

APPEAL No. 25-8039
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

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DISCLOSURE STATEMENT

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

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STATEMENT OF JURISDICTION

Plaintiff's verified complaint raises federal questions under the U.S. Constitution and 42 U.S.C. § 1983. 3-ER-299. The district court exercised original jurisdiction under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction). 3-ER-299.

As discussed more fully below and in response to the Court's February 4 Order (Doc. 47.1), appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1). The district court did not issue "an order that merely enforces or interprets a previous injunction." *See* Doc. 47.1 at 1. Rather, on December 12, 2025, the district court *refused* to grant an injunction and *refused* to modify its previous injunction. 1-ER-2, 11. On December 22, 2025, Plaintiff timely appealed this order. 3-ER-412.

STATEMENT OF THE ISSUES

1. This Court has “jurisdiction of appeals from ... [i]nterlocutory orders of the district courts ... refusing ... injunctions, or refusing to ... modify injunctions.” 28 U.S.C. § 1292(a)(1). Here, Plaintiff Rod Theis asked the district court to “order[]” his employer, InterMountain, to stop termination proceedings and remove records from his personnel file. The district court denied the motion, ruling that Rod “effectively [sought] to widen the scope of the injunction” it had previously entered and rejecting his “broader, underlying argument that his conduct was protected by the First Amendment.” 1-ER-11. Does this Court have appellate jurisdiction?

2. Under the First Amendment, courts and employers cannot “treat[] everything teachers ... say in the workplace as government speech.” *Kennedy v. Bremerton Sch. Dist. (Kennedy III)*, 597 U.S. 507, 530–31 (2022). InterMountain allowed employees to decorate their workspaces with personal items visible to students, like pro-LGBT messages, children’s books, and family photos. Yet it censored and fired Rod—after a hostile teacher set him up—for displaying three children’s books because they promote a “binary view of gender.” The district court held that Rod spoke as an employee because students might see the books and “teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction.” 1-ER-11. Did the district court err?

PERTINENT STATUTES AND POLICIES

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

INTRODUCTION

The district court below refused to stop Defendant InterMountain from doubling down on its constitutional violation at issue in this Court’s Case No. 25-5641—namely, censoring personal office décor based on viewpoint.

InterMountain doesn’t require “employees to ask permission before they present specific views or decorate their workspace.” 2-ER-197. So naturally, employees decorate their offices with a wide array of personal speech, including pro-LGBT messages and children’s books. But when Plaintiff Rod Theis decorated *his* office with three children’s books, InterMountain disciplined him for purportedly expressing a “binary view of gender.” The district court partially stopped InterMountain’s censorship—resulting in the injunction at issue in Case No. 25-5641—declaring Rod could display the books with no students present.

An antagonistic teacher then coordinated a setup. She encouraged students—who had no reason to be in Rod’s office—to barge into the office, read the books aloud, and feign offense while the teacher recorded everything on her cellphone. This evidence gave InterMountain an excuse to fire Rod, and InterMountain initiated termination proceedings.

Rod asked the district court to “order[]” InterMountain to stop termination proceedings and remove records of the complaint against him from his personnel file. The district court refused to enter that order and refused to modify its previous injunction. Instead, it rejected

Rod’s argument that the First Amendment protected his display of the books. This Court thus has jurisdiction over this appeal.

In allowing Rod’s termination, the district court committed the same error for which the Supreme Court reversed a panel of this Court: treating everything school employees say at school as government speech. *Kennedy v. Bremerton Sch. Dist.* (*Kennedy II*), 991 F.3d 1004, 1015 (9th Cir. 2021), *rev’d*, 597 U.S. 507 (2022). That error traces back to this Court’s decision in *Johnson v. Poway Unified School District*, 658 F.3d 954, 967–68 (9th Cir. 2011), which the district court applied here. 1-ER-11. *Poway* held that “teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction” because they “*necessarily* act as teachers” at essentially all times: “when at school or a school function, in the general presence of students, [or] in a capacity one might reasonably view as official.” 658 F.3d at 967–68 & n.15.

The Supreme Court rejected that approach. *Kennedy III*, 597 U.S. at 530–31. The proper analysis focuses on “whether the speech at issue is itself ordinarily within the scope of an employee’s duties.” *Id.* at 529 (citation modified).

Here, Rod’s job duties do not include decorating his office. Inter-Mountain admitted that employees don’t have to ask permission before decorating their offices, and many display their personal views. His

admittedly private speech does not become government speech simply because students may view it.

All other First Amendment retaliation factors favor Rod. In its initial decision, the district court recognized that Rod's books commented on a matter of public concern. InterMountain didn't dispute that it fired Rod because of the books. And a single teacher's setup and complaint offer no evidence of actual disruption to outweigh Rod's free-speech rights, especially when all four students who read two of the books denied feeling "uncomfortable." That makes sense because their science and English classes also teach the binary view of sex.

As *Kennedy III* requires, this Court should reverse and remand with instructions to enter a preliminary injunction ordering InterMountain to reinstate Rod, stop enforcing its speech code to prohibit Rod from displaying his books or similar messages, and remove any reference to the investigation and discipline of Rod in its records.

STATEMENT OF THE CASE

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

For 17 years, Rod served students in public schools as a licensed clinical social worker with InterMountain. 3-ER-302. He served as an education specialist, requiring him to travel to schools in the 17 school districts across four counties that InterMountain serves. 3-ER-300, 302. He met with students individually to assess their educational needs by administering standardized tests (to evaluate their intellectual or academic level) or behavioral assessments (to determine their social or emotional needs). 3-ER-300, 302. The schools provided 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. 3-ER-302. Rod received glowing recommendations from colleagues. 2-ER-90–96.

