with discipline. "A law [] lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534 (citing *Lukumi*, 508 U.S. at 542–546). The interest here, as stated by Defendant VanNice, was that employees weren't allowed to express views on specific subjects (in this instance, gender) while at work that "might be contrary to someone else's beliefs or views." Compl. ¶ 154. The Speech Policy, however, clearly permits other employees to express their opinions on controversial subjects, including the same subject here, without fear of reprisal. *Id.* ¶¶ 56–59, 218. Similarly, LGMS English and Science classes also teach the same view as Plaintiff, "a binary view of gender," through lessons that impart how biology dictates gender and the correct usage of traditional gender pronouns. *Id.* ¶¶ 179–182.

The Speech Policy, therefore, creates "a system of individualized governmental assessment of the reasons for the relevant conduct." *Lukumi*, 508 U.S. at 535, 537. Governments establish "a system of individualized exemptions" when they apply "a subjective test" on a "case-by-case basis" to assess if particular conduct is forbidden. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 884) (1990) (cleaned up). Defendants have discretion to censor Plaintiff's religious speech while allowing both similar and differing speech. Policies that fail to meet the requirement of being neutral and generally applicable "are subject to 'the most rigorous of scrutiny[.]'" *Id.* at 541 (quoting *Lukumi*, 508 U.S. at 546). The Speech Policy meets neither. Further, Defendants' "official expressions of hostility to [Plaintiff's] religion ... were inconsistent with what the Free Exercise Clause requires." *Masterpiece*, 584 U.S. at 639. This violation of Plaintiff's First Amendment rights must be "examined under the strictest scrutiny[.]" *Fulton*, 593 U.S. at 541.

B. Defendants' Speech Policy discriminates based on viewpoint, is a prior restraint, and allows a heckler's veto.

1. Defendants' Speech Policy is subject to viewpoint analysis, not *Pickering* balancing.

Defendants' Speech Policy prohibits Plaintiff's personal display of the Books because they "promote a binary view of gender[.]" Compl. ¶ 178. According to

Defendants, this view "contributes to an unwelcoming environment, which directly contradicts IMESD's commitment to inclusivity and diversity." *Id.* These admissions show Defendants targeted the "particular views taken by" Plaintiff on gender. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). That is viewpoint discrimination, subjecting it to strict scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 478–79, 484–86 (2014).

Sometimes, a First Amendment retaliation claim requires the plaintiff to satisfy the *Pickering* balancing test—showing that a plaintiff's First Amendment interests outweigh the government's interests in efficiently providing public services. *See Eng v. Cooley*, 552 F.3d 1062, 1074 (9th Cir. 2009). But the First Amendment applies more strongly against viewpoint discrimination—even if the speaker is a public employee.

Recent Supreme Court cases show that strict scrutiny is the right test in cases involving the religious speech of a public employee. Start with *Kennedy v. Bremerton School District*, a case about the religious speech of a football coach. There, the Supreme Court declined to decide whether strict scrutiny or *Pickering* applies. 597 U.S. 507, 532 (2022). But the Court noted that strict scrutiny "generally obtains under the Free Speech Clause." *Id.* So *Pickering* doesn't automatically apply to employment-like cases, particularly those involving religious speech. Next, in *303 Creative LLC v. Elenis*, the Court went beyond strict scrutiny and applied a per-se rule against state action designed to "excise certain ideas or viewpoints from the public dialogue." 600 U.S. 570 at 588 (2023) (cleaned up). And

in *Janus v. American Federation of State, County, and Municipal Employees*, the Court applied strict scrutiny to a rule requiring employees to support speech with which they disagreed. 585 U.S. 878, 906 (2018). As in *Rosenberger* and *303 Creative*, Defendants sought to exclude a particular viewpoint from public dialogue. As in *Janus*, this was a "blanket requirement" concerning a particular type of speech. 585 U.S. at 880. As in *Kennedy*, the prohibited speech was religious and didn't concern Plaintiff's duties as an education specialist, making it worthy of double protection.

In light of the Supreme Court's recent approach and past cases dealing with government policies that discriminate based upon viewpoint, strict scrutiny fits here more so than *Pickering* because the Speech Policy 1) discriminates based upon viewpoint, 2) targets speech based on listeners' subjective reaction to the views expressed, and 3) erects a prior restraint and grants Defendants unbridled discretion to determine which views to censor.

a. The Speech Policy requires the silencing of Plaintiff's views, but not others.

