APPEAL NO. 25-5641

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODERICK E. THEIS, II,

Plaintiff-Appellant,

v.

INTERMOUNTAIN EDUCATION SERVICE DISTRICT BOARD OF DIRECTORS, MARK S. MULVIHILL, Superintendent, and AIMEE VANNICE, Assistant Superintendent and Director of Human Resources,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 2:25-cv-00865-HL

OPENING BRIEF OF APPELLANT

John J. Bursch
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450–4235
jbursch@ADFlegal.org

David A. Cortman
Travis C. Barham
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339–0774
dcortman@ADFlegal.org
tbarham@ADFlegal.org

Tyson C. Langhofer
Matthew C. Ray
Mathew W. Hoffmann
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707–4655
tlanghofer@ADFlegal.org
mray@ADFlegal.org
mhoffmann@ADFlegal.org

Rebekah Schultheiss
LAW OFFICES OF REBEKAH MILLARD, LLC
P.O. Box 7582
Springfield, Oregon 97475
(707) 227–2401
rebekah@millardoffices.com

Counsel for Appellant

DISCLOSURE STATEMENT

As a natural person, Roderick E. Theis, II has no parent corporation and no stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

RULES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Appellant Roderick E. Theis, II respectfully requests oral argument. InterMountain Education Service District has prohibited both the display of books he chooses to decorate his office and the expression of any views that promote a binary view of sex while actively promoting opposing views. Thus, it has infringed his rights to free speech, free exercise of religion, and due process. This case raises important constitutional questions addressing whether officials in a public education district may (1) discriminate based on viewpoint out of fear that students may errantly attribute an employee's personal speech to InterMountain; (2) prevent an employee from expressing a "binary view of gender" after interrogating him about his religious beliefs, labeling his expression "transphobic," and accusing him of "undermin[ing]" the school's "inclusive environment"; and (3) stifle an employee's expression on topics sparking debate in academic, political, legal, and cultural contexts, even though no policy prohibits it and co-workers (and even the various schools) echo those views.

Because the case implicates important constitutional liberties and presents nuanced disputes, oral argument will assist the Court.

STATEMENT OF JURISDICTION

Plaintiff's verified complaint raises federal questions under the U.S. Constitution and 42 U.S.C. § 1983. 2-ER-182. The district court exercised original jurisdiction under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction). 2-ER-182.

Appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1). On August 20, 2025, the district court partly denied Plaintiff's preliminary injunction motion. 1-ER-34. On September 4, 2025, Plaintiff timely appealed this order. 2-ER-295.

STATEMENT OF THE ISSUES

Roderick Theis is an InterMountain social worker who has served students for 17 years. He recently placed two children's books behind his desk as décor. Only the covers, saying *He Is He* and *She Is She*, were visible. No students or parents objected. InterMountain lets employees decorate their workspaces with personal items visible to children, such as transgender-pride flags, "Black Lives Matter" signs, other political messages, children's books, and family photos. But after one employee complained about the content of Rod's books, InterMountain interrogated him about his religious beliefs, accused him of "undermin[ing]" the school's "inclusive environment," and prohibited him from both displaying the books and expressing "a binary view of gender." Yet no policy bans this speech, and schools InterMountain serves teach students this same "binary view." Per the district court, InterMountain can bar Rod from displaying his books or expressing his views to students.

This Court must consider *de novo* whether InterMountain may:

1. Conclude that admittedly private speech morphs into government speech when a student sees it.
2. Discriminate based on viewpoint out of fear that students may errantly attribute Rod's personal speech to it.
3. Prohibit Rod from expressing a "binary view of gender" after interrogating him about his religious beliefs and labeling his expression "transphobic" and dangerous to an "inclusive environment," while the schools teach the same view of gender.
4. Invoke a vague policy to stifle Rod's speech on hotly debated topics, even though the policy's text does not prohibit it and InterMountain's schools echo those views.

The answer to all questions is the same: "No."

PERTINENT STATUTES AND POLICIES

The relevant constitutional provisions, statutes, and policies are attached as an addendum to this brief.

INTRODUCTION

For half a century, it's been clear that "state-operated schools may not be enclaves of totalitarianism." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). "[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." *Kennedy v. Bremerton Sch. Dist. (Kennedy III)*, 597 U.S. 507, 538 (2022) (quotation omitted). And "disagreement with a disfavored political stance or controversial viewpoint, by itself, is not a valid reason to curtail expression of that viewpoint at a public school." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 786 (9th Cir. 2022).

But InterMountain rejects these timeless principles. It allows employees to engage in all sorts of private, favored ideological expression when students are present. But when one employee expresses a disfavored view—even in such a passive, unobtrusive way that hardly anyone notices—the hammer can fall. All a school must do to censor that speech and sidestep the First Amendment is to claim that private expression is government speech. Then school officials can label this disfavored view dangerous to students or the school's mission. And it won't matter if teachers teach students the same view in class.

This approach violates the First and Fourteenth Amendments. "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker*, 393 U.S. at 513. And that's why this Court should reverse the district court and remand with instructions that InterMountain cannot prevent Rod from displaying his books in his office when students are present and must remove any reference to the letter of directive and related investigations in its records for Rod.

STATEMENT OF THE CASE

I. Rod has faithfully served the students in his community for 17 years as an InterMountain social worker.

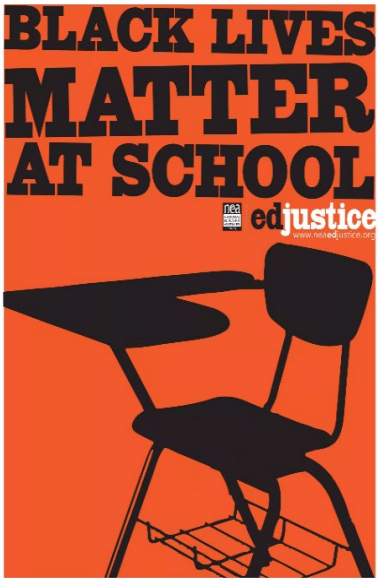
For 17 years, Rod has served students in public schools as a licensed clinical social worker with InterMountain. 2-ER-185. Specifically, he serves as an education specialist, a role that requires him to travel to schools in the 17 school districts across four counties that InterMountain serves. 2-ER-183, 185. In this role, he meets with students individually to assess their educational needs by administering either standardized tests to evaluate their intellectual or academic level or behavioral assessments to determine their social or emotional needs. 2-ER-183, 185. The schools he serves provide him an office in which to conduct these assessments and then write reports about his observations, the student's test results, and his recommendations for how the school can best meet the student's needs. 2-ER-185.

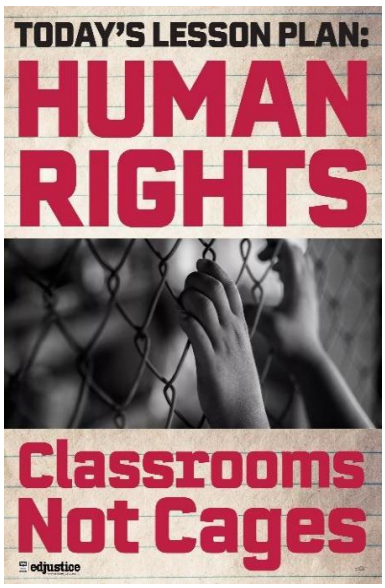
While important, Rod's role is limited. He is not a counselor, does not engage students in wide-ranging conversations, and does not advise them on anything. 2-ER-80, 185. He just administers prescribed tests or evaluations and reports the results to school officials. 2-ER-80, 185. His office is generally not open to students or parents except when students are being tested or evaluated. 2-ER-188. Indeed, his office door says: "Staff Only." 2-ER-188. During the three weeks he displayed the books, he evaluated only four students in one of his offices. 2-ER-188.

II. Rod's faith-based beliefs inspired him to decorate his offices with three children's books, just as his coworkers express their views with their office décor.

InterMountain employees like Rod use office space in the schools they serve, and InterMountain gives them a free hand to decorate those offices as they see fit; it does not require them "to ask permission before they present specific views or decorate their workspace." 2-ER-81. Thus, they decorate their offices with paintings, personal photos, plants, posters, inspirational quotes, books, and more. 2-ER-185. Some opt for children's toys, arts and crafts materials, and books on counseling children. 2-ER-186. Others for artwork, family photos, and personal notes from students and colleagues. 2-ER-186.