Rod's role was limited. He was not a counselor, did not engage students in wide-ranging conversations, and did not advise them. 2-ER-196; 3-ER-302. He just administered prescribed tests or evaluations and reported the results to school officials. 2-ER-196; 3-ER-302. His office was not open to students or parents except when students were being tested or evaluated. 3-ER-305. His office door said: "Staff Only." 3-ER-305. During the three weeks he displayed the books in question, *He Is*

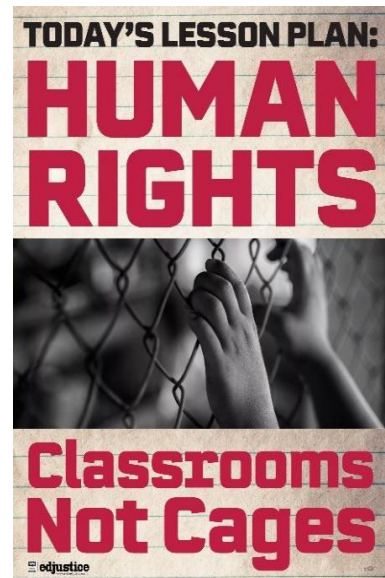
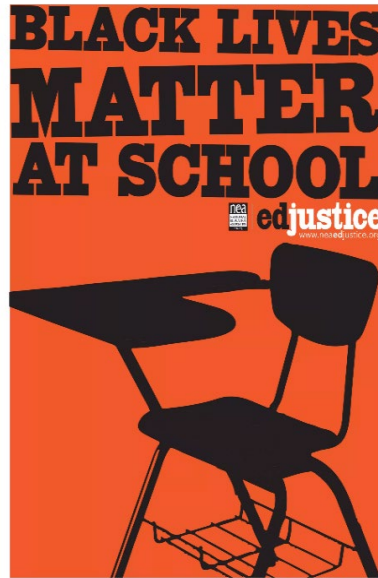
He and She Is She, he evaluated only four students in one office. 3-ER-305.

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-197.

Thus, they decorate their offices with paintings, personal photos, plants, posters, inspirational quotes, books, and more. 3-ER-302. Some opt for children’s toys, arts and crafts materials, and books on counseling children. 3-ER-303. Others display artwork, family photos, and personal notes from students and colleagues. 3-ER-303.

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 in support of the educators’ union. 3-ER-303. 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.” 3-ER-303. 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:



3-ER-303–04. 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* (May 2023), <https://perma.cc/MZR8-KVGS>. 3-ER-303.

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 children’s books titled *What Should Danny Do?* and *What Should Darla Do?* 3-ER-302. Another InterMountain employee had a large collection of books for girls experiencing puberty. 3-ER-303.

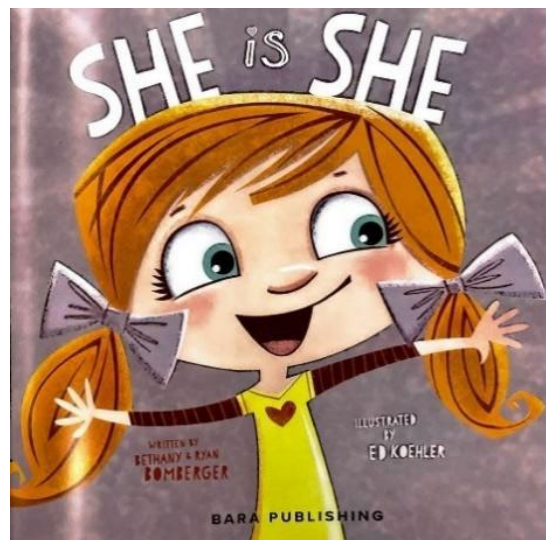
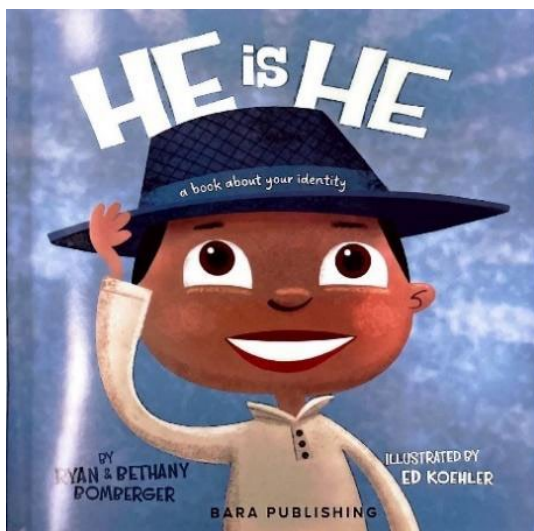
The schools that InterMountain serves also allow teachers to promote ideological messages to students. At La Grande Middle School, where Rod had an office, a social studies teacher displayed in a

classroom a poster of President Obama saying, “Yes, we can.” 3-ER-304. A special education teacher displays a transgender pride flag declaring, “YOU ARE LOVED.” 3-ER-304. A counselor displays a poster, saying: “Black students, Black dreams, Black futures, Black lives MATTER.” 3-ER-304. The counselor also displays a rainbow-colored sticker promoting the Oregon School Counselors Association, 3-ER-304–05, which has publicly criticized President Trump’s executive orders for causing “heightened fear and anxiety,” including to “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* (2022), <https://perma.cc/ZHJ3-74R9> (one of the resources).

In early October 2024, 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*. 3-ER-306. Again, his office door had a “Staff Only” sign, and Rod placed them on the windowsill behind his desk, with only the covers visible. 3-ER-305–06.



The covers feature an illustration of a smiling boy and girl, respectively, the title, and the phrase “a book about your identity.” 3-ER-306.