Defendants' Speech Policy "singled out" Plaintiff's message and disfavored his speech "based on the views [he] expressed" while allowing other controversial views. *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, concurring). Defendant VanNice informed Plaintiff that District employees weren't allowed to express views and opinions on specific subjects (in this instance, gender) while at work and, therefore, he could not display books that contain a view that "might be contrary to someone else's beliefs or views." Compl. ¶ 154. But the Speech Policy permits other employees to express their opinions and viewpoints on LGBT-related issues without

fear of reprisal, i*d.* ¶ 56–59, 218, even though those views are contrary to someone else's beliefs or views. As Defendant Mulvihill explained, in rejecting Plaintiff's appeal, the Books "communicate[] a message that is excluding on the basis of gender identity" and thus "undermine[] the inclusive environment" at LGSD and the District. *Id.* ¶ 184. Therefore, the Speech Policy doesn't ban all employee speech on gender; it just bans views like Plaintiff's—that God created humans as either male or female and that this is good and beautiful. Compl. ¶¶ 5, 112–114, 154, 178, 183–86, 190, 259.

Viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject"—"when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. Because "[g]overnment discrimination among viewpoints … is a more blatant and egregious form of content discrimination," (*Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 168 (2015)), it is "presumptively unconstitutional." *Rosenberger*, 515 U.S. at 829–830. Once a court determines that a decision "aim[s] at the suppression of" views, it is clear the government is discriminating based on viewpoint. *Matal*, 582 U.S. at 248 (Kennedy, concurring). This egregious governmental action is per se unconstitutional, even in public schools. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 393–94 (1992) (it is a "certainty" that viewpoint discrimination is impermissible, even when regulating speech that is otherwise "categorically excluded from the protection of the First Amendment"); *Roe v. San Jose Unified Sch. Dist. Bd.*, No. 20-CV-02798-LHK, 2021

WL 292035, at *16–17 (N.D. Cal. Jan. 28, 2021) (holding that the prohibition of "viewpoint discrimination" in K-12 schools is "clearly established").

The Supreme Court has warned employers to stay "vigilan[t]" to ensure public employers do not silence public employees "simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Viewpoint discrimination is "nearly always presumptively suspect." *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 108 (3d Cir. 2022); *see also Janus*, 585 U.S. at 906. The Ninth Circuit also demands viewpoint neutrality when the government makes decisions based on employee's speech. *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 786 (9th Cir. 2022); *see also Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017). Such regulations must be neutral to prevent employers from using their authority to silence employees' opinions they simply disagree with. *Dodge*, 56 F.4th at 786 n.6 (citing *Rankin*, 483 U.S. at 384).

Here, while the Speech Policy permitted other employees to express their ideas on gender, Plaintiff's expression was censored. Only the Books' covers were visible, but Defendant VanNice apparently read the book and called out the portion of *She is She* that discusses the Biblical and scientific definitions of a woman. And even though the Books never discuss transgender issues, VanNice interpreted them to mean that the book didn't support transgender individuals. *Id.* ¶ 118–126, 140–142, 146, 159–160. Defendant Mulvihill concluded that the Books "amounted to a bias incident" because they "promote a binary view of gender, which excludes and

invalidates an understanding of gender diversity," and that their display "communicates a message of exclusion and diminishes the validity of non-binary and transgender experiences" and "contributes to an unwelcoming environment[.]" *Id.* ¶ 178. Even displaying the Books on a shelf with other books, as other District employees, LGMS teachers, and the LGMS library do, wasn't sufficient. *Id.* ¶¶ 53–55, 133–139, 153. The only way to "[a]ddress the ... impact of bias and hate," *id.* ¶ 41, was to remove the Books entirely. This take-down order underscores how Defendants took issue with Plaintiff's views—the remedy was the removal of those views. *Id.* ¶¶ 185–192. This is textbook viewpoint discrimination. But "[t]he government may not regulate … based on … favoritism … towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386. The District used its authority to silence any dissenting discourse on gender, discriminating against Plaintiff and his religious views. *Rankin*, 483 U.S. at 384.

b. The Speech Policy bans speech based on listeners' subjective reaction to the views expressed.

The Speech Policy permits Defendants to punish Plaintiff for his display based on who the Books allegedly offended—a "highly subjective" and viewpoint-based standard. *Matal*, 582 U.S. at 233 n.5, 1763; *Iancu v. Brunetti*, 588 U.S. 388, 396 (2019) ("[A] law disfavoring 'ideas that offend' discriminates based on viewpoint…."). A Policy violation was justified by a single coworker's complaint that the Books were "transphobic" and on the hypothetical and subjective "potential impact" of the display on students and staff who "may interpret that the books send

a message of bias and exclusion" at some point in the future. Compl. ¶¶ 157–160, 190. By Defendants' own admission, the Speech Policy facilitates a heckler's veto.