Some choose ideological décor, like the InterMountain employee who features a picture of workers standing in a picket line, holding rainbow-colored signs that spell "UNIONS"—a clear pro-LGBT message. 2-ER-186. To anyone familiar with InterMountain, this is not surprising, as this union urges members to engage in "Activism through Art," noting "[a]rt is a powerful tool for change." 2-ER-186. It provides posters for them to "use[ ] for creative and social media content, visuals, public messages, calls to action, ... and more," including these posters promoting LGBTQ+, Black Lives Matter, and illegal immigration:





2-ER-186–87. Unsurprisingly, this union urges members to use transgender terminology and warns against "misgendering." Or. Educ. Ass'n, *Ensuring and Protecting Opportunities for Girls, Women and LGBTQ+ Students and Educators*, https://perma.cc/MZR8-KVGS. 2-ER-186.

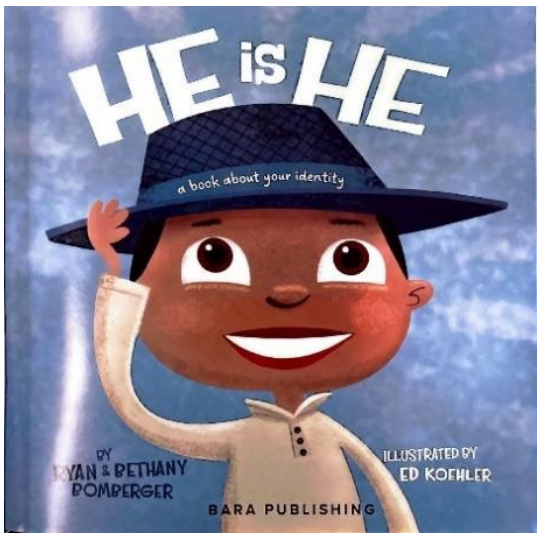
Still other InterMountain employees decorate their offices with children's books, including those that distinguish between boys and girls. An InterMountain speech pathologist decorated her office by displaying the children's books entitled *What Should Danny Do?* and *What Should Darla Do?* 2-ER-185. Another InterMountain employee had a large collection of books for girls experiencing puberty. 2-ER-186.

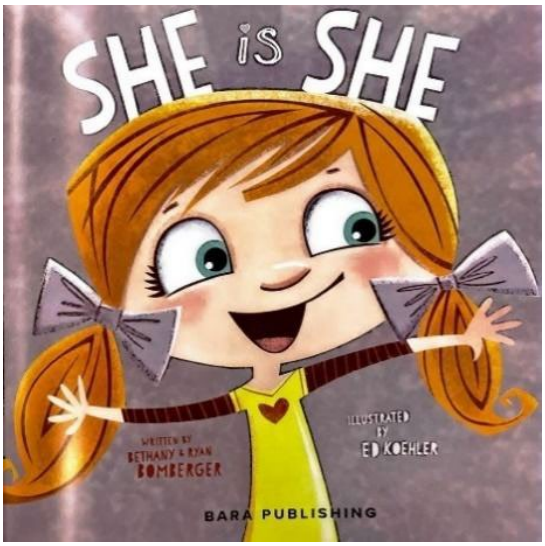
The schools that InterMountain serves also allow teachers to promote ideological messages to students. For example, at La Grande Middle School, where Rod has an office, a social studies teacher displayed in a classroom a poster of President Obama saying, "Yes, we can." 2-ER-

187. A special education teacher displays a transgender pride flag with, "YOU ARE LOVED," written on it. 2-ER-187. A counselor displays a poster, saying: "Black students, Black dreams, Black futures, Black lives MATTER." 2-ER-187. The counselor also displays a rainbow-colored sticker promoting the Oregon School Counselors Association, 2-ER-187–88, which has publicly criticized President Trump's executive orders for causing "heightened fear and anxiety" to various communities, including "our immigrant and refugee students and our LGBTQ2SIA+ students." Or. Sch. Counselors Ass'n, *Statement to Students and Families* (Feb. 2025), https://perma.cc/YS3P-8YPH. And it directs members to resources urging them to use transgender terms and to hide from parents their child's struggle with gender dysphoria. *Id.* (pointing to "ASCA Resources for Supporting LGBTQ Students"); Am. Sch. Counselor Ass'n, *The School Counselor and Transgender and Nonbinary Youth*, https://perma.cc/ZHJ3-74R9 (one of the resources).

In early October 2024, amid this ideological ferment, Rod decorated his spartan office at La Grande Middle School with two children's books he bought with his own funds: *He Is He* and *She Is She*. 2-ER-189. His office door sported a "Staff Only" sign, and Rod placed them on the windowsill behind his desk, with only the covers visible. 2-ER-188–89.

The covers feature an illustration of a smiling boy and girl respectively, the title, and the phrase "a book about your identity." 2-ER-189.



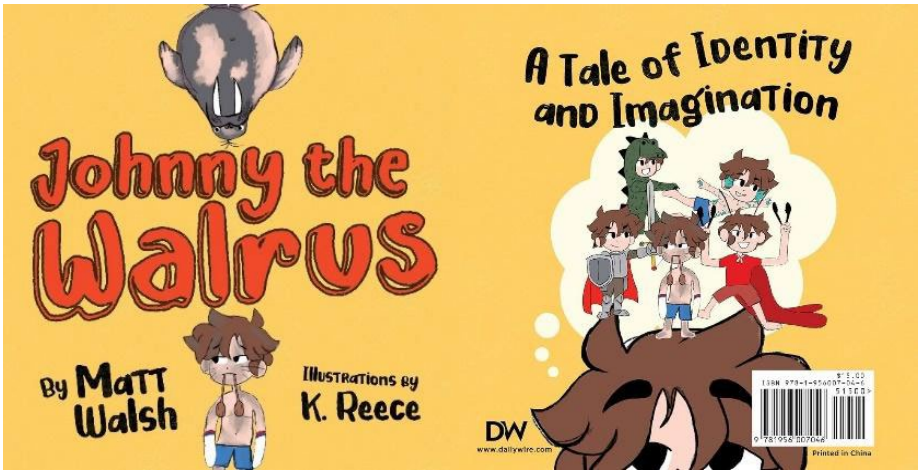


Rod never used these books as part of his work with students, but the covers expressed his personal views. 2-ER-189. During the almost three weeks he displayed them, four students visited his office; no one complained or even inquired about them. No parent, student, or staff handled or read them while he was present. 2-ER-190.

At his offices in the Elgin and Union School Districts, Rod displayed on his desk another children's book, which he also purchased with his own funds: *Johnny the Walrus*. 2-ER-190–91.

Rod displayed this book in his Elgin office throughout the 2024–25 school year and in his Union office throughout the 2022–23 and 2023–24 school years. 2-ER-191. Again, no one complained about it, and it expressed his personal views. He never used it as part of his duties,

though he shared and discussed it with one inquisitive student once. 2-ER-195, 198. To everyone else, only the covers were visible. 2-ER-191.



All three books urge children to prize the way that God created them—as either boys or girls. *He Is He* and *She Is She* point to the Bible and science to explain how boys and girls can each do great things and that it is great to be the way that God created each of us. 2-ER-195–97. *Johnny the Walrus* uses a fictitious story about an imaginative boy to make similar points. 2-ER-191. All three reinforce Rod's view that God created every person as male or female, that we should accept our God-given sex and not seek to change it, and that this sex is revealed through our DNA, which cannot change. 2-ER-179, 197. But visitors could only see the covers, and Rod simply wanted to express his view that boys should embrace being boys and girls should embrace being girls. 2-ER-195.

III. After one coworker complained, InterMountain interrogated Rod, ordered him to remove the books, and threatened his job for promoting a "binary view of gender."

A. La Grande's principal tipped Rod off to the complaint.

Almost three weeks after Rod put *He Is He* and *She Is She* on his La Grande office windowsill, the school's principal emailed him, seeking a meeting to discuss "some concerns brought to [him] about a couple of books on display in [Rod's] office" and asking Rod to remove them in the interim. 2-ER-195, 248–49. When they met, the principal explained that a La Grande employee had looked up the content of the books online and complained that they could be considered offensive to transgender-identifying students. 2-ER-192. The principal made clear that he did not see anything inappropriate or offensive about them and that he did not think Rod had done anything wrong. 2-ER-192–93. But he claimed he had to "maintain a more neutral environment" (despite the pervasive ideological (including pro-LGBT) décor from teachers) and he instructed Rod to remove the books from the school, which Rod did. 2-ER-193, 73.