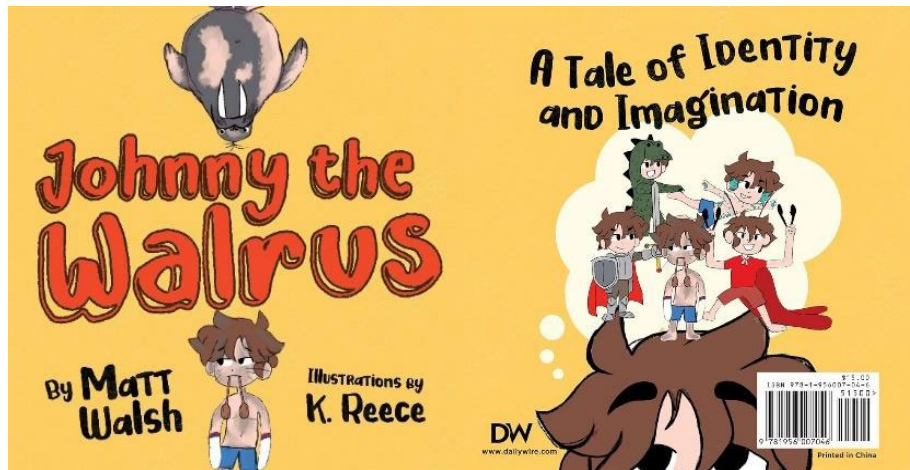
Rod never used these books as part of his work with students, but the covers expressed his personal views. 3-ER-306. During the almost three weeks he displayed them, four students visited his office; no one complained or even inquired about them. No parent, student, or staff handled or read them while he was present. 3-ER-307.

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*. 3-ER-307–08.



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. 3-ER-308. 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 after the session had ended. 3-ER-312, 315. To everyone else, only the cover was visible. 3-ER-308.



All three books urge children to prize the way that God created them—as 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 terrific to be the way God created each of us. 3-ER-312–14; 2-ER-80–83. *Johnny the Walrus* uses a fictitious story about an imaginative boy to make similar points. 3-ER-308. All three reinforce Rod’s view that God created every person 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. 3-ER-296, 314. 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. 3-ER-312.

III. After La Grande teacher Rachael Oliver complained, Inter-Mountain 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. 3-ER-312, 365–66. Rachael Oliver, a special education teacher at La Grande, had complained that *She Is She* and *He Is He* were “explicitly religious and clearly transphobic”—while acknowledging that the books did not “explicitly” mention “trans people.” 2-ER-57, 79. Shockingly, Oliver entered Rod’s office without his knowledge or consent, took the two books from the windowsill, and photographed their contents. 2-ER-57, 79–83.

The principal made clear that he did not see anything inappropriate or offensive about the books, and he did not think Rod had done anything wrong. 3-ER-309–10. But the principal 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. 3-ER-310; 2-ER-189.

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. 3-ER-310. 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 InterMountain would investigate his décor as a “potential bias incident.” 3-ER-311, 370–71.

That is, InterMountain accused Rod of violating its speech code in Policy ACB and ACB-R. 3-ER-300, 310, 350–51, 353–54. 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.” 3-ER-301, 350. 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.” 3-ER-301, 353. By violating this speech code, employees expose themselves to “discipline up to and including termination.” 3-ER-357, 363.

After receiving VanNice’s email, Rod reviewed the speech code, especially its “bias incident” definition. 3-ER-370. He pointed out that neither he nor the books targeted anyone or demonstrated ill will, antagonism, or hostility. 3-ER-370. InterMountain itself inconsistently applied that portion of its speech code. In response, Superintendent Mulvihill

said the code “does not require evidence of direct targeting for it to be violated.” 3-ER-362. Yet in a subsequent, separate investigation, VanNice determined that Rod did *not* violate the speech code because an alleged “remark was not directed at any specific student, colleague, or member of the school community.” 2-ER-84.

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 Rod in the presence of two note-takers as part of her investigation. 3-ER-311. She opened the meeting by recounting how Rod had displayed the books in his office, and how this display potentially violated the speech code as a “bias incident.” 3-ER-311, 373, 380. Responding to 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.” 3-ER-311–12, 373–74, 380.

Though students could only see the books’ covers when they visited Rod’s office, VanNice quizzed Rod about their content. 3-ER-311–12. So Rod explained how *She Is She* talks about how “girls can do anything” and how it is “great to be a girl.” 3-ER-312, 374. Similarly, *He Is He* talks about how “[b]oys can do great things” with “[t]ons of examples.” 3-ER-312, 374, 380. 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.” 3-ER-374, 380.

Not content, 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.” 3-ER-312, 374, 380. When VanNice asked about the books’ use of pronouns (*e.g.*, “she is not we”), Rod noted that the books use pronouns in the traditional way—just like *Mine Is Mine*, a book in La Grande’s library. 3-ER-312, 374, 380–81. 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.” 3-ER-314, 375, 381.

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?” 3-ER-312–13, 375. So Rod explained how he thinks the Bible supports the views that the books promote. 3-ER-313, 375. 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?” 3-ER-376, 381–82. So Rod noted that there is “nothing confusing about” the simple statement that *She Is She*. 3-ER-376, 382. VanNice then asked him to explain the phrase: “She is

free to be how God wanted her to be.” 3-ER-376, 382. 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.” 3-ER-376.

Growing frustrated, VanNice demanded to know how the three books “would help a transgender student.” 3-ER-314, 375, 381. Rod reminded her that he does not use the books when working with students, and that he placed them behind his desk to supervise access to them. 3-ER-315, 375, 381. Once, after an evaluation ended, Rod shared *Johnny the Walrus* with one student who asked. 3-ER-315, 375, 381. VanNice pressed, asking when it would be appropriate to use these books with students. Rod reminded her that he does not use them as part of his work with students, they are decorations, and many teachers decorate their offices with private books. 3-ER-315, 375, 381. Indeed, many books in La Grande’s classrooms feature violence, suicide, explicit language, domestic abuse, drug and alcohol use, and sexual content. 3-ER-315–16. 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 with a cover that depicts two boys kissing. 3-ER-316.

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?” 3-ER-316, 376, 382. Rod responded: “No.” 3-ER-316, 376, 382. She asked

if he believed displaying the books around students was “a hostile expression of animus towards others.” 3-ER-317, 376, 382. Rod denied that, explaining 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,” 3-ER-317, 377, 382, much less two innocuous book covers.