Regulating speech based on a heckler's veto "discriminat[es] on the basis of viewpoint" because the heckler complains precisely about the views taken by Plaintiff. *Rosenbaum v. City & Cnty. of S.F.*, 8 F. App'x 687, 692 n.1 (9th Cir. 2001). But it's a "bedrock" First Amendment principle that "government may not prohibit the expression of an idea simply because" some "find[] the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Schools especially have a "strong interest" in teaching their students "the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy*, 594 U.S. at 190. Otherwise, "[b]ecause some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all." *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010).

Besides taking issue with Plaintiff's viewpoint on gender, Defendants claimed offense at a plainly benign and passive message. The Books' covers depict illustrations of a smiling boy and girl with the statements "He is He" and "She is She." Compl. ¶¶ 75–76. The LGMS Principal told Plaintiff that he didn't think the Books were inappropriate or offensive, *id.* ¶ 97, and the building administrator of Plaintiff's Elgin office actually *approved* of Plaintiff's display of *Johnny the Walrus*. *Id.* ¶ 171. Even the LGSD employee who complained had to go home and look up the Books online to subjectively determine that they were offensive. *Id.* ¶¶ 94–96. But

District officials were offended by the mere fact that, in their eyes, Plaintiff's celebration of boys and girls didn't convey their position that gender is fluid. *Id.* ¶¶ 178, 184.

The Speech Policy took issue solely with Plaintiff's viewpoint, not the impact the Books supposedly had on the District or its schools. The Supreme Court has held repeatedly that "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal*, 582 U.S. at 244 (quoting *St. v. New York*, 394 U.S. 576, 592 (1969)). Restricting any message the government finds "offensive" is the very "essence of viewpoint discrimination." *Id.* at 249 (Kennedy, concurring).

c. The Speech Policy is a prior restraint and grants unbridled discretion.

"[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). Thus, courts "consistently condemn" speech regulations that "vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places." *Id.* at 153. Left with only vague or non-existent criteria on which to make their decision, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Policies that grant unbridled discretion,

therefore, violate the First Amendment's prohibition on viewpoint discrimination. *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1225 (9th Cir. 2017).

Far from providing narrow, objective, and definite standards, Defendants' Speech Policy allows complete discretion. The Speech Policy prohibits what it calls "bias incident[s]," defined as a "person's hostile expression of animus toward" another "person's perceived ... gender identity[.]" Compl. ¶ 40. But beyond the statement that "[b]ias incidents may include derogatory language or behavior," Ex. E at 1, the Speech Policy fails to define what a "hostile expression of animus" is. Nor does it require a finding that "any one person was directly targeted." *Id.* ¶¶ 188–189. Rather, the Policy states that "[p]ersons impacted by a bias incident ... shall be defined broadly to include ... the community of students as a whole who are likely to be impacted by the act." Ex. F at 1. But this only leaves employees guessing as to what speech or conduct may "impact" an unlimited number of "communit[ies[of students[.]"

The Speech Policy also doesn't require Defendants to assess evidence of the threat of ongoing or future harm to justify a finding that conduct or speech constitutes a bias incident. *Id.* ¶¶ 186–190. Rather, Defendants' Speech Policy allows administrators to declare policy violations "at any time," "for any reason," and "in the sole and absolute discretion of the [administrator]." *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012); *accord* Compl. ¶190 (explaining that the policy violation was based on the hypothetical and subjective "potential impact" of Plaintiff's display on students and staff who "may interpret that the books send a message of bias and exclusion" at some point in the future.) Governments, however, must tailor prior

restraints to redress "extremely serious" "substantive evil[s]" that have an "extremely high" degree of "imminence." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1440 n.9 (9th Cir. 1984). The government must show a "solidity of evidence" to justify its prior restraint. *Id.* Given that standard, "[e]ven when a speaker has repeatedly exceeded the limits of the First Amendment, courts are extremely reluctant to permit the state to close down his communication forum altogether." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987).

Finally, Defendants' Speech Policy allows them to censor speech without the burden to seek any independent review of their censorship. The only appeal of a bias incident that Defendants' Speech Policy offers goes to District officials. Compl. ¶¶ 163, 193. The appeal doesn't go to a neutral third party, such as a court. *Contra Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."). Indeed, "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Id.* at 57–58. Lastly, Defendants shirk their "burden of persuasion" to show the need for the directive on appeal. *Id.* at 58.