B. InterMountain investigated Rod for violating its speech code.

The day after receiving the principal's email, Rod received another from InterMountain's Assistant Superintendent and HR Director, Aimee VanNice. 2-ER-193. She explained that a La Grande employee complained that Rod violated InterMountain's speech code by displaying *He Is He* and *She Is She* in his office and that InterMountain would investigate his décor as a "potential bias incident." 2-ER-194, 253–54.

That is, InterMountain accused Rod of violating its speech code in Policy ACB and ACB-R. 2-ER-183, 193, 233–34, 236–37. This speech code defines "bias incident"—which includes "derogatory language or behavior"—to mean a "person's hostile expression of animus toward another person, relating to the other person's perceived ... gender identity." 2-ER-184, 233. The code allows anyone to allege a bias incident because it defines "[p]ersons impacted by a bias incident ... broadly to include 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." 2-ER-184, 236. By violating this speech code, employees expose themselves to "discipline up to and including termination." 2-ER-240. 246.

After receiving VanNice's email, Rod reviewed the speech code, especially its "bias incident" definition. He pointed out that neither he nor the books targeted anyone or demonstrated ill will, antagonism, or hostility. 2-ER-253. But under the speech code, InterMountain does not have to identify the "another person" referenced in the policy who perceived the alleged hostility or animosity. *E.g.*, 2-ER-245 ("The investigator did not find that any one person was directly targeted. However, ... Board Policy ACB does not require evidence of direct targeting for it to be violated."). 2-ER-184.

C. InterMountain officials interrogated Rod about his beliefs and expression, holding him to a standard applied to no one else.

About a week later, VanNice questioned him in the presence of two note-takers as part of her investigation. 2-ER-194. She opened the meeting by recounting how Rod had displayed the books in his office and that this display potentially violated the speech code as a "bias incident." 2-ER-194, 256, 263. Under her questioning, Rod explained that he does not need or use the books when carrying out his job responsibilities, that students come to his office only when being evaluated, and that he displayed the books as decoration to create a more "student friendly, kid friendly" environment and to "[s]end a positive message" that would "put kids at ease." 2-ER-194–95, 256–57, 263.

Though students could only see the covers of the books when they visited Rod's office, VanNice quizzed Rod about their content. So Rod explained how *She Is She* talks about how "girls can do anything" and how it is "great to be a girl." Similarly, *He Is He* talks about how "[b]oys can do great things" with "[t]ons of examples." 2-ER-195, 257, 263. To him, the message of the books was "[n]ot confusing" in that they simply said it is "good to be a girl" and "good to be a boy." 2-ER-257, 263.

Not content with this, VanNice questioned Rod about the viewpoints the books express. When she asked about "the science" in the books, Rod recounted how the books say that "DNA determines what we are," that it "never changes," that "separate sports teams" ensure

"competition is fair," and how "[o]nly girls can get pregnant." 2-ER-195, 257, 263. When she asked about the books' use of pronouns (*e.g.*, "she is not we"), Rod noted that they use pronouns in the traditional way—just like *Mine Is Mine*, a book in La Grande's library. 2-ER-195, 257, 263–64. When she returned to the science, Rod observed there is only "one way to be" female scientifically, meaning that "females are XX and males are XY." 2-ER-197, 258, 264.

Next, VanNice questioned the religious views the books express and those Rod believes. Turning to a page in *She Is She* that contains at least five Bible verses, she asked: "Does the [B]ible support they/them?" 2-ER-195–96, 258. So Rod explained how he thinks the Bible supports the views that the books promote. 2-ER-196, 258. When he explained how he wanted to combat depression in children, even if just through "an artistic display that presents truth," she asked in Pilate-esque fashion: "What do you mean by truth?" 2-ER-259, 264–65. So Rod noted that there is "nothing confusing about" the simple statement that *She Is She*. 2-ER-259, 265. She then asked him to explain the phrase: "She is free to be how God wanted her to be." 2-ER-259, 265. So Rod again outlined his religious view: that the Bible teaches "[w]e are all created equally but with different purposes" and that "[w]e are all designed by God, and [H]e was intentional." 2-ER-259.

Growing frustrated, VanNice demanded to know how the three books "would help a transgender student." 2-ER-197, 258, 264. Rod

reminded her that he does not use the books when working with students and that he put them behind his desk to supervise access to them. 2-ER-198, 258, 264. Once, Rod shared "a little bit of" *Johnny the Walrus* with one student after the evaluation ended. 2-ER-198, 258, 264. VanNice pressed for when it would be appropriate to use these books with students. Rod reminded her that he does not use them, that they are decorations, and that many teachers decorate their offices with private book collections. 2-ER-198, 258, 264. Indeed, many books in La Grande's classrooms feature violence, suicide, explicit language, domestic abuse, drug and alcohol use, and sexual content. 2-ER-198–99. Several sixth-grade classrooms and the library feature books on same-sex relationships and characters identifying as non-binary that students freely access, including one whose cover depicts two boys kissing. 2-ER-199.

But VanNice wasn't done with the books' viewpoints. She asked Rod: "Does this book [*She Is She*] support a she wanting to be a he?" 2-ER-199, 259, 265. Rod responded: "No." 2-ER-199, 259, 265. She asked if he believed displaying the books around students was "a hostile expression of animus towards others." 2-ER-200, 259, 265. Rod explained how he had "no ill will towards anyone," wished no one harm, and could not see how anyone would feel hostility from his display of two books that have "no ill will in them." 2-ER-200, 260, 265. VanNice kept pressing, asking if he understood the possibility that a transgender-identifying student might have thoughts about the books, and Rod admitted

that it was possible. 2-ER-200, 260. After all, anything is possible. But he also pointed out that several classrooms near his office also have books that are labeled for young adults, contain sexually inappropriate material (*e.g.*, masturbation), and had sparked parental complaints, but they all remained on display. 2-ER-200, 260, 266. To these, VanNice turned a blind eye, pretending that they had no relevance unless Rod was reporting those teachers. 2-ER-201, 260, 266.

VanNice concluded her interrogation by declaring that these books could not go back into Rod's office. He could only showcase "books that don't display a view that might be contrary to someone else's beliefs or views" because while employees are "on the clock," they "are not allowed to express views and opinions on specific subjects." 2-ER-201, 261, 266. Her proclamation was both impossible—there are no views with which everyone agrees—and false—InterMountain lets employees decorate their offices with a wide range of "views and opinions on specific subjects," including gender. 2-ER-201, 261, 266. *See supra* Case II.B. Finally, she drilled down on why she prohibited Rod from displaying his books: they did "not support transgender or gender neutral." 2-ER-261. Put simply, she didn't like their viewpoints.

IV. InterMountain punished Rod for violating its speech code, even though the schools it serves teach students the same "binary view" that Rod expressed.

A. InterMountain issued Rod a letter of directive that included false statements.

About three weeks later, VanNice sent Rod a letter of directive outlining her investigation's results. 2-ER-201, 239. She recounted how InterMountain received a complaint that Rod had displayed "inappropriate materials," *i.e.*, "transphobic books." 2-ER-201–02, 239. She falsely accused him of moving all three books to his Elgin office during the investigation. 2-ER-240. Predictably, she concluded that displaying the three books to students violated InterMountain's speech code, 2-ER-202, 240, even though no student or parent complained, and Rod specifically denied any hostility or animosity towards anyone. 2-ER-200, 260, 265. She warned that "further conduct of this nature may result in discipline up to termination of your employment." 2-ER-202, 240.

B. InterMountain's superintendent rejected Rod's appeal.

Rod appealed VanNice's letter of directive to InterMountain's superintendent, Mark Mulvihill. 2-ER-202, 269. Rod highlighted how InterMountain colleagues decorate their offices, before explaining that he chose *He Is He* and *She Is She* because they were "positive kid-friendly artwork." 2-ER-202–03, 271. He recounted how no one ever read any of the books and how they are far less problematic than a variety of other books readily available to students. 2-ER-273–74 (referencing 2-ER-198–200). He reiterated again how he had no "prejudiced, spiteful[,] or

malevolent ill-will toward anyone"; how neither he nor the books conveyed "any sort of animus"; and how they impacted no one, except one offended employee. 2-ER-203–04, 273–74, 279. He asked Mulvihill to clarify whether "further conduct" referred to any instance where "someone who disagrees with me about what is true, positive, or harmful decides to take offense at something in my office." 2-ER-204, 279–80. And he detailed various inaccuracies in VanNice's findings. 2-ER-275–77.