VanNice kept pressing, asking if Rod understood the possibility that a transgender-identifying student might have thoughts about the books, and Rod admitted that it was possible. 3-ER-317, 377. After all, anything is possible. But he also pointed out that several classrooms near his office also had books that are labeled as inappropriate for middle school aged students, contained sexually inappropriate material (e.g., masturbation), and had sparked parental complaints, yet they *all* remained on display. 3-ER-317, 377, 383. VanNice pretended those books were irrelevant unless Rod was reporting those teachers. 3-ER-318, 377, 383.

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.” 3-ER-318, 378, 383. Her proclamation was both impossible—there are no views with which everyone agrees—and patently false—InterMountain lets employees

decorate their offices with décor expressing innumerable “views and opinions on specific subjects,” including the opposite view of gender. 3-ER-318, 378, 383. *See supra* Statement of Case II. Finally, she emphasized why she prohibited Rod from displaying his books: they did “not support transgender or gender neutral.” 3-ER-378. 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. 3-ER-318, 356. She recounted how InterMountain received a complaint that Rod had displayed “inappropriate materials,” *i.e.*, “transphobic books.” 3-ER-318–19, 356. She falsely accused him of moving all three books to his Elgin office during the investigation. 3-ER-357. Predictably, she concluded that displaying the books to students violated InterMountain’s speech code, 3-ER-319, 357, even though no student or parent complained, and Rod specifically denied any hostility or animosity towards anyone. 3-ER-317, 377, 382. She warned that “further conduct of this nature may result in discipline up to and including termination of your employment.” 3-ER-319, 357.

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

Rod appealed VanNice’s letter of directive to InterMountain’s superintendent, Mark Mulvihill. 3-ER-319, 386. 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.” 3-ER-319–20, 388. He recounted how no one ever read the books and how they are far less problematic than many other books readily available to students. 3-ER-390–91 (referencing 3-ER-315–17). He reiterated again he had no “prejudiced, spiteful[,] or malevolent ill-will toward anyone”; neither he nor the books conveyed “any sort of animus”; and the books impacted no one, except one offended employee. 3-ER-320–21, 390–91, 396. 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.” 3-ER-321, 396–97. And he detailed various inaccuracies in VanNice’s findings. 3-ER-392–94.

Mulvihill summarily denied Rod’s appeal. 3-ER-321, 360. 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.” 3-ER-321–22, 360. He decided that displaying these books also 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. 3-ER-322, 360–61. He again threatened Rod’s employment if he did not comply with these directives. 3-ER-323, 363.

Mulvihill ignored that these same state laws that he was applying to Rod also apply to the schools. Yet La Grande’s English and science classes teach the same “binary view of gender” Mulvihill deemed illegal and a policy violation. 3-ER-322. La Grande’s science lessons on genetics teach that males have XY chromosomes while females have XX, and a person’s DNA dictates sex and other characteristics. 3-ER-322, 400, 403–04, 407. Its English classes teach students to use “he” or “she”—not “they”—to refer to a single person. 3-ER-322. This is precisely what Rod believes, and the same message the books express. 2-ER-80–83.

V. The district court partially granted and partially denied Rod’s request for an injunction; he appealed.

Rod filed this lawsuit and sought a preliminary injunction, seeking to display the three books and to expunge his record. 3-ER-248–49.

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-30 & n.6. Yet the district court still ruled that Rod’s passive display of the books—even though many other employees decorated their workspaces with all manner of personal speech—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-32. But the district court didn’t see the same risk “when no students were present in his office.” 1-ER-32. So it enjoined InterMountain “from taking disciplinary action against Plaintiff Roderick Theis if he chooses to resume displaying the books *He is He*, *She is She*, or *Johnny the Walrus* in any of his offices within the [InterMountain] service area *while the children that he serves are not present* in those office spaces.” 1-ER-46 (emphasis added).

VI. When Rod resumed displaying the books as the injunction allowed, Oliver coordinated a setup.

Two days after the district court entered its injunction, Rod resumed displaying *He Is He* and *She Is She* in his La Grande office when the students he served weren’t present. 2-ER-66. That same day, Oliver noticed that Rod had again displayed the books because she was monitoring his office. 2-ER-72.

The next school day (August 25), four eighth-grade “ambassadors” entered Rod’s office, unannounced and without his consent. 2-ER-66, 109. That day was the first day of school for sixth and seventh graders. 2-ER-126. Eighth graders didn’t have school, but some of them

volunteered as “ambassadors” to help with the first day for the other students. 2-ER-126. Rod did not have any assessments scheduled for that day and was working on reports in his office. 2-ER-66. No student had ever entered his office before unannounced. 2-ER-67. No one had ever asked to read *He Is He* and *She Is She*, either. 3-ER-307; 2-ER-67.

The ambassadors “repeatedly” asked to see Rod’s books. 2-ER-126. Rod didn’t know the ambassadors, so he asked them a series of questions: “1) who they were, 2) why they were in [his] office, 3) where they were supposed to be, and 4) who was in charge of them.” 2-ER-127. They informed him that they served as ambassadors, didn’t have anywhere to be at that time, and weren’t under anyone’s authority at the school. 2-ER-126. While Rod asked follow-up questions about what ambassadors do, the eighth graders grew “impatient,” and one of them grabbed *She Is She* from the windowsill. 2-ER-126–27.

Rod had ensured that the ambassadors “were not in the building as students,” they didn’t have any duties during that time, they were under “no one’s authority,” and they entered Rod’s office of “their own free will.” 2-ER-126. And Rod would not have tried to physically stop or remove the ambassadors or forcefully take the books from them. 2-ER-67. So he did not stop the ambassador from reading *She Is She* to the other teenagers. 2-ER-126. But—as if on cue—Oliver passed by the office recording with her phone. 2-ER-67. She appeared in the doorway as the ambassadors finished reading *She Is She*. 2-ER-110–11. The

ambassadors weren't surprised to see Oliver. 2-ER-73. After all, they knew her and had "talked outside" her room before barging into Rod's office. 2-ER-73, 106.