This case proves how unbridled discretion allows administrators to target speech based on viewpoint. Defendants haven't censored other employees who expressed differing views on gender. *Supra* Section I.A.3; *accord* Compl. ¶¶ 56–59,

218. As the Ninth Circuit has recognized, unbridled discretion will cause citizens to "hesitate to express, or refrain from expressing, [their] viewpoint[s] for fear of adverse government action." *Kaahumanu*, 68 F.3d at 807. That's exactly what's happened to Plaintiff—and potentially many other employees—here. Compl. ¶ 200.

C. Defendants' censorship of Plaintiff's religious speech fails to satisfy strict scrutiny.

Content and viewpoint discrimination must survive strict scrutiny. *Reed*, 576 U.S. at 163–64. And policies that are neither neutral towards religion nor generally applicable "are subject to 'the most rigorous of scrutiny[.]'" *Kennedy*, 597 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546). That is, the government bears the burden of proving its discrimination is "the least restrictive means available to further a compelling government interest." *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (en banc). Defendants cannot meet this "exacting standard." *Id.*

1. Defendants cannot show a compelling interest to justify censoring Plaintiff's speech.

Defendants have no compelling interest in discriminating based on what Plaintiff said. Defendants may try to rely on general interests in combatting discrimination. But excluding Plaintiff's respectful, passive, and protected speech to "creat[e] a safe place" and ensure "inclusivity and tolerance" for LGBT students fails. *Dodge*, 56 F.4th at 786 (9th Cir. 2022). Those are just bywords for "avoid[ing] the 'discomfort and unpleasantness that always accompany an unpopular viewpoint.'" *Id.* (quoting *Tinker*, 393 U.S. at 509). And the Books didn't even address gender identity or transgender issues. Further, "[t]here is no categorical

'harassment exception' to the First Amendment's free speech clause." *Rodriguez*, 605 F.3d at 708. "Harassment law generally targets conduct" and it can "sweep[] in speech . . . only when consistent with the First Amendment." *Id.* at 710. Anti-harassment measures cannot target "pure speech." *Id.* What's more, the religious beliefs of staff and students need to be tolerated too. *See Kennedy*, 597 U.S. at 538 ("[L]earning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'") (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)). The fact that Plaintiff's speech didn't disrupt or even concern the District further undermines Defendants' interest in silencing him.

Defendants may also try to rely on their desire to avoid disruption to the educational environment as a compelling interest. But there was no disruption to the District's ability to provide services to the public. Between the time when Plaintiff began displaying the Books and when he was told to remove them, no student commented, inquired about, or became visibly upset or distracted by either of the Books. *Id.* ¶¶ 80–81. And in the two years that Plaintiff displayed *Johnny the Walrus*, only one curious student inquired about that book. *Id.* ¶ 129. Defendant Mulvihill admitted that the display of the Books didn't disrupt the District's ability to provide efficient services and that Defendants "did not find that any one person was directly targeted" by Plaintiff's display. *Id.* ¶¶ 187–188. That LGSD teaches a binary view of gender through its English and Science classes undermines any

contention that promoting such a viewpoint disrupts the District's or the schools' operations. *Id.* ¶¶ 179–182.

The only "disruption" the District identified was one LGSD employee's complaint that, in his or her mind, the Books were offensive. *Id.* ¶¶ 157–160, 172. That is a far cry from disrupting District operations. Any feelings from speech, such as feeling "outraged," "upset," "angry," "intimidated," and "frustrated" all show that the "only disruption was the effect controversial speech [had] on those who disagree with it." *Dodge*, 56 F.4th at 786. If these feelings of "outrage" and "offense" were enough for disruption, then employees could fire anyone for any view. Despite offering no evidence to show that Plaintiff's speech was likely to undermine the District's functions and hearing no complaints from students, Defendants still ordered Plaintiff to remove the Books. No compelling interest justifies their actions.

2. Removal of the Books was not the least restrictive means to further their interests.

Nor was removal of the Books the least restrictive means to any governmental interest. "A complete ban can be narrowly tailored only if each activity within the proscription's scope is an appropriately targeted evil." *Berger*, 569 F.3d at 1053 (cleaned up). So Defendants bear the heavy burden of showing *all* of that speech would rise to the exceptionally high level of harassing or discriminatory conduct. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

Here, Defendants warned that "further conduct of this nature" may result in termination of his employment. Compl. ¶ 161. They didn't define what "further

conduct of this nature" meant, *id.* ¶ 174, but they did explain that the Books violated the Speech Policy because of the hypothetical and subjective "potential impact" of the display on students and staff who "may interpret that the books send a message of bias and exclusion" at some point in the future. *Id.* ¶ 190. It cannot be the least restrictive means to any governmental end to restrict pure speech—the very thing the First Amendment prohibits government from "abridging." U.S. Const. amend. I. The Free Speech Clause "remove[s] governmental restraints from the arena of public discussion." *Cohen v. California*, 403 U.S. 15, 24 (1971). Simply put, the District cannot ban Plaintiff's messages "in the name of preventing disruption, when the only disruption was the effect controversial speech has on those who disagree with it because they disagree with it." *Dodge*, 56 F.4th at 786.