Mulvihill summarily denied Rod's appeal. 2-ER-204, 243. He agreed that displaying the books violated InterMountain's speech code, saying they "promote a binary view of gender," "contribute[ ] to an unwelcoming environment," and "contradict[ ] [InterMountain's] commitment to inclusivity and diversity." 2-ER-204–05, 243. He decided that displaying these books violates state law because they "communicate[ ] a message that is excluding on the basis of gender identity and undermine[ ] the inclusive environment" that InterMountain and the schools it serves must maintain. 2-ER-205, 243–44. He again threatened Rod's employment if he did not comply with these directives. 2-ER-206, 246.

Mulvihill ignored how La Grande's English and science classes teach the same "binary view of gender" he deemed illegal and a policy violation. 2-ER-205. La Grande's science lessons on genetics teach that males have XY chromosomes while females have XX and that a person's DNA dictates sex and other characteristics. 2-ER-205, 283, 286–87, 290. And its English classes teach students to use "he" or "she"—not "they"—

to refer to a single person. 2-ER-205. This is precisely the same thing that Rod believes, and the same message the books express.

V. Proceedings Below

Rod filed this lawsuit and sought a preliminary injunction, seeking to display the three books and to expunge his record. 2-ER-131–32. That is, he simply wants to display the books in his office. Oral Arg. Tr. at 31:12–19, ECF No. 31.

The district court correctly recognized that *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), "must be reexamined in light of *Kennedy [III]*" and that *Poway*'s "broad statement that 'teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or ... in the general presence of students,' is of questionable precedential value in light of *Kennedy*'s direction to consider the scope and context of the speech." 1-ER-18 & n.6. But it made three reversible errors when it held that Rod could not display the books when students entered his office. First, it ruled that even an employee's private, passive speech in the presence of K–12 students is somehow transmogrified into government speech—or at least that the government can stifle disfavored views lest students erroneously think they are InterMountain's. *Id.* But InterMountain cannot "treat[ ] everything teachers ... say in the workplace as government speech subject to government control." *Kennedy III*, 597 U.S. at 530–31.

Second, the district court ruled that InterMountain neutrally applied the same rules to Rod that it did to everyone else. But officials labeled Rod's religious views "transphobic" and a threat to both an "inclusive environment" and InterMountain's values before prohibiting him from displaying the same "binary view of gender" that English and science teachers articulate in class. This flaunts the Free Exercise Clause, which "bars even subtle departures from neutrality on religion." *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018).

Third, the district court ruled that InterMountain's speech code clearly puts employees on notice that expressing—even passively—a "binary view of gender" constitutes a "bias incident." But this language does not appear anywhere in the policy and school teachers—who are subject to the same statute and similar policies as Rod—actively express this same view in class regularly.

Like the proverbial tree in the forest, Rod is free to speak—but only when no one is listening. Thus, he appealed. 2-ER-295.

SUMMARY OF ARGUMENT

Like any other InterMountain employee, Rod is free to decorate his office with his personal speech. Some of his co-workers displayed paintings, personal photos, plants, posters, inspirational quotes, and books. Others displayed ideological messages, like a picture supporting unions. Rod displayed his three books, which went mostly unnoticed. Yet when a single co-worker complained, InterMountain censored Rod.

The district court partially upheld this censorship. It ruled that Rod's private speech transformed into official-duty speech when children walked through his office door. But Rod has no official duty to decorate his office. His decorations—just like his colleagues' pro-LGBT and pro-union decorations—are personal, not related to his job duties.

The district court started off on the right foot. It correctly observed that *Poway* "must be reexamined in light of *Kennedy [III]*" and that *Poway*'s "broad statement that 'teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or ... in the general presence of students,' is of questionable precedential value in light of *Kennedy*'s direction to consider the scope and context of the speech." 1-ER-18 n.6 (quoting *Poway*, 658 F.3d at 968 (emphasis in original)). Rather, "'[t]he critical question ... is whether the speech at issue is itself ordinarily within the scope of an employee's duties.'" *Kennedy III*, 597 U.S. at 529 (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014).

But in clinging to parts of *Poway*, the district court erred. It held that Rod's private speech somehow became government speech when students enter his office because they *might* "view[ ] [it] as being promoted by the school." 1-ER-20. To the district court, the government speaks any time an observer may *think* that it is, even when it isn't. That reasoning misses another of *Kennedy III*'s significant holdings: its rejection of the *Lemon*-Endorsement test, that "long ago abandoned" notion that the state risked violating the Establishment Clause because a "'reasonable observer' could think it 'endorsed [an employee's] religious activity by not stopping the practice.'" *Kennedy III*, 597 U.S. at 533 (quoting *Kennedy v. Bremerton Sch. Dist. (Kennedy II)*, 991 F.3d 1004, 1018 (9th Cir. 2021)). Further, where public employers are concerned that observers will wrongly attribute to the government speech that is actually private, the answer is *more* speech, not censorship. *See Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1299–1300 (7th Cir. 1993) ("Public belief that the government is partial does not permit the government to become partial," "[t]he school's proper response is to educate the audience rather than squelch the speaker.") If allowed to stand, the district court's rule would cause the government-speech doctrine to grow exponentially and swallow citizens' freedoms.

The district court also erred in rejecting Rod's free-exercise claim. In censoring Rod and labeling his beliefs as "transphobic" and unwelcome, InterMountain took direct aim at his Christian faith. And Inter-

Mountain's speech code is neither neutral nor generally applicable. Rather it wields it to prohibit only certain viewpoints. The Supreme Court's recent cases reveal that strict scrutiny is the proper test for evaluating a public employee's free-exercise claim against such conduct. InterMountain flunks both strict scrutiny and *Pickering*-balancing.

Finally, the district court erred in holding that Rod was unlikely to succeed on his due-process claim. InterMountain failed to give employees fair notice that it defines a "hostile expression of animus" to include "promot[ing] a binary view of gender," 2-ER-243, as that prohibition isn't in the speech code, and InterMountain's component schools interpret the same policy language differently. Plus, how can it be a policy-violating "bias incident" when the schools teach the same exact view in several classes?

This Court should reverse and remand with instructions to issue a preliminary injunction that prevents InterMountain from enforcing its speech code to prohibit Rod from displaying the books or similar messages in his offices.

STANDARD OF REVIEW

This Court "review[s] de novo the underlying issues of law" of a denial of a preliminary injunction. *Hubbard v. City of San Diego*, 139 F.4th 843, 849 (9th Cir. 2025).

ARGUMENT

Rod is entitled to a preliminary injunction because (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 this Court'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 [Rod]" and the other two *Winter* factors are met, Rod need 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)).

I. InterMountain unconstitutionally retaliated against Rod.

InterMountain admitted that Rod spoke on a matter of public concern and that it censored him for it. 1-ER-16. Therefore, Rod's First Amendment retaliation claim turns on "whether [he] spoke as a private citizen," and if so, "whether [InterMountain] had an adequate justification for treating [him] differently from other[s]." *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).

The district court erred in ruling that Rod's display was government speech rather than private. The evidence demonstrates that there

was no disruption to InterMountain's ability to perform its services. Thus, Rod is likely to succeed on the merits of his retaliation claim.

A. Rod spoke on a matter of public concern, and InterMountain censored him for it.

When Rod displayed the books in his office, he spoke on a matter of public concern. The district court and InterMountain recognized this. 1-ER-16. That's wise. The Supreme Court recognized that "gender identity" is "undoubtedly [a] matter[ ] of profound value and concern to the public." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (citation modified). So when Rod "waded into the [gender identity] debate, [he] waded into a matter of public concern." *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021).

InterMountain conceded that Rod's speech was a motivating factor in the adverse action. 1-ER-16. Rod's display of the books unquestionably motivated InterMountain's actions. As InterMountain put it, Rod's "promot[ion]" of "a binary view of gender" sparked the investigation and discipline. 2-ER-243.

B. Rod spoke as a private citizen.

The district court rightly recognized that when Rod displayed the books in his office, he expressed his own views, not InterMountain's. 1-ER-20. But it erred by saying that this private citizen speech suddenly became government speech when students saw it. 1-ER-20.

1. In displaying the books, Rod expressed his personal views, not InterMountain's.

It is beyond dispute that "citizens do not surrender their First Amendment rights by accepting public employment," *Lane*, 573 U.S. at 231, and that government employees "receive First Amendment protection for expressions made at work." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006). While the First Amendment does not protect "statements [made] pursuant to [the employee's] official duties" *id.* at 421, government employees, no less than others, have the right "to speak as a citizen." *Id.* at 417.