Thirty minutes later, the ambassadors returned to Rod's office and again entered without his consent. 2-ER-67, 109. They grabbed *He Is He* from Rod's windowsill without his consent and began to read it. 2-ER-67. After that, the ambassadors went to Oliver's classroom. 2-ER-109–10. All the ambassadors denied being "uncomfortable" while they read the books. 2-ER-106–09.

Predictably, Oliver filed another complaint against Rod the next day. 2-ER-104. Oliver alleged Rod violated InterMountain's speech code because the ambassadors read *She Is She*. 2-ER-104. InterMountain and La Grande launched another investigation. 2-ER-68–69. On October 31, VanNice placed Rod on administrative leave while InterMountain considered terminating him. 2-ER-74.

VII. The district court denied Rod's motion to order InterMountain to stop the termination proceedings.

Rod filed a new motion seeking to stop the termination proceedings and to (1) enforce the preliminary injunction; (2) enter a new injunction; or (3) modify the prior injunction to allow Rod to display the books in the presence of students he was not actively serving. 2-ER-133; 1-ER-11; 2-ER-52–53. Rod also moved the district court to "order[] Defendants" to "[c]ease and desist their current efforts to terminate his

employment” and to “[r]emove all documents pertaining to” Oliver’s complaint from his “personnel file.” 2-ER-133.

He primarily argued that (1) he was entitled to an injunction because the First Amendment protected his right to display the books, and (2) the termination proceedings violated the preliminary injunction because he did not serve the eighth-grade ambassadors. 2-ER-142. Rod cited FED. R. CIV. P. 65, outlined the “Scope of Injunction,” and asked for a waiver of security. 2-ER-133, 135. Opposing, InterMountain argued that it was “only enjoined from taking action against [Rod] if the books were on display while students were **not present**.” 2-ER-49.

The district court denied Rod’s motion, rejecting both his primary arguments. It ruled that Rod failed to establish that InterMountain “violated” the preliminary injunction. 1-ER-9. And it rejected Rod’s request “to widen the scope of the injunction.” 1-ER-11.

The district court adopted the same, flawed reasoning from its “prior Order” that *Kennedy III* rejected: “teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction.” 1-ER-11 (quoting, *inter alia*, *Poway*, 658 F.3d at 967–68). According to the court, Rod spoke “as a public employee” because his books 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-12 (quoting 1-ER-32). Rod appealed. After the district court’s order, InterMountain terminated Rod.

SUMMARY OF ARGUMENT

This Court has jurisdiction. The district court’s order did not merely interpret or enforce an injunction. It “refus[ed]” an injunction and “refus[ed] to ... modify” an injunction. 28 U.S.C. § 1292(a)(1). The district court refused Rod’s request for an injunction that stopped the termination proceedings by rejecting his “broader, underlying argument that his conduct was protected by the First Amendment.” 1-ER-11. And it refused to modify its previous injunction after recognizing that Rod “effectively [sought] to widen the scope of the injunction.” 1-ER-11.

Rod meets all the elements for the preliminary injunction the district court denied. He’s likely to succeed on the merits of his First Amendment retaliation claim. The district court acknowledged his books discussed a matter of public concern. And InterMountain didn’t dispute that it fired him because of the books.

Rod didn’t speak as a government employee. As InterMountain acknowledges, employees didn’t have to ask advance permission to decorate their office with personal speech. The district court held otherwise based on an “excessively broad” conception of a school employee’s role that the Supreme Court has rejected. *See Kennedy III*, 597 U.S. at 530. Instead of treating everything an employee says around students as government speech, or looking to what a reasonable observer might mistakenly think, the proper test examines “whether the speech at issue is itself ordinarily within the scope of an employee’s duties.” *Id.* at

529 (citation modified). Rod had no official duty to decorate his office. An employee’s private speech does not somehow become government speech simply because a student may see or read it.

InterMountain can’t meet its burden to show any disruption from Rod’s speech. Only a single, offended teacher complained. She first complained that the books were “religious” and, in her mind, “transphobic.” Then, just days after Rod began re-displaying the books, she coordinated a setup to lay the groundwork for another complaint. But disagreement with another’s views, no matter how fervent, cannot satisfy an employer’s *Pickering* burden. And Rod’s books expressed the view of sex taught in La Grande’s science and English classes. That’s why La Grande’s eighth-grade ambassadors uniformly denied feeling “uncomfortable” about *He Is He* and *She Is She*.

Rod meets the remaining preliminary injunction factors. He suffers ongoing irreparable injury from losing his job because of his protected speech. And vindicating First Amendment rights always serves the equities and public interest. This Court should reverse with instructions to enter a preliminary injunction protecting Rod.

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

This Court has “jurisdiction of appeals from ... [i]nterlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” 28 U.S.C. § 1292(a)(1); *Nat. Res. Def. Council v. Cnty. of L.A.*, 840 F.3d 1098, 1101 (9th Cir. 2016). The district court’s order refused to grant an injunction and refused to modify an injunction.

Rod is entitled to that injunction on his First Amendment retaliation claim 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) (citation modified). When, as here, the hardship balance “tips sharply in [Rod’s] favor” and the other two *Winter* factors are met, Rod need only show “‘serious questions’ on 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. This Court has jurisdiction.

The district court’s order (A) “refus[ed]” Rod’s request for a new injunction and (B) “refus[ed] to ... modify” its previous injunction, so this Court has jurisdiction. 28 U.S.C. § 1292(a)(1). The district court rejected Rod’s “broader, underlying argument that his conduct was protected by the First Amendment.” 1-ER-11. And it thought that Rod “effectively [sought] to widen the scope of the [prior] injunction.” 1-ER-11. It thus denied his motion. In so doing, the district court did not merely interpret its prior injunction; it analyzed and rejected Rod’s independent argument that he had a First Amendment right to display his books.