Plaintiff has engaged in pure religious speech protected to the utmost by the First Amendment. One coworker apparently took offense to his speech, but "[w]ithout the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched." *Rodriguez*, 605 F.3d at 708. Therefore, Defendants' actions fail to satisfy strict scrutiny.

D. Defendants' retaliation against Plaintiff's speech and the Speech Policy fails to satisfy the *Pickering* balancing test.

Defendants' actions also fail to satisfy the *Pickering*-balancing test for First Amendment retaliation claims. To establish a prima facie First Amendment retaliation claim, the plaintiff must prove that "(1) []he engaged in protected speech;

(2) the defendants took an 'adverse employment action' against h[im]; and (3) h[is] speech was a 'substantial or motivating' factor for the adverse employment action." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1044 (9th Cir. 2017) (quoting *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004)). The burden then "shift[s] to the Defendants to show that the balance of interests justified their adverse employment decision." *Eng*, 552 F.3d at 1074. That is, a defendant must demonstrate that it had a legitimate administrative interest in suppressing the speech that outweighed the plaintiff's First Amendment rights. *See Dodge*, 56 F.4th at 776–77 (citing *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968)).

1. Plaintiff's display of the Books is constitutionally protected speech.

Whether a public employee has engaged in speech protected by the First Amendment breaks down to two inquiries: (1) whether he "spoke on a matter of public concern," and (2) whether he "spoke as a private citizen or public employee." *Eng*, 552 F.3d at 1070.

a. Plaintiff spoke on a matter of public concern.

Speech addresses an issue of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest.'" *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). What constitutes public concern is "defined broadly," *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 978 (9th Cir. 2002), based on the "content, form, and context of a given statement, as revealed by the whole record," *Johnson v. Multnomah County*, 48 F.3d 420, 422 (9th

Cir. 1995) (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)). While no single factor is dispositive, "content is the most important." *Thomas*, 379 F.3d at 810.

Here, District officials viewed Plaintiff's display of the Books as a comment on gender identity, which is a fiercely debated topic in today's culture. *See Janus*, 585 U.S. at 914–15 ("[S]exual orientation and gender identity" is "undoubtedly [a] matter[ ] of profound 'value and concern to the public.'") That Plaintiff's expression took place in his private office doesn't undermine the conclusion that any message he conveyed was a matter of public concern. A government employee doesn't lose the right to speak about issues of public concern in forums closed to the general public. *Connick*, 461 U.S. at 148 n.8; *Thomas*, 379 F.3d at 810 ("Because content is the most important factor, we have concluded that speech about a matter of public concern may be protected even when made in a private context."). The content, form, and context of Plaintiff's speech demonstrate that it was a matter of public concern. *See Dodge*, 56 F.4th at 778 (holding that employee spoke on a matter of public concern in "a teacher-only training with a limited audience.")

b. Plaintiff spoke as a private citizen.

The second inquiry—whether Plaintiff was speaking as a private citizen or a public employee—depends on the "scope and content of [his] job responsibilities." *Eng*, 552 F.3d at 1071. A person speaks in a personal capacity if he "'had no official duty' to make the questioned statements, or if the speech was not the product of 'perform[ing] the tasks [he] was paid to perform.'" *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008) (cleaned up). Here, Plaintiff

had no official duty to decorate his office, much less display the books that he chose, nor were either required to perform his job.

To be sure, the Ninth Circuit has held that a public-school teacher "did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings[.]" *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967 (9th Cir. 2011). Generally, "teachers necessarily act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official." *Id.*, 658 F.3d at 968.

However, the Supreme Court has rejected this "error of positing an 'excessively broad job descriptio[n]' by treating everything teachers ... say in the workplace as government speech subject to government control." *Kennedy*, 597 U.S. at 530–31 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)). "On this understanding," the Court explained, "a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. *Id.* This argument also ignores the fact that other District and school employees "were free to engage briefly in personal speech and activity" by decorating their offices. *Id.* at 531. That Plaintiff chose to use the same vehicle to engage in religious speech "does not transform his speech into government speech." *Id.* "To hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do

not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* (quoting *Tinker*, 393 U.S. at 506).