Under *Garcetti*, speech is part of one's official duties if it (1) "owes its existence to a public employee's professional responsibilities"; (2) is "commissioned or created" by the employer; (3) "is part of what [the employee] was employed to do"; (4) is a task the employee "was paid to perform"; and (5) "[has] no relevant analogue to speech by citizens who are not government employees." *Id.* at 421–24. Indeed, "the critical question … is whether *the speech at issue itself* is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties," *Lane*, 573 U.S. at 240 (emphasis added). In this Court's words, employees speak as citizens when they have "no official duty to make the questioned statements." *Dodge*, 56 F.4th at 778 (citation modified).

Supreme Court precedent rejects the view that everything public employees say on public property during the workday is necessarily government speech. Such a rule would blur the line between state and

private action and erase public employee's First Amendment rights. *Garcetti* itself rejected the notion that "all speech within the office" or "concern[ing] the subject matter" of the job (which personal decorations are not) "is automatically exposed to restriction" as governmental speech. 547 U.S. at 421. *Lane* also never blessed restricting "speech that simply relates to public employment or concerns information learned in the course of public employment." 573 U.S. at 239. And *Kennedy III* rejected the idea that employees "'clothed with the mantle of one who imparts knowledge and wisdom,'" 597 U.S. at 530 (quoting *Kennedy II*, 991 F.3d at 1015), "*necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or ... in the general presence of students." *Kennedy v. Bremerton Sch. Dist. (Kennedy I)*, 869 F.3d 813, 824 (9th Cir. 2017) (quoting *Poway*, 658 F.3d at 968) (emphasis original).

Thus, the inquiry does not turn on the employee's status as an "'especially respected person[ ],'" *Kennedy II*, 991 F.3d at 1015 (quoting *Kennedy I*, 869 F.3d at 825), nor is the "time" or "location" of his speech dispositive. *Id.* Rather, "[t]he critical question ... is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 573 U.S. at 240. And this duty-centric inquiry must be "practical" not "[f]ormal[istic]"—employers cannot "restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424.

Under this standard, Rod spoke as a citizen when he displayed his books. InterMountain did not commission, employ, or pay him to

display them. As the district court recognized, Rod's job responsibilities "do not include decorating his office," "displaying certain books or instructing on them," 1-ER-19, just as Coach Kennedy's job did not include prayer. And Rod did not use them when performing his responsibilities. 2-ER-189. In fact, Rod's job does not include providing *any* instruction or counsel. He is neither a teacher nor a counselor. He is an evaluator. And he never used the Books "while acting within the scope of his duties as [an education specialist]." *Kennedy III*, 597 U.S. at 530. Nor did he tell any student that it was "important they participate in any religious activity" or "pressure[ ] or encourage[ ] any student" to read the books. *Id.* at 515. They just sat on his windowsill or desk while he and the student completed the evaluation.

Meanwhile, the private activity of decorating one's office with items that students can see occurs all the time at InterMountain and in the schools Rod serves. InterMountain employees display family photos, posters supporting the public educators' union (which oftentimes takes positions opposed to that of the government), and even other books. *See supra* Case II. At school, teachers and counselors display similar items as well as transgender pride flags and Black Lives Matter posters. *Id.* Finally, InterMountain admits that, as a matter of policy, it does "not require … employees to ask permission before they present specific views or decorate their workspace." 2-ER-81. This concession undermines its position that family photos are government speech or that

InterMountain somehow endorses the views contained within every book that employees put on their bookshelf. Thus, InterMountain employees' personal office decorations are not government speech, regardless of who happens to see them or whose expression they think it is. Rod spoke as a private citizen, even when students were present, because he "had no official duty" to display the books. *Dodge*, 56 F.4th at 778 (citation modified).

2. The district court erred by endorsing InterMountain's "excessively broad" test for official speech, a test the Supreme Court rejected.

This Court's *Kennedy I* & *II* opinions illustrate the danger of an undisciplined approach to distinguishing between government and private speech. Ignoring that "schools do not endorse everything they fail to censor," *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990), this Court reasoned that Coach Kennedy's personal, on-field prayers were not his own, but the government's—and worse, that even if the prayers were his own, the risk of misattribution to the state compelled their censorship. *Kennedy II*, 991 F.3d at 1015–18.

In holding that Coach Kennedy "'spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents,'" *id.* at 1016 (quoting *Kennedy I*, 869 F.3d at 831), the *Kennedy II* Court "read *Garcetti* far too broadly." *Lane*, 573 U.S. at 239. A school employee doesn't speak as an employee just because he bears "the mantle of one who imparts knowledge and

wisdom," and that "expression was [his] stock in trade." *Kennedy II*, 991 F.3d at 1015 (quoting *Kennedy I*, 869 F.3d at 826).

a. The Supreme Court's reversal in *Kennedy III* rejected *Poway's* standard for a narrower test.

The Supreme Court rejected this Court's conception of when employees speak in their official capacities as "excessively broad." *Kennedy III*, 597 U.S. at 530–31. That excessively broad conception of Coach Kennedy's job description arose from this Court's analysis in *Poway*. *See Kennedy I*, 869 F.3d at 827 (quoting *Poway*, 658 F.3d at 967) ("[J]ust as Johnson's job responsibilities included 'speaking to his class in his classroom during class hours,' Kennedy's included speaking demonstratively to spectators at the stadium after the game through his conduct" and "Kennedy's demonstrative speech thus occurred 'while performing a function' that fit 'squarely within the scope of his position.'").

The district court correctly observed that *Poway* "must be reexamined in light of *Kennedy [III]*." 1-ER-18 n.6. It also noted that *Poway*'s "broad statement that 'teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or ... in the general presence of students,' is of questionable precedential value in light of *Kennedy*'s direction to consider the scope and context of the speech." 1-ER-18 n.6 (quoting *Kennedy I*, 658 F.3d at 968 (emphasis in original)).

This Court's more recent, post-*Kennedy III* precedents agree. The proper analysis of whether "[a] person speaks in a personal capacity" is

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.'" *Dodge*, 56 F.4th at 778 (citation modified). Applying that test here confirms that Rod's personal office decorations are private speech.

b. *Kennedy III* rejected the district court's "eye of the beholder" gloss on the "official duties" test.

As has been clear for 35 years, Rod's expression does not become government speech just because a student sees it. *Mergens*, 496 U.S. at 250 ("[S]chools do not endorse everything they fail to censor."); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[N]ot every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events ... is the government's own.").

But the district court held that when Rod "displayed [the books] while engaged in speech that [InterMountain] paid him to produce as an Education Specialist," the display could "be reasonably viewed as being promoted by the school or as the efforts of an employee to press his particular views upon students." 1-ER-19–20 (emphasis omitted). It acknowledged that the display had nothing to do with Rod's job. Even so, it ruled that Rod's display suddenly transforms into InterMountain's speech when a student crosses the threshold into his office. A switch flips, and expression that is private at all other times turns into government speech.

This reasoning repeats the same error as *Poway* by holding that teachers are "clothed with the mantle of one who imparts knowledge and wisdom," 658 F.3d at 967, and "*necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or … in the general presence of students." *Id.* at 968 (emphasis in original). Worse, it misses the whole point of *Kennedy III*, which explicitly *rejected* the notion that the school district risked violating the Establishment Clause because a "'reasonable observer' could think it 'endorsed Kennedy's religious activity by not stopping the practice.'" 597 U.S. at 533 (quoting *Kennedy II*, 991 F.3d at 1018). Indeed, the Court held that the First Amendment permitted Kennedy to pray at midfield, after games, and in full view of the students and community. *Id.* at 512.

No one suggested that praying was part of Coach Kennedy's job duties—he was a football coach, not a chaplain. Nor did any school policy authorize or encourage his prayers. No evidence suggested that the district hired him or allowed him to engage in the practice of post-game prayer with the intent of promoting religion. When he prayed after the games, others were free to socialize, mill about the field, enter the stands, or text friends or family. In fact, this Court acknowledged that, for the first six years of his practice, the district was not even aware of his midfield prayers; and when it did become aware of them, its immediate response was to tell him to stop. *See Kennedy II*, 991 F.3d at 1011.

This sort of expression—unauthorized, long unknown, and eventually disapproved by the state—cannot be "government speech."