A. The district court refused an injunction.

Rod argued that he had a First Amendment right to display the disputed books and, on that basis, sought an “order[]” stopping the termination proceedings and removing records of the complaint against him. 2-ER-133. The district court’s order addressed this “broader, underlying argument.” 1-ER-11. The court wrote to “clarify that”—in its view—Rod’s conduct “was not” “protected by the First Amendment.” 1-ER-11 n.7. It “disagree[d]” with Rod’s argument and therefore denied his motion on that basis—independent of its discussion of the scope of the prior injunction. 1-ER-11. As InterMountain put it, the district court “reiterat[ed] its prior conclusion that [Theis’] display of the books when students are present is not protected under the First Amendment.” Doc. 8.1 at 6 (quoting 1-ER-13).

This “interlocutory appeal therefore falls squarely within the language of section 1292(a)(1).” *Nat. Res. Def. Council*, 840 F.3d at 1102 (citation modified). Rod moved for an injunction—“an order that is directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion.” *Gon v. First State Ins. Co.*, 871 F.2d 863, 865 (9th Cir. 1989) (citation modified). Rod asked the district court to “order[] Defendants” to “[c]ease” the termination proceedings and remove records of the complaint against him. 2-ER-133. He cited FED. R. CIV. P. 65 and moved to waive the security requirement because “Defendants will suffer no damages from a preliminary injunction.” 2-ER-135.

The district court’s order “explicitly denied an express request to” issue an injunction. *Las Vegas Sun, Inc. v. Adelson*, 147 F.4th 1103, 1112 (9th Cir. 2025). Under § 1292(a)(1), the jurisdictional inquiry focuses on the substance of the district court’s order, not on labels in a motion. *See Simon v. City & Cnty. of S.F.*, 135 F.4th 784, 814–15 (9th Cir. 2025) (holding that this Court had jurisdiction over an order granting a “motion to enforce the injunction” because it had “the practical effect of modifying the original injunction” (citation modified)). Like in *Natural Resources Defense Council*, the district court’s order “expressly stated that it was,” 840 F.3d at 1102, rejecting Rod’s argument that he had a “First Amendment right to display the books to students” and

thus denying his motion, 1-ER-11. So the district court’s “order[] ... refus[ed]” the injunction that Rod sought. 28 U.S.C. § 1292(a)(1).

InterMountain argued that the district “court declined to reconsider” its previous preliminary injunction. Doc. 8.1 at 11. That further shows how this Court has jurisdiction. “[T]he denial of a motion ... to reconsider a request for an injunction” is “appealable ... if the motion raises new matter not considered when the injunction was first issued.” *Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) (quoting *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n.4 (9th Cir. 1984)). In InterMountain’s words, the second appeal discusses “separate conduct,” Doc. 9.1 at 2, namely, InterMountain’s efforts to terminate Rod for displaying the books *after* the district court’s preliminary injunction order, Doc. 6.1 at 6–8. So InterMountain’s arguments concede that the district court refused to grant and refused to modify an injunction. This Court has jurisdiction.

B. The district court refused to modify an injunction.

This Court also has jurisdiction because the district court’s order “refus[ed] to ... modify” the injunction it previously granted. *See* 28 U.S.C. § 1292(a)(1). According to the district court’s order, Rod “effectively [sought] to widen the scope of the injunction” by allowing him to display the books except “to students that he [was] *actively* serving by administering tests or assessments.” 1-ER-11. The court concluded the First Amendment did not protect that speech. 1-ER-11. So the district

court declined to modify its previous injunction to apply to Rod’s speech to the eighth-grade ambassadors.

The district court’s order did not “merely interpret[]” its prior injunction. *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1037 (9th Cir. 1998). The order refused a request to modify the existing injunction to “substantially alter[] the legal relations of the parties.” *Id.* (citing *Pub. Serv. Co. of Colo. v. Batt*, 67 F.3d 234, 236–37 (9th Cir. 1995)). So this Court has appellate jurisdiction.

The *Cunningham* district court granted an injunction requiring the defendants to provide “constitutionally adequate mental health treatment” in a civil commitment facility. *Id.* at 1036. After the injunction’s entry, the facility’s first female resident moved to intervene as a plaintiff and “for enforcement of the injunction with regard to her.” *Id.* at 1037. She asked to “be placed in a treatment facility where she would not be the sole female resident and would not be housed with males and that her treatment plan not require her to participate in therapy with male sex offenders.” *Id.* The district court granted her motion and ordered the defendants to provide separate housing and therapy. *Id.*

This Court held that it had jurisdiction over the appeal of that order. In the “most general sense,” the district court’s order “merely implement[ed] the purpose of the original injunction to provide constitutionally adequate treatment.” *Id.* But it concluded that the order “create[ed] a new legal relationship between [the female resident] and [the]

defendants that did not theretofore exist.” *Id.* Indeed, the district court had ordered the female resident placed in different housing and therapy from the original plaintiffs. *Id.* The order thus was “a modification of the original injunction.” *Id.*

Conversely, in *Public Service Company*, the government argued that a subsequent order finding “good cause to continue [an] injunction” modified the injunction “so that it would automatically dissolve when the record of decision was issued.” 67 F.3d at 236. This Court disagreed, holding that the subsequent order did not change the “duration[]” of the original injunction because that injunction remained “in effect by force of its own terms.” *Id.* at 236–38.

The district court’s order here aligns with the order in *Cunningham*, not the order in *Public Service Company*. Like *Cunningham*, Rod’s requested injunction would have substantially altered the legal relationship between him and InterMountain. InterMountain had placed Rod on administrative leave and initiated termination proceedings against him that eventually led to his firing. Rod sought an order enjoining InterMountain from continuing the termination proceedings and requiring it to scrub his record of the complaint against him. The district court ruled that the requested relief would have exceeded the scope of the initial injunction by granting Rod *more* protection, just like the *Cunningham* order awarded additional relief to the plaintiff there. And unlike in *Public Service Company*, Rod’s arguments here don’t depend

on an alleged change in the injunction’s duration. He raised his First Amendment right to display his books. That requested relief—per the district court—would have changed the legal relation of the parties by ending Rod’s administrative leave, scrubbing his employment record, stopping the termination proceedings, and preserving his job.