It isn't dispositive that Plaintiff's expression "took place 'within the office' environment[.]" *Kennedy*, 597 U.S. at 530 (quoting *Garcetti*, 547 U.S. at 421). What matters is whether Plaintiff used the Books "while acting within the scope of his duties as [an education specialist]." *Id.* Plaintiff didn't use the Books as part of his work with students, he "never told any student that it was important they participate in any religious activity," *id.* at 515, and he "never pressured or encouraged any student" to read the Books on display. *Id.* He only ever showed *Johnny the Walrus* to one student who asked about it, Compl. ¶¶ 129–131, and he never discussed the *He is He* and *She is She* books with any student, *id.* ¶¶ 78–81. Therefore, Plaintiff's display was private speech, not employee speech.

2. Defendants acted adversely to Plaintiff's speech by ordering the removal of the Books and threatening him with discipline.

The second element of a prima facie First Amendment retaliation claim is an adverse employment action. To determine if an adverse employment action occurred for purposes of First Amendment retaliation, the Ninth Circuit applies the "reasonably likely to deter" test. *Greisen v. Hanken*, 925 F.3d 1097, 1113 (9th Cir. 2019). Plaintiff must prove that the employer's action was "reasonably likely to deter [him] from engaging in constitutionally protected speech." *Id.* (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003)). Plaintiff need not have suffered a tangible loss. *See Brodheim v. Cry*, 584 F.3d 1262, 1269–70 (9th Cir. 2009). The purpose of protection against retaliation for engaging in protected speech

is to stop "actions by a government employer that 'chill the exercise of protected' First Amendment rights." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (en banc) (quoting *Coszalter*, 320 F.3d at 974–75). The key question, then, is whether the retaliatory activity "would 'chill or silence a person of ordinary firmness' from continuing to speak out." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 n.1 (9th Cir. 2010) (quoting *Mendocino Env't Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)). The "precise nature of the retaliation is not critical to the inquiry." *Coszalter*, 320 F.3d at 974.

"Various kinds of employment actions may have an impermissible chilling effect," including "minor acts of retaliation," *Dahlia*, 735 F.3d at 1079 (citing *Coszalter*, 320 F.3d at 975), and "[i]nformal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation.'" *Mulligan v. Nichols*, 835 F.3d 983, 989 n.5 (9th Cir. 2016) (cleaned up). The insinuation or threat that "some form of punishment or adverse regulatory action" may follow can also chill a person from speaking and violate the First Amendment. *Greisen*, 925 F.3d at 1114 (quoting *Brodheim*, 584 F.3d at 1270); *Coszalter*, 320 F.3d at 976–77 (even a "threat of disciplinary action" may constitute adverse employment action for purposes of First Amendment retaliation).

District officials' conduct towards Plaintiff's display of the Books was an adverse employment action because their actions were reasonably likely to deter him from engaging in protected speech. Their aim was to prevent him from engaging in protected speech. They ordered him to remove the Books from his

offices and then threatened him that "further conduct of this nature" would result in "discipline," including "termination." Compl. ¶ 161. "It is hardly controversial that threatening a subordinate's employment if they do not stop engaging in protected speech is reasonably likely to deter that person from speaking." *Dodge*, 56 F.4th at 779 (citing *Brodheim*, 584 F.3d at 1270; *Dahlia*, 735 F.3d at 1079). "The power of a threat lies not in any negative actions eventually taken, but in the apprehension it creates in the recipient of the threat." *Brodheim*, 584 F.3d at 1271. Even where there is no "explicit, specific threat of discipline or transfer," courts reason that "a statement that 'warns' a person to stop doing something carries the implication of some consequence of a failure to heed that warning." *Id.* at 1270.

The chilling effect of Defendants' threat is compounded by the vagueness of the Speech Policy and the unbridled discretion it grants to Defendants. *Supra* Section I.B.1.c. As Plaintiff explained in his appeal to Defendant Mulvihill, the "only suggested evidence of impact" is that "a staff person was offended by the display of the two books in [Plaintiff's] office[.]" Compl. ¶ 172. This, combined with Defendants' warning that "further conduct of this nature" could result in termination, left Plaintiff guessing as to what "conduct" the Speech Policy prohibited. *Id.* ¶ 174. To him, "conduct" could mean displaying anything in his office that someone "who disagrees with [Plaintiff] about what is true, positive, or harmful [may] decide[] to take offense at[.]" *Id.* ¶ 175.

3. Plaintiff's speech was the substantial and motivating factor in Defendants' actions.

Lastly, Plaintiff must show that his protected speech motivated any adverse employment action taken against him. *Howard*, 871 F.3d at 1044–45. Plaintiff's display of the Books unquestionably motivated Defendants' actions; it was the subject of their investigation and discipline. Thus, Plaintiff has pled a prima facie First Amendment retaliation claim against the District for purposes of obtaining a preliminary injunction. *See Dodge*, 56 F.4th at 781.