Rather, one of the Supreme Court's chief concerns in *Kennedy III* was that, under the lower court's reasoning, schools would feel compelled to "order[ ] [teachers] not to engage in any 'demonstrative' conduct of a religious nature' *within view of students*, even to the point of being forbidden from folding their hands or bowing their heads in prayer before lunch" in order to conform to the Constitution. 597 U.S. at 521 (emphasis added). "Such a rule would be a sure sign that [the Court's] Establishment Clause jurisprudence had gone off the rails." *Id.* at 540. "Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice," but, "[u]nder the [d]istrict's rule, a school would be *required* to do so." *Id.* (emphasis original). The *Kennedy III* Court would not and did not allow this. But the district court's holding risks sending the government speech doctrine off the rails.

The misperception of endorsement of a particular viewpoint cannot convert state inaction into state action. And for good reason: just as the government does not endorse a particular sports team when a public employee praises the team during working hours, the fact that someone might think an employee is endorsing a political or religious view does not mean the government is doing so.

That rule applies with full force in public schools. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. That is especially true where they have "not fostered or encouraged any mistaken impression that the [speaker] speak[s] for" them. *Rosenberger v. Rector & Vistors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (quotation omitted). In *Rosenberger*, for example, where the university "t[ook] pains to disassociate itself from the private speech" at issue, "[the] concern that Wide Awake's religious orientation would be attributed to the University [was] not a plausible fear, and there [was] no real likelihood that the speech in question [was] being either endorsed or coerced by the State." *Id.* at 841–842. Any other view would not only threaten "a denial of the right of free speech," but would "risk fostering a pervasive bias or hostility to religion[.]" *Id.* at 845–846.

Further, where public employers are fairly concerned that observers will wrongly attribute to the government speech that is actually private, the proper remedy is not to silence private speakers but to disclaim sponsorship of their messages. Because "[p]ublic belief that the government is partial does not permit the government to become partial," "[t]he school's proper response is to educate the audience rather than squelch the speaker." *Hedges*, 9 F.3d at 1299–1300. "Schools may explain that they do not endorse speech by permitting it. If pupils do

not comprehend so simple a lesson, then one wonders whether the [ ] schools can teach anything at all." *Id.*

The district court erred in applying the foregoing principles of state action and government speech to Rod's personal office decorations. It's not true that every message a public employee conveys in the presence of students is government speech. Rod spoke as a citizen for First Amendment purposes.

C. As the *Pickering* balancing test favors Rod, InterMountain had no justification for mistreating him.

Because Rod established his *prima facie* case (*i.e.*, the first three elements), InterMountain must show it "had a legitimate administrative interest in suppressing the speech that outweighed [Rod's] First Amendment rights." *Dodge*, 56 F.4th at 776–77 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)).

InterMountain cannot carry its burden. It cannot show that Rod's protected First Amendment expression presented an "actual, material and substantial disruption," or demonstrate even "reasonable predictions of disruption in the workplace." *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009).

1. InterMountain admits that it censored Rod because of his views, not because his speech disrupted anything.

Below, InterMountain conceded that it ordered Rod to remove the books because of the viewpoint it interpreted the display to convey. It admitted that "[t]he conduct at issue here" was "plaintiff's display in his

office of two books that advance *a binary view of gender*[.]" 2-ER-90 (emphasis added). In InterMountain's eyes, "the books' titles are an expression of animus toward gender expansive students." 2-ER-94.

But the books do not even address transgender issues, much less demean or attack anyone. InterMountain's component schools did not find the books hateful either, 2-ER-192, 203, even though they were bound by the same Oregon statute that InterMountain claims requires censorship of Rod's books. *See* Addendum at A.6 ("To comply with the prohibition on discrimination required by Or. Rev. Stat. § 659.850, each education provider must adopt a policy to address bias incidents."). In fact, students are exposed to a "binary view of gender" in their English and science classes. 2-ER-205.

InterMountain's only response to the schools' teaching the same views was that it "does not, and cannot, control the school districts or schools it serves or their employees[,]" "the library or classroom content in the schools[,]" or "the curriculum taught at any of the school districts[.]" 2-ER-91. But the schools are bound by the same Policy. And that shows that this isn't about harm to children at all—which InterMountain had no evidence to support. No students or parents complained about the books in the three weeks Rod displayed *He Is He* and *She Is She* or the two years he displayed *Johnny the Walrus*. 2-ER-190–91, 206. In reality, InterMountain took issue with the mere fact that, in

its eyes, Rod's celebration of boys and girls "directly contradicts" its view that gender is fluid. 2-ER-204–05.

2. InterMountain allows employees to speak about many issues, like gender identity, via office décor.

InterMountain "allow[s] many books that 'contain views that might be and are contrary to someone else's beliefs or views', and allows other employees to express views and opinions on specific subjects, including gender." 2-ER-201; 2-ER-81 ("The [speech code] [is] not intended or implemented to prevent employees from presenting their views on any specific topic provided that those views are not bias incidents."). Many books in La Grande's classrooms feature violence, suicide, explicit language, domestic abuse, drug and alcohol use, and sexual content. 2-ER-198–99. Several sixth-grade classrooms and the library feature books on same-sex relationships and characters identifying as non-binary that students can freely access, including one whose cover depicts two boys kissing. 2-ER-199. InterMountain and school employees also decorate their workspaces with personal items visible to children, including transgender-pride flags, "Black Lives Matter" signs, other political messages, children's books, and family photos. *See supra* Case II. InterMountain's best response to these facts was to say it is "unaware" of any other employees "displaying art, books, or other workspace decorations that comment on the issue of gender identity." 2-ER-81. But they do. *See supra* Case II (noting décor distinguishing boys from girls).

3. Rod's speech did not disrupt any services InterMountain provides the public.

To show that its administrative interests outweighed Rod's speech rights, InterMountain "'must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace.'" *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1138 (9th Cir. 2025) (quoting *Robinson*, 566 F.3d at 824). Mere speculation is not sufficient. "[T]he government must support its claim that it reasonably predicted disruption 'by some evidence, not rank speculation or bald allegation.'" *Id.* (quoting *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 725 (9th Cir. 2022)).

4. Disagreement is not disruption under *Pickering*.

The *Damiano* Court reminded public employers that *Pickering*-balancing sets the bar high for them to show real disruption before they can restrict employees' speech rights. The school district there claimed it saw "student protests," "received between 75 and 150 complaints," and "fielded approximately 50 phone calls" due to the teacher-plaintiffs' speech. *Damiano*, 140 F.4th at 1143–44. But this Court concluded that the defendants failed to "specif[y] whether these complaints came from students, parents, District employees, or others" and did not provide "any other information about the nature of these complaints." *Id.* And even though the record included "23 documents that may be characterized as formal, written complaints," *id.*, this Court held that plaintiffs could take their case to a jury. *Id.* at 1148.

InterMountain tries to justify its censorship with a single co-worker's complaint that he or she felt Rod's books were offensive. Such a contrived disruption cannot satisfy InterMountain's *Pickering* burden. Those "hurt or upset" feelings do not evince a "devastating effect on the cohesion of the [school's] teachers." *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004). This—plus *Damiano*'s emphasis that coworkers' complaints are given less weight than complaints by students and parents, *Damiano*, 140 F.4th at 1144 ("While evidence of 'intra-school disharmony' among coworkers is relevant, an individual coworker's 'hurt feelings cannot be determinative of the balance.'" (quoting *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 980 (9th Cir. 1998)))—means that InterMountain cannot meet *Pickering*'s demanding standard.

The district court agreed. It held that "one bias incident complaint about [Rod's] display" did not satisfy InterMountain's burden to show that Rod's display "adversely impacts its interests." 1-ER-22. Similarly, the court found that InterMountain's reference to "the potential impact for staff and visitors" alone was "an insufficient basis for [it] to find an actual, material, and substantial disruption, or even a reasonable prediction of such a disruption." 1-ER-22.

The district court was right. The only disruption would be "the effect controversial speech has on those who disagree with it because they

disagree with it." *Dodge*, 56 F.4th at 786. As disagreement is all Inter-Mountain had, its interest does not outweigh Rod's speech rights.

II. InterMountain violated Rod's free-exercise rights.

The Free Exercise and Free Speech Clauses "work in tandem." *Kennedy III*, 597 U.S. at 523. "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Id.* As this Court recently explained, "these rights spring from a common constitutional principle: that the government may not insist upon our adherence to state-favored orthodoxies, whether of a religious or political variety." *Bates v. Pakseresht*, 146 F.4th 772, 783–84 (9th Cir. 2025) (holding state policy that "suppress[ed] [Bates's] sharing of [her] religious views" burdened her free speech and free exercise rights). "When 'the First Amendment protects an individual's right to speak [her] mind,' it likewise protects her right to speak and live out her conscience, as her religion would direct." *Id.* at 784 (quoting *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023)).