II. InterMountain unconstitutionally retaliated against Rod.

A First Amendment retaliation claim requires Rod to show that (1) he spoke as a private citizen on a matter of public concern; (2) InterMountain took adverse employment action against him; and (3) his speech was a substantial or motivating factor for the adverse action. *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776–77 (9th Cir. 2022). The burdens of evidence and persuasion then shift to InterMountain who must show it “had a legitimate administrative interest in suppressing the speech that outweighed [Rod’s] First Amendment rights.” *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

The district court and InterMountain properly recognized Rod spoke on a matter of public concern. InterMountain similarly didn’t dispute that it fired Rod because of his speech. But the district court doubled down on its erroneous holding that Rod’s books constituted official-duty speech. Finally, InterMountain has no evidence of actual or predicted disruption from Rod’s passive display of children’s books. Rod is likely to succeed on his free speech retaliation claim.

A. Rod spoke on a matter of public concern, and InterMountain fired 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 as much when Rod first moved for a preliminary injunction. 1-ER-28. 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 also didn’t dispute that it fired Rod—at least in part—for his speech. 2-ER-54. InterMountain argued that the First Amendment didn’t protect Rod’s display of the books in the ambassadors’ presence, so InterMountain was “well within” its “rights to initiate any associated disciplinary action.” 2-ER-54.

B. Rod spoke as a private citizen.

In its initial decision, the district court rightly recognized that when Rod displayed the books in his office, he expressed his own views, not InterMountain’s. 1-ER-32. But it reaffirmed its incorrect conclusion that Rod’s private citizen speech suddenly became government speech when students saw it. 1-ER-12.

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

Government employees, no less than others, have the right “to speak as a citizen.” *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The government as employer retains control over “speech that owes its existence to a public employee’s professional responsibilities.” *Reges v. Cauce*, 162 F.4th 979, 994 (9th Cir. 2025). 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.” *Garcetti*, 547 U.S. at 421–24. “The critical question ... is whether *the speech at issue is itself* ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” *Lane v. Franks*, 573 U.S. 228, 240 (2014) (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 employees’ 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* definitively 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 826), 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 in its initial decision, Rod’s job responsibilities “do[] not include decorating his office,” “displaying certain books or instructing on them,” 1-ER-31, just as Coach Kennedy’s

job did not include prayer. And Rod did not use the books when performing his responsibilities. 3-ER-306. 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. The books just sat on his windowsill or desk while he and the student completed the evaluation. And the ambassadors grabbed and read the books of their own free will—with Rachael Oliver’s apparent encouragement, not Rod’s.

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* Statement of Case II. At school, teachers and counselors display similar items as well as transgender pride flags and Black Lives Matter posters. *Id.* That’s why 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-197. This concession undermines its position that family photos are government speech, or that InterMountain somehow endorses the views contained within

every book that employees display in their office. Accordingly, InterMountain employees' personal office decorations are not government speech, regardless of who happens to see them or whose expression they think it is.

This Court's post-*Kennedy III* precedent confirms that Rod spoke as a private citizen. *Poway* involved speech "not directly attributed to an individual speaker and" occurring in "spaces that were not acknowledged to be the purview of the faculty." *Reges*, 162 F.4th at 997. The *Reges* defendants couldn't rely on *Poway* because the plaintiff professor spoke on his syllabus and the university admitted that syllabi were "the purview of the faculty" and "not reviewed by the university before posting;" faculty had "great flexibility in determining the contents of their syllabi." *Id.* at 996. Additionally, students wouldn't have thought the university was speaking through the professor because his statement began with a first-person pronoun. *Id.*

Similarly here, InterMountain admitted that employees do not have to receive advance permission to decorate their offices. 2-ER-198. Office décor is the employee's purview. Employees and school staff decorate their offices with all manner of personal speech, which shows that students would think the décor spoke for the individual, not the school. Under *Reges*, *Poway* doesn't control. 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 has 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), a panel of 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, 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 because “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 (“[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.’” (quoting *Poway*, 658 F.3d at 967)).

Poway in turn relied on earlier precedent setting an “expansive definition of ‘instructional time.’” 658 F.3d 967 n.14 (quoting *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994)). The *Peloza* Court concluded that teachers speak as employees “any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students’ departure after the instructional day.” 37 F.3d at 522. The *Poway* plaintiff’s classroom banners “fell well within that expansive definition,” simply because students could see them. *Poway*, 658 F.3d at 967 n.14. Similarly—according to this Court—Coach Kennedy spoke as an employee because he “spoke at a school event, on school property, wearing [school]-logoed attire, while on duty as a supervisor, and in the most prominent position on the field.” *Kennedy I*, 869 F.3d at 827.

But post-*Kennedy III*, 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

performing the tasks he was paid to perform.” *Dodge*, 56 F.4th at 778 (citation modified). Unlike the rule applied in *Peloza*, *Poway*, *Kennedy I*, and *Kennedy II*, not “everything teachers and coaches say in the workplace [is] government speech subject to government control.” *Kennedy III*, 597 U.S. at 530–31. Applying the proper 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 InterMountain’s whenever 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 Rod’s display of the books in front of the ambassadors “could reasonably be viewed as being promoted by the school or as the efforts of Plaintiff to press his views upon the students.” 1-ER-12. The ambassadors barged into Rod’s office without his consent, repeatedly asked to see his books, grabbed them from the windowsill, and then read them—all independent of Rod. As the district court recognized, the ambassadors entered and remained in Rod’s office of “their own free will.” 1-ER-5. Nothing indicates they thought

InterMountain was speaking through Rod’s books. 2-ER-106–10. Yet the district court still ruled that Rod’s display suddenly transforms into InterMountain’s speech when a student—even one Rod doesn’t serve—crosses the threshold of his office.