4. There was no disruption.

Once the plaintiff establishes a prima facie case, the burden "shift[s] to the Defendants to show that the balance of interests justified their adverse employment decision." *Eng*, 552 F.3d at 1074. The defendant must show that it had a legitimate administrative interest in suppressing the speech that outweighed Plaintiff's First Amendment rights. *Pickering*, 391 U.S. at 568. The government's burden in proving disruption "varies with the content of the speech." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.*; *see also Connick*, 461 U.S. at 150–52. Speech about matters of public concern "occupies the 'highest rung of the hierarchy of [F]irst [A]mendment values.'" *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Thus, employers must make a "'stronger showing' of disruption when the speech deal[s] ... directly with issues of public concern." *Robinson*, 566 F.3d at 826 (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1115

(9th Cir. 1983)). Moreover, "[t]he First Amendment affords the broadest protection to ... political expression," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *see also Dodge*, 56 F.4th at 782.

a. Mere offense is not disruption.

Speech is disruptive only when there is an "'actual, material and substantial disruption,' or [there are] 'reasonable predictions of disruption' in the workplace." *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (cleaned up); *see also Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 749 n.2 (9th Cir. 2001). Disruption "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Nunez v. Davis*, 169 F.3d 1222, 1228 (9th Cir. 1999) (quoting *Rankin*, 483 U.S. at 388). Other relevant considerations in the school context are whether "students and parents have expressed concern that the plaintiff's conduct has disrupted the school's normal operations, or has eroded the public trust between the school and members of its community." *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 725 (9th Cir. 2022).

None of that is present here. Defendant Mulvihill admitted that Plaintiff's display didn't disrupt the District's ability to deliver services to its schools and their students. Compl. ¶ 187. Defendants only cited one coworker's complaint that the Books were offensive (after leaving the office, looking up the Books and locating

certain passages) as the basis for finding a policy violation. *Id.* ¶¶ 96, 158. But speech that upsets co-workers without evidence of "any actual injury" to the employer's or the school's operations doesn't constitute a disruption. *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004).

In sum, while one employee may have been offended by the Books, Defendants presented no evidence of actual or tangible disruption to school operations. "That some may not like the political message being conveyed is par for the course and cannot itself be a basis for finding disruption of a kind that outweighs the speaker's First Amendment rights." *Dodge*, 56 F.4th at 783. If these feelings of "offense" were enough for disruption, then employees could fire anyone for any view. In a different office, this could mean firing someone for displaying a book about marriage equality that his employers found offensive.

b. Plaintiff's speech did not concern the District or his work.

Defendants' censorship is more egregious when considering that Plaintiff's speech was wholly unrelated to an opinion or statement about the District and didn't have any connection to his work with students. Plaintiff's religious opinion celebrating boys and girls doesn't affect the District or school functioning. Neither does an opinion that celebrates transgender individuals, as demonstrated by the fact that both the District and LGMS permit displays of Pride flags in offices and classrooms. *Id.* ¶¶ 56–59, 63. Plaintiff's statement was purely religious and was not about the District or directed toward any student.

The Supreme Court has struck down attempts to discipline employees for stating opinions that are "unrelated" to their job description. *Rankin*, 483 U.S. at 380, 389. In *Rankin*, a secretary at a police department was terminated for expressing a desire that President Ronald Reagan should have been assassinated. *Id.* at 380. While her opinion was inflammatory and unpopular at her workplace, she was terminated solely "based on the content of her speech." *Id.* at 390. McPherson's "duties were purely clerical" and given her "position in the office, and the nature of her statement" the Court wasn't convinced that the government had an interest in discharging her that outweighed her rights under the First Amendment. *Id.* at 392. McPherson's political opinion was unrelated to the secretarial role the station hired her to fill.

Similarly, Plaintiff's display was irrelevant to the job he needed to fulfill—evaluating the educational needs of students. His religious opinion on gender didn't affect the District or school operations or his ability to faithfully serve students. Plaintiff's expression didn't address, criticize, or impact the District. Therefore, Defendants had no interest in silencing that speech.

E. Defendants are violating Plaintiff's right to due process of law by authorizing officials to censor whatever they determine to be a "bias incident."

Under the Due Process Clause, a regulation is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that [employees] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). This doctrine "prevents arbitrary and discriminatory enforcement," *Stephenson v. Davenport*

Cmty. Sch. Dist., 110 F.3d 1303, 1308 (8th Cir. 1997), and applies with additional force where policies "interfere[] with the right of free speech." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1992).