Here, Rod believes that "God created every person male or female, and that people should accept their God-given sex and not seek to reject or change it." 2-ER-179. InterMountain's enforcement of its policy to prohibit Rod from promoting that binary view of gender is "unmistakably normative" and "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs

as things to be rejected." *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2353 (2025). That violates the Free Exercise Clause.

The district court held that Rod "failed to show that [InterMountain] impermissibly burdened his sincere religious practice" because its speech code is neutral and generally applicable, and InterMountain's actions were not "motivated by hostility toward [Rod's] religion." 1-ER-26–27. Both conclusions are wrong. And holding that Rod was unlikely to succeed on his free-exercise claim despite finding that InterMountain unlawfully suppressed his religious speech overlooks *Bates*.

A. InterMountain showed hostility to Rod's religious speech.

The district court held that VanNice's interrogation of Rod "d[id] not support a finding or inference that [InterMountain was] motivated by hostility toward [Rod's] religion" because her questioning did not "compare[ ] to the statements in *Masterpiece*[.]" 1-ER-27. This misreads *Masterpiece* and ignores this Court's caselaw. "The Supreme Court has never suggested that overt hostility is required." *Bates*, 146 F.4th at 795. That rule "would not be consistent" with the principle that the "Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Id.* (quoting *Masterpiece*, 584 U.S. at 638).

The district court omitted how VanNice conducted her interrogation in an "accusatory and leading" manner, "much like a prosecuting attorney[.]" 2-ER-276. Then InterMountain labeled Rod's display as "transphobic" and "a hostile expression of animus toward another

person relating to their actual or perceived gender identity." 2-ER-201–02; *see Masterpiece*, 584 U.S. at 636 (noting Colorado Civil Rights Commissioner compared Jack Phillips' invocation of his sincerely held religious beliefs to defenses of "slavery" and the "Holocaust," and described his faith as "one of the most despicable pieces of rhetoric that people can use"). Then it said that the display "contribute[d] to an unwelcoming environment" and "undermine[d] the inclusive environment" in school and in InterMountain. 2-ER-204–05; *see Masterpiece*, 584 U.S. at 634–35 (noting Commissioner stated Phillips "cannot act on his religious beliefs 'if he decides to do business in the state'" and instead needed to "compromise" his beliefs "if [he] wants to do business in the state"). Far from being subtle, InterMountain clearly told Rod that his religious views were not welcome. That demonstrates unconstitutional hostility to his beliefs. That hostility means this Court should "set aside" InterMountain's censorship "without further inquiry." *Kennedy III*, 597 U.S. at 525 n.1, and at least subject it to strict scrutiny.

B. InterMountain infringed Rod's religious exercise using a policy that is not neutral or generally applicable.

InterMountain investigated, censored, and threatened termination for Rod because one coworker perceived his speech as "transphobic." *See supra* Case III.A. That it labeled Rod's religious speech as "hostile" is not neutral. And it does not discipline other employees who take the opposite view. 2-ER-218. That is not generally applicable.

The district court reasoned that InterMountain's speech code is neutral because "[t]here is no indication that the [speech code] restricts any religious practices because of their religious motivations ... [a]nd even if [it] adversely impacted religious practices, it is addressing the legitimate concern of ensuring an open and welcoming school environment for all students and employees." 1-ER-27. Similarly, the district court concluded that InterMountain's speech code is generally applicable because "[i]t prohibits all bias incidents, regardless of their motivation" and "it does not provide any mechanism for individualized exceptions that would invite [InterMountain] to consider the reasons for the conduct." 1-ER-27.

But this Court recently reiterated that to determine whether a policy is neutral toward religion, courts "must carefully examine the totality of the circumstances surrounding its application, including 'the effect of [the] law in its real operation,' which 'is strong evidence of its object.'" *Bates*, 146 F.4th at 791 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535, 540 (1993)).

Here, the totality of the circumstances reveals that InterMountain interprets its speech code to prohibit only certain viewpoints. It declares any promotion of "a binary view of gender" as a "bias incident." 2-ER-204–05. According to it, a binary view of gender "communicates a message of exclusion and diminishes the *validity* of non-binary and transgender experiences," and "contributes to an unwelcoming

environment, which directly contradicts [its] *commitment* to inclusivity and diversity." 2-ER-243 (emphasis added). By its own admission, InterMountain is committed to "gender diversity" and "communicat[ing] a message that is excluding on the basis of gender identity" is what "conflicted with [InterMountain's] policy[.]" 2-ER-243–44.

But government "cannot purport to rescue one group ... from stigma and isolation by stigmatizing and isolating another." *Mahmoud*, 145 S. Ct. at 2363. A "welcoming" environment "cannot be achieved through hostility toward [ ] religious beliefs[.]" *Id.* Here, the speech code is only "open and welcoming," 1-ER-27, to those who promote the "*validity* of non-binary and transgender experiences." 2-ER-243 (emphasis added). Meanwhile, it labels individuals of faith who hold to a biological view of gender as "transphobic" and hostile, and it calls for their termination. That is not neutrality. And the district court overlooked that this very same speech is taught throughout the schools in several classes. That completely undermines InterMountain's alleged reasons for censoring it as a bias incident and shows that InterMountain's problem is really with the religious beliefs that undergird it.

C. Strict scrutiny applies to Rod's free-exercise claim.

InterMountain's censorship must pass strict scrutiny by showing that its policy "advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021) (quoting *Lukumi*, 508 U.S. at 546). While *Kennedy III*

declined to decide whether strict scrutiny or *Pickering* applies, it noted that "[u]nder the Free Exercise Clause, a government entity normally must satisfy at least strict scrutiny." 597 U.S. at 532. And the Supreme Court has "never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause." *Id.* at 545 (Thomas, J., concurring).

The district court notes this Court's reliance on a "practice of applying a balancing test when confronted with constitutional challenges to restrictions on public employee speech in the workplace," which applies when a public employer restricts displays of religious items. *Berry v. Dep't of Soc. Servs.,* 447 F.3d 642, 649–51 (9th Cir. 2006) (applying *Pickering* balancing to employee's Bible on his desk and "Happy Birthday Jesus" sign). Significantly, the *Berry* court did not hold that the cubicle decorations were government speech. Rather, it proceeded straight to *Pickering*-balancing, *id.* at 652, using a pre-*Kennedy III*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), understanding of the Religion Clauses, *id.* at 651. But the Supreme Court "long ago abandoned *Lemon*," *Kennedy III*, 597 U.S. at 534, and courts refer to it as "now-abrogated," *Groff v. DeJoy,* 600 U.S. 447, 460 (2023), or "overruled," *Jusino v. Fed'n of Catholic Tchrs., Inc.*, 54 F.4th 95, 102 (2d Cir. 2022).

Strict scrutiny is the right test when government restricts religious speech. The *303 Creative* Court went beyond this and applied a *per se* rule against state action designed to "excise certain ideas or viewpoints from the public dialogue." 600 U.S. at 588 (citation modified).

The *Janus* Court applied "exacting scrutiny" to a rule requiring employees to support speech with which they disagreed. 585 U.S. at 907. Given the Supreme Court's approach to government policies that burden religious exercise, strict scrutiny fits here better than *Pickering*-balancing.

D. InterMountain fails strict scrutiny.

InterMountain cannot meet strict scrutiny's "exacting standard." *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (en banc). That is, it bears the burden of proving its discrimination is "the least restrictive means available to further a compelling government interest." *Id.* Yet, it has no compelling interest in regulating Rod's passive and benign religious speech on a matter of public concern. His display undermined no InterMountain interest or functioning. *Supra* Argument I.C.2. And investigating, censoring, and threatening termination for Rod are not narrowly tailored to any interest. InterMountain allows its employees to decorate their offices with personal messages. 2-ER-81. It cannot welcome employees to share their views on a host of issues but then punish one simply because a co-employee objects to his views.

1. Censoring Rod is not narrowly tailored to any interest.

Forcing Rod to remove the books was not the least restrictive means to further InterMountain's interests. If it is concerned that observers will misattribute to it speech that is actually private, it should clarify that office décor doesn't speak for InterMountain, not censor the

message. *Hedges*, 9 F.3d at 1299–1300 ("The school's proper response is to educate the audience rather than squelch the speaker.")