This reasoning repeats the same error as *Kennedy II* and *Poway* by holding that teachers are “clothed with the mantle of one who imparts knowledge and wisdom,” *Kennedy II*, 991 F.3d at 1015, and “necessarily act as teachers for purposes of a *Pickering* inquiry when at school or ... in the general presence of students.” *Poway*, 658 F.3d at 968 (emphasis in original); see 1-ER-11. 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 Supreme Court held that the First Amendment protected Kennedy’s right to pray at midfield, after games, and in full view of the students and community. *Id.* at 540.

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. This Court acknowledged that, for the first six years of Coach Kennedy’s 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) (citation modified). “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 making the same error and 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 threaten “a denial of the right of free speech,” and “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 v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299–1300 (7th Cir. 1993). “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.* at 1300.

The district court erred in applying these defunct state-action and government-speech principles to Rod’s personal office decorations. It’s not true that every message he conveys around students is government speech. Rod spoke as a citizen for First Amendment purposes.

C. InterMountain cannot meet its disruption burden.

InterMountain cannot carry its burden to show that Rod’s protected First Amendment expression presented an “actual, material and substantial disruption,” or to demonstrate even “reasonable predictions of disruption in the workplace.” *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (citation modified). InterMountain doesn’t like Rod’s views (unless they’re expressed in science and English curricula). But that dislike can’t qualify as disruption, especially when InterMountain allows its employees to express their personal opinions through office décor, and when the very schools it serves teach the same views as Rod’s in several classes. Only a single teacher complained about the books. Like InterMountain, that teacher objected to the books’ viewpoint. But disagreement is not disruption. Rod’s right to speak on an

important matter of public concern far outweighs InterMountain’s interest in preventing speculative disruption.

1. InterMountain censored and fired Rod because of his views, not because his speech disrupted anything.

InterMountain ordered Rod to remove the books because of the viewpoint it interpreted the display to convey. Mulvihill concluded that displaying the books violated InterMountain’s speech code because they “promote a binary view of gender,” “contribute[] to an unwelcoming environment,” and “contradict[] [InterMountain’s] commitment to inclusivity and diversity.” 3-ER-321–22, 360.

But the books do not mention transgender issues, much less demean or attack anyone. InterMountain’s component schools did not find the books hateful either, 3-ER-309, 320, 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, La Grande’s English and science classes teach students the “binary view of gender.” 3-ER-322.

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*. 3-ER-307–08, 323. The eighth-grade ambassadors read the first two of their own free will during non-instructional

time and when they didn't have any responsibilities. 2-ER-67. Even they weren't "uncomfortable" reading the books. 2-ER-106–09.

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

InterMountain "allow[s] other employees to express views and opinions on specific subjects, including gender." 3-ER-318; 2-ER-197 ("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."). Similarly, many books in La Grande's classrooms feature violence, suicide, explicit language, domestic abuse, drug and alcohol use, and sexual content. 3-ER-315–16. 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. 3-ER-316. 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* Statement of Case II.

Rod merely wanted to offer his own views on topics that other InterMountain employees and school employees freely discuss. InterMountain cannot grant complete freedom to discuss one side of an issue while claiming unacceptable disruption from the other side. InterMountain has no justification to "license one side of a debate to fight

freestyle, while requiring the other to follow Marquis of Queensberry rules.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

3. Disagreement is not disruption under *Pickering*.

One teacher’s complaint about the books’ viewpoint cannot satisfy InterMountain’s *Pickering* burden. Oliver objected to the (according to her) “explicitly religious and clearly transphobic” views expressed in the books. 2-ER-79. But a co-worker’s “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) (citation modified).

Those hurt feelings apparently motivated Oliver to coordinate a setup so she could again complain about Rod. That astroturfing also doesn’t show any actual disruption. Her complaint remained nothing more than a personal disagreement with views she attributed to Rod’s books. “[A]n individual coworker’s hurt feelings cannot be determinative of the balance.” *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1144 (9th Cir. 2025) (citation modified).

In Rod’s first appeal, InterMountain didn’t claim any actual disruption—because there wasn’t any. *See* Answering Br. 33–34, Dkt. No. 33.1. Instead, InterMountain defended censoring Rod only by arguing that *Johnny the Walrus* was “discriminatory.” *Id.* at 33. As Rod has explained, the book doesn’t discriminate against anyone. Reply Br. 7, Dkt. No. 37.1. To the extent it conveys a “binary view of gender,” La

Grande’s science and English classes teach the same. 3-ER-322. But InterMountain didn’t terminate Rod because of *Johnny the Walrus*; it fired him because of *He Is He* and *She Is She*. 2-ER-104. And each of the eighth-grade ambassadors confirmed they weren’t “uncomfortable” reading those books. Indeed, no one—besides Oliver—ever complained about them. 3-ER-307.

That confirms 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. And mere disagreement does not outweigh Rod’s speech rights.

III. 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). For all the reasons discussed, Rod has demonstrated—at the very least—a colorable claim that InterMountain’s application of its speech code violated his free-speech rights. Indeed, InterMountain fired Rod *because* of his protected speech. Out of a job, he suffers ongoing irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976)

(plurality) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

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) (citation modified), particularly in “America’s public schools,” “the nurseries of democracy.” *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021).

CONCLUSION

The district court refused to stop InterMountain doubling its constitutional violation. This Court should reverse with instructions to enter a preliminary injunction ordering InterMountain to reinstate Rod, to stop enforcing its speech code to prohibit Rod from displaying his books or similar messages, and to remove any reference to the investigation and discipline of Rod in InterMountain’s records.

Respectfully submitted this 13th day of February, 2026.

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STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, Appellant states that the currently pending appeal *Theis v. InterMountain Education Service District* (No. 25-5641) is related to this case because it arises from the same district court case and involves the same event.

/s/ Mathew W. Hoffmann

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2026, 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/ Mathew W. Hoffmann

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