The Speech Policy fails in two respects. First, it fails to give employees adequate notice of when it applies. Public employees are constitutionally guaranteed "a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S.104, 108 (1972). The Speech Policy breaches that guarantee, subjecting employees to discipline and censorship if their speech or office decorations somehow imply (through a "hostile expression of animus," whatever that is) a message that "impact[s]" or is "likely to" impact a laundry list of groups. Compl. Ex F at 1. No employee can read the Speech Policy and know what's prohibited. This makes it unconstitutional.

Second, the Speech Policy lacks "explicit standards for those who apply [it]." *Grayned*, 408 U.S. at 108–09. The same provisions described above alone demonstrate the lack of standards. But just in case there was any doubt, the Speech Policy also expressly gives enforcers unlimited discretion, barring even "language or behavior," Ex. E at 1, that the administration determines is "likely to [] impact[]" a group. Ex. F at 1. Defendants' actions show that this is no surplusage: they use this exact leeway to silence speech that staff "may interpret" to "send a message of bias and exclusion" at some point in the future. Compl. ¶ 190.

The Speech Policy vests them with unlimited discretion to restrict speech. This dooms their Policy under both the First and Fourteenth Amendments.

F. Defendants and their Speech Policy are violating Plaintiff's right to equal protection of the law by banning his religious views.

The Supreme Court has stated that "whenever the government treats any person unequally because of his or her [membership in a protected class], that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229–30 (1995); *see also Damiano v. Florida Parole & Probation Comm'n*, 785 F.2d 929, 932–33 (11th Cir.1986) (explaining that protected classes include race, religion, national origin, and poverty). "The Constitution's equal protection guarantee ensures that [government] officials cannot discriminate against particular religions." *Davis v. Powell*, 901 F. Supp. 2d 1196, 1218–19 (S.D. Cal. 2012) (quoting *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir.1997), abrogated in part on other grounds by *Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir.2008)). Courts apply strict scrutiny "when distinctions are made on the basis of a suspect class, like religion." *Ass'n of Christian Schs. Int'l v. Stearns*, 362 Fed.Appx. 640, 646 (9th Cir.2010).

Here, the Speech Policy discriminates based upon religion by permitting Plaintiff's coworkers to display messages that gender is fluid but prohibiting Plaintiff from expressing his religious beliefs on gender. Decisions based upon "an unjustifiable standard such as race, religion, or other arbitrary classification"—traditional suspect classes—are intolerable under the Equal Protection Clause. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

II. All other preliminary injunction factors favor Plaintiff.

Plaintiff is substantially likely to prevail on his claims. Since all other factors also favor Plaintiff, the Court should grant his requested preliminary injunction. It is axiomatic that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). In the Ninth Circuit, "[i]rreparable harm is relatively easy to establish in a First Amendment case" because the party seeking the injunction "need only demonstrate the existence of a colorable First Amendment claim." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022), cert. denied, —— U.S. ——, 143 S.Ct. 1749 (2023) (cleaned up); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief.'") (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)). Plaintiff has therefore met his burden in establishing a likelihood of irreparable harm.

For all the reasons discussed above, Plaintiff has demonstrated a colorable claim that Defendants' application of its Speech Policy to Plaintiff violated his constitutional rights and will continue to violate those rights absent an injunction. In particular, Defendants' subjective enforcement of the Speech Policy and their complete failure to define "further conduct of this nature" has and will continue to cause Plaintiff to self-censor his speech for fear of losing his job. The irreparable harm factor thus weighs in favor of injunctive relief.

Where, as here, the party opposing injunctive relief is a government entity, the third and fourth factors—the balance of equities and the public interest—"merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Because Plaintiff has (at a minimum) "raised serious First Amendment questions," that alone "compels a finding that the balance of hardships tips sharply in [his] favor." *Am. Bev. Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (cleaned up). "[T]he balance of equities favors [the party] whose First Amendment rights are being chilled." *Harris*, 772 F.3d at 583. Defendants have censored Plaintiff's expression, and Plaintiff is self-censoring out of fear.

Furthermore, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). And there is a "significant public interest in upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (cleaned up). Defendants themselves have an interest in protecting expression. "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190. Defendants are censoring speech about gender—a matter of enormous public concern. *Supra* Section I.D.1.a. Defendants' acts pose a grave threat to individual rights and to the ability of schools to serve their function, both of which are vital public interests. An injunction is urgently needed to preserve those interests.

Conclusion

This Court should enjoin Defendants' ongoing violation of Plaintiff's constitutional rights.

Respectfully submitted this 29th day of May, 2025.

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Certificate of Compliance

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,997 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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Certificate of Service

I hereby certify that on the 29th day of May, 2025, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

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