Here, InterMountain's only justification for censoring Rod was the hypothetical and subjective "potential impact" of the books' display on students and staff who "may interpret that the books send a message of bias and exclusion" at some point in the future. 2-ER-206. Yet InterMountain and its schools allow all kinds of personal displays which students may consider as sending "bias[ed] and exclus[ory]" messages. *See supra* Case II. A student who believes that "All Lives Matter" may feel a bias against him from the teacher who displays "Black Lives Matter." And the schools teach the very same message Rod displayed, with an impact that is much greater to students than Rod's passive book covers. This "system of exceptions" undermines InterMountain's contention that tolerating Rod's religious views is infeasible or unworkable. *Fulton*, 593 U.S. at 542.

2. InterMountain has no compelling interest in censoring Rod's religious speech.

InterMountain has no compelling interest in discriminating against Rod for his religious speech. As the district court held, InterMountain cannot "show that [Rod's] protected First Amendment expression presented an 'actual, material and substantial disruption,' or demonstrate 'reasonable predictions of disruption in the workplace.'" 1-ER-22 (quoting *Robinson*, 566 F.3d at 824).

First, InterMountain argued that its "countervailing interest in regulating speech was complying with Oregon's anti-bias law." 1-ER-21. But the district court rightly dispensed with this in a single line, concluding that simply "citing statutory requirements does not change [InterMountain's] burden to justify [its] restrictions on [Rod's] First Amendment rights." 1-ER-23.

Second, as the district court noted, there was only "one bias incident complaint about [Rod's] display in his [La Grande] office." 1-ER-22 (citing 2-ER-81). And the only "disruption" InterMountain identified was that one La Grande employee felt the books were "transphobic." 2-ER-201–04. Excluding Rod'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. Those are just buzzwords for "avoid[ing] the 'discomfort and unpleasantness that always accompany an unpopular viewpoint.'" *Id.* (quoting *Tinker*, 393 U.S. at 509).

Further, educators have an interest in teaching students and staff that the religious beliefs of others need to be tolerated too. *Kennedy III*, 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." (quotation modified)).

Despite offering no evidence to show that Rod's speech was likely to undermine InterMountain's functions and hearing no complaints from students, InterMountain still ordered Rod to remove the books. No

compelling interest justifies its actions. Therefore, InterMountain's actions flunk strict scrutiny. And InterMountain's actions flunk even the *Pickering* balancing test. *See supra* Argument I.C.

III. InterMountain violated Rod's due-process rights.

The district court erred again when it held that Rod was unlikely to succeed on his due-process claim because InterMountain's speech code gave him fair notice of what was prohibited. 1-ER-30. The Constitution guarantees public employees "a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S.104, 108 (1972). This doctrine 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). InterMountain disciplined and censored Rod because his speech promoted "a binary view of gender"—even though those words are nowhere in its speech code or state law. The district court ignored this and more, and this Court should reverse.

The district court ruled InterMountain met this high bar because a "person of ordinary intelligence would understand that bias incidents were expressions of ill will directed toward another person based on their protected characteristics." 1-ER-30. That proves Rod's point. How could employees understand that InterMountain defines an "expression of ill will" to include promoting "a binary view of gender"? 2-ER-90, 243.

None could have, for three reasons. First, InterMountain's prohibition on "hostile expression[s] of animus" does not contain the phrase "binary view of gender." "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (citation modified). Here, InterMountain's speech code provides no "mark" informing employees to steer clear of promoting a binary view of gender. Indeed, it does not define "hostile expression of animus" at all. 2-ER-233–34, 236–37.

The district court highlighted portions of Rod's interviews and written responses to conclude that he understood that a "hostile expression of animus" was "an act, word, or other medium that conveys deep-seated ill will, antagonism, or hostility towards another person." 1-ER-30 (citing 2-ER-274). But closer inspection of Rod's responses to InterMountain officials reveals that he could only guess the speech code's meaning. Rod hadn't even heard of the speech code, much less received training or other information on it, before being told that he'd violated it. 2-ER-272–73 ("I was not familiar with the term Bias Incident ... I promptly read them in detail in an attempt to try to understand both what they are and what I could expect in the investigative process. However, I was still left confused as to how the display of the two books could objectively be considered a violation[.]"). Plus, he felt the need to ask for "clarification" about what the speech code prohibited. 2-ER-274.

Thus, no employee could understand what was prohibited from looking at the four corners of InterMountain's speech code.

Second, InterMountain's definition of a "hostile expression of animus" conflicts with that of its component schools. InterMountain says its speech code mirrors an Oregon statute which applies to every public education provider. 2-ER-91–93; Addendum at A.6.Yet, La Grande's principal told Rod he didn't think the books were inappropriate or offensive, and the building administrator of Rod's Elgin office actually approved of his display of *Johnny the Walrus*. 2-ER-192, 203. Thus, school officials charged with enforcing the same statute that InterMountain claims requires censorship of Rod's display did not agree that the law prohibits employees from "promot[ing] a binary view of gender."

Similarly, another school district subject to the same law investigated teachers under its bias incident policy after they advocated for increased protections for students, parents, and educators who held the belief that gender is binary and rooted in biology. *Damiano*, 140 F.4th at 1130. And those teachers promoted their views on a larger scale, publishing their "I Resolve" policy proposal on YouTube with the aim of spurring nationwide policy change. *Id.* at 1142. The district's investigator, however, did "'not sustain' the allegation that either [teacher] violated District policy by committing a 'bias incident' because he found that it was 'not clear' whether 'I Resolve' was a 'hostile expression of animus toward those who use a different gender identity.'" *Id*. at 1135.

Finally, the schools Rod serves teach students a "binary view of gender" in English and science classes, further showing that the statute does not clearly proscribe what InterMountain claims it does. La Grande's science classes teach that DNA dictates an individual's sex. 2-ER-283–90. And in English classes, students learn to use traditional "he/him" or "she/her" pronouns when referring to a single, gendered individual, not "they/them." 2-ER-205. If the statement "he is he" is not a "hostile statement of animus" in class, neither is it when passively displayed in Rod's office.

These data points, together with the above instances where school officials declined to prohibit the promotion of a binary view of gender, demonstrate that InterMountain's enforcement of its speech code is the outlier. No employee "of ordinary intelligence" could glean from its text that it prohibited "promot[ing] a binary view of gender." Thus, InterMountain's application of a "bias incident" is a "wholly subjective judgment" unmoored from any "statutory definitions, narrowing context, or settled legal meanings." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010). That renders the speech code unconstitutionally vague. The district court erred by concluding otherwise. This Court should reverse.

IV. Rod meets the remaining preliminary injunction factors.

All other preliminary injunction factors favor Rod. "Irreparable 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) (citation modified); *see also 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)) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") For all the reasons discussed above, Rod has demonstrated a colorable claim that InterMountain's application of its speech code violated his free-speech and free-exercise rights and will continue to violate those rights absent an injunction. Rod has therefore met his burden in establishing a likelihood of irreparable harm.

Where 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 Rod has "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 & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (citation modified). And "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), particularly in "America's public schools," "the nurseries of democracy." *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021).

CONCLUSION

InterMountain discriminated against Rod's speech and his religious views by applying a vague policy in a one-handed way. This Court should reverse with instructions to enter a preliminary injunction that prevents InterMountain from enforcing its speech code to prohibit Rod from displaying his books or similar messages in his offices and that removes any reference to the investigation and discipline of Rod in InterMountain's records.

Respectfully submitted this 17th day of October, 2025.

/s/ Matthew C. Ray

Tyson C. Langhofer
Matthew C. Ray
Mathew W. Hoffmann
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707–4655
tlanghofer@ADFlegal.org
mray@ADFlegal.org
mhoffmann@ADFlegal.org

John J. Bursch
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450–4235
jbursch@ADFlegal.org

David A. Cortman
Travis C. Barham
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339–0774
dcortman@ADFlegal.org
tbarham@ADFlegal.org

Rebekah Schultheiss
LAW OFFICES OF REBEKAH MILLARD, LLC
P.O. Box 7582
Springfield, Oregon 97475
(707) 227–2401
rebekah@millardoffices.com

Counsel for Appellant

STATEMENT OF RELATED CASES

Under Ninth Circuit Local Rule 28-2.6, Appellant is not aware of any related cases in this Court.

/s/ Matthew C. Ray

Matthew C. Ray
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
Telephone: (571) 707–4655
mray@ADFlegal.org

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2025, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the ACMS system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Matthew C. Ray

Matthew C. Ray
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
Telephone: (571) 707–4655
mray@ADFlegal.org

Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 25-5641

I am the attorney or self-represented party.

This brief contains 12,129 **words,** including 74 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature Matthew C. Ray **Date** October 17, 2025
*(use "*s/[typed name]*" to sign electronically-filed documents